John Davison Lawson

American State Trials

A Collection of the Important and Interesting Criminal Trials Which Have Taken Place in the United States, From the Beginning of Our Government to the Present Day, With Notes and Annotations

Volume 2

AMERICAN STATE TRIALS

A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.

WITH NOTES AND ANNOTATIONS

JOHN D. LAWSON, LL.D.
EDITOR

VOLUME II

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SEYMOUR DWIGHT THOMPSON, LL.D.

(1842-1904)

A WRITER OF INTERNATIONAL REPUTATION AND A MEMBER OF AN APPELLATE COURT, HIS NAME IS INSCRIBED HIGH UPON THE ROLL OF HONOR OF THE AMERICAN BENCH AND BAR. AND BECAUSE HE WAS MY INSTRUCTOR AND GUIDE IN THE ART OF LEGAL AUTHORSHIP; MY ASSOCIATE IN THE PRACTISE OF LAW; MY PREDECESSOR IN THE EDITORIAL CHAIR OF TWO LEGAL PERIODICALS, AND MY FRIEND FOR MORE THAN A QUARTER OF A CENTURY, THIS VOLUME IS AFFECTIONATELY DEDICATED TO HIS MEMORY.

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PREFACE TO VOLUME TWO.

The decision in *Stakes'* Case (*p. 1*) that cruelty to an animal is a crime, *per se,* was humane and right. Unfortunately, kindness and mercy to animals was not permanently established as a principle of law by this ruling and public opinion was for many years quite indifferent. But only one year after it was made the most devoted and active friend of the brute creation this Continent has known, Henry Burgh, was born in this very city, and in 1866 was founded by him the first American Society for the Prevention of Cruelty to Animals.[1]

When he began his work no State or Territory in the United States had a single statute relating to the protection of animals from cruelty. In less than twenty-four years all of them had adopted substantially the very laws which he had obtained from the Legislature of New York. But the pity is that this was necessary, for had other judges in New York and in the rest of the country declared the law as

[1] BURGH, Henry. (1823-1888.) Born in New York City. Student in Columbia College, which he left before graduation to travel in Europe for five years. Secretary to American Legation, Russia, 1862. While traveling in the East he witnessed many instances of cruelty to animals and having made the acquaintance of Lord Hambley, the President of the Royal Society for the Prevention of Cruelty to Animals, he returned to the United States determined to devote the remainder of his days to the interests of dumb creatures. The American Society was founded in 1866 and he became its first President and later established branches in every part of the Union. He never would receive a salary or money reward and determined to lay by a portion of his income to the work of speaking for those who could not speak for themselves. He was the author of several stories and plays.

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Recorder Riker did in the case of Stakes, such statutes would not have been needed.

The whole story of the *Dorr* Rebellion is told in this Trial (*p. 5*) and in the interesting essay of Mr. Eaton (*p. 15*).

Degey's Case (*p. 171*) is a reminder that the man in the pulpit is the only orator and debater to whom the law under no circumstances permits the hearer to make a reply.

Bathsheba Spooner (*p. 175*) was certainly an Eighteenth Century Lucretia Borgia. Had she lived a hundred and fifty years later she would have suffered little inconvenience as the result of her escapade with her young lover and the British soldiers.[2] Her picture would have been in all the newspapers and she would have been in great demand by a certain class of theatrical managers. But the Jury of Matrons had no mercy, though their verdict was afterwards shown to have been wrong. For this reason the terror which her punishment was intended to produce was neutralized by pity for her sufferings. Her appearance was so calm and her end so peaceful that it was forgotten how deeply her hands had been stained in blood. This and the mistake made by the Jury of Matrons caused the tragedy to be long talked of among the people and her wickedness came to be forgotten in the admiration excited by her beauty and her fortitude and in the sympathy which her unfortunate condition aroused in every wife and mother. Nevertheless, says her old biographer, "the case doth furnish an illustration of the truth that the most revolting crimes have been

[2] Within a couple of years in the City of Chicago a number of women have been acquitted of the murder of their husbands.

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committed by the fair hands of women and that when a woman oversteps the modesty of her position and breaks loose from the restraint of the law, her whole character is changed and her affections are inverted. No criminals are so hardened, none go through the ordeal of a public trial or endure a death of shame with more calmness and apparent innocence than the woman."

When Enoch Arden, returning to his native port after his shipwreck and the months spent on the solitary island in the mid-ocean, and learning that after waiting for years and believing him dead, his wife had married his old rival, crept up the village street at night, and looking in at the window,

> "beheld
> His wife his wife no more and saw the babe,
> Hers yet not his upon his father's knee,
> And all the warmth, the peace, the happiness
> And his own children tall and beautiful
> And him that other reigning in his place
> Lord of his rights and of his children's love,
> Then he tho' Miriam Lane had told him all
> Because things seen are mightier than things heard,
> Staggered and shook holding the branch and feared
> To send abroad a shrill and terrible cry
> Which in one moment like the blast of doom
> Would shatter all the happiness of the hearth.
> . . . . . .
> There speech and thought and nature failed a little
> And he lay tranced; but when he rose and paced
> Back toward his solitary home again,
> All down the long and narrow street he went,
> Beating it in upon his weary brain,
> As tho' it were the burden of a song
> Never to tell her; never to let her know."

Van Pelt (*p. 202*) was not a hero of the Tennyson kind. Returning from the war and finding his wife married again he consoled himself very soon by marrying, too. But he had forgotten to take account of the Law. Perhaps he had consulted a lawyer and

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received the discouraging answer that Stephen Blackford did in Hard Times. Stephen applied to his lawyer, Bounderby, as to how he should get rid of his wife. "It costs money," said Bounderby, "a mint of money. You'd have to go to Doctors Commons with a suit, and you'd have to go to a Court of Common Law with a suit, and you'd have to go to the House of Lords with a suit, and you'd have to get an Act from Parliament to enable you to marry again and it would cost you, if it was a case of very plain sailing, I suppose from one thousand to fifteen hundred pounds, perhaps twice the money." But the Court, taking into consideration the provocation, was somewhat easy on Van Pelt, though the Judge did not see fit to criticize the divorce laws as applied to the common people as did the celebrated and witty Mr. Justice Maule when he had a case before him in the London Courts a few years later. A man who had been deserted by a worthless wife and had married again had been convicted of bigamy and was called up for sentence before Maule, who addressed him as follows:

"Prisoner at the bar, you have been convicted before me of what the law regards as a very serious and grave offence, that of going through the marriage ceremony a second time while your wife was still alive. You may plead in mitigation of your conduct that she was given to dissipation and drunkenness, that she proved herself a curse to her household while she remained mistress of it, and that she had latterly deserted you; but I am not permitted to recognize any such plea. You entered into a solemn engagement to take her for better or for worse, and if you got infinitely more of the latter, as you appear to have done, it was your duty to patiently submit. You say you took another person to be your wife because you were left with several young children, who required the care and protection of some one who might act as a substitute for the parent who had deserted them; but the law makes no allowances for bigamists with large families. Had you taken the other female to live with you as your concubine you would never have been interferred with by the law. But your crime consists in having, to use your own language, preferred to make an honest woman of her. Another of your irrational excuses is that your wife had committed

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adultery, and so you thought you were relieved from treating her with any further consideration; but you were mistaken. The law, in its wisdom, points out a means by which you might rid yourself from further association with a woman who had dishonoured you; but you did not think proper to adopt it. You ought first to have brought an action against your wife's seducer, if you could discover him. That might have cost you money and you say you are a poor working man, but that is not the fault of the law. You would then be obliged to prove by evidence your wife's criminality in a court of justice, and thus obtain a verdict with damages against the defendant, who was not unlikely to turn out to be a pauper. But so jealous is the law (which you ought to be aware is the perfection of reason) of the sanctity of the marriage tie, that in accomplishing this you would only have fulfilled the lighter portion of your duty. You must then have gone, with your verdict in your hand, and petitioned the House of Lords for a divorce. It would cost you, perhaps, five or six hundred pounds, and you do not seem to be worth as many pence. But it is the boast of the law that it is impartial, and it makes no difference between the rich and the poor. The wealthiest man in the kingdom would have to pay no less than that sum for the same luxury, so that you could have no reason to complain. You would of course have to prove your case over again, and at the end of a year or possibly two, you might obtain a divorce which would enable you legally to do what you have thought proper to do without it. You have thus wilfully rejected the boon which the legislature offered you and it is my duty to pass such a sentence as I think your offence deserves, and that sentence is, that you be imprisoned for one day; and inasmuch as the present assize is three days old, the result is that you will be immediately discharged."

It was long before the days of the National Bank Act and people had not become accustomed to Bank Officials going to jail as they have been doing very frequently during the last decade when *Nathaniel Childs* (*p. 205*), respected citizen and Sunday-school teacher, was charged by his superior officers with having stolen over $100,000 of the bank's money. No wonder the community refused to believe such a thing possible and that the jury declared him innocent. But he was probably guilty, as subsequent circumstances showed. What Board of Directors of a bank or trust company would to-day carry on their business in the easy way that these gentlemen did? There was considerable gold lying around loose and accessible to any-

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one who could get into the vault. "There was no peculiar apartment in the vault in which coins for daily use and other coins were kept," said one witness on the trial, and anyone with a little trouble could obtain the key to the cellar in which the gold was kept. But there were no steel vaults and time locks in those days; people did not even lock the doors of their houses at night and the Directors acted in business as they did at home. They were almost the pioneers and founders of St. Louis, these gentlemen; most of them had come from the older states with little or no money, but industry and ability to grasp the opportunities which the new territory presented had made them the capitalists and leaders of the town. What one of them, who ten years later was to become Attorney General in the Cabinet of President Lincoln, said in his speech to the jury concerning two of his colleagues and himself would equally apply to all of them. He had seen the "goodly City" when it was a small hamlet with but four brick houses and 2,500 inhabitants; he had seen it grow rapidly in wealth and numbers and many of its settlers grow up with it. And he asked the jury:

"Is it any impeachment of Mr. Barnes, one of our great merchants, now so enterprising and prosperous, and apparently so wealthy, and still so rising, to say of him, that but a few years ago he was a very intelligent and faithful clerk, living on his salary, in a respectable mercantile house in this city? Is it any impeachment of Col. Brant, now one of our few millionaires, the owner of a princely fortune of his own making, to say of him that, twenty years ago, he was only a Deputy Quartermaster, with the rank, pay and emoluments of a Captain of Infantry? If these be reproaches, then all our leading men of wealth and influence, our great landholders, our eminent merchants, our far-seeing and nice-calculating brokers and financiers, instead of glorying in the achievements of their talents and industry, have cause to blush over the mushroom growth of their bloated fortunes.

"Gentlemen, few of us are natives of this country: we are all adventurers, coming from a distance, to seek a fortune or make a name: we had very little to bring with us: if we had been rich and prosperous at home, we would have shown our wisdom by letting

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well enough alone, and staying there. But with most of us, migration was a necessary of life. I remember as if it were yesterday, the first time I ever crossed the Mississippi, the twenty-ninth of April, 1814, and I can give you, with entire precision, the inventory of my worldly wealth at that interesting epoch. Imprimis, a horse, saddle and bridle—the horse a first rate gelding, of the best Hunter blood on the shores of the Chesapeake; item, a pair of saddlebags, well packed with pretty good apparel; and lastly, in actual cash in my pocket, three dollars and a half! I came without fear or doubt of the future; buoyed up by the confident hopes, puffed up, it may be, by the silly vanity of youth, I never allowed myself to doubt of a reasonable measure of success. I knew then, as I know now, that, in the good providence of God, integrity, industry and perseverance never go wholly unrewarded; that in all civilized society, they entitle their possessor to personal independence and to the decent respect of the world." (Edward Bates.)

The case of *John Johnson* (*p. 512*) is an extraordinary one, for he was a respectable man of family earning a decent livelihood. But the sight of the bag of money in the trunk of his young lodger was too much for him and drove him to a brutal and senseless murder, for which he paid the extreme penalty of the law. Our ancestors had a way of increasing the punishment of criminals in strange ways and the sermon of the Ordinary at Newgate was still copied in all its absurdity and hideousness in New York City at the beginning of the Nineteenth Century.

How business customs have changed since Mrs. Spence went shopping in New York City a century ago (*Spence v. Duffey, p. 541*)! Then the retail shopkeeper did not invite people to come into his store merely to look around and see what he had to sell; if they did not intend to buy, what were they there for! The women of the present day will hardly agree with old Lawyer Sampson, that a woman's proper place was at home mending stockings and making puddings for the family.

The whole story of the murder of young Austin by *Selfridge* (*p. 544*) is told in the Narrative. The case

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is a leading one and the argument of the lawyers and the charge of Mr. Justice Parker were destined to be the text in every subsequent trial for murder for a half a century in every State of the Union where the plea of self-defense was set up.

The irate parent in the *Morris* case (*p. 703*) was very properly punished. The ancient respect for the office of teacher so well described by the counsel for the People hardly obtains in this day and generation. Our modern system of education may excel in some ways that of our grandfathers, but in the matter of respect for the law and authority everyone must admit that it has grievously failed.

The case of *Dr. Hughes* (*p. 714*) resembles that of Clough (*Vol. I., p. 723*), another story of disappointed love and insane revenge. The murderer's wish to return to the scene of the tragedy has never been realized and the old Cleveland lawyer still awaits the promised call from one of his earliest clients.

The trial of *Pell* (*p. 787*) gives a comfortable picture of the great Metropolis of America when it was more like a rural town than the commercial capital of the Continent. Gone are the quiet public gardens in which the quick tempered defendant and his wife had the dispute with the waiter and in their place are the great hotels and restaurants of to-day with their decorated walls and marble pillars and the thunder of the traffic of the streets outside! !

A sermon might be preached with the case of *Mayberry* (*p. 790*) for its text. Of what little use is the law unless it is backed by a great public sentiment! An active minority succeeds in abolishing the death penalty. A brutal murder takes place in a quiet and law-abiding community. The neighbors of the victim

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attend the trial, and as they listen to the story of the crime they are stirred to vengeance against the murderer. When the verdict is rendered and the prisoner is sentenced to imprisonment for life, and they comprehend what that really means, detention in a state prison for a few years and then a pardon by some sentimental Governor,[3] they feel that the punishment does not fit the crime. So they step in and flouting the very law they have made themselves, proceed to carry out the ancient command: Whoso sheds man's blood, by man shall his blood be shed.

The trial of *Diana Sellick* (*p. 837*), besides the fact of the incompetence of the black as a witness in New York, again referred to (see also *Southard's Case, post*), presents the common law procedure in the selection of a jury, which once prevailed in this country, but has long since disappeared from our practice. Certainly the question as to whether one called as a juror is biased or not, is a question of fact, and logically should be decided as questions of fact are by laymen, and not as questions of law are by judges. This is now and has always been the English method. A challenge *propter affectum, i. e.,* that the juror is not indifferent but is biased, must be proved by evidence *aliunde;* it is not allowable to ask a juryman whether he has an opinion or has expressed one. The counsel must challenge the juror he objects to, must state the ground of bias and must then produce his witnesses in support of his charge. If it is the juror first called that is challenged, the Court appoints two triers from the panel summoned or from the specta-

[3] The records show that in a majority of the American States a sentence of life imprisonment means on an average confinement for less than ten years.

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tors, and these sit as a jury of two to try the issue, the onus being on the challenger to make out his case. If the triers find the juror qualified, then he and the two triers decide the next challenge. As soon as the second juror is chosen the two triers step down and out and any subsequent challenge is tried by the first two jurors. The examination on the *voir dire,* so familiar to the American lawyer, is almost unknown to the English practitioner.[4] The juror in Diana's trial who did not believe in capital punishment had his competency passed on in this way, and the same thing was done in *Johnson's* case (*p. 512*). It is rather strange that in the United States, where the tendency has always been to increase the powers of the jury rather than that of the Judge, this particular change should have been made by our law givers. The New York newspapers of the day give no account of Diana's execution: she was probably reprieved.

The case of *Charles Gill* (*p. 852*) recalls that of *Noah* (*Vol. I., p. 671*), except that the motive in the Noah case was political, while in Gill's it was clearly financial.

The youth of the country were not as well looked after in the year 1827 as they are today, by the public authorities, the parental control being then little interfered with by the State. Young *French* (*p. 858*) and his companions would be known now as "delinquents," and might find themselves in the Children's Court for their indulgence in drinks and cigars. The pie shop proprietor's recipe for "Tom and Jerry" is certainly worth preserving in those states at least

[4] Criminal Procedure in England. 1 Am. Jour. Crim. Law and Criminology 700.

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whose anti-saloon laws are compelling every man to be his own bar-keeper.

The conviction and execution of *Arbuthnot* and *Ambrister* (*p. 862, 891*) were the act of General Jackson. It brought to him the strongest support in some quarters, and the strongest criticism in others, and caused a breach in a friendship which was never healed, between himself and that other great Southern statesman, John C. Calhoun.

Father Neptune appears no longer to the passengers on the modern Atlantic liner as he used to do in the old sailing days. *Peter Duffie* (*p. 901*) was perhaps right in thinking that the frolic was rather rough, and certainly a modern sea voyage lost nothing when it disappeared.

The case of *Elizabeth Southard* (*p. 905*) brings before us the slave codes of seventy-five years ago. Under these a slave could not be a witness against a white person, either in a civil or criminal case, and where there was no statute this rule was the common law of the State. Even a free negro was subject generally to the same disability. In prosecutions against negroes they were competent witnesses in some of the States, in others only where there was no white person who could give evidence on the subject. And some States required that owners of slaves should keep at least one white person on each plantation.[5] The law was logical, for it would be absurd for a "chattel" to come into court and testify against its owner. Elizabeth was tried in Virginia, but only a little earlier the same law existed in the State of New York. (*Diana Sellick, p. 857.*) We find here likewise a novel definition of "sky-larking."

[5] Goodell Am. Slave Code; Hurd Law of Freedom and Bondage.

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Dyer and *Dayton* (*p. 917*) found out that the old nursery maxim that "finders are keepers," was not the Law of the Land. The idea advanced by their counsel that the intent to appropriate must exist at the very moment of the taking possession by the finder, though good law for many years both in England and America, is not so to-day in either country.

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THE TRIAL OF ROBERT STAKES FOR CRUELTY TO ANIMALS, NEW YORK CITY, 1822.

THE NARRATIVE

Long before the first Society for the Prevention of Cruelty to Animals was founded, dumb beasts had their champions and friends. One of them, a Mr. Hone, walking down Broadway in the City of New York, observed a teamster savagely beating his horses, which were unable to move a heavily loaded wagon. The friend of animals protested, and the teamster replying that he had a right to whip his horses as he pleased, Mr. Hone proceeded to enforce his argument with his good right arm, in which encounter the man came out second best. Notwithstanding the beating he received, he was haled before a New York Court, convicted by the jury and punished, the Judge, the well-known Recorder Riker, ruling that to treat a dumb beast with cruelty was a misdemeanor at common law.

THE TRIAL[1]

In the Court of General Sessions, New York City, December, 1822.

HON. RICHARD RIKER,[2] *Recorder.*
JACOB B. TAYLOR, } *Aldermen.*
HENRY MEAD, }

December 20.

Robert Stakes, having been indicted for beating his horses in a cruel and barbarous manner, his trial came on to-day.

Mr. Maxwell,[3] District Attorney, for the People.

Mr. Fay,[4] for the Prisoner.

[1] * Wheeler's Criminal Cases. 1 Am. State Trials, 108.
[2] See 1 Am. State Trials, 361.
[3] See 1 Am. State Trials, 62.
[4] See 1 Am. State Trials, 718.

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THE EVIDENCE.

Mr. Hone. The prisoner was driving two horses attached to a wagon, containing a load of manure. The load was very heavy, and near the office of the Daily Advertiser on Broadway, above Broome Street, they stopped, unable to draw it further. Stakes thereupon struck them a number of blows over the head, neck and shoulders with the butt end of his whip. I expostulated, and told him he was brutal and must stop it. He swore at me, and as he continued to beat them, I seized the whip, which led to a scuffle between us, which ended in my bruising his face rather badly.

Mr. Hone (a brother of the first witness), corroborates his testimony.

Mr. Walker. I saw the beating; it was cruel and excessive. The horses could not draw the load. I saw at least a dozen blows struck. Most of the blows were on the heads of the horses.

Mr. Sherwood and *Mr. Bruen* thought the beating uncalled for, as the load was too heavy for the horses. One of the horses was vicious and balky, and did not do his share.

Mr. Fay (To the Jury). The evidence is not satisfactory against the defendant; it does not appear that the horses were injured. It was proved the horses were vicious, and would not draw the load; that they had balked two or three times coming into town with an empty wagon; that the tricks of a vicious horse were extremely calculated to inflame the passions of its owner. The driver might on such an occasion as the one now before the Court, strike the horse ten or a dozen blows, even with the butt end of a whip, without being answerable by indictment or otherwise. A parent has a right to correct and chastise his children; a school-master has authority to correct his scholars, and a master his servant, and it would be strange, and an anomaly, in the law, if a brute might not be corrected for its vicious habits.

Mr. Maxwell. The Almighty had given man dominion over the fowls of the air, the beasts of the field, and the fishes of the sea. But he must take care that his dominion be not abused; like other gifts of the Deity, it might be, and often was, abused. In such a case, the municipal laws of the country stepped in to the aid of those of nature and religion, and would punish him for any infraction of their rules. The evidence was conclusive against the defendant. It appeared by the testimony of Mr. Hone and Mr. Walker, and also

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by the brother of Mr. Hone, that the beating was outrageous, and without any justification. It was in the open street, in the most populous part of the city; showing an example unworthy of a man in inflicting an unwarrantable injury upon a brute. Several cases had occurred in this city and vicinity that shocked the feelings of a number of citizens, and this case called loudly for an example and punishment.

The COURT. It appears by the evidence, that the prisoner was engaged in carting manure from the city to a place in the country. The prisoner had got as far with his load as Broome street and Broadway, when his horses either refused to draw, or were unable to draw it any further. It appears he commenced beating one of them very severely. He beat the horse over the head, neck and shoulders with the butt end of his whip. Mr. Hone, who was passing at the time, humanely interfered. A scuffle ensued; the prisoner swearing he had a right to whip his horses without being called to account. He struck them over the head, and not on those parts experienced horsemen have recourse to. The testimony, in the opinion of the Court, does not appear to excuse or authorize the excessive violence of the beating. Mr. Hone's testimony is explicit and positive, that he beat one of the horses over the head with the butt end of his cart whip ten or twelve blows, and was corroborated by his brother and Mr. Walker, a clerk in the office of the Daily Advertiser, testified that he struck the horses forty or fifty blows, and thinks the beating was very violent and excessive. He declared that his feelings were so wounded by the transaction that he was on the point of leaving the office for the purpose of arresting the violent proceedings of the prisoner. It is true, by the testimony of Mr. Sherwood and Mr. Bruen, that the load was heavy, and that one of the horses was vicious, and sometimes refused to draw the load, yet it does not appear but that by proper management they might have been made to draw it. Yet, if they would not, the defendant had no right to beat them in the inhuman manner he did. The District Attorney has stated the law truly: a man may

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be punished for any abuse of his gift of power over the brute. If you think this power was abused, you will find the defendant guilty, but if you think it was not abused; if you think the horses were vicious, and refused to draw the load, or if you think they were not overloaded, and that the butt end of the whip is a proper instrument, the defendant will be entitled to your verdict of acquittal.

The *Jury* returned a verdict of *Guilty*.

RIKER, *Recorder*. To treat a dumb beast with cruelty is a misdemeanor at common law. Cruelty to a beast cannot be justified. We have heard of several cases of late that have demanded the interposition of justice. We have heard of instances where the tongues of suckling calves have been tied for the purpose of preventing their dams being sucked; and also cases where they have been bled to death for the purpose of giving color to their flesh. In all such cases of wanton cruelty, brought before this Court, they will not only notice, but punish the guilty offender.

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THE TRIAL OF THOMAS WILSON DORR FOR TREASON, RHODE ISLAND, 1844

THE NARRATIVE

This is the story of an American Revolution known of by few Americans. After the Revolution of 1776 the various colonies proceeded to form new governments and with the exception of Connecticut and Rhode Island all of them framed and adopted new constitutions. These two states, unlike the others, continued to rule themselves under the old charters which had been granted by the Crown; and without a written constitution they were like England not subject to any constitutional limitations, but their governments were supreme.[1] In 1818 Connecticut adopted a written constitution, and in 1842 a majority of the people of Rhode Island, after having many times appealed to the Legislature in vain, undertook to do what every other American state had done, form their own constitution or government. The leader of this movement, which terminated in an unsuccessful rising, was Thomas Wilson Dorr, and the event is known in history as Dorr's Rebellion.

[1] "The General Assembly was even more powerful than the Parliament of England, for it had always exercised, and it continued to exercise, until the constitution of 1842, supreme legislative, executive and judicial powers. Just before 1842 it became felt by an ever-increasing number of the people of the state, that the time had come when there should be some express limitation upon the powers of the General Assembly and an extension of the suffrage. A limitation of the powers of the General Assembly by itself would be of no avail, for whatever the General Assembly enacted, it could, at any time, repeal. The General Assembly had at various times enlarged and restricted the suffrage, and it could enlarge it now, but it would not. The only way to bring about these changes was through a state constitution, framed by a convention and adopted by the people. The people of the state, after much agitation and discussion extending over many years, with the necessity for action steadily increasing, finally undertook to do in the period ending in 1842 what the people of other colonies had done in 1776 or soon

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Rhode Island had not a republican form of government such as the founders of the Federal Constitution intended, but an oligarchy parading under the name. As early as 1777, the people began to petition the General Assembly to call a constitutional convention; they did so again in 1821, in 1822, in 1824 and in 1829, only to be told that the signers were a low and degraded portion of the community and that if they did not like the constitution of the state as it then existed they were at liberty to leave it. Then the people began to see clearly that the only remedy they had was to ignore the General Assembly and to proceed to form a new constitution independently of it. In 1834 the agitation became great, and delegates from the towns of Newport, Providence and eight other towns, assembled in convention in Providence, to decide upon the "best course to be pursued for the establishment of a written constitution which should properly define and fix the powers of the different departments of government and the rights of the citizen."

Dorr was a delegate from Providence, and was one of a committee of five to report at a second meeting. He was chairman of this committee and wrote its report, which brought him at once to the front as a leader. The General Assembly was asked to call a convention representative of the people at large, to prepare a liberal and permanent constitution, urging "that the same Legislature which has imposed upon the citizens of Rhode Island a landed qualifica-

after. The opposition to this course by the landowning constituted authorities brought about the Dorr war that ended in Dorr's personal defeat, but ultimately in the partial accomplishment of the establishment of the principles for which he contended.

"In 1724 the General Assembly passed an act limiting the suffrage to landowners and their oldest sons. With the decay of shipping and commerce after the Revolution and the War of 1812, the increase of cotton spinning brought into existence a new class in the state. It came about that the members of the class holding the government in their hands were not increasing in numbers in the same ratio that the members of the new class were, so that, through the exclusion from the suffrage of the rapidly growing class, consisting of artisans, tradespeople and professional men, a minority was governing the majority." Mr. Eaton's paper, p. 7.

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tion not spoken of in the charter, has at least as much right to suspend it, for the single purpose of facilitating the exercise by the people, of the great, original right of sovereignty in the formation of a constitution." The General Assembly's only reply was to pass an act requesting the legal voters to choose delegates "for the purpose of amending the present or proposing a new constitution for this state, the delegates to be of the same number and like qualifications as the members of the General Assembly, and the results of the labor of the convention to be submitted to the vote of the existing electorate." This without any enlargement of the suffrage meant of course no change at all, and it became at last evident to the excluded majority that it must take the control into its own hands and frame a new constitution without regard to the existing government. The Rhode Island Suffrage Convocation was formed with branches in nearly every town in the state whose principles were, that "whenever a majority of the citizens of this state who are recognized as citizens of the United States, shall, by their delegates in convention assembled, draught a constitution and the same shall be accepted by their constituents, it will then be to all intents and purposes the law of the state." The whole movement was thus changed, instead of educating the people to demand reforms in the government through the General Assembly, and a convention to be called by the General Assembly, a peaceful revolution was to be brought about by ignoring the constituted authorities. This was the beginning of the movement that culminated next year in the Dorr war. Neither of the two parties, Whig or Democratic, inagurated this movement. It was the result of the awakening to a realizing sense of their number, power and opportunity of the excluded classes under the leadership of Dorr and others, aided by the incapacity, the blind fatuity and the almost inconceivable bad management of the landholders and their leaders.[2]

[2] Id., p. 11.

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The convention called by the General Assembly in 1834 had been a failure; only a few delegates attended and they did nothing. So in 1841 it called another convention, but it maintained the existing qualifications for the election and was of course treated with scorn by the Suffragists, who two months later met in convention at Providence and submitted a constitution to the vote of the state. It having been carried by the voters, the Convention resolved and declared that the "said constitution rightfully ought to be, and is, the paramount law and constitution of the State of Rhode Island and Providence Plantations. And we do further resolve and declare for ourselves and in behalf of the people whom we represent, that we will establish said constitution and sustain and defend the same by all necessary means." The second convention called by the General Assembly like the first was a fiasco and adjourned without doing anything, so in January, 1842, that body passed an act providing that "all persons now qualified to vote and those who may be qualified to vote under the existing laws, together with all persons who shall be qualified to vote under the provisions of the constitution to be framed by the Convention authorized by the General Assembly shall be qualified to vote upon the question of the adoption of said constitution." This was a virtual surrender to the Suffragists and should have been accepted by them, but it was not; the Assembly Convention reassembled, framed its constitution, but on being submitted to the voters it was defeated by a narrow majority.

At this stage the Judges of the Supreme Court promulgated an opinion that the convention which formed the People's Constitution assembled without law, that the votes in favor of it were given without law; and however strong an expression of public opinion they might represent, their constitution was not the paramount law of the land, and was of no binding force whatever, and that any attempt to carry it into effect would be treason against the state if not against the United States. In reply, Dorr published an

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opinion of nine lawyers including himself to the effect that the people's constitution was the republican form of government required by the Federal Constitution, and that it had been legally and lawfully adopted.

In March, 1842, the General Assembly passed an act declaring illegal and void all meetings for the election of state officers not held in accordance with the laws of the state, forbidding anyone to act as an officer at such illegal meeting or to accept any office by virtue of such an election, with provisions for punishment by heavy fines and imprisonment of minor officers, and also for punishment as treason, in the case of the higher officers. The act provided that trials for the offenses specified might be held in any county, whether the offense was committed in that or some other county. It was this act under which Dorr was subsequently tried and convicted of treason.

One of the newspapers having stated that the Bey of Algiers was lacking in power to enforce such a law, it became known derisively as the Algerine law, and those supporting it, the Law and Order party, were called "Algerines" by the Dorrites. This law induced many of the Dorrite nominees for office to decline, and a committee, of which Dorr was chairman, was elected to fill vacancies. The other members of this committee, Dorr not acting, now announced their State ticket, with Dorr at the head as Governor, and at the election held by his party, on April 18, 1842, Dorr and other state officers were unanimously elected. It is impossible to account for the supineness of the constituted authorities in allowing these elections to take place, after the publication of the opinion of the members of the Supreme Court and the passage of the Algerine law, except upon the supposition that as the General Assembly had passed no act to enable the Governor to call out the militia, and as the Governor had no real authority, none being given to him by the Charter of 1663, he did not feel authorized to do so. It seems certain that this failure to take any step to suppress

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the Dorrite movement encouraged the Dorrites to go on in their course. In addition, both sides well knew that the militia could not be relied upon. Two days later the regular election under the charter came off, and Samuel Ward King was elected Governor. Two rival Governors and General Assemblies were now in existence. The charter government appealed to President Tyler to suppress the Dorrites, but were met by a refusal, and on May 3, 1842, Dorr was inaugurated Governor at the first and only meeting of his Legislature. A procession of perhaps two thousand persons, including some militia companies and an independent company, some of whom were armed, preceded by the usual brass band, escorted the Governor-elect and the members of the General Assembly-elect to a new unoccupied foundry building (whence this became known as the "Foundry Legislature") and where Dorr delivered his inaugural address.

At this point Dorr made his second great blunder—the first being his not taking possession of the State Capitol and offices on the day he took office. Hearing that the Charter Assembly had appealed to Washington again he went there himself to oppose the appeal and secure the aid of the Federal Government for himself. The charter authorities at once raised the cry that he had run away and issued warrants for his arrest and arrested a number of his leading supporters. Learning of this he returned at once and the next day made an appeal to arms by an attack upon the arsenal, to obtain possession of the guns and military supplies stored there. But unknown to him, a detachment of militia was inside, and among its officers was Samuel Ames, who had married Dorr's sister. The night was warm, very dark and foggy. Every one lost every one and it is impossible to make out exactly what did take place. There was an attempt to fire a cannon against the arsenal, and some witnesses testified at Dorr's trial for treason that Door himself made the attempt, but this was denied by other witnesses. The cannon would not go off because a pail of water had

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been poured into it. The attack failed, Dorr's force dispersed, and by morning Dorr drove out of the city and left the state, barely escaping arrest, and went to New York.[3]

Being informed that his followers were gathering at Chepachet, Dorr joined them on June 25. To his surprise and disappointment he found only a slight breastwork thrown up on Acote's Hill and about 140 men in arms, with no commissariat. Now at last Governor King declared martial law and called out the militia of the state, and to the number of more than four thousand they assembled at Providence and marched and countermarched. Then a portion was sent to Foster and an advance guard was cautiously despatched to Greenville, about half way to Chepatchet. The insignificant, undrilled handful of volunteers at Acote's Hill gradually melted away, and, calling a council, Dorr and his officers decided to disband. The decision was made known to the men between six and seven o'clock on the afternoon of June 27, and was at once carried into effect, Dorr sending letters to Providence at once for publication, announcing the fact of disbandment, and immediately leaving the state to escape arrest. This ended the Dorr war. Only one man lost his life, a Massachusetts man on Massachusetts soil, who was accidentally killed by a musket ball fired across a bridge.[4]

But the aftermath! In June, 1824, Governor King offered a reward of $4,000 for Dorr's apprehension, but the latter remained in New Hampshire under the protection of a friendly Governor, who refused to honor a requisition for his extradition. In August Dorr issued an address to the people of Rhode Island, reviewing the whole controversy and the reasons for his course and announcing his intention of returning to the state, which he did a few days later, and was at once arrested for treason and kept in jail in Providence until February, 1844, when he was taken to Newport for trial there.

[3] Eaton, p. 24.
[4] Eaton, p. 26.

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Dorr's offenses had all been committed in Providence County and there he had many supporters. It would therefore be difficult to secure a jury in that county from which all persons of his way of thinking could be excluded, whereas in Newport County Dorr had but few adherents. The so-called Algerine law permitted such a trial in other than the county in which the offense was committed and for this reason the trial came off in Newport. The Court that tried Dorr consisted of the same three Judges who had given their opinion against the legality of the Dorrite movement, and Judge Brayton, who had since then been added to the Court. One hundred and eighteen jurors were summoned and examined before twelve were obtained for the jury, and but three of the hundred and eighteen belonged to the Democratic party, now considered the Dorr party. There was not a single Dorrite on the jury. There were four counts in the indictment, two for acts of treason at Providence and two for acts of treason at Gloucester.

In opening the defense, Dorr's counsel made five points: 1—That treason cannot be committed against a state, but only against the United States. 2—That the act of March, 1842 (the Algerine law), was unconstitutional and void, as destructive of the common law of trial by jury, which was a fundamental part of the English constitution and the Declaration of Independence and had ever since been fundamental law in Rhode Island. 3—That that act, if constitutional, gave the Court no jurisdiction to try the indictment in the County of Newport, all the overt acts being therein charged as committed in the County of Providence. 4—That the defendant acted justifiably as Governor of the State, under a valid constitution, rightfully adopted, which he was sworn to support. 5—That the evidence did not support the charge of treasonable and criminal intent in the defendant. The Court easily decided that treason can be committed against a state, as well as against the United States, after full argument with elaborate citation of authorities by defendant and his counsel, and so it did as to the second, for Dorr had

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always maintained that the General Assembly had superior power and this was the reason why he wanted a constitution. In support of the fourth point, Dorr offered evidence to prove that a large majority of the whole male adult population of the state, citizens of the United States, had voted for the People's Constitution, in December, 1841, and that under the constitution he had been elected Governor. He offered to produce the ballots themselves and the men who cast them, but the evidence was refused by the Court, Chief Justice Durfee saying to the jury: "Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted, or a Governor elected or not. Courts take notice without proof offered from the Bar, what the constitution is, or was, and who is or was the Governor of their own state. It belongs to the Legislature to exercise this high duty."

The result was a foregone conclusion. Upon the evidence, the admissions made by the defendant, the exclusion of the testimony of the defendant above described, and with the jury made up as it was, exclusively of anti-Dorrites, notwithstanding the able and eloquent address made by Dorr, there could be but one result. The jury agreed at once upon a verdict of guilty; the exceptions made by his counsel were overruled and the unseemly severe sentence of imprisonment for life was pronounced by the Chief Justice.

Dorr was at once removed to the state prison at Providence, but the result of the severity of the sentence was that soon a reaction set in and expressions of sympathy for the "Martyr Governor" flowed in from all sides, and in a very short time the General Assembly passed an act releasing him on his taking an oath of allegiance to the state. Dorr declined to take the oath required, declaring that to do so would be a recognition on his part that he had heretofore failed in allegiance, and this he could not admit. The agitation for his unconditional release increased and the subject became the leading political issue in the state and the following spring the "Liberation" candidate for Governor, Charles Jackson,

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was elected and the "Liberationists" had a majority in the General Assembly. Dorr was released unconditionally under an act of the General Assembly in June, 1845, having remained in prison one year. He came out a disappointed, broken-hearted man, but with resolution undaunted, although a physical wreck, his rheumatic affection having increased by the dampness of his stone cell in prison, and with some obscure affection of the stomach that kept him an invalid at home during the nine remaining years of his life. The sympathy excited by his condition, with a sense of the recognition of the value of Dorr's work as a political reformer, led to the passage, shortly before Dorr's death, of an extraordinary Act of the General Assembly wiping out all of the judicial proceedings against him.[5]

This act was declared unconstitutional by the Supreme Court,[6] but to the dying man, says Mr. Eaton in his admirable essay on Thomas Wilson Dorr and the Dorr War, "this attempted annulment of the decree against him brought small comfort. Upon his conviction he had appealed to the people of our State and our country. The appeal was not in vain. As the animosities of the conflict fade away from sight, we appreciate in spite of the mistakes in judgment that he sometimes made, that high upon the roll of Rhode Island's great men will stand forever the name of the political reformer and public benefactor, Thomas Wilson Dorr."

THE TRIAL[7]

In the Supreme Court of Rhode Island, Newport, April, 1844.

HON. JOB DURFEE,[8] *Chief Justice.*
HON. LEVI HAILE,[9]
HON. WILLIAM R. STAPLES,[10] } *Associate Justices.*
HON. GEORGE A. BRAYTON,

[5] R. I. Acts and Resolves, 1854, p. 249.
[6] *Re* Dorr, 3 R. I. 1854.
[7] *Bibliography.* *Report of the trial of Thomas Wilson Dorr for treason; including the testimony at length, arguments of counsel—the charge of the Chief Justice—the motions and arguments

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On October 31, 1843, Mr. Dorr,[11] who was a fugitive from justice, returned to Rhode Island and was immediately arrested and conducted to prison on a charge of treason against the state, on an indictment against him then pending in the County of Newport. On February 29, 1844, Mr. Dorr was

on the questions of a new trial and in arrest of judgment: together with the sentence of the Court, and the speech of Mr. Dorr before sentence. From notes taken at the trial. Providence: B. F. Moore, printer, 1844." This report is the work of George Turner and W. S. Burges, the prisoner's counsel and friends. There is another report, also very full, by Pitman.

[8]"Thomas Wilson Dorr and the Dorr war; a paper read by Hon. Amasa M. Eaton, of Providence, R. I., Bedford Springs, Pennsylvania, June 29, 1909." This paper is also published in "Great American Lawyers" (Lewis), Philadelphia, 1908.

[8] DURFEE, Job (1790-1847). Born Tiverton, R. I. Graduated Brown University 1813. Speaker House of Representatives 1826. Associate Justice of the Supreme Court 1833. Chief Justice 1835 until his death.

[9] HAILE, Levi (1797-1854). Born Warren, R. I. Graduated Brown University 1821. Began practice of law in Warren. Member of Rhode Island House of Representatives from Warren 1824-1835. Associate Judge of Supreme Court of R. I. (1835-1854). Trustee of Brown University (1830-1854).

[10] STAPLES, William Read (1798-1868). Born Providence, R. I. Graduated Brown University 1817. Admitted to bar 1819. Member of Providence City Council 1832. Justice police court for two years. Associate Justice of Rhode Island Supreme Court 1835-1854. Chief Justice of Rhode Island Supreme Court 1854-1856. Auditor of Rhode Island 1856-1868. Secretary and Treasurer Rhode Island Society for Encouragement of Domestic Industries. Founder, Secretary and Cabinet Keeper of Rhode Island Historical Society. Author of many historical books.

[11] DORR, Thomas Wilson (1805-1854). Born Providence, R. I. Graduated Harvard 1823. Studied law in New York under judges Kent and McConn, and was admitted to the bar. Elected to Lower House of Rhode Island General Assembly from Providence 1833. Dorr's career in the General Assembly terminated in 1837 in consequence of the course he took in bringing to an end the peculiar "bank process" then in force in Rhode Island, under which if a debtor failed to pay his note at bank by three p. m. on the day when it became due, an attachment, judgment, execution, levy and sale might follow the same day, so that before sunset of that day such debtor's real estate might become the property of the bank holding his protested note, to the exclusion of the claims of all other creditors. Dorr wrote the report of the committee that reported a bill that became a law "limiting the banks hereafter to the same remedies for the collection of debts as are possessed by

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brought before the Supreme Court at Newport and being called upon to plead contended that the law of the state (styled the Algerine law) which authorized the finding of an indictment out of the county in which the offense is charged to have been committed was unconstitutional. He subsequently withdrew this plea, pleaded not guilty and then moved the Court to transfer the indictment to Providence County, where the defendant and his witnesses resided, as the defendant was constitutionally entitled to "a speedy trial by an impartial jury," neither of which could be obtained here. The COURT refused the request and set the trial for April 26.

April 26.

The whole COURT being present the defendant was arraigned and pleaded not guilty.

Joseph M. Blake,[12] Attorney General, and *Alfred Bosworth*[13] for the State.

The Defendant per se, George Turner and *Walter S. Burges*[14] for the defense.

individuals in the state." He was a delegate from Providence to the convention called in 1834 to frame a new state constitution, was elected Governor of Rhode Island by the Dorrite party 1842, was arrested and confined in jail at Providence from October to February, 1843-1844, when he was taken to Newport, R. I., to be tried for treason. Convicted and sentenced to imprisonment for life, June 25, 1844. Released June, 1845.

[12] BLAKE, Joseph M. (1809-1879). Born Northfield, Mass. Studied law. In 1836 elected Representative from Bristol in Rhode Island General Assembly. Attorney General 1843-1850.

[13] BOSWORTH, Alfred W. (1812-1862). Born Warren, R. I. Graduated Brown University 1835. Admitted to Rhode Island Bar 1838 after studying law under Levi Haile. Practiced law in Chepachet and Warren. Representative in Rhode Island General Assembly 1839-1854. Judge of Supreme Court (1854-1862). Speaker of Rhode Island Legislature 1842-1844 and 1851-1853. Was Counsel for Rhode Island against Massachusetts in boundary case. Trustee of Brown University 1854-1862.

[14] BURGES, Walter Snow (1818-1882). Born Rochester, Mass. Graduated Brown University 1831. Principal of Thaxter Academy, Edgartown, Mass., 1831-1835. Admitted to Rhode Island Bar 1835. Elected to Rhode Island House of Representatives 1841. U. S. District Attorney 1845-1849. Attorney General 1851-

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Mr. Turner stated to the Court, that both the defendant and himself had to regret the absence of *Hon. Samuel Y. Atwell,*[15] the principal counsel, who was detained at home by a severe if not dangerous indisposition. But the defendant would not ask for delay on this account.

The *Attorney General* proposed to the Court several questions to be put to jurors, as they should be severally examined, touching their competency to sit in the case: 1—Have you attended to the reading of the indictment of the state against Thomas W. Dorr, the prisoner at the Bar? 2—Have you formed or expressed the opinion, that the said Thomas W. Dorr is guilty—or the opinion that he is not guilty of the crime in said indictment? 3—Did you vote for the said Thomas W. Dorr for Governor at the election, on the eighteenth of April, 1844? 4—Have you formed the opinion, or do you believe that said Thomas W. Dorr was the Governor of this state, or authorized to exercise the duties of Governor, at any time between the sixteenth day of May, 1842, and the twenty-eighth day of June 1842? 5—Are you a relation of the said Thomas W. Dorr? 6—Are you a free-holder in the County of Newport?

Defendant objected to the third and fourth questions as unreasonable and improper.

The *Attorney General* contended that if these questions were not put, jurors, who had taken part with the prisoner and approved his proceedings, would sit to try him. If they voted for him, or believed him to have been Governor of the State, they had prejudged his case, and of course would hold him justifiable against the charge in the indictment.

1854 and 1860-1867. Member of Rhode Island Senate 1859-1860. Justice Court of Common Pleas 1868-1875. Associate Justice Supreme Court of Rhode Island 1875-1881.

[15] ATWELL, Samuel Young (1796-1844). Born Providence. Graduated Brown University 1814. Studied medicine and later law. Member House of Representatives from Gloucester 1835-1840. Speaker 1836-1837. Chairman of State Commission on Banking 1837. While acting as counsel for the defense in the Sprague murder case he caught a cold which caused his death October 25, 1844.

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If Mr. Dorr was Governor, then he had a right to do all that he did; and those persons who believe that he was, are certainly incompetent to try him.

Mr. Dorr said that although, as had been remarked, this was a novel case, novel and unusual expedients ought not to be resorted to, to procure conviction. It was impossible to doubt the purport and tendency of these questions. They were aimed at all persons belonging to one of the political parties in the State, the party with which the defendant was connected. All such were to be excluded from the jury; and all of another description were to be admitted without any such test as had been proposed. This would insure to him not the "impartial jury" guaranteed to him, as of common right, but a partial jury of political opponents, and would work the most flagrant injustice. These questions were involved in the second question, or rather that question involved all that could be properly asked of the opinions of jurors. If the reply was, that the juror had neither formed nor expressed an opinion concerning the guilt or innocence of the prisoner, he had qualified himself; and it was improper to go behind the oath he had taken, to extort from him other answers, when the first covered the whole ground upon which it was competent to examine him. To go farther than this was to invade the right of the juror himself, to question his veracity, and virtually to charge him with perjury. If he had told the truth in his answer he was competent. And how far could an investigation of this kind be carried? Where was it to stop? A great variety of opinions upon the political questions involved in this case had been entertained, and different opinions by the same individuals at different times. Some were still for the old charter; some for one constitution, some for another; some had voted for the defendant and believed he was duly elected and qualified as Governor, who afterwards went over to the opposite party, and contradicted their former assertions and acts. If these questions were to be put, then many others might be asked with the same propriety, the oath of the jury-

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man to his impartiality would be nugatory, and an inquisitorial process would be devised, such as had never been heard of in a court of justice. If the juror answer that he voted for defendant as Governor, and considered him to be Governor between the times named, then it would be necessary to ask him if he still remained of the same opinion, and, if not, when and how he changed his mind. There is no end to this sort of inquisition. Then, again, look on the other side of the question. If a person who says he believed the defendant to be Governor be unfit to be a juror because of partiality, how much more fit and less partial is he who says he believes the defendant not to have been Governor, and has thereby closed his mind against all the evidence of justification that the defendant may offer. The difficulty is in the case itself. It is a political question; and all persons have conversed about it and canvassed it more or less. If a fair trial be intended, the jury must not be selected from the political opponents of the defendant. He cannot ask the prosecutor to put an entire list of defendant's political friends in the box; and he has a right to protest against the exclusive selection of his political enemies; a jury at large, without selection, will be the nearest approach to fairness. A fair trial is inconsistent with such a procedure as that suggested, and with any other tending to the same result. No man can mistake the political meaning of the questions which it is now proposed to ask.

The COURT, after deliberation, were equally divided upon the motion of the *Attorney General,* and the question was overruled. Chief Justice DURFEE and Judge HAILE were in favor of putting the questions, and Judges BRAYTON and STAPLES in the negative.

The Prisoner, on being asked the usual questions by whom he would be tried, replied, "by an impartial jury."

The indictment was then read again.[16]

[16] The Grand Jurors of the State of Rhode Island and Providence Plantation, and in and for the body of the County of Newport, upon their oaths present, That Thomas Wilson Dorr, of the City of

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The regular drawn jury for the term consisted of sixteen. Sixty in addition were selected and summoned upon a *venire* by the Sheriff, previous to the commencement of the term.

Of the one hundred and nineteen jurors summoned, eighty-three were set aside by the COURT, in consequence of their

Providence, in the County of Providence, Attorney and Counsellor at Law, being an inhabitant of, and residing within the said State of Rhode Island and Providence Plantations, and being under the protection of the laws of the said State of Rhode Island and Providence Plantations, and owing allegiance and fidelity to the said State, not weighing the duty of his said allegiance and wickedly and traitorously devising and intending, the peace of the said State of Rhode Island and Providence Plantations, to disturb and to stir up, move and excite, insurrection, rebellion and war against the said State, on the seventeenth day of May, in the year of our Lord, one thousand eight hundred and forty-two, at the City of Providence aforesaid, in the aforesaid County of Providence, with force and arms unlawfully, falsely, maliciously and traitorously, did conspire, compass, imagine and intend to raise and levy war, insurrection and rebellion, against the said State; and in order to perfect, fulfill, and bring to effect the said compassings, imaginations, and intents of him, the said Thomas Wilson Dorr—he, the said Thomas Wilson Dorr, afterwards, to wit, on the said seventeenth day of May, in the year of our Lord, one thousand eight hundred and forty-two, at the City of Providence aforesaid, in the aforesaid County of Providence, with a great multitude of persons, whose names are at present, to the Jurors aforesaid, unknown, to a great number, to wit, to the number of three hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, muskets, swords, pistols, dirks, and other warlike meapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and gather themselves together against the said State, and then and there, with force and arms, did falsely and traitorously and in a warlike, hostile manner, array and dispose themselves against the said State of Rhode Island and Providence Plantations, and then and there, that is to say, on the day and year aforesaid, at the City of Providence aforesaid, in the aforesaid County of Providence, within the said State, in pursuance of their traitorous intentions and purposes aforesaid, he, the said Thomas Wilson Dorr, with the said persons so as aforesaid, traitorously assembled, and armed and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war, against the said State of Rhode Island and Providence Plantations, contrary to the duty of his said allegiance and fidelity, against the form of the Statute in such case made and provided, and against the peace and dignity of the State.

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answers that they had formed and expressed an opinion of the guilt or innocence of the prisoner, or upon proof by witnesses to the same effect. Only one person was set aside on proof by a witness for the Government that he had formed and expressed an opinion. Several were set aside on proof produced by the defendant.

April 29.

The selection of the jury was completed today, the following being selected: Benjamin Carr, of Tiverton, Asa Devol, do., William L. Melville, Jr., of Newport, William Card, do., Jonathan Coggeshall, Jr., of Portsmouth, David Seabury, of Tiverton, Benjamin Cory, do., Charles W. Howland, of Little Compton, Borden Chase, of Portsmouth, Joseph Paddock, Jr., of Newport, Richard C. Norman, do., William D. Southwick, do.

Mr. Bosworth (to the jury):

The crime charged was happily a novel one. A terrible oppression had been occasioned by trials for treason, when carried on by the King and Government in England; and this had been the occasion of the crime being restricted here to those odious and atrocious acts which stab maliciously and wickedly at the life of the State. The prosecutors could have no feelings which would lead them to desire a conviction in this case. The jury were fortunately relieved from the duty of ascertaining the law. The Court will instruct them in the law, and they will apply it to the facts. The violation of high duties is treason. By the statute against treason, two witnesses are required to each overt act. Levying war was an unlawful assembling, in warlike array, with treasonable purposes, and with ability to commit the act. Appearing at the head of armed men, and advising them to act, is a levying war. Dispersion without any actual engagement does not take away the character of treason. Maneuvering in the face of the government is enough. There are four counts in the indictment. Two charge the acts done at Providence on the seventeenth and

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eighteenth of May, 1842, and two of those done at Gloucester on the twenty-fifth and twenty-seventh of June.

Mr. Bosworth asked the Court whether the prosecution may prove the intention of the accused before the proof of the overt acts of treason. The COURT, upon the authority of Chief Justice Marshall, in Burr's Trial, decided that the prosecutors might proceed in the order they pleased. Chief Justice DURFEE said that the intention may well be proved first; "for the law does not presume that a man at the head of armed men is committing treason."

April 30.

WITNESSES FOR THE PROSECUTION

Jeremiah Briggs. Was present at the meeting of an Assembly at the "Foundry," on the third of May, 1842. Saw the officers sworn; saw Mr. Dorr hold up his hand and take the oath of office. The oath was taken by the Representatives, Senators, Clerks, and the State officers, excepting the General Treasurer. Mr. Dorr took an oath to support the constitution of the State and of the United States as Governor. Saw a large procession formed on Christian Hill. The General Assembly and the Governor were attended by about one hundred and fifty men. Crossed over from the hill to the house where they were to meet. Was there the whole time: and heard Mr. Dorr deliver his address as Governor; it was very long. The Assembly passed acts to renew the charters of several of the military companies. They also elected military officers, and passed several resolutions. They also amended some laws passed by the General Assembly some time previous; recollect in particular the riot act. Some of them seemed to think the foundry was not a fit place to sit in, as it rained through, and some drops fell on the Speaker's head. They requested the Sheriff, Burrington Anthony, to obtain the court house for their session the next morning. Witness passed in with the procession. They went in uncovered, through files of soldiers.

Cross-Examined. Heard Mr. Dorr deliver his address from a printed paper. There was nothing unusual in it for such an address. Never heard one delivered before. Heard nothing in it about using force. The procession was like others I have seen since; have seen better looking men.

William Burrough. Saw Mr. Dorr at the foundry acting as Governor of the State. Saw the procession form. It was composed of men armed and unarmed. Saw Mr. Dorr take the oath in the common form. Military guards were stationed about the building for some time. The General Assembly passed acts, and appointed military officers. They appointed a committee to call on the Secretary of State to take possession

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of the papers of his office; also a committee to take possession of the public funds. Mr. Anthony, the Sheriff, was authorized to prepare the court house for the use of the Assembly. They abolished the laws respecting offenses against the State, called the Algerine laws. They appointed civil officers, and continued the courts. They appointed a Speaker and Clerks, and altered the law respecting riots. Saw a guard at Anthony's house on the eighteenth of May. There were several cannon there, and some companies of armed men; supposed they were there to protect Mr. Dorr.

Cross-Examined. There were armed men in the procession on the third of May. Some had clubs or canes, they were not ordinary walking sticks, some of them were as large as my arm. The committee spoken of to take possession of the public funds, were to demand them after a new Treasurer was sworn in. There was nothing warlike or riotous in the proceedings of the Assembly. Do not recollect hearing any forcible measures proposed. B. Anthony was authorized to go and demand the keys of the State House, and if he obtained them, to prepare it for their use. Nothing was said about what he was to do if he did not get the keys. Saw no difference from other legislatures in the mode of conducting the business. One man there seemed to know more about business than the rest, and told them what to do. Others did not seem to understand the manner of doing business. Never saw anything just like it elsewhere.

Levi Salisbury. Saw Mr. Dorr at the foundry. The Assembly was held there for the purpose of organizing the new government; and they took the necessary steps for that purpose. Was not present when Mr. Dorr took the oath as Governor. Heard him deliver his message. He was standing on the platform at the end of the building. Don't recollect seeing him before he came in. The procession was decent, well dressed and orderly. The armed men had guns or swords. The General Assembly passed acts and resolutions, and appointed officers, chiefly military. Do not recollect the appointment of any but military officers, excepting those necessary to organize the two houses. Committees were appointed to inspect the public offices, and to transfer to the new officers the books, property and papers. A resolution was passed directing the new Treasurer to receive and receipt for the funds. Do not recollect hearing Mr. Dorr propose to take possession of the public property by force, or any other person in his presence. Was not at B. Anthony's house on the night of the attack on the arsenal. Know of it only by report. Do not recollect of hearing Mr. Dorr say anything about attacking the arsenal.

Cross-Examined. Believe the General Assembly passed a resolution authorizing the Governor to demand and require the surrender of the public property to the new officers of the State. The organization of the government was conducted in every respect in an orderly manner. There was nothing unusual, except that both houses met in one room. Saw no dictation of any

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one person over the rest. There was by-talk and conversation among the members of the Legislature, as in other public bodies. Resolution was passed in the House, requesting the Sheriff to prepare the court house for the use of the Assembly. Do not recollect that anything was said of any alternative, if the house should be refused to him. Saw nothing unusual in the procession. Did not see any of the procession carrying large sticks or clubs.

[Witness hesitated in replying to a question from the *Attorney General,* whether he knew that it was Mr. Dorr's wish to take possession by force on the third of May, 1842, on the ground that he might subject himself to prosecution for misprison of treason, if he stated he had such knowledge and gave no information of it.]

The *Attorney General* said it would be such an offense to refuse to testify what he knew of such a desire or intention on the part of the defendant.

Mr. Dorr said he hoped Mr. Salisbury would not withhold anything he knew on his account.

The COURT said that the witness was not asked whether he divulged or concealed, at the time, his knowledge of Mr. Dorr's intentions, but now generally what he knew on the subject; and that he must answer the question asked of him.

Mr. Salisbury. Certainly understood at the time, that it was the wish of Mr. Dorr to take possession of the State House and of the other property; understood Mr. Dorr was for vigorous measures; there was some discussion in the House on the subject, but it was dropped informally. There was a division of opinion in the House upon taking such a step. The resolution that was passed, requesting the Sheriff to prepare the State House for the sitting of the Assembly, did not authorize or imply the use of force.

Wm. H. Smith. Was at the foundry at the meeting of the General Assembly. Heard Mr. Dorr deliver his inaugural message. Think Mr. Dorr took the oath; but do not positively recollect. The procession was formed near the Hoyle tavern. Mr. Dorr was near the head of it. Some were armed, others not. Persons with arms walked by the side of the members of the Assembly; also by Mr. Dorr. The Assembly elected military officers. Do not know that Mr. Dorr signed any military commissions to officers then appointed; or that such commissions were issued; or of Mr. Dorr's procuring a seal of the State. Have seen commissions with Mr. Dorr's signature to them; but do not know that they were issued to the persons named in them. Heard Mr. Dorr say that he was elected to the place of Chief Magistrate, and was bound to perform the duties of his office. Have the impression that Mr. Dorr said it would have been better to go at once to the State House, and take possession of it. Know that it was Mr. Dorr's desire to take possession of the State House at all events. Did not know at the time that force must necessarily be used. There were different opinions as to the necessity of force to accomplish the object.

Cross-Examined. A resolution passed the Assembly, requir-

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ing all persons in possession of any of the State property or papers, to transfer the same to the newly elected officers; and the Governor was authorized to carry this into effect. State officers, Senators and Representatives were elected. A committee was appointed to count the votes. The votes were counted; and the result was declared to the Assembly. There were about 7000 votes given in. There were few if any against Mr. Dorr. Do not know that any other Governor of the State was ever elected by an equal majority. Mr. Dorr made no proposition hostile to the true interests of the State. He acted as Governor of the State. Never knew of his acting otherwise than from a high sense of duty. He was treated by the Assembly and those associated with him, as Governor. Do not know where the votes given in for defendant as Governor now are; or where the votes are at present, which were given for the People's Constitution, under which Mr. Dorr acted.

Roger W. Potter. Was Sheriff of Providence County in May, 1842. Saw defendant at the Assembly held at the foundry. He was called the Governor of the State. The day after the Assembly adjourned, a warrant was placed in my hands against Dorr, and another against William H. Smith, as Secretary of State. Mr. Dorr was not to be found. Saw him again on the sixteenth of May (the day he returned from New York). He was in a carriage surrounded by a guard of armed men.

Cross-Examined. Did not go out of the middle of the city to look for Dorr. Was first directed to go to Burrington Anthony's house for Dorr; but, after dinner, was directed not to go there, but to arrest Dorr if I should find him down street in the city. Did not know what might be considered his place of residence, as he had removed from his former home to the Franklin House, and afterwards left that house. Did not know that his residence was at B. Anthony's. Did not inquire for him there. Was told he might be found at the printing office of the Herald or Express.

Dutee J. Pearce. Do not know what day Mr. Dorr left the State for New York after the adjournment of the People's Legislature. I left on Saturday and met Mr. Dorr in Philadelphia on Monday. We proceeded to Washington. Left him in New York, when I returned from that place. Knew Mr. Dorr intended to return to Rhode Island, but nothing respecting his intention to maintain himself as Governor and to take possession of the public property by force. Mr. Dorr did not communicate with me on the subject. The proposition to take possession of the public property was made at the time of the sitting of the Legislature; but did not hear defendant make it. I took ground against the proposition and opposed it. During the session of the Legislature at the foundry there was a meeting of several persons at B. Anthony's house; and the subject of taking possession by force of the public property was talked over. Several persons were in favor of it. Do not recollect that Mr. Dorr expressed an opinion.

During this absence of defend-

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ant, heard him speak of bringing a force to this State, to resist the force which might be brought by the General Government in aid of the Charter Government. Defendant never spoke of wanting or using any force from abroad, except in the contingency of an interference from abroad by the U. S. troops. He did not say how many men would be wanted in such an event. His object was to prevent an interference on the part of the General Government. Was informed, after I left Washington, that defendant saw the President. Mr. Dorr stated to me afterward at Chepachet, that he considered himself the lawful Governor of the State, and that he had as good a right to use force to defend the Government as any other officer had to overthrow it. Did not hear him hold out any inducement to any one to stand by him. He certainly did not to me.

Cross-Examined. Did not hear Mr. Dorr say that he wished to take forcible possession of the State House. Had no doubt of Mr. Dorr's intention to take possession of the State House.

William P. Blodget. Saw Dorr in the procession on the sixteenth of May. Followed the procession to Federal Hill, near B. Anthony's house. He addressed the multitude; do not recollect whether from a carriage or a platform. He said it was false, as he had been accused, that he should have the aid of five hundred men from abroad that he had asked for; he expected five thousand when they were wanted. He drew his sword and said that it had been dipped in blood once, and before he should yield up the rights of the people of Rhode Island, it should be buried in gore to the hilt. Dorr was surrounded by between three hundred or four hundred armed men in the procession, and a concourse of unarmed. Witness never heard such a yell as when defendant announced his determination. They applauded him with the yell of fiends. Was told it was not safe for me to remain there. Was not much frightened. The men about Dorr were more like desperadoes than men. They only wanted a leader to do anything. Gave information of these proceedings to the Governor and Council.

The cannon of the artillery company were taken by Dorr's men on the afternoon of Tuesday, the seventeenth of May. The detachment came down about four o'clock; no authorized person was present to defend them. Tried with some friends to prevent carrying off of the guns in case the orders should arrive from the Governor in time; they did not arrive and the guns were carried off. The officer in command of the detachment, said the muskets of his men were loaded; so also did one of the company. The troops from the rest of the State were ordered up and came during the night of the seventeenth and in the morning of the eighteenth. Was not at the arsenal, but was ordered to await the arrival of the troops. In the morning the column of about five hundred and fifty men marched up Federal Hill under the command of Col. William Blodget; marched beside the commander; some one came and told them for God's sake to stop, as they

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would be fired upon. Companies were then deployed to the right and left, and the cannon of the Newport artillery were unlimbered in front. The hostile guns were then withdrawn some distance. The numbers around them decreased very rapidly when the troops came up, to forty or fifty. The cannon were said to be loaded with round shot and slug iron. After a time, B. Anthony promised that the guns should be returned at four o'clock in the afternoon, if the troops were withdrawn; Anthony said the men were drunk, and could not be influenced by him. The troops were consequently withdrawn.

Cross-Examined. Did not see on what Dorr stood when he made his speech. The shout was more like an infernal yell than anything else. To understand it, one must have seen Dorr's countenance when he made the speech. It accorded with the whole scene. Dorr did not make any explanation as to the use of the five thousand upon the interference of Tyler. His name was not mentioned. Did not derive the story of the sword from a newspaper. Have not said that I came here to get Mr. Dorr convicted, or to that effect. Have said that I should say here all I could against Mr. Dorr.

Edward H. Hazard. Saw the procession of the sixteenth of May. Information was received by the authorities, that Dorr was in Stonington, and an armed force of his friends went to Stonington to escort him up. A proposition was made to the Governor to arrest Dorr at Kingston depot, but it was not accepted. Went down to the depot of the Stonington Railroad on Monday morning and saw Dorr arrive. There were probably about fourteen hundred men in the procession; went with Col. Blodget afterwards to Federal Hill. Heard Mr. Dorr say that the sword had been dyed in blood, and should use it again in the same way in defense of the rights of the People of this State. Dorr also requested the military officers to meet him at Anthony's. Saw the men at the breastwork after they had fallen back from Anthony's house. D'Wolf was to take charge of them, and, if they could hold out a short time, Dorr was to return.

Cross-Examined. Dorr spoke boldly and candidly. Think he may have said that the five thousand men who were to come from New York were to stand against Tyler; do not distinctly recollect; did not derive the story about the sword from a newspaper.

Henry S. Hazard. Was in Providence on the seventeenth and eighteenth of May; saw Dorr on the sixteenth of May when he came from Stonington; saw the procession first going to the bridge; didn't follow it; saw a large collection at B. Anthony's house on the seventeenth of May; many were the same as those who were in the procession. There were three hundred or four hundred up there when I went up; they were in companies; their arms were stacked, and guards were stationed round them. On the night of the seventeenth, about 12 or 1 o'clock, heard cannon fired; rode up on horseback over Federal Hill; saw the men in line; rode along the line, and over to the arsenal; told Col. Blodget that they were coming; he said he was ready for them; rode back, and heard them ask-

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ing one another in line whether they were going to the arsenal; some said they were; some said they were not; then rode to the light infantry armory and told Col. Brown. There were four or five hundred men; but not all under arms. The cannon were in the road; they appeared ready for service.

Cross-Examined. Should think there were rising four hundred men with arms; there was a very heavy fog that night. Rode along the line from one end to the other. Couldn't see more than half the length. They were standing in line; not in the best of discipline; think they were mostly in double line; stopped a little from the farther end of them; went there on purpose to see how many there were; didn't see Dorr that night. Had said I hoped justice would be done to Mr. Dorr; and was anxious to have him arrested; had no hard feelings against Mr. Dorr.

Joseph S. Pitman. Heard on the fifteenth of May that Mr. Dorr had requested an armed force to meet him at Stonington. The next day saw him escorted through the streets of Providence.

Henry S. Hazard. (Recalled) —As we marched up, the cannon of the insurgents was planted opposite Anthony's house, pointed down the hill. We marched up until we could see into the muzzles of the guns, and then halted. The insurgents then withdrew their cannon and many of them dispersed; should think that when they posted their cannon again, not more than forty or fifty remained. Saw a man swinging a torch as if to apply it to the cannon; some one took hold of him, and prevented it.

Orson Moffitt. Saw Dorr in Providence on sixteenth and seventeenth of May; saw him marching through the streets on the sixteenth. On the seventeenth, an armed force came down from B. Anthony's house to seize the cannon of the artillery company; saw them take the guns and carry them away. They said they came by orders of Gov. Dorr. They said their muskets were loaded. Saw Dorr on the sixteenth draw his sword; and something was said about a sword dyed in blood; could not hear exactly what else he said. Went to Warren on the seventeenth, at night, to bring up the troops; came back and went through the city the rest of the night; went into Dorr's lines. Heard him give the order to fire. Saw one gun flash, and then heard Mr. Dorr himself call for the torch. Saw the other gun flash; saw him holding the torch; could see him plainly when the gun flashed; was near enough to him to have touched him easily; the cannon was near the arsenal, pointed at it; when he found the gun only flashed, he said he was betrayed. He appeared to be commanding; heard him give no other orders than the one to fire; it was obeyed instantly. There was no guard on the plain when I was there; saw a number of men about. They generally started to go off, and I left soon after the gun was flashed. About 12 o'clock that night I was fired into going down Carpenter street; was challenged first; did not stop, and the musket was fired. Was leaning down and looking out of the carriage, else I should have been hit.

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Cross-Examined. Saw Dorr draw his sword on the sixteenth; could not exactly hear what he said. Saw Dorr on the night of the seventeenth. Am certain that he applied the torch to the cannon; knew him by the voice at first and then by sight; could not say anything about the dress of Mr. Dorr, whether he had a hat or a cap, or what sort of a belt, or what was the position of the guns, or who were near, or standing around, or who flashed the first gun. Was in the midst of the men about the guns.

George O. Bourn. A person who was following the march to the arsenal told me there were three or four hundred under arms, and that others were to be armed with the guns that might be taken. They were then to march toward the city. The cannon were placed near the great tree. Thought the men in the arsenal could reach those around the cannon on the field with muskets. One of the insurgents told me there were one thousand men without arms, who were to be furnished from the arsenal.

May 1.

Roger W. Potter. (Recalled.) —Went on Federal Hill on the morning of the eighteenth of May while the insurgents were there. Was called upon in the morning to go to the council chamber. A warrant was put into my possession against Thomas W. Dorr. Went up with the Governor to Federal Hill. We missed the troops who had started before us. When we got there John S. Harris was addressing the crowd. Went in and inquired for Dorr; B. Anthony pledged his honor that Dorr had been gone some time. A call for the Governor to come to the window arose. Governor King then said that the Sheriff was in the house with a warrant for Dorr; they cried out, No, No, shoot him; shoot him. Governor King then retreated from the window. I went to the window; they cried out shoot him. A man leveled a gun at my head; we looked at each other a moment, and the man lowered his musket. At Burrington Anthony's request, I called to the crowd not to fire into the house. The cry then arose that the landholders were coming. Wm. Dean gave the information; and the men rushed away from the house and the cannon. Went out to the cannon. A man named Gould was flourishing a lighted port match above one of them which was pointed directly at the troops coming up the hill. Carter said that he should stand by the guns till he was shot down; Gould said that the cannon were loaded with round shot and scrap iron. When we first went up there was a line of men with muskets before the house, perhaps a hundred; there were armed men in the house, on the stairs and above. When the troops came up there was a great rush of both armed and unarmed men from about the house. One man cried out, where the hell are you going; a pretty soldier to be running away.

Hiram Chappell. Was in the procession which escorted Dorr from Stonington depot. They were under arms. Don't know that the muskets were loaded. The men had ammunition. Remained at and about the house of Burrington Anthony till they went to the arsenal. Isaac Allen had command of the troops at

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Burrington Anthony's house; he said at the time that he was appointed major by Dorr and received his orders from him. Know of ammunition being purchased for the purpose of going to the arsenal. Dorr gave me money to buy powder and flannel, twenty-five dollars. Dorr went with the troops to the arsenal. I did not go on the field. All the troops left the field about day break. Went back with Dorr in the same squad. He said nothing about disbanding his troops or going away. Did not know that Mr. Dorr had left till 8 or 9 o'clock. Drew the charges of the guns in the morning with Carter; found first a bag of slugs, then a ball, then a cartridge, then another ball, then another cartridge; the last cartridge was fired off and the guns reloaded. They were loaded with ball and bags of slugs when the troops came up.

Went to Chepatchet on the twenty-fourth of June. Saw men under arms, about two hundred and fifty or three hundred, and in the morning saw a breastwork thrown up. Isaac Allen had command of them. Afterwards they chose D'Wolf commander. Saturday Dorr came with an escort and staid there till Monday night. About dark a letter was read on the hill ordering the troops to disperse and go home peaceably. There were twenty-five or thirty of the Spartan band who were said to come from New York. They were armed with muskets. They were out on scouts most of the time. D'Wolf was chosen by the officers. There was a pike company there, a picked up company. There was a large quantity of scrap iron for the cannon, and three boxes of balls; looked as if they came from some fort. One of the cannon came from Olneyville, called the Governor King. A rumor rose at one time that the Algerines were coming, and Major Allen made a fuss and called up the Woonsocket artillery to stand with match ropes lighted by the guns. Allen said that if the Algerines did not come up then they would go into town on Wednesday. D'Wolf and Allen took their orders from Dorr. They so reported, and Dorr directed the troops to obey them. Dorr's order was that no stranger should be admitted on the hill. The report was there that men were coming from New York, Massachusetts, and Connecticut; also that Mike Walsh had written to New York for the rest of his band. The muskets were said to have arrived at Norwich, and were then in boxes on the wharf, as the railroad directors would not let them be brought over; the troops there were encouraged by these reports. Know that arms and ammunition were obtained and secreted after the Federal Hill affair for the Chepatchet gathering. Had some in my own house. Knew of the expedition to Warren, as the men came to my house for arms. Knew that they wished to go and get arms from the wharf of Messrs. Brown & Ives. At Chepatchet guards were set, countersigns had, and one prisoner was taken. Heard from Captain Bradley that he had surrounded Sprague's house with his company to find if Dorr was there. Ascertained that he went away about half an hour after the letter was read upon the hill. Knew half an hour previous that Mr. Dorr was going to leave. Dorr came on the hill soon after

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he got there, and also on Monday. Heard that Dorr's father had been there Monday. When the letter was read upon the hill, the troops dispersed in great confusion, like a flock of sheep with dogs after them. Know that arms were purchased in other States for the use of the troops at Chepatchet. Tents were there which came from Massachusetts; two men there told him that they were stolen. Dorr went off from Federal Hill before the Governor and sheriff came up. Didn't leave till after it was reported to me that the troops were coming.

Cross-Examined. There were two hundred and fifty or three hundred men armed at Chepatchet; they were going and coming continually. They were not permitted to go or come freely from the hill. No one could go from the hill except by permission of the sergeant of the guard. An expedition went out after arms on Saturday. Heard there was a council of officers before the order to disband was given. The balls for the artillery that were there were put up in boxes, as they are kept in forts and armories; had information of Allen that aid was coming from New York, Massachusetts, and Connecticut. On Monday night it was rumored that the State troops were encamped at Scituate. Did not hear at the time we left that any State troops were marching from Greenville. Stated before the commissioners upon my examination that I plugged the cannon at Federal Hill; before they went to the arsenal did plug the cannon with short pine plugs, this was done about 11 o'clock in the night; didn't tell any one of it then; should have been very foolish to have done so. Went out with the pieces and halted there till morning. Was present when the charges were withdrawn from the guns the next morning; the pine plugs were jammed through.

By the two hundred and fifty or three hundred men in arms in Chepatchet mean only those who were on the hill. There were men armed and unarmed in the village. There were guards in the barracks, as they were called, at the upper end of the village and at Sprague's tavern. The men around street went where they pleased, except when the companies marched. The object of the assemblage in arms at Chepatchet and at Federal Hill was to take possession of the State. Was an officer, but without a commission; did not tell any one, after examination by the commissioners, that my story to them about plugging the guns was false, and was related to them to gain favor.

Jonathan M. Wheeler. Was is Providence on the sixteenth, seventeenth and eighteenth days of May. Men were under arms in the escort. Dorr delivered an address on Federal Hill; was on the hill afternoon of the seventeenth; there were armed men there; didn't know that the cannon were taken till evening. Was on the hill the night of the seventeenth; saw Mr. Dorr there once on the ground at the arsenal. The troops were around him; staid there till two o'clock and then went away. Don't know what the troops did; think I heard Dorr say that if he was legal Governor he had a right to take possession of the public

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property, and was bound to do it. Understood the intention was to take the arsenal that night. Saw the guns flash. Was not near enough to see how they were pointed. Understood the guns were brought on the field to take the arsenal. Think the men in the field were under the command of Thomas W. Dorr.

Gen. Leonard Blodget. Was appointed to command the arsenal in Providence by Col. Samuel Ames, Quarter Master Gen., and by the approval of Gov. King. Commanded the arsenal on the night of the seventeenth, and on the 18th of May, 1842. On the night of the seventeenth an attack was expected. Somewhere from one to two o'clock in the night a sentinel came and informed me that there was a flag of truce at the door. Went down stairs to the door, and saw two men with a flag. One of them demanded the surrender of the arsenal. I asked him in whose name. He replied, in the name of Col. Wheeler, adding in an undertone, and of Gov. Dorr. Said I knew no such persons by those titles; and should not surrender but defend my post. They then said that he or they would come and take it. Replied very well, then come and take it. The bearer of the message then answered that Dorr had a large force with him. Understood that the demand was made by Col. Wheeler in the name of Gov. Dorr. Was informed that there would be an attack just before the men came on the ground. Went out once and heard their voices. There appeared to be a large number; but saw them indistinctly. The arsenal and the arms in it were State property. The Quarter Master General supplied the provisions and ammunition. From thirty to fifty men were enlisted by me for the defense of the arsenal. Gov. King came into the arsenal from ten to twelve o'clock on the night of the seventeenth, and went away again. Two companies marched into the building from the city to assist in the defense—the cadets and marine artillery, numbering about seventy-five men each. A number of citizens were also present, making about two hundred in all who were in the arsenal that night. Did not see the flash of the guns before the arsenal.

Cross-Examined. Do not recollect that Orson Moffit made any report to me of proceedings that night. Do not recollect seeing Moffit. Sent out Mr. Barker and Col. Pitman as scouts. Know nothing in particular of the movements of Mr. Dorr on the outside. Gov. King remained but a short time at the arsenal. The building is of stone, two stories high, the walls eighteen inches thick, the doors and windows of iron. The artillery pieces were placed in the lower story—five six-pounders. The doors toward the attacking party were to be opened, and the pieces were to be run out and fired.

Nelson B. Aldrich. Saw Mr. Dorr on the plain before the arsenal on the night of the seventeenth of May, with the men who marched there. They had two pieces of cannon. Saw the flash of the cannon; but was not near enough to see the direction in which they were pointed; the cannon were north of the arsenal. When Dorr passed he was going along the line of a company. Understood that the object was to

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take the arsenal. Was at Chepatchet, and saw Dorr once on the hill. Can't say whether he was armed. There were armed men there; and saw cannon, implements of war and musical instruments. Saw Dorr at Sprague's tavern, the headquarters. He had a belt around him. Can't say whether he had arms or not.

Richard Knight. On Saturday, twenty-fifth June, started from Providence for Chepatchet about two o'clock in the afternoon. Nothing strange took place till near Chepatchet, passed two young men from Chepatchet going to Providence in a wagon; they turned and followed me; they could not overtake me; my horse got near the fort and became frightened and ran; men ran down the hill and crossed his track; there were three blacks there; one of them had a gun. Guns were pointed at me, and one was fired. A black man told me the next day there was a ball in it. Several men ran along the hill and headed him off. The horse ran but about five rods farther and then stopped. The men asked where I was going; said I was going to Jeremiah Sheldon's. They told me to pass on; I stopped and asked for Mr. Sheldon; the two men then came up and stopped opposite. Sheldon was sent for and went into an inner room with me. Soon an armed man came to the door, and said Capt. Bradley wanted to see me at the door of the house; went out and saw a man with a sword, who said that Gov. Dorr had sent to have me arrested, and carried on the hill. The officer told two men to take hold one of each arm; they moved on three or four rods and halted. There were twenty-five or thirty men about, who were ordered to fall in, and they then marched me on the hill. They carried me up to near where the marquee was. There was a gathering on the other side of the marquee. Was taken up to the place and saw Dorr in the circle. The salute of the officer was returned by Mr. Dorr. They took me into the ring, and the officer said to Dorr that he had taken a man and asked what should be done with him; Dorr said that depended on which side he was. The officer returned and said I must go into the marquee and be examined by the officers. Went in and saw a man with no hair on, who was called Secretary. They asked me several questions, and the answers were noted down in a book. Understood the Secretary was Seth Luther. Mr. Carter was present during the examination; was then marched over with 16 men to the guard house. Was kept there that night and the next day. Got permission to go to Col. Aldrich's, who was colonel and commissary in that army. A great many men came in from the Thompson road. On Sunday there were from six hundred to one thousand men in the village, mostly without arms. They were said to be companies from places out of the State; some with drums, some without. The companies were marched up and down the street. Some of these companies said they were from one place at one time, and another at another. Saw pikes made in the blacksmith shop near the guard house. On Monday at two or three o'clock, Col.

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Aldrich came and said I was released, but must stay till sunset, and then go without giving any information that I was released. He said that Gov. Dorr was going away. Asked him to let him have an officer to go on the hill. Aldrich called a man whom he called Sergeant of the Guard, and I went with him. Down round the tavern there were men that grabbed me, but the officer caused me to be let go. Went up the hill and looked round. When I first went there on Saturday, Sheldon told me that the Algerines were deceived; that they could have three thousand men and as much money as they wanted. Went up on the hill and saw about one hundred and fifty men under arms and probably one hundred and fifty more standing round. On Monday there were three or four hundred men under arms, half of them well armed. They pointed me out as the old Algerine. They were expecting some communication from the Governor, and were impatient; some one said he had gone, another said it was a d—d Algerine lie. They expected the communication to be to go and attack the column at Greenville or Scituate. Saw Dorr with a belt on; cannot say whether he had any sword or pistols. The men said that they were going to take possession of the government of the State. Left the hill about seven o'clock. Went towards Providence, and about two or three miles from Greenville was stopped by the other kind of troops, at least they looked differently.

Cross-Examined. Dorr was not present in the marquee when the man with no hair examined me. Experienced no ill treatment from Dorr, or by his orders. Was released by order of Mr. Dorr. Dorr was not present at any time after I was taken into the marquee, and never heard him say a single word. Bradley said that I was taken in the camp; replied that I was taken in Sheldon's house. Carter said they were not going to have any Algerines coming there to contradict them; he would find that I had been taken in their camp, which would soon be the whole State of Rhode Island. Carter took up a bag apparently of bullets, and said that those were the pills for the d—d Algerines. Went to Chepatchet upon the suggestion of a daughter of Mr. Sheldon. Had other business there. Thought I had as good a right to go there as anybody. Paid tolls and went on my own hook. Don't recollect of having seen any of the Governor's Council that day before starting. A great number of men there on Sunday were spectators. The companies marched up and down the street several times, saying they were from as many different places. The last company was a large one of sixty or seventy men; they hurra'd, and said, this is the first company of the three thousand men from Hartford who would all be there before the next night. Understood these movements of men pretending to be from different places were merely for show, to produce an impression of their large numbers. Saw no men intoxicated on the hill, everything was orderly there; but there were one or two near the tavern who appeared to be affected with liquor. Don't recollect that they

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were armed. Was insulted most at the guard house.

Chas. J. Shelley. On the night of the twenty-second of June was hailed on the road to Chepatchet and ordered to stop. Didn't stop. Drove on till near Sprague's tavern, and was again ordered to stop. Drove on till near the tavern, when we saw a cannon on the bridge a short distance off. We then stopped and went into the tavern, and asked some one to take care of the horse. Capt. West, as they called him, took out a pistol, and ordered me to sit down, saying that I had been at large long enough. Did not see Dorr, or hear that he was there. There was a warlike assemblage at Chepatchet, at Sprague's tavern, and at the guard house. Should think there were a dozen or fifteen men.

Mr. Dorr objected.

The COURT decided that it was proper for the witness to state the object and intentions of the men collected there.

Mr. Shelley. A body of armed men were in Sprague's house. Newell stated to me that they were officers and soldiers of Gov. Dorr. He was called Gen. Newell. Was taken prisoner by them; was retained in Sprague's bar room half an hour; then was taken over to the guard house, the building described by Mr. Knight. Protested against being taken from the house of Mr. Sprague. Sprague said these men would take care of me; that I was a prisoner of war. They took me for an Algerine, a spy, a d—d scoundrel. They stated that they were arrayed against the Algerine government. Was searched, and was taken from the guard house, bound in the street, marched off towards the north, and finally reached Woonsocket. There were in company from thirty to forty men armed with muskets, and a piece of cannon. Major Allen had the chief command. Captain Bradley, Capt. West, and others, were present. After marching six or seven miles, I was put into the ammunition wagon. After they reached Woonsocket an alarm was fired, and men collected in arms. Was taken to a room called the arsenal. After having been kept there some time was released. Two others were taken at the same time and were marched over with us. Saw a wagon at Woonsocket, said to be loaded with muskets in boxes, and tents. This load went back with us to Chepatchet. Went over with Carter; staid in Chepatchet about an hour. There were considerable numbers of men in arms there then; they stated that their object was to take possession of the government, and to place the rightful Governor at its head. Seth Luther was there. He talked of the object of the assemblage. He said they had a large number of men in New York, who were coming on, with Mr. Dorr at the head. Carter said the same. He said they were all prepared and wouldn't have to go home for their breakfast as they did on Federal Hill.

Cross-Examined. Don't know that I heard at that time of any apprehended attack upon Chepatchet from the City of Providence. They talked at Chepatchet of an express being sent towards Providence. Was complainant in certain cases in Providence county against part of the

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persons for offenses committed at this time. Some of these men were acquitted, and part of the matter was compromised. The defense set up was that there was a state of war and the offense was merged in treason. It was not set up in their defense that there was any deficiency of evidence.

Henry A. Kendall. Saw the body of men who marched on the night of May seventeenth to the arsenal, and saw them again on the plain before that building. They had arms and cannon, drums and fifes. Was there when they started, and on the plain. The cannon were stationed so as to fire upon the arsenal. The purpose of the marching to the arsenal was to take it. Was a part of the time near Mr. Dorr. Can't say that I heard him give any orders. Orders were given by various persons. The troops marched on the plain; they halted awhile and then advanced. Saw the artillery pieces attempted to be fired. They flashed. Don't know who attempted to fire the guns; was about ten or twenty feet from them; don't know where Dorr stood at the time. Think another attempt was made to fire the guns, or one of them. Discouraged Dorr from making the attempt on the arsenal. He did not comply with the advice. The men, some of them, remained on the field till daylight. They went on about one o'clock. Heard of the flag of truce being sent; think Carter bore it. Don't know when Dorr left the plain; cannot recall the particulars of any conversation I had with Mr. Dorr on the field. Know what my own intention was in going to the arsenal; not that of any one else.

Cross-Examined. Saw the man who attempted to fire one of the guns; it was not Dorr. Don't think I saw the man who touched the second gun. Did not see Mr. Dorr have a torch in his hand that night. Did not go with the men to Chepatchet.

Col. Silas A. Comstock. Came to Providence about noon eighteenth of May, and went on Federal Hill. Saw the embankment which had been thrown up on the brow of the hill. Did not remain there. Was also at Chepatchet. Saw Gov. Dorr there, and a collection of armed men. Mr. Dorr came up on the hill to inspect them. He wore a belt with two pistols in it. Arrived at Chepatchet before him. The men on the hill were, some of them, at work on the entrenchment. Do not recollect that they were drawn up in order when Mr. Dorr came upon the ground. There were a number of pieces of cannon; some of which were mounted; there were also powder and cannon balls. Did not hear Mr. Dorr address the soldiers. The object of the assemblage was military discipline and improvement, in order to support and protect the People's Legislature, which was to meet at Chepatchet on the Fourth of July. The meeting was accidental, and not by any particular orders. Guards were stationed about the hill in the night; and in the day time also. Understood that Gov. Dorr issued his proclamation to convene the People's General Assembly at Chepatchet; and the men on Acote's hill gathered there in reference to this call. They meant to defend the place. The guards were stationed about for the safety and protection of the place. The men came to Che-

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patchet in consequence of rumors that Chepatchet was to be sacked by Carter troops from Providence.

Cross-Examined. Acted as Colonel of the men assembled in arms at Chepatchet, and exercised authority accordingly. On Monday, June twenty-seventh, when the men were formed into a regiment, there were under my command from two to two hundred and fifty men under arms and orders; and this was the greatest number of armed men who were at any time at Chepatchet on his side. There were many other persons on the ground, and in the village, who came and went as they pleased. There were as many spectators as men every day about the lines. The number of soldiers on the hill did not vary much, though the men kept changing as they came and went. Was not there on Saturday afternoon; but understood that a company then went off and returned to Cumberland. The spectators spoken of were from Glocester, and from other towns. Our men were all volunteers, without pay. Nothing was furnished them but their food.

There was no fort on the hill; there was nothing more than a slight breastwork going round the south and west sides of the hill. It was a temporary work of not much strength. There were large openings, or embrazures, in it, for the pieces of cannon.

The general impression among the men was, that we were to maintain the government under the People's Constitution, by offensive or defensive means, as circumstances might require.

The men did not come there as full companies in a state of discipline. They came in squads, a dozen or so in each. Only one or two companies came there as such, and officered. There were from eleven to thirteen men who were said to have come from New York, and to belong to the Spartan Band. They conducted themselves like the rest of the men in an orderly manner. Considered them under my command as the rest were. There was no colored man under arms, there were two or three blacks in the commissary's department to prepare the provisions. None of our men were under pay. No inducement, other than his food, was held out to any to come there.

Understood that a proclamation was issued by Gov. Dorr to the People of the State; but did not see it. The People were called upon to assemble in arms for the support of their government. There was very little response to the call. Our men did not assemble there from the several towns, as there was reason to expect they would do. The government under the People's Constitution was abandoned for want of support by the People. This was the sole cause of the disbandment of the men.

A Council of Officers was called by Gov. Dorr to consider the subject, at Gen. Sprague's house. Every officer present expressed his opinion upon it. The ground of the disbandment was that the People of the State, after having been called upon, had refused to give their support to their own government. They had denounced its officers, and had gone over, many of them, to

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the other side, leaving their friends by themselves. The order to disband was submitted to the council of military officers by Gov. Dorr, and received their approval. The meeting was at headquarters, at Sprague's house. Two meetings were held there in the course of the day. At the last, in the afternoon, the order for disbanding the men was given by Gov. Dorr to Gen. D'Wolf, at the house for him to carry on the field and announce to the men. This order was issued toward sunset on Monday, June twenty-seventh. Believe it was within an hour of sunset when the order was sent. The men disbanded in consequence of the order. There were but few who made any objection to the disbandment or who did not approve of it, as affairs were situated. Did not see Gov. Dorr leave Chepatchet. The last I saw of him when he gave the order to D'Wolf. It was a short order to the officers to disband their men. Do not recollect the wording of it. D'Wolf read it to the men on the field as given and signed by the Commander-in-Chief. There was no irregularity or disorder among the men, at the time; though they wanted discipline. I recognized Gov. Dorr as Governor of Rhode Island and Commander-in-Chief; and received his orders. Do not know of any force being expected from New York or elsewhere, or of any supplies expected from abroad. It was a matter of conversation that, if the troops of the United States should interfere in our State affairs, there were men in New York who stood ready to give their assistance to repel them. There were at the hill two Massachusetts men, D'Wolf and another. No unnecessary restraint was placed upon the people in the village of Chepatchet. Know of no person being arrested besides Mr. Knight.

Gov. Dorr gave orders that private property should be strictly respected by all, and it was respected. The soldiers received their provisions from the commissary. Heard no complaint from any one that private property had been interfered with. We left the village uninjured and unmolested as we found it. Gov. Dorr gave directions to have the guns, tents and every thing else on the hill removed.

I acted as a Colonel; commanded the second regiment. There were a number of companies, parts of which came there; two companies from Woonsocket, one from Burrillville, one from Cumberland, one from Glocester, one from Pawtucket. There was but one regiment there. Did not give any orders in particular to the Spartan band. Among them were Mike Walsh, Johnson, Newman. Walsh was the leader. Didn't ask Walsh whether his object was to support the Peoples' Constitution or not. Had the impression that they were there to assist in any arrangements that might be made to defend it. Did not see Walsh go through any exercises.

The principal reason for disbanding was that the People did not come as they had promised, to support the Constitution and Government; and many of our friends had come out in the papers with a public remonstrance against our proceeding further. The charter troops had no effect

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upon us. They had not come near us. Orders were sent to all the towns, by Gov. Dorr, for the people to assemble at Chepachet; to come out generally, all who were in favor of the Constitution, and show themselves, and present a strong front. The latest of my seeing Mr. Dorr was when he gave the order to D'Wolf. The consultation was had among the principal officers. D'Wolf was called first, as he was the tallest officer we had. Bradley, Newell, Potter, Carter, Landers, and as many more were called into council by Gov. Dorr. Word was sent to them on the hill in his name. They went to his room, and he stated, in substance, that as no response had been returned to the orders issued; and the people were not with us, and declined to support us, it was proper to disband. This was the opinion of the council also. D'Wolf fully recognized the propriety of the measure. The officers all separately expressed their opinions, but do not recollect that the question was formally put to the vote.

Horace A. Pierce. Came on with Mr. Dorr from Stonington on his return from New York May 16th. Mr. Sayles was there. Mr. Dorr did not say any thing in my hearing about collecting a force at Anthony's house. I was not an officer there on the sixteenth. Saw Mr. Dorr a little after sundown on the seventeenth. There was a considerable number of men under arms at Anthony's house, about three hundred. There were two companies from Woonsocket, one from Pawtucket, several from Providence. It was said they were there by order of Gov. Dorr. Expected the object was to make an attack upon the arsenal. They went to attack the arsenal that night about one o'clock. Col. Wheeler and Maj. Allen had the direction of the troops. Dorr was at the head of them. He went with them. When we got near the arsenal some one gave the word to halt. They then advanced some distance to where the cannon were placed. They were attempted to be fired; and were afterwards limbered again. Dorr came back and requested men to take charge of the guns. Many of the men deserted them. Some of them were afraid and left. After the guns were flashed, Dorr came and requested the men to take charge of them. They were again unlimbered, and Dorr gave the order to have them fired, again. It was said he touched them off. Could not see distinctly whether he did so or not. Some who were standing by remarked that few men would have the courage that Dorr had, and no one could call him a coward; for he touched off the cannon himself. Those who remained then went back to Anthony's house. It was from seven to eight in the morning, when Mr. Dorr left Providence. The State troops came up between eight and nine. Mr. Dorr went with C. Allen. Did not know that he was going till he had gone. The first I knew of it, some one called out of the window and requested them to disband. This was not assented to by those who had charge of the pieces. When the State troops came up, some one who had the port fire, swung it, as if to touch off the cannon. Saw a gun presented either at the Sheriff or Gov. King. The pieces were withdrawn after the house had been searched.

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Heard a fortnight after that another attempt would be made. Went to Chepatchet, on Wednesday June twenty-second. A company came from Chepatchet to Woonsocket, and I returned with them. The embankment was begun to be thrown up on Wednesday or Thursday. There were from one hundred to one hundred and fifty men there then. Understood Mr. Dorr would be there. The purpose of our going there was to protect the General Assembly and to execute the further orders of that body. Mr. Dorr came on Friday night or Saturday morning. On Saturday there were from two hundred to two hundred and fifty men on the hill. There were a great many without arms who were in the village as spectators. Went on the hill first with Dorr. He went round and spoke with the men. Didn't hear him give an address. There were five or six pieces of cannon on the hill. Never saw but one loaded. That was loaded with powder, ball, and a bag of slugs. Saw scrap iron around and pikes. They were carried up on the hill. Saw Mike Walsh and his party. Thought he had fourteen men; some said eleven. Heard that if the Executive of the United States interfered, men would come from New York and other States to repel the troops of the United States. The arms and ammunition were not to my knowledge furnished from New York. The disbanding was near sundown. D'Wolf brought the letter on the hill and read it. Can't tell certainly what time Mr. Dorr left Chepachet. When Mr. Dorr went on the hill, he had a belt on with a pair of pistols. Saw the handles of them. Think he had no sword. He had a cane.

Cross-Examined. A man by the name of Smith told me first that Mr. Dorr touched the cannon off. Couldn't tell what time Mr. Dorr left Burrington Anthony's house. Think there were fifty men that returned from the arsenal. There was no order purporting to come from Dorr for the troops to assemble at Chepatchet. It was given by Major Allen. The organization at Chepatchet was to carry into effect the government under the People's Constitution. The greatest number of persons under arms on the hill, including all who were subject to orders, was from two hundred to two hundred and fifty men. The men in the streets came and went as they pleased as spectators. There were some artillery balls there. Many of them did not fit the guns. There were not cannon balls enough to supply the pieces more than fifteen or twenty minutes in an engagement. There were muskets and rifles in the marquee, that were not called for or used. They were lying scattered about there. Walsh and his men were subject to orders like the rest. They drilled and worked on the intrenchment. Good order and discipline were maintained. Saw no disorder or improper conduct among the men.

Benjamin M. Darling. Was on the plain before the arsenal on the night of the 17th of May, 1842. Arrived there from out of town just as the men were going out; and did not hear the reason for going. Had heard that Gov. Dorr would probably be arrested, and that he wanted his friends to come and protect him. Saw two cannon there. Saw a flash which was said to be of the cannon.

Cross-Examined. Saw Mr.

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Dorr on the ground. Was near him, as his aid. Got to B. Anthony's house late from Woonsocket, and was not in the council. It was a dark night, from a very heavy fog. A man could hardly be distinguished a few feet off. The men halted on the field. It was very still there. Mr. Dorr was near the middle of the whole force. The men scattered not a great while after they went on the ground. Some scattered immediately. Did not move from my place till the Pawtucket Company left and marched off the ground. Saw Dorr going about among the men in different parts of the field to rally them. Dorr came up again. He gave the order to have pieces withdrawn, after the attempt had been made to fire them.

John S. Dispeau. Saw Mr. Dorr at Providence on the 17th of May, 1842. He had a body of men assembled there with him in the afternoon. Did not see him take the command of them. Saw the men move from Burrington Anthony's house to the arsenal. Think it was hard on to two o'clock at night. Was frequently called for at Anthony's house. Some one would come and inquire for the Pawtucket company, and I would go in with Dorr. Sometimes he was busy with others and sometimes not. The officers there were talking of their plans. They were talking whether it was best to make an attack upon the arsenal or not. Don't know what conclusion Dorr came to.

Mr. Dorr went to the arsenal to make an attack. Did not see Dorr on the field; did not meet Mr. Dorr. Considered every one as being for himself, and that he had no superior; ordered my company myself to fall in and march to the field. Returned to Burrington Anthony's house about sunrise. Saw Dorr there. Don't recollect that any conversation passed between them. Did not go to Chepatchet. Received an order to go that was left at my store; don't know by whom. A man came to Pawtucket and told me I was wanted by Gov. Dorr. Don't know the man. Went round and gave notice to my men, who were handy. Ordered them to meet at the National House in Providence. Went in myself about 4 o'clock in the afternoon. My commission was left in my shop. Others saw it before I did; so that it became known that I had it. Was requested (when under arrest) by Governor and Council to bring in those papers, meaning the order and commission, when I was out on parol, and I did so accordingly.

Cross-Examined. There were two hundred or two hundred and fifty men at Federal Hill before going to the arsenal. Went into the council of officers. Don't know who presided. Recollect that Dorr said that he was not much acquainted practically with military matters. Something was said about the propriety of Mr. Dorrs' going out or remaining at head quarters.

Had ninety men in my company at first mostly well armed; all armed with something or other. Did not know my own men well. Had seen Chappell's examination before the commissioners published in the papers, in which he (Chappell) stated that he had plugged up the guns before they were carried out to the arsenal. Chappell then told me that he did not plug the guns;

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but had said so in order to get his discharge from imprisonment.

Willis Bowen. Was in Chepatchet, on Saturday, in June, 1842. There was an assembly of men in arms there. Was there but little while. Judged there were from one hundred and fifty to two hundred men under arms. The troops were drawn up in a hollow square. Gov. Dorr went into the square and delivered a speech. He had a belt around him and the appearance of pistols. The men formed into square to hear his speech; can't recollect much of it. He stated that he came there for the benefit of the people, and that he would rather that his bones should remain on the hill than that the people should not have their rights. He went off the hill escorted; don't know by how many. He was attended when he came on by several persons; one of them appeared to be an officer. Saw there cannon, drums, fifes, tents, and flags flying.

Cross-Examined. Was a little deaf when there from a cold, and the wind blew strong. Should think Dorr used the words before mentioned. Was there but a short time. Was two or three rods from Dorr, at the corner of the hollow square. Saw no disturbance or disorder.

Caleb E. Tucker. Was at Chepatchet on Saturday. Saw an assemblage of men in arms, cannon, tents, &c. Saw Gov. Dorr there in the afternoon. He had a belt and pistols, and a small cane in his hand. The men were drawn up in order and manœuvring about. The first I saw of Mr. Dorr, a man from Thompson pointed him out, and said the Governor was a smart, portly looking man. Heard him address the troops, who were drawn up in a hollow square. He said they were there for the purpose of protecting the Legislature, which was to be there in a few days. He spoke of the rights of the People which they were to defend. Could not say certainly whether he used the expression that he would rather leave his bones there, or not. He said he would rather stay there till cold weather than that the people should not have their rights, and their Assembly meet. Guards were placed around the hill below, none upon it.

Cross-Examined. Asked no leave to go on the hill. There was no objection made to my going. The men I saw there were rugged, hard handed people, farmers and mechanics. There was perfect order on the hill, and the same in the village. There were two men from Connecticut, apparently visitors, not armed. There were perhaps two hundred men under arms. The meeting there corresponded well with military trainings generally. The order was as good as at a general muster. Saw one or two not quite sober at the tavern.

May 2.

Darius Hill. Saw the assemblage of armed men at Chepatchet. Understood from those there that Gov. Dorr was to convene his legislature there on or about the fourth of July. Hardly think the men on the hill were the members of the legislature. Don't know what the cannon were put there for, except for protection. They were pointed so as to command the road from Providence. Saw many things that

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looked as if they might, with a little help, go into the cannon. Heard there was a body of men coming up that way under a pretty slow progress from Providence. Did not understand for what object. The People on the hill were under the command of Major I. B. Allen. Didn't hear Dorr give any command. Didn't suppose that I acted under any body's command; considered myself a nation by myself. Didn't interrupt Dorr to ask him what his intentions were. Heard but few words of his address.

Cross-Examined. I reside four miles west of Chepatchet. Am a small farmer. The men on the hill were principally of that class, and mechanics, those whom I knew.

George B. Aldrich. After passing Mr. Dorr in the road in a carriage going out of town about half past 8 in the morning of 18th of May, I proceeded into Providence and went on Federal Hill, where I saw about forty or fifty suffrage men with cannon. The number of men with the cannon were decreasing while I was there.

Was at Chepatchet Thursday, Friday, and Saturday, in June. Saw Dorr on the hill there on Saturday. Did not hear him address the troops. Some of them were drilling.

Mr. Dorr said, that, if he had had his way, the embankment would have been thrown up in a different manner; Mr. Dorr said he gave no orders to Major Allen to call the people together at the time when they were called. He said that the breastwork was not well done. Went with Major Allen from Woonsocket up there. They went there to protect the Legislature that was to meet there the 4th of July; and that was the purpose of the greater part of them. Went because the rest did. Major Allen seemed to be commander. Heard forty reports about the Charter troops coming there; sometimes they were at Greenville; sometimes within a mile, and sometimes at Scituate. Went on Saturday night about sunset. There were armed men scattering all the way up and down in the village. Saw two men who drove up to the tavern ordered out of the carriage by armed men. Can't say that I saw any one under restraint as a prisoner. There were a good many things carried on, some manœuvring, some firing. Saw a lot of old iron there. Expect likely they were going to put it into the cannon. The cannon were on the south side of the hill, pointed southerly.

Cross-Examined. There was no fort at Chepatchet, only a line along one side of the hill about four feet high. They mowed a quantity of brush, put that in the middle and covered it with dirt. Work at farming when I do anything.

Gen. Jedediah Sprague. Live in Chepatchet. Keep the hotel there. Kept it also in 1842. Was at a meeting at Woonsocket about the 1st of June. Heard there was to be a military parade there and found a meeting of officers. Military movements were discussed at this meeting. An organization of the military was the intention. Understood that the organization was for improvement in tactics. D'Wolf was there; he might have been the chairman. Comstock, Allen, Potter and Dean were also present. It was proposed to raise a

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subscription to purchase a piece of ground for the suffrage association to use as a parade ground. Was not surprised when I heard Mr. Dorr was coming. Think it was anticipated, and that he would return. He took rooms at my house; and was sometimes there and sometimes on the hill. During the time Mr. Dorr was there, the military officers from the hill were occasionally inquiring for him, and went and talked with him. Soon after Mr. Dorr came heard him say that he knew nothing of the assembling at Chepatchet and of what was going on till shortly before he arrived. He said that he was going to convene the legislature there. Never heard from Mr. Dorr that it was his intention to go to Greenville and attack the Charter troops. Mr. Dorr left Chepatchet about sundown on the 27th of June. Conversed with him about leaving. He expressed his intention of going because he was not sustained by his friends. He meant that he was not sustained in calling the Legislature, and in carrying into effect the People's Constitution. He said it had become evident that he was contending against his friends and enemies, and must overcome both to effect the object contemplated. Others advised him to leave. The citizens of the place came to the conclusion that this was the best course. Heard that there were large forces of the government troops to be marched there. Heard of the expectation of assistance from abroad. Heard some of those at Chepatchet say that they expected it from New York.

Cross-Examined. When Gov. Dorr arrived at Chepatchet, he was accompanied by citizens of the village and town. No person from out of the State was with him. Understood that the military force collected was for the purpose of protecting the people's legislature. Heard that some of the men were desirous of going to Greenville to attack the charter forces. The disbandment took place on Monday, June 27th. Heard the order read before it was delivered to the commanding officer. There were various rumors of the approach of the opposite forces. They arrived the next day, the 28th, about breakfast time, say 7 to 8 o'clock. Mr. Dorr left Chepatchet one or two hours after the order to disband was given.

Recollect that Mr. Dorr called on the people to support him.

Gov. Dorr on Saturday requested me to close my bar room that there might be no disorder in the village. The request was complied with, and the bar room was kept closed. The troops were very orderly, quiet and peaceable at his house. The troops were principally farmers from the country towns. There were some Providence men among them; but not many of them answered the call. Knew a great many of the troops personally. They were men of good reputation.

Understood there were two or three instances where private property was interfered with by some of the men—three instances, a horse was taken, used and afterwards returned; a cow was taken for food; this was paid for. Saw Mr. Dorr pay for a part of it. Some boards were taken which were afterwards burnt on the hill. Know that these acts were contrary to the orders of Gov. Dorr. His orders

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to his men were that private property must be strictly respected.

Dutee J. Pearce. Went to Chepatchet on Sunday, 26th of June, about 12 o'clock. Saw Mr. Dorr at Sprague's hall presiding in a council of officers. Don't recollect any one but William H. Potter. Mr. Dorr was occupying the seat usually occupied by a chairman. Stopped a moment, and Mr. Dorr said that it was a meeting of officers, and called me to his room. Urged upon him the necessity of disbanding his forces, and stated the force which would come against him. Mr. Dorr gave no assurance that he should do so. He said he came there for the purpose of acting under the Constitution which he had sworn to support; that he had the same right to use force for the purpose of supporting that Constitution, that others had to bring force to put down the government under that Constitution. Told him it was altogether idle to expect that Legislature (the People's) to organize again, that a great many of its members had resigned, and that I did not know one that would meet there in pursuance of any call from him. Further stated that the Charter Legislature had adjourned from Newport on Friday, and that their very last act was to pass a law calling a Convention, under which all could vote for delegates, and that this measure had tended in a great measure to allay the excitement, and that many of those who were his friends, were quite willing to accept this proposition as a compromise of the difficulties. Mentioned to Mr. Dorr that I saw many of the most ardent friends of the Suffrage cause in the ranks of the Charter troops on Saturday. Among others I mentioned Mr. Emmes, of Providence, which seemed to strike Mr. Dorr with astonishment. Mr. Dorr asked if I saw the review of State troops on Saturday. I told him I saw them pass my boarding house. They were said to be twenty-three hundred strong. There were at least fifteen hundred of them well armed. Also stated that additional forces to the number of five hundred to six hundred were expected from Washington and Kent. Mr. Dorr asked if he was to be attacked that evening. I answered that I thought not. Told him that it was the intention of the most influential Charter men to adopt such a course as would prevent bloodshed. Mr. Dorr said little, showed distrust; and did not believe my statements or conclusions to the extent represented to him. Talked at Chepatchet mostly with the citizens and the guards. Asked Mr. Dorr how many armed men were there; he gave no definite answer. Got the impression that there was three hundred or four hundred, and more were coming. Do not think that Mr. Dorr expected foreign forces; judged so from what Mr. Dorr had said previously, that he intended to rely upon the people of the State, and rejected the idea of any force from abroad except upon the contingency of the United States interfering. I told Dorr also that an application had been made to the President of the United States by the Charter government, which would probably be answered favorably on Tuesday following; and that then the United States troops would be brought against him;

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that Col. Bankhead was waiting in Providence, probably for further orders. Stated also the rumor that Bankhead had been out in disguise and reconnoitered Dorr's camp. Dorr asked who was in command of the State troops. Told him Gen. McNeil. He said it was strange that he should be in such a place, (refering to Gen. John McNeil, formerly of the army, and then in the Boston Custom House.) I told him it was not the New Hampshire General, but the McNeil connected with the Stonington railroad. He expressed himself astonished, as he had lately been advising with him about his rights and movements in Rhode Island. Mr. Dorr did not say whether McNeil's advice was to dissuade him or not from an attempt to establish the government.

Cross-Examined. Have the impression that Mr. Dorr said he had nothing personal in view, but came there to discharge his duty as a public officer. Saw no disclaimer in the newspapers on the part of Suffrage men, of Mr. Dorr's proceedings; but knew that individuals had come out and disclaimed any further support of the new government. Mr. Dorr asked if I had resigned my seat in the People's Legislature. Replied that when I was arrested and gave bail, I necessarily vacated my seat. In this opinion I was confirmed by Mr. Atwell, and by Mr. Dorr, who said he didn't see how I could take my seat again.

Dorr did not treat me cordially, but politely. He stated that he had called on the People for support, and had issued a Proclamation to that effect; but that the support that had been promised had not come. Recollect telling Dorr that Maj. Power was taken; and his reply was then "my sword is gone."

Laban Wade. Was on Federal Hill on the night of the attack on the arsenal. Saw the armed men march to the arsenal and Mr. Dorr with them. Did not hear him give any order. Saw him at two or three different places on the plain. Saw the cannon touched and flash. They were pointed toward the arsenal. Cannot say that I recollect hearing the order given to fire.

Was also at Chepatchet as early as any of them. Went away on Monday. Mr. Dorr was there. I considered him the Governor of the State, and presumed he had the command of the acting commander. Think I saw Dorr on the hill. Saw him at Sprague's tavern, the head quarters. There were arms and munitions of war at the hill. My object in going to Chepatchet was to support the People's Constitution and the Assembly there. Contemplated to fight hard if attacked. Didn't contemplate attacking any body. If ordered by Gov. King to disperse, should have dispersed *if I had been obliged to.* The reason I dispersed was because the rest went away and left me. The disbandment was in consequence of an order from Gov. Dorr made up in a council of officers. Saw the cannon twice attempted to be fired at the arsenal. Can't say if the attempt was made again. Never received any order to go to Chepatchet.

Cross-Examined. Saw Gov. Dorr at two or three places on the arsenal ground. It was so dark from a heavy fog you couldn't see any thing unless you

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felt it first. Couldn't see how the men were situated there on the ground. A portion of them retreated and marched off soon after going on the ground, can't tell how many. Should think nearly half. Can't tell how many marched there. The last I saw of Dorr there was after daylight and before sunrise. He was near the cannon. They were being dragged off. The men had all left when I came off the field. Don't know who fired the gun. It was not Dorr the first time, for I stood within two feet of him. Before the second flash I went a little from him. Did not see him go to the gun. Couldn't say whether he did or did not. Gov. Dorr had a glazed cap, frock coat, and white sword belt. Didn't see any body wave the torch. The man who touched the cannon was a fair sized man. The men at Chepatchet were good hardy fellows, farmers and mechanics. The company I went with were mechanics.

Col. William H. Potter, (Acting Adj. Gen. at Chepatchet.) Was at Federal Hill at the time of the preparation to attack the arsenal. The object of the assemblage was to take it. Saw Mr. Dorr on the field and considered him the Commander-in-chief of the State. Did not know what was intended next if they should take the arsenal. Was at Chepatchet.

Attended the meeting of officers at Woonsocket, two or three weeks before the affair at Chepatchet. Colonel D'Wolf was chairman. The object of that meeting was to find a place for the organization and discipline of the militia, and to carry into effect the People's Constitution against all opposition. If assaulted, they intended to defend themselves against the forces of the State, or any other forces. The officers adjourned to meet at Chepatchet. Gen. Sprague was appointed a committee to select a piece of ground suitable for military exercise. Sprague, Comstock and others were present. No letter from Mr. Dorr was read there. Cannot swear whether the meeting was held with the consent of Mr. Dorr or not.

The next time I saw Gov. Dorr, was at Killingly, Conn. Fifteen or twenty went into the room with me to see Gov. Dorr. Mr. Dorr came down with them to Chepatchet. Col. Newell gave the information that Gov. Dorr was in Killingly. It was expected that Mr. Dorr would come to Chepatchet. Some officers were appointed by Mr. Dorr before he came and after. Col. D'Wolf was appointed next in command to himself, with the title of General. Did not hear Gov. Dorr's speech at Acote's hill, or hear him say anything about attacking the forces at Greenville. Some forty or fifty of the men wanted to go and see what they were made of at Greenville. Do not know what they might have done before they got back. If the Charter forces had made an attack on ours at Chepatchet, they would have been resisted. There were six or seven cannon at Chepatchet. Do not know where they or the ammunition were procured. Some of the powder was brought by the people of Chepatchet. The object of the assemblage was to carry into effect the People's Constitution by all means that might be necessary.

The greatest number of men in arms at Chepatchet at any

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time, was about two hundred and twenty-five. The object of the troops was to support the General Assembly and the People's Constitution in any way that might be required, and as should be directed by Gov. Dorr upon consultation with his officers. Orders were issued in writing, by direction of Gov. Dorr, to the people of the towns, particularly in the county of Providence, to assemble in arms at Chepatchet; and these orders were sent a second time. Pikes were made for the use of some of the men, and there was scrap iron on hand for the purpose of loading the pieces.

Cross-Examined. Know of an order issued to convene a council of officers, before the affair at Chepatchet. They were requested to consider whether the People's Constitution could at that time be put in force; to consider whether any thing should be done, and if any thing, what. This council did not meet as requested. The assemblage at Chepatchet was voluntary and without orders. The men came from Woonsocket and other places voluntarily, with their officers. After Gov. Dorr's arrival a general call was made upon the people similar to the order to Dispeau, and that call was repeated, up to Monday. It was not replied to. There were as many men there on Sunday and Monday as on any day. The men were counted by Gov. Dorr's order on Saturday. There were two hundred or two hundred and twenty-five. After that a detachment left the place and went home. Some went to Cumberland and some to Slatersville. Sixty or seventy left. Do not know by whose request they returned home. The men were counted a second time, by Mr. Dorr's order. The number did not exceed two hundred and twenty-five at any time—that is, this was the number of men armed and under orders. They were mostly farmers and mechanics. The men about the village were unarmed and under no orders. No strict discipline was maintained on the hill until Monday. No man was pressed into the service. All who did serve, served voluntarily. Never heard of Mr. Knight's being fired upon, as has been related. I acted as Adjutant General. Do not know of funds being provided to subsist the force. A contribution was taken up on the ground and $70 collected. There was no depot of provisions on hand. There were some barrels of flour and beef remaining when the camp broke up, which would not have lasted four days. Part of the cannon balls would not fit the pieces. What would fit would not have lasted more than fifteen minutes in an engagement.

A council of officers was called on Monday. It was evident that there were not artillery, ammunition and provisions enough, and that we were not sustained by the force that was expected. The enemy were said to be at Greenville and Scituate; there had been frequently such reports. It was reported on Saturday and Sunday night that they were coming. Does not know by whom the order of dismissal was taken to the ground. The order was issued about 4 o'clock. Mr. Dorr left Chepatchet about sunset. No person from out of the State was in Mr. Dorr's company when I saw him at Killingly. All with whom he returned into the State were officers and citizens of the State.

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Gen. William Gibbs McNeil. I appear as a witness on this occasion most unexpectedly, most painfully and most reluctantly. Had been summoned, had been permitted to leave the State, and had been recalled by a letter from the Attorney General. Was now again within the jurisdiction of the State and bound to give my testimony. I was desirous of doing this on account of some insinuations contained in the testimony of Dutee J. Pearce, which slandered me most falsely and most foully. In the conversation which I had with Mr. Dorr, I was not a counsellor or adviser except in opposition to him. I regard this conversation as private and in confidence.

Mr. Dorr. I release you from all the honorary obligation which you regard yourself as being under, that you may relate all you know.

General McNeil. Being in New York in May, 1842, and hearing that Mr. Dorr was there, called with Mr. Gailliard, of South Carolina, to pay my respects to him at the Howard House. A great many persons were present, none of whom I knew. Mr. Dorr introduced me to Mr. Slamm, much to my surprise, as I had always regarded him as a fictitious character. (Laughter.) Do not wish to be understood that I found Mr. Slamm other than a gentleman in all respects. Mr. Slamm informed me that Mr. Dorr intended to return to Rhode Island and enforce the Constitution, which he regarded as valid. We conversed but little, and upon the question of the necessity of his so doing. Did not consider that there was anything serious in the matter. Asked Mr. Dorr, jestingly, who was to command his forces. Dorr walked up to me and slapped me on the shoulder and asked me if I would not. Did not decline the offer, because I did not consider it as serious.

It was remarked that a majority were in favor of this Constitution, which I had always denied, contending that there was no majority, meaning no legally ascertained majority. It was also stated, by Mr. Slamm, that they could have assistance from abroad, as many as ten thousand from New York, and one thousand from other places. I left the House without an impression of anything serious being intended. The next day, the last time I had the pleasure of seeing Mr. Dorr, Burrington Anthony came to me and requested a car to run separately from Stonington to Providence. I acceded to his request, was censured for this, on the supposition that I had made an offer of this conveyance. The price was not specified. This was the last day I saw Mr. Dorr; but I hope that we may often meet again as friends, as before.

Cross-Examined. In connection with the aid from abroad, think it highly probable that something may have been said by Mr. Dorr about an expected interference on the part of the United States government in Rhode Island affairs, but cannot now recall it. There were no enlistments spoken of as having been made. The language was general that thousands would repair to Mr. Dorr's standard from sympathy in the cause. Believe they would have come after Mr. Dorr had got possession of the city of Providence. I only speak from my general knowledge of the people of the cities, and from

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mixing with them all over the county. Sympathy would have been an inducement to them. The conversation was hasty and general.

Have not seen Mr. Dorr since until to-day. Had no communication in any way with Mr. Dorr after this interview; nor was there any concert or understanding between me and Mr. Dorr. Afterwards held a commission from the authorities of Rhode Island as Major General, Commanding-in-chief. Was not a citizen of this State. Col. Bankhead was not under my employ or command.

I afterward understood, that for the part I had taken in Rhode Island affairs, I was liable to be attacked in the city of New York. Went immediately to the Pewter Mug to meet any assailants, but found no difficulty. Was not molested.

The *Attorney General* stated that all his witnesses had been examined, and that the prosecution would rest here for the present.

Mr. Bosworth (to the jury):

The evidence, exhibits the proceedings of a set of daring, worthless, desperate men, guided and directed by a leader who sought the bad eminence in which he was placed with his eyes open and warned of consequences, and who waged war on the sanctities of private life, for the accomplishment of his foul, ambitious and nefarious purposes; to attain which he was ready and willing to imbrue his hands in the blood of his friends and relatives. At the arsenal he was prevented from succeeding, by the treachery of one of his men, and by the desertion of others; but not until, descending from the honorable place of a commander, he had attempted with his own hands to light the torch of civil war against his relations and fellow-citizens. After having committed such atrocious acts, he escaped from the State.

The prisoner also took an oath as Governor of the State at the Foundry, and exercised the duties appropriate to such a station. He issued military commissions, giving power to expel, kill and destroy the inhabitants of the State. The General Assembly also performed the part of a legislative body. They assumed to exercise the authority of a Legislature. Postponing the choice of Judges, they proceeded in the election of military officers, and passed divers acts and resolutions. All which indicated most clearly in all of them

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a deliberate, wicked and malicious intent. They knew what they were about; they acted with their eyes open, and the consequences are upon their heads.

After remaining a short time abroad in the capacity of an extra territorial Governor, and obtaining assurances of aid in his nefarious designs, the prisoner returned again into the State, still bent upon his wicked object, and urging on others to carry it into effect, even at the sacrifice of life; willing, as he said, to leave his bones on the field, and calling on the people to stand by and support him. But fortunately he was not supported by his friends, on whom he called in vain. A formidable force was sent to break up his encampment; and when all hope of success had vanished, and he had nothing left to depend upon, he fled again, thereby manifesting a sense of guilt, and a conviction that he was a wrongdoer who felt no confidence in his cause. For if he had been animated, as it has been pretended, by sense of duty, he would have remained, to receive the justice that was due, and which he could have no reason to fear if he were not guilty.

Mr. Bosworth then reviewed the testimony bearing on the particular overt acts, and concluded with urging that the evidence was so clear, positive and direct, that the jury could not hesitate, and must pronounce the prisoner guilty.

May 3.

Mr. Turner. Gentlemen of the Jury—When you consider the novel character of the circumstances by which I am surrounded; the high nature of the duties which have devolved on me, as one of the counsel for our distinguished client; and the deep sense of professional and personal responsibility which a faithful discharge of those duties create in the mind; you will find, I trust, ample apology for whatever embarrassment may be betrayed by me in attempting their discharge; and will kindly extend to me such indulgent consideration as my position requires.

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The circumstances, I have said to be of a novel character, for trials for treason have, happily for us, until the present time been entirely unknown in this State; and of very rare occurrence in this country.

The duties of which I speak, inasmuch as they embrace the distinct assertion of principles of vital importance to the whole community, of which we are all members, as well as the vindication of the character of our client, may well be pronounced of a high and commanding nature.

And the responsibility, which it is impossible not to feel, arises from a contemplation of the consequences to him and to us, which will result from the verdict you may render in the present case; which verdict in a greater or less degree, will depend upon the fidelity and ability with which the defense is conducted.

In view of these circumstances, well may the defendant's counsel, therefore, feel a degree of self-distrust, and embarrassment, which ordinary cases would neither call for nor justify.

But, gentlemen, in some respects, your own situation is not less difficult than ours; your position, as jurors, has also its novelty, its duties, and its responsibilities. It is your duty, impartially and fairly to try, and true deliverance make between the State and prisoner at the Bar; and this you, under your oaths as jurors, are to do according to law and the evidence given you. It is your duty, therefore, attentively and patiently to hear, and seriously and carefully consider and weigh the matter, whether of law or evidence, that may be submitted to you for the defense; we look to you for that on your parts; and on the other hand we assure you on our parts that it will be our endeavor neither to tax your attention nor draw on your indulgence beyond what a complete discharge of our own duties may require.

In point of responsibility, gentlemen, there can be no comparison between us. When we shall have faithfully acquitted ourselves of our duty to our client all our responsibility ends; yours then begins; neither he nor the people of this

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State or country, nor our fellow men of this day, nor those after generations that may succeed us, will have cause to inquire after or care for us. But it will be to you that he and they will all look; and all will equally hold you while living and your memories after death responsible for the verdict you may render;—you are at this moment, and it is the first that has occurred in American history, standing in a position between *popular rights* and *popular supremacy,* on the one side, and *legislative assumption* and *oppression* on the other; and although you will decide the immediate fate of one person alone by that verdict, yet upon that verdict may hang suspended the destinies of Freedom herself.

By the indictment our client (Mr. Dorr) is charged with the crime of *treason.*

Treason, gentlemen, is an offense that differs materially and essentially in its character from most other crimes; in them, such as murder, rape, arson, etc., the injury intended is merely of a personal and private nature; they are directed against the individuals of a community only, and are punished as such. But treason is a crime against an entire community collectively, and it is the highest crime that an individual can commit against a community or body politic, of which he is a member. It is, therefore, a *political* offense; and as such it ever has been and still is to be regarded.

Such being the nature and character of treason, from the principles and structure of American government, its object is generally, if not always, a change either in the form of government or the administration of it. We are to look, therefore, for its origin, in political causes. History will justify me in saying, that treason has been most frequently created and oftenest punished under the most arbitrary governments, and those whose administration has been most wickedly conducted. Could a full and perfect history of all the proceedings against treason be written at this day, it would present to us such a picture of cruelty, depravity, oppression, robbery and murder, sometimes with and sometimes without the *forms,* but always *under color of* LAW; and

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avowedly for the better preservation of ORDER; that as Americans, the citizens of a free country, which has hitherto escaped its desolations, we should turn in disgust and abhorrence from the detail of its monstrous atrocities.

Treason, gentlemen, you must be aware is a plant of slow growth; for "mankind are more disposed to suffer whilst evils are sufferable, than to right themselves by abolishing the forms to which they have been accustomed"; and where prosecutions for this and similar offenses have been most frequent, it has been invariably found that injustice and oppression have ever been their precursors. It derives its origin most frequently "from a long train of usurpations and abuses" on the part of government; whilst, on the other hand, under good governments, well administered, treason is a crime scarcely known in history

It is of importance, therefore, gentlemen, that we should turn our attention a moment to the political history of our own State, as well for the purpose of ascertaining the remote causes of the present prosecution as to fix in our minds the great and broad principles upon which we intend to rely for the prisoner's defense. He would not himself, nor shall we in his behalf, seek by evasion or subterfuge to shun the great question you are to try; it is not the *act,* but the *construction* put upon it, which gives importance to the cause; and the question, when stripped of its technical investments, and presented before you in its naked lineaments is this: *are the people of a State, dependent on the will of the Legislature alone for altering its fundamental laws, and reorganizing its government?* This is the great question; and well deserving the deepest solicitude and the most profound consideration.

It was my purpose, gentlemen, to have reviewed to you the course of legislation pursued by the Charter Government on subjects out of which this prosecution has grown; and to enlarge somewhat on the grievances under which about three-fifths of our fellow-citizens have labored, in order to have shown to you that justice to them and to their rights had

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long been not only neglected but denied, and to have satisfied you that the time had actually arrived for the people themselves to take measures for establishing a written constitution; but from all this I am debarred by the direction of the Honorable Court; and will ask your attention to the matter of the indictment itself.

The points of our defense are as follows:

1. That in this country treason is an offense against the United States only, and cannot be committed against an individual State.

2. That the fourth section of the Act of Rhode Island, of March, 1842, entitled "An Act relating to offenses against the sovereign power of the State," is unconstitutional and void, as destructive of the common-law right of trial by jury; which was a fundamental part of the English Constitution at the Declaration of Independence, and has ever since been a fundamental law of Rhode Island.

3. That that act, if constitutional, gives this Court no jurisdiction to *try* this indictment in the County of Newport; all the overt acts being therein charged as committed in the County of Providence.

4. That the defendant acted justifiably as Governor of the State, under a valid Constitution, rightfully adopted, which he was sworn to support.

5. That the evidence does not support the charge of treasonable and criminal intent in the defendant.

Before making any comments, I will call the witnesses for the defendant, who have been long detained here, and are anxious to return to their homes and business.

WITNESSES FOR THE DEFENDANT

Henry S. Hazard (recalled). Stood at the door of the arsenal when Col. Blodget came to the door on the night of 17th May. Saw men with the pieces in the lower story; but cannot state whether the plan was to defend both stories or not, except from what has been said here by the witnesses.

Col. Charles W. Carter. Was present, as an officer of the escort, in the procession of the General Assembly from High street to "the foundry," on the 3d of May, 1842. Saw no per-

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sons in the procession unusually armed, or having large canes, sticks of wood, or any thing of that sort. The object of this assemblage was to organize the government under the People's Constitution. In the afternoon Gov. Dorr ordered the city troops, in which I was an officer, a lieutenant in the 4th Ward Volunteers, to be in readiness for the next day. The next day I called on Gov. Dorr to ask him for what service they were wanted. He replied that he regretted that his purpose of taking possession of the State House and of the public property was defeated by the opposition of the House of Representatives. He (Mr. Dorr) thought this was the right course, and was in favor of it.

Before we went to take the arsenal, or to attempt to take it, there was a meeting of military officers, at Burrington Anthony's house, at the request of Gov. Dorr, to consult about the steps to be taken. Some thought it would be better to march into the city first before going to the arsenal. The majority were in favor of going to the latter; and the opposition was waived. After hearing the views of the officers, Gov. Dorr gave the order to march to the arsenal, which contained the State arms. I supposed the soldiers then would follow Gov. Dorr wherever he might lead them; this, was my determination.

Several of the officers suggested to Gov. Dorr that he had better remain at Anthony's house, with a guard. I was one of them. Gov. Dorr replied that he had often publicly stated, and at the Town House, that when danger should happen he wished to be found any where but in the rear; that he should be as good as his word, and would not send others where he was not willing to go himself. Mr. Dorr went out in the centre of the column. I was near him. Henry A. Kendall was on one side.

It was a very dark night, heavy fog and mist; difficult to distinguish anything a little distance off. The night was not chosen because it was dark. The fog came up late. Seemed like an interposition of divine Providence.

Counted the men in sections before they started to go out; and found two hundred and thirty-four in all, although the number had been represented by some as larger.

Saw Gov. Dorr on the field, doing his duty as an officer, and attempting to rally and bring up the men. The two artillery pieces, six pounders, were loaded with round shot—balls.

Col. Wheeler, the chief officer of the force, after the men had been halted, called on me to carry a flag of truce to the arsenal, and demand the surrender of it. Col. Wheeler told me to say to Col. Blodget, who commanded the arsenal, that "there was force enough there to blow them all to hell." I replied, I would say no such thing, but would say what was proper on such an occasion. Col. Blodget has given a perfectly true account of what took place when I went to the arsenal with the flag. Went up to the lines, and called for the corporal of the guard. Was asked who's there. Replied an enemy, having in my hand a sword with a white handkerchief upon it for a flag. Made a demand for the surrender of the place in the name of Col. Wheeler; but immediately

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thought that it should be made in the name of Gov. Dorr, and corrected myself. Col. Blodget answered that he knew no such persons, and should defend his post. Went back and saw Col. Wheeler. Said Wheeler, what did he (Blodget) say? "What did he say," I replied, "what the devil should he say but that he should defend the arsenal." Turned round, and looked toward the other end of the line; and, when I looked back again, there was no Col. Wheeler to be seen. He had gone off in the fog. Went after Gov. Dorr; and both looked for the Colonel, but could not find him on the field. Gov. Dorr then ordered me to take command of the artillery, which I did.

Saw Capt. Dispeau with the Pawtucket company going off in the rear. Asked him where the devil he was going. Dispeau replied "there is danger here." Asked him how the devil he expected to go to war without getting into danger.

The men were then ordered into line, the guns were placed in position and pointed at the arsenal, and the right gun was touched; it flashed but did not go off. The left gun was also flashed, and primed again; and was flashed a second time without going off. The first gun was touched off by a man named Andrews, the second by a Mr. Hathaway. Gov. Dorr stood in the rear of the guns. He did not have a torch in his hand that night, or apply a portfire or torch to either of the pieces. I commanded them, stood close by them all the time and am sure that Gov. Dorr did not attempt to fire them. Have heard the testimony of Orson Moffit, that he saw Gov. Dorr swing a torch and flash one of the pieces; and know that in saying so he has testified what is false. I gave the word to fire the pieces by the order of the Commander, Gov. Dorr.

The guns were entirely unserviceable, powder old and poor, and, becoming damp, had hardened, so that the priming wire would not go down through it. The statement which has been made here, that the guns were plugged up with wood, or something else, is untrue. They were bored out in the morning, after they were brought back, at Anthony's house, with a gimlet and rod, which was the only way in which they could be cleared. There were no plugs found in them; the substance was dissolved powder, which had hardened and become solid.

After the flash, the men began to scatter; so that soon there were hardly enough left to carry off the guns. I limbered one of them myself. Gov. Dorr collected about fifty men to take the guns back. He went off the field with one of them, and I with the other. The rest of the men had left.

There were about fifty men who went back to the house of B. Anthony, on the morning of the 18th, and their number decreased. Col. Wheeler having gone, Gov. Dorr that morning appointed Levi Aldrich Colonel, and several others in the places of those who had left. The signals were not answered; the men did not return to defend the head quarters, and it became necessary for Mr. Dorr to leave the ground, which he did at about half past 8 o'clock. Gov. Dorr consulted with his friends, and showed me a letter informing

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him that all the officers of the government, in Providence, had resigned, and that he could expect no support. He was advised to leave. This was my advice to him. Understood he left an order with Col. Aldrich to fall back, with authority to dismiss his men. The Col. gave the order from the window.

Sometime after Gov. Dorr had gone, the charter troops, some six or eight hundred of them, came up. Twenty-seven of our men remained. They fell back to the edge of the hill, stood by the cannon, and would not suffer them to be taken from them by force. They meant to go off with the honors of war. Mr. Anthony requested me to give them up. My intention was that they should be given up to the Artillery Company, to whom they belonged, according to the agreement when they were taken; and they were so given up the next day. Prevented a cannon from being fired at the mass of men when they were coming up the hill, by catching the match. After Gov. Dorr had gone away, some one said something about a compromise with the enemy. Gov. Dorr never mentioned any such thing. Never believed any thing about this compromise. When Gov. King and the sheriff came up, the men saw that there was no such thing. I called this the soft soap story. There was no man on duty among the soldiers on Federal Hill who was under the influence of liquor, or intoxicated. The statement that any of the men were in that condition is untrue.

Was one of Gov. Dorr's aids at Chepatchet in June following. The average of the armed men there, composing our force, did not exceed two hundred. The men were coming and going as they pleased. The service was voluntary. A company from Cumberland went back on Saturday. Knew of none being taken up and compelled to serve. Took up one of my own men who was drunk, and kept him in the guard house till sober. He was the only one whom I saw in that condition.

There was no command exercised over the men about the village, and not much over the soldiers on the hill. Thirteen of the latter were from New York. Being in the confidence of Gov. Dorr as his aid, I had frequent conversation with him. Heard him say that in case the President of the United States interfered in the affairs of this State, he wished and expected assistance from other States. Never heard him say that he desired or expected any such aid to interfere between the two political parties of the State, and to strengthen one against the other. Mr. Dorr's view was that if the people were let alone from abroad by the United States they would take care of themselves; and if they could not maintain their rights they did not deserve to have any.

There was a talk among some of the men, that if they got to Providence they could occupy the Colleges for barracks. Gov. Dorr forbade all marauding. He ordered that private property should be every where respected. A couple of beef cattle were taken; but the one that was kept was paid for.

Gov. Dorr said that the assembling at Chepatchet was premature for want of a consultation. There was no regularly or-

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ganized force there. The organization commenced after they got there. A council of officers was held at Sprague's hotel, before whom the state of affairs was laid. I was present. The opinion of the officers was given in favor of disbanding. Gov. Dorr wrote an order to this effect, and Gen. D'Wolf carried it to Acote's hill and made it known to the men. Gov. Dorr said that it appeared by a newspaper that had been sent to him, that many, who had been just before our staunch friends, in Providence, were now going against us and denouncing us. Many had also expressed their satisfaction with the doings of the Charter General Assembly. Gov. Dorr said it made no difference how they went over to the enemy, whether from cowardice, or by base means; it had become evident that the majority were against supporting the Constitution by arms; and if we remained there, we should have to contend as a faction both against friends and enemies.

The order to disband was given when the sun was three quarters of an hour high. The soldiers broke up from the camp as men do at the end of a general muster, without any haste or disorder. Gov. Dorr left Chepatchet at about sunset. I went with him. There were no others except the driver of the wagon. Went to Vernon Stile's hotel, in Thompson, Connecticut. There were only three colored men on the hill; and they were in the commissary's department. Heard in Norwich that Eddy had some money there to procure ammunition. The troops dispersed immediately on being disbanded. Of some six hundred men in Providence, who held meetings and agreed to come out into service when called for, only thirty-five came to Chepatchet. Gov. Dorr was informed that when he should move to carry the government into effect, that he could depend on fifteen hundred men, who were pledged to support him. He remarked, at the disbandment, that if those who had been deprived of their rights, would not fight for themselves, they were not worth fighting for.

Was present on Saturday afternoon and heard Gov. Dorr deliver his Address to the troops. Stood near him. Did not hear him use the expression about laying his bones on the hill, as has been stated. If he had used it, would have heard it. The flag under which we assembled, was the standard of '76.

Cross-Examined. The guns which were aimed at the arsenal, were unloaded after they were brought back to Anthony's house in the morning. They were loaded with round shot—with cannon balls. When reloaded they were loaded with slugs. The guns were pointed quartering at the arsenal; thought it would produce a better effect than if the balls went plump on. The guns were as far apart as the width of this room. Saw the right gun touched and went to the left. There were not more than a dozen men around them. About this time they went away behind wood-piles and somewhere else. After the return from the arsenal, I remained outside at B. Anthony's house, rallying the men. Was not by the guns the whole time after they were brought back. Saw nothing but powder when the priming was withdrawn. Didn't

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know when Gov. Dorr was to return from New York. A man came to me and said Gov. Dorr wished him to make some pikes. Saw the pikes when made. The assemblage at Chepatchet was to protect the People's Legislature, and the town against invasion. It was only talk among some of the men of going to Providence and taking possession of the Colleges. There was no plan or conversation to that effect among the officers. Things did not admit of such a movement. Held myself ready to go any where that I should be ordered. Think I said something about preparing hot shot, to be used when necessary, as they are sometimes in war. Do not know of any aid being called from New York to act in any other case than that of interference by the general government. Think I proposed taking the armories in Providence first, before we should attempt to take the arsenal. Gov. Dorr wanted to take the arsenal because it contained the State arms.

Saw Gov. Dorr between the time of the Federal Hill affair and that at Chepatchet. The plan was to procure men and ammunition, and to maintain the People's Constitution and government by force, if accessary. Think I mentioned then, that they had tried to take the Warren guns. Gov. Dorr might have approved of it; cannot speak certainly. Do not think he disapproved of it. There were men about the village of Chepatchet with arms. The men left the hill at first, when they pleased, but that was stopped toward the last; and those who chose to become soldiers were required to stay. Two farmers, good men, came there and were going off the hill. Told them that they had better not; but one said he had six cows at home and one heifer that kicked very badly and thought they had better go home and see to them, as they had left there nothing but women folks. I made them leave their muskets behind. The men generally wanted to go to Greenville, to attack the charter troops. The reason they did not, was, the news from Providence that our party in town had given up entirely. Was not on the hill when the order to disband was read. Heard no proposition from Dorr to go to Providence and take possession of the Colleges, or any thing else. Never heard any thing from Gov. Dorr which carried the appearance that he was acting for his own personal interest. He was acting for the people only, and in their service; and if they had not abondoned him through cowardice, their Government would have been this day in operation.

John S. Harris. Know where the votes given for the People's Constitution now are, and of their being counted, and how many there are.

The *Attorney General* objected to the admission of any testimony on this point.

The COURT. Such testimony is not relevant at all to the issue.

Mr. Turner. A great deal of evidence has been offered to show that the Defendant assumed to be Governor of the State and pretended to act under a Constitution. The assistant of the prosecuting officer has laid great stress on this point in his opening to the jury. In the present stage of the case, we offer this testimony, for the purpose of explaining the motives of the prisoner.

Mr. Dorr. I am entitled to

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this testimony, even supposing that all the proceedings in favor of the People's Constitution, and to elect a government under it, were null and void. It was an explanation of my intentions, and to show what authority there was at the foundation of my acts, and that I had not risen up in the midst of the People as an usurper, acting of my own mere motion, and without law. It is certainly proper to claim a right to repel the charge of wicked and malicious motives in exercising a pretended authority, which has been so much dwelt upon by the prosecutor in the opening of the case. I am charged with usurping the duties appropriate to a Governor of the State. Let us inquire whether this was or was not an unauthorized assumption. Let us look into the election, and, beyond, at the votes for the Constitution itself, at the formation and proceedings of the People's Legislature, at my recognition by the Assembly and by the People in my political capacity, and then it will be more easy to make up a fair judgment upon the character, motives and intentions of the accused.

DURFEE, C. J. The Court rule, that as evidence has been introduced very properly by the government to prove a conspiracy, it is for the prisoner to disprove that fact, but not to confirm it. It is not necessary, in order to be a usurper, that a man should set himself up alone, and pretend to act in any authority. In fact he cannot do so but by the consent of large numbers. But such a conspiracy can give no authority by its numbers, and can excuse no one for the violation of the laws. No one knows better than the prisoner the maxim that ignorance of the law is no excuse for its violation. No crime can be permitted to be excused by showing that the prisoner acted under a mistake of the law respecting his natural rights. *A prisoner might as well set up, to an indictment for robbery, the defence that he had a natural right to the possession of the property which he took from the person robbed.* The evidence which the jury should consider, is that which relates to the levying of war, and the part which the defendant took in it. If the evidence prove this charge as laid in the indictment, then the jury should bring in a verdict of guilty, otherwise of not guilty. The evidence offered will not prove the absence of the malice charged.

Mr. Dorr hoped not to be misunderstood in having it supposed by any one that he set up the defence that he acted under a mistake of law in supporting the rights of the people or his own. Very far from it—he claimed to be justified by having done what he had a right to do. But the testimony was offered in this stage to explain his motives.

STAPLES, J. The evidence of the prisoner's intention can be of no importance. There is no pretence of any private malice on his part, and the law infers general malice to constitute the offence, if the facts be proved.

DURFEE, C. J. All considerations of this kind are more properly presented after verdict by way of mitigation of the sentence.

BRAYTON, J. I understand that no evidence had been offered to prove special malice in the prisoner.

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Mr. Turner. Will the Court have the goodness to state why testimony as to the "fiendish looks" and expressions of the Defendant was allowed to be gone into? The opening counsel has indulged himself freely in harsh imputations against the Defendant; and a great many things have been introduced here, which can have no other effect than to prejudice the jury against him. We ought to be permitted to remove all these prejudices, as we can, if we be permitted to go into the whole case.

DURFEE, C. J. The evidence proper for the jury is that which relates to the levying of war, and the part the Defendant took in it.

STAPLES, J. No evidence ought to have the slightest weight with the jury, if any such has been put in, to show any personal malice or feelings on the part of the prisoner. The evidence must go to prove the facts laid in the indictment, and upon these the jury must render a verdict of guilty if at all.

The COURT rejected the testimony offered; and the Defendant excepted to their ruling. At the request of the COURT, the motion to admit this testimony was reduced to writing as follows:

"The Defendant offers to prove, by John S. Harris, that a large majority of the whole male adult population of this State, being citizens of the United States, gave their votes for the adoption of the Constitution, commonly known and called the People's Constitution of Rhode Island, in the month of December, A. D. 1841, under which said Constitution the Defendant was elected Governor of this State, in the month of April, 1842. And this testimony he offers, in this stage of the case, to repel the imputation of malicious motives and intentions, as charged in the indictment and urged by the prosecutor in behalf of the State."

Mr. Harris. After the People's Legislature broke up, Gov. Dorr went to Burrington Anthony's house, and the next day to Mr. Bradford Allen's house, to meet a number of his friends; and was occupied in signing commissions and in the business of the government. When this was done, he set out for Washington. He went there, at the desire of his friends, and in compliance with the vote of a large public meeting in Providence, for the purpose of making a true representation of our affairs to the President. Was not present at the arsenal, and had nothing to do with military affairs.

Col. Benj. M. Darling (recalled). Was present at Federal Hill in the procession on the 16th of May, in the barouche with Gov. Dorr when he addressed the people. The escort were arranged in a hollow square or circle. There were three hundred and seventy-five armed men. The line of men extended nearly around the carriage. Did not hear any thing said about the sword being dyed in blood. If any such expression had been used, I must have heard it, as I sat within 3 feet of Mr. Dorr in front. Mr. Dorr said that it had been presented to him by the brother of an officer who died in Florida. He said it had never been dishonored, and never should be as long as he had it. I waved my sword and gave the signal for a cheer. It was a

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loud and hearty cheer. Mr. Dorr stood on the seat while making his speech, and held up the sword when he was speaking of it. No such language was used by him concerning the sword being dyed in blood, as has been related by Wm. P. Blodget and E. H. Hazard. Nor did he wave the sword. His beard was very long, and he looked very dusty. Recollect Dorr's saying something about the five thousand men; but not exactly his remarks. The whole proceedings on the hill lasted for about an hour. The address was not more than three quarters of an hour long. The meeting was peaceable and orderly. Heard no threats made by any of them. Don't think any one could have stood within 20 feet without distinguishing whether Gov. Dorr stood in a carriage or on a platform.

Samuel H. Wales. Was on Federal Hill in the procession when Gov. Dorr returned from Stonington. Mr. Dorr made no such remarks concerning the sword, as have been stated here by Blodget and Hazard. The principal tenor of the speech was an account of his reception in New York. In reference to the five thousand men, he stated that he was sure of aid enough from New York to paralyse any force which the United States might use against the Suffrage party in this State. Gov. Dorr drew the sword and held it up. He said it belonged to an officer who died in the Florida war; and the brother of this officer had presented it to him. Mr. Dorr added that it had never been dishonored in battle, and he hoped it never would be. Mr. Dorr said that he was willing to die with that sword in his hand, if need be, to sustain the Constitution of the State. I stood very near the carriage, within five feet of Mr. Dorr, inside of the military. They occupied a large space around the carriage. Paid particular attention to the speech. Should have heard Mr. Dorr if he had used any such expression as testified to by Blodget respecting the sword dyed in blood. Mr. Dorr appeared fatigued and covered with dust. The applause was very hearty, and might have been peculiar, as it was a dusty day. There was no ferocious yell as has been described. The meeting was orderly and soon broke up.

Nathan Porter. Followed the procession to Federal Hill. Gov. Dorr stood up on the middle seat of the barouche in delivering his speech. He said it had been reported here that he had solicited five hundred men from New York; that was a mistake; he could have five thousand men, but he did not want them except to repel the force of the General Government. Gov. Dorr drew his sword and held it up. He said it had belonged to a brave man who had fought in the Florida war; that it had never been dishonored, and never should be; that he had sacrificed all in the cause except life, and that he was willing to lay that down, if need be, in the cause of the People; that the sword had been used in the cause of the country, and he was ready to use it again if need be. The appearance of Dorr was peculiar. His face was red and he was very dusty. The wind was high and blew his hair about—his beard was long and he looked haggard. I remarked to some one by, that I never saw Gov. Dorr look so badly. He looked as one would

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who had been riding in the sun uncovered. Thought the speech was calm and dignified, and a moderate one under the circumstances. The meeting was orderly, and the cheer was a loud and hearty one, and seemed to come from warm and manly hearts. I stood very near Gov. Dorr. Have heard the statement of Blodget. Mr. Dorr used no expression of the sword dyed in blood or gore.

Jumes Thurber, Jr. Am acquainted with William P. Blodget. On Tuesday, met him between here and the Park House, and passed the compliments of the morning with him. Spoke to him about the death of Major Power. He said, yes, the old man was used up. I replied, yes, and I see you was pretty much used up at Dedham, the other day. He said, they packed a jury against him, and thus convicted him. I said, well, I do not know but they will do so here with Mr. Dorr. Blodget replied, I hope so, by God. I said two wrongs do not make a right. Blodget answered I want to pay them in their own coin. He said he had not heretofore wished Mr. Dorr convicted; but now he would do what he could, and he should not have been down here, had it not been for this.

Burrington Anthony. Was at home when the men returned from the arsenal. Gov. Dorr left about an hour before the Charter troops came up. Did not say to Col. Blodget, as he has stated, that the men on Federal Hill, at my house, were drunk. May have said to him, that they were much excited; but I did not mean by liquor. I offered them nothing to drink; and saw none of them at any time affected by it. Pledged myself to Col. Blodget and Gen. Gibbs, when the Charter troops were at my house, that I would endeavor to have the artillery pieces restored that afternoon, as far as was in my power, but I had no command over the men. Saw a letter containing the resignation of the officers of the government put into Dorr's hands, at my house. A great many of Mr. Dorr's men, who had returned to the house, had then gone away. Heard no firing. After a few men had carried the pieces back to the edge of the hill, the Charter troops came up near them; and a match was then waved over a cannon pointed at them. At this they sprang aside against the fence and all went down together. The piece was not fired.

Heard Gov. Dorr's speech delivered at Tammany Hall in New York, on the 14th of May. There were five thousand persons in and around the hall. He expressly repudiated the idea of foreign aid except in the event of the interference of the United States in the affairs of Rhode Island. He said, as he had always said, that if the people of this State could not maintain their rights against the Charter party, they did not deserve to have any.

Met Gen. William G. McNeil in New York at the Astor House. He said he had seen Gov. Dorr, and had omitted one thing, and that was to offer him and his friends a car to go to Providence, provided that it should not interfere with the regular train. He requested me to step up to the desk and write an order to that effect, and he signed it. He had always expressed himself as a

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political friend. Understood him then to be favorable to the Suffrage cause.

Sheriff Potter must have been mistaken as to my requesting him to prevent the people without from firing. Did not use the language attributed to me. Asked Sheriff Potter if he had any objections to the People's Legislature sitting in the Court House. Potter said he had no intimation of his being superseded as Sheriff, and should not relinquish the possession of it. This was on the day of the meeting of the People's Legislature. I was not authorized by the vote of the House to take the State House, or to use force. I was directed to ask for it.

Capt. Josiah Reed. Was captain of the chartered United Independent Company of Volunteers of the city of Providence. Was on Federal Hill in the afternoon of May 17th. A member, and an officer, of the old Artillery Company told me that the company were at the armory, and wanted us to come down and get their pieces—two six-pounders. Soon after I was called into the house by the Governor, and received an order from him to go down and take them. Went down with my company. Saw Col. Bennet and demanded the guns in the name of Gov. Dorr. Requested me to file my men round at the back door where the guns were, and asked if I would wait about five minutes for the key, which was not there. I stated that the company had not yet made up their minds to let the guns go. Shortly after Lieut. Col. Wilkinson called me into the armory and asked me if I would pledge my word that the guns should be returned to the company after we had got through with them. Told him I would, and he gave me liberty to take them. After I went out, the key not coming, another officer came out and told them to wrench the lock off the door. I ordered Sergeant Dawley to do so. While he was in the act of doing it with his bayonet, the key was found and passed out of the window to William H. Potter, who unlocked the door, and we took the guns. The guns did not belong to the State. They were the property of the Artillery Company. The key was in possession of Lieut. Col. Wilkinson, who was not at the armory at the time we went there. These brass pieces were sent to the Company by General Washington, to replace three iron guns which were borrowed of this company, and which were lost in the Sound. These cannon were taken at the surrender of Burgoyne.

Was at Anthony's house previous to going to the arsenal. Gov. Dorr was requested by the officers to remain at the house. But he refused to remain, saying that, as he had promised, he should not be found in the rear, when there was danger to be met.

At the arsenal ground I was sent with a detachment, and lay in ambush close by the building, on one side. The plan was, that when the doors were opened to run out and fire the artillery pieces, my company should rush in and take possession of the building; which I did not apprehend there was much difficulty in doing.

Kingsley P. Studley. Was a Lieutenant in the Volunteers; and went down with them to the

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Artillery armory to take their pieces. The detachment which went for this purpose consisted of fifty men.

Thaddeus Simmons. Was at the arsenal within twenty feet of the cannon. Was one of the guard who marched out by the side of Gov. Dorr; four on each side; and was close by him from Anthony's to the Arsenal. The guns were placed under the command of Lieut. Carter. They were southeast from where some thirty men were, near a tree. Heard the orders given by some one to fire. Both guns flashed, first one, and then the other. Do not know who touched them; but know it was not Mr. Dorr. Was so near as to be positive of this. Mr. Dorr moved about the field to bring up the men.

Joshua Hathaway. Was not at the arsenal. Was at Anthony's house the first part of the evening, and the next morning when the artillery pieces were brought back. Know in what state the guns were when they returned from the arsenal, as I assisted in boring them out. The difficulty with them was that the powder had moistened and dissolved and then hardened. There was no pine or other plugs found in the vents. There was nothing but powder in the vents; and they had to be bored out with a gimlet before they were serviceable. I helped do it. Have a brother named Seth, who was said to have been at the arsenal ground that night.

Benj. M. Slade. Was commissary at Chepatchet. When the troops disbanded, there was not more than two days provision on hand. It was mostly obtained by voluntary subscription; some of it in Providence, some in Woonsocket. Some was sent in by the citizens of Chepatchet. There were two colored people employed in my department. The whole number of our men under arms at Chepatchet was from two hundred to two hundred and fifty. There was no chaplain on the hill. The flag was the United States' flag. Some tents were borrowed from Massachusetts. The marquee was borrowed by me and Captain Landers.

Wm. H. Potter (recalled). Was near Gov. Dorr at the arsenal. Stood within eight or ten feet of him, near the tree where the pieces were flashed. Mr. Dorr did not wave a torch or touch either of the pieces. If he had done so, I must have seen him. Lieut. Carter was near them, and appeared to have charge of them.

William J. Miller. Was one of the publishers of the Providence Express in June, 1842. A proclamation for convening the People's Legislature at Glocester, was sent us on Saturday for publication. Circumstances compelled us to decline its publication. An order of Gov. Dorr for the disbandment of his military force at Chepatchet was brought to the Express office, on Tuesday morning, June 28th, by the hands of Walter S. Burges, for publication. It was printed by us in an extra by a permit of one of the Governor's Council.

Col. W. H. Potter (recalled). The procession in Chepatchet, alluded to by D. J. Pearce as being formed at the hotel, and moving toward the hill was entirely a civil procession. The men in it had no arms, nor were they under orders. All persons there

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in the street favorable to the cause were requested to manifest it by falling in and joining a procession.

Walter S. Burges. The relations between Mr. Dorr and myself having been of a friendly nature, I called to see him at Mr. Anthony's house, on the evening of the 17th May, 1842. There was no doubt entertained that it was his intention to take possession of the States' Arsenal that night. We had a conversation on this and other subjects, in which he requested me, in case of any accident to him, to attend to his affairs and take care of the papers in his office. He directed me where to find the books and papers which were in his hands as one of the State Commissioners of the Scituate Bank; the files of papers pertaining to his office of President of the School Committee in the city of Providence, which he had filled for some considerable time; also, the papers, securities and funds belonging to the Rhode Island Historical Society of which he was then Treasurer—and sundry other valuable papers relating to certain administration and guardianship accounts—particularising the location of each, and giving me the keys that led to them.

Never have seen Gov. Dorr before nor since manifest any motives or intentions other than as a public officer.

May 3.

Walter S. Burges. Just before dark, on the evening of Monday, June 27, I received a letter from Governor Dorr. It was brought to me in my office by two officers of the Charter party, unopened. The men who brought it, one of them a Mr. Eddy, had been intercepted. I opened it in the presence of the officers. It contained information to me of an order being given for the disbanding of the troops at Chepatchet—also a copy of the original order, under sealed cover, directed to the Express office, for publication. These were taken immediately that evening before General McNeil and the Governor and Council. The next morning they were returned to me by Gov. Arnold, one of the Council, who requested me to leave the order at the Express office and have it published. I carried it to that office, but they refused to publish it, unless by an order from the Governor and Council. I returned to Gov. Arnold, and obtained his order or permission for its publication, and again carried it to the Express office, and it was soon out in an Extra. This was on the morning of the 28th June.

Mr. Turner. I recall the attention of the jury to the five points which I before introduced, viz.: 1. That treason was not an offense against this State, but against the United States. 2. That, if any treason had been committed, an indictment could not constitutionally be found out of the county, where it was charged as having been committed. 3. That, at all events, such indictment, wherever found, could

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not be *tried* out of such county. 4. That the defendant committed no treason, but acted justifiably, having performed the acts charged against him, in his capacity of Governor of the State, and having been duly elected and sworn under a valid Constitution. 5. That there was an absence of all the motives and malice which are necessary to the existence of the offense charged.

These points I propose to take up, separately, and to maintain and illustrate each in its order.

The COURT. There has been no foundation laid in the proof of facts to sustain the fourth point of justification.

Mr. Turner. The testimony on this point being distinct from the rest, I had intended to reserve it until I should come to it in the proper order; but I am ready to take up the points in any order that might be preferred by the Court.

STAPLES, J. All the testimony ought certainly to be put in in this stage of the case. It would be irregular after commencing the argument of the law to return to the introduction of new proof.

Mr. Turner proposed to prove by the authorities that the people had a right to adopt a constitution of government, and that in the exercise of that right they did adopt a constitution in December, 1841; under which the defendant derived his authority; and in proof of this fact, he proposed to offer and authenticate the votes of the people themselves in proof of said Constitution

The *Attorney General* objected to the introduction of this testimony; and asked how the votes themselves were to be proved.

Mr. Dorr. I intend to show that the votes were received and counted, and how many there were, and for what they were given; then I will produce the votes themselves, and lay them on the table before the jury for their inspection, and that of the Court; and, in the next place, if the gentleman be not satisfied, I will call in the voters themselves severally to verify their votes, commencing at any place he may please to designate.

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DURFEE, C. J. This subject has already been gone into at large in the case of Cooley; and such testimony as is now offered was rejected upon full deliberation by the Court. We cannot permit it to go to the jury. It would fail to prove the point for which it is introduced if it were admitted; for the prisoner cannot be held justified by acting under any other constitution than that of the State. This Court can recognize no other than that under which it holds its existence; and must take it for granted that the government preceding the present was also the government of the State until changed, in due legal course. Any irregular action, without legal authority, is no action at all, that can be taken notice of by a court of law, who are bound by the laws and sit to administer them. It matters not therefore whether a majority, or what majority, voted for a pretended constitution, as is alleged by the prisoner, and as he now asks to be permitted to prove. The numbers are nothing; we must look to the legality of the proceeding, which, being without form of legal authority, is void and of no effect. If such proceedings should be tolerated in a court of law, and be accounted to hold any man justifiable for the violation of it, then law is at an end, and general anarchy would ensue; as what had been done once could be done again, and with as good effect; so that a succession of changes might be perpetual, and there would be no permanent form of government. Of what benefit then to the prisoner can it be to introduce testimony which cannot support his case, if conceded to its fullest extent. The question is not what was done, but what was done according to law; and numbers, however great, cannot decide this either way. The fact is, the prisoner asks leave to bring into this Court a political question which cannot be settled here, and has been settled elsewhere. If a government had been set up under what is called the People's Constitution, and they had appointed Judges to give effect to their proceedings, and deriving authority from such a source, such a court might have been addressed upon a question like this. But we are not that court. We know and can know but one

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government, one authority in the State. We can recognize the Constitution under which we hold our places, and no other. All other proceedings under any other are to us as nullities. It would be improper for this Court to take any other notice of them; and, if we did, we could allow to them no effect or importance whatsoever. Besides, the prisoner asks to prove a law, and the highest law by parole. Was ever such a proposition before heard of in a court of justice? If there be any such Constitution it must be found at the head of the statutes of the State; and the courts are bound to take notice of it. It is one of the laws, and the highest law of the State. But we find no such law. And again, if the prisoner was Governor of the State, as alleged, the evidence of it is a certificate of record from the proper officer. In every point of view therefore the testimony now offered is inadmissible; and, as before observed, this question has been fully considered in another case. The Court therefore decide that the testimony offered cannot be permitted to go to the jury.

Mr. Turner. Although this question may have been before considered, yet in a case of this importance we may well ask to have it brought again to the attention of the Court. It is indispensable to the main point of the defense, that this testimony should be allowed to go to the jury, with all the effect that it may be entitled to. If it be excluded the defendant is cut off from the full defense to which he is entitled; and great injustice must be done him in consequence. We contend that he was, at the time when the offense charged against him is said to have been committed, the Governor of this State, acting under valid authority, deriving his powers from a constitution rightfully adopted by the people themselves, the highest power in the State, in the exercise of their original, sovereign capacity, and overruling and superseding by that transcendant act of sovereignty, all other rules and authorities whatsoever. Any objection to this testimony comes with bad grace from the prosecuting officer; who has been permitted to show that Mr. Dorr acted as Governor, under the forms of an election, and in the presence

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of a Legislature, also purporting to be chosen by the people, under the same Constitution. If Mr. Dorr so acted, as we know he did, and as has been again proved here, then we ask to show why he acted and by what authority he acted; and to discuss that authority. We propose to show by most abundant authorities as a foundation for what the people did in their sovereign capacity, that they are by the theory of our institutions, and in fact, the ultimate sovereign power of the State, responsible to no higher authority, except that of their Creator, for the manner in which they have used this sovereign power for their own good, and for that of the State, of which they are the judges and which judgment no other tribunal can call in question. If we cannot go into this proof, what becomes of the full, fair and impartial trial, to which the defendant is of common right entitled? Without the liberty to investigate this vital and momentous question, which involves the liberty of our State and country, this trial degenerates into a merely formal process, a ceremony before conviction; and he is to be deprived of his civil rights and subjected to the extreme infliction of the law, without a hearing, and without an opportunity to justify himself before the jury; who are thus to decide his case without hearing the whole of it, and without the due consideration of all the points and all the arguments, which is necessary to the conscientious and satisfactory discharge of the solemn and momentous duty which has been imposed upon them. And further, this is not the same court that acted upon this question on a former occasion, at the trial of Colonel Cooley in Providence. The Court was then acting under the Charter Government, which has been done away with. This Court sits under a Constitution from which it derives its power. It is different in name, and in the number of its Judges. One of the Judges on the bench has never heard any discussion of the subjects under consideration in his judicial capacity. Under all these circumstances, regarding the entire novelty of this case, both here and in other States, and the careful deliberation to which, in all its

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important aspects and bearings, as affecting the liberty and rights of the citizens of the State and country, it is so peculiarly entitled, have we not a strong claim upon the Court to be heard fully and dispassionately and to the whole extent which the investigation may require upon this the main, vital question of the case. We are prepared to show most conclusively upon principle and authority that the people had a perfect right to reorganize their government as they might see fit, and that in the exercise of this right they did in fact so proceed, and did adopt a constitution, under which the defendant was duly elected, and exercised his appropriate power and performed his specified duties according to the oath of office which was administered to him.

STAPLES, J. The admission of this testimony would be permitting the prisoner to show that we are not a court. The authority of this Court is derived from the Constitution of the State; and that constitution itself was formed, according to legal proceedings, originating with the Government under the Charter, which has now ceased to exist. If that was no legal government, as the prisoner proposes to show, then the present is no constitution, having no rightful origin, and we as Judges have no powers under it. Can we permit such a proceeding as this—to have our own existence drawn in question? The acts set up by the prisoner in his justification were revolutionary in their character, and success was necessary to give them effect. In this event the Judges chosen would have recognized the source which created them, and would have treated the acts of the Government as valid. The prisoner asks us to take notice of an organization which not only did not exist rightfully, but did not exist at all.

Mr. Dorr. The defendant in this case claims the right to inquire and show who are the people of this state, what they had a right to do, and what they did, as the basis of justification of his course and conduct in the recent political affairs of this State. He proposes to show that the people in a political sense are the adult male population, including

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qualified voters, and those who are not qualified, the men, who do not look for their origin to the State but to their Creator, and who compose the great mass of the community, bearing its burdens, contributing to its support, the authors of its prosperity and the defenders of its rights. In the next place, it will appear, if there be any virtue in the solemn declarations of popular rights, in the Constitutions of the States, in the decisions of courts, in the opinions and arguments of the most eminent jurists and statesmen, and of the greatest and best men who have adorned our history—that the people, as thus defined, are the ultimate, uncontrolled sovereign power, in whose hands is vested, not by grant or transmission, but by the hand of God, the right, the ability, the competency to provide for their own political safety and happiness, by devising and creating such forms of government as in their several communities they shall deem best and most expedient, and by altering, amending, abolishing and renewing the same, at such times, and in such modes as to them shall seem proper and necessary; of the propriety and necessity of all which proceedings they are the sole and exclusive judges. It will also appear, if the defendant be allowed to make out his case, that in a recent exigency, the people of this State so defined, and so empowered, did see fit to put in exercise this original, ultimate sovereign power, and did form and adopt a written Republican Constitution for the government of the State, under which a government was duly elected and qualified, and among the members of which the defendant accepted and exercised the office of the Chief Magistrate. To prove the existence and adoption of this constitution the votes of the people are here, and we are ready to present them to the jury. The people also are not far off, and may be called upon to authenticate their own acts, if they be drawn in question.

Your Honors say that this testimony cannot be admitted. Why not? It will unsettle the foundations of the Court! Is there any justice in this objection? The Court will remain just where it is until changed by competent authority; and

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its jurisdiction will remain the same. This objection would have seemed to carry more weight under a state of things that now no longer exists. When the Court sat under the Charter Government, it might have been said that to have that government impugned, and to admit testimony to show that it was set aside and superseded would be virtually drawing in question the existence of the Court. But this Court does not sit under the Charter Government; and it can now look back with equanimity upon a past state of things, and can, for the purpose of justice, inquire what rights were then gained and lost, and upon what principles the actors in the affairs of that period are to be justified or condemned, without questioning their own existence under the present Constitution; which they are bound to regard as a fact, without either admitting or denying other facts present or past. The constitution under which they act has been carried into effect. A government is in operation under it. A judiciary has been elected under it. And by what possible act of the Court or jury can this constitution be changed, or that part relating to the judiciary be abolished? It is not the province of courts and juries to make or unmake constitutions. That is the work of the people. If after examining the votes and the proofs of his election, and weighing the authorities, the jury should come to the conclusion that the defendant is not guilty, what conceivable effect can this opinion have upon the stability of the Court? Another jury may be of the opposite opinion. Does this place the Court back again where they were before and save their authority? The opinion of the jury expends itself in the particular case on trial. It cannot extend beyond it. It convicts or acquits no one else. It is very difficult to comprehend the force of this objection. Why should not a jury be permitted to investigate a question of political rights as well as a question relating to person or property? We wish to ask the jury whether, upon American principles, and upon a survey of all the facts, the defendant is guilty; if they should say not, they look at the facts and law of this case, and not an inch beyond it. They affirm

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and deny nothing respecting the failure of the Government under the People's Constitution. They say simply that what the defendant did he had a right to do at the time. What became of his rights, or those of the people; why and how the Government was overthrown; whether another constitution was rightfully or wrongfully set up, and whether this Court are to continue any longer in existence, are all matters with which the verdict has nothing to do.

The present Constitution is a fact which is taken for granted on all hands. It exists and is made effectual by a government operating under it. No other constitution has now any operation; and there is no other government in actual competition. But is this state of facts to decide a question of right? Because the constitution and government under it have been set aside by force, and because through the fault or misfortune of its supporters and by external interference the plan of reform in this State failed of success, is the opposite forcible success the criterion of all our rights? It may be true that the people have been defeated, or have defeated themselves, and have acquiesced, or are disposed to acquiesce in a new order of things, and yet it may be also true that they were in the right; and that those who attempted to serve them in 1842 were in the right. And this is what we now desire the opportunity to prove to a jury of the country.

The Court have taken an oath to support the Constitution under which they act; and they cannot escape from it while they continue to act, and until they are relieved by a competent authority. In what respect then can they be affected by any argument to show that the old Charter Government was two years ago rightfully superseded by that under the People's Constitution? If the Court be convinced by this argument, still they are held by the obligation to the Constitution which they have assumed; and which they have assumed without qualification, or any reference whatever to its origin, or the question whether the Charter Government was valid or not at the time this Constitution was formed.

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If the Court be not convinced, then they remain just as they were before. But whether convinced or not, they still remain a court; and the defendant, if heard, has the advantage and the justice of a full hearing, in what he deems the most vital portion of his case. In addition to this, it may be remarked that the question of the effect upon the Court of the People's Constitution, could not be a practical one, even if the Court were now sitting under the Charter Government; for, by the People's Constitution, the Judges were continued in their places until a new election should take place; and the Legislature under this Constitution made no such election; so that, in the case supposed, the Court would be as much the Court of the Constitution as of the Charter.

But beyond all this, taking for granted that the Court, by permitting the defendant's justification to go to the jury, would be permitting its own legal existence to be drawn in question, what right have the Court to regard any real or supposed consequences, or to interpose them as barriers to a full investigation of all the principles and facts of the case? The Court sit to do justice, let what will come of it; and let justice be done, though the heavens fall. What reason is there why a court should not hear all objections, in good faith, not only against the soundness and legality of their decisions, and against their jurisdiction, but against their own qualifications or legal competency or existence as Judges? Some years ago there was a controversy concerning what was called the "Perpetuation Act," relating to the holding over of a part of the Government, till a new election should be effected by the voters. Now suppose this Court not to have held over by operation of law, but by act of such a perpetuated Government, and the question had arisen whether the Court had a valid existence, and its powers were legally continued; would not Your Honors have listened to such a question? If you had entertained any serious doubts as to your legal competency, and the validity of your powers under such an act, would you not have hesitated to proceed, or have postponed your proceed-

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ing until the difficulty could be removed? Suppose that it should be now suggested that Your Honors are sitting here under an election, in which the prescriptions of the Constitution were not complied with, or without being properly qualified and without commissions, would not such a suggestion deserve and require your attention; and, if well founded, would not your action as a Court be at once arrested? This doctrine that a person accused of treason can not be permitted fully to defend himself, because, if he do, certain consequences may follow, and the jury may take a different view of the constitutional or legal question proposed from that of the Court has no limitations, and may be carried out, in their discretion, so as to work an entire denial of justice, and a defeat of the trial by jury. If one consequence is to be regarded, why not another? A learned Judge has recently observed, that "insanity and the alibi have become the Castor and Pollux of the Criminal Court," so that the guilty have often escaped improperly under these forms of defense. Why not say at once that hereafter those grounds of defense shall be no longer permitted in this Court, because they have been, and may be, employed to the defeat of public justice?

As to the proof of the People's Constitution, and the election of the Governor under it, by parole, which is deemed objectionable, the difficulty will be at once removed, by presenting a copy of this Constitution and a certificate of the election of the defendant as Governor, under the hand of the person who was Secretary of State under said Constitution, in 1842. These, Your Honors, of course will not admit; and being thus deprived of the shortest and easiest mode of reaching the Court and jury, we will proceed with parole proof, if we are permitted, in the way that foreign laws are sometimes proved; Your Honors not regarding the Constitution and election as any part of the legal record of the State. This difficulty is not of our own making.

It has been already submitted to your consideration, that this is not the same Court that before decided the question

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now in argument. This Court derives its origin from a different source; and there is a new member on the bench. The question before you may be regarded as new.

But it is said that the people of this State did not succeed in 1842. They did not permanently establish their constitution and government. And what of this? Is might the standard of right in a country of republics like this? Does the existence of a right cease with the establishment, possession and enjoyment of it? Does success create rights or confirm them? In despotic countries, where rights are only concessions from the hand of force, this doctrine of contingent rights may meet with some countenance from the state of affairs, and the long suffering patience of the people; but it has no application here. If the defendant had a right to proceed as he did, in the discharge of his appointed duties, defeat did not take it away; and he ought to be permitted to assert it in his defense against the accusation which here rests upon him. It will not do to say that this is a political question, which has been settled elsewhere. This is not an answer to the present application. One party carried the day, and the other lost it. Is it to be asserted that the party which ought to succeed is always successful, and that which does not succeed is always in the wrong? If not, then, so far as this case is concerned, the question has not been settled; and, if as Your Honor says, it be political, then political facts and arguments are appropriate to it, and more especially as addressed to a political jury.

To say that the People's Constitution was formed without authority from the government then existing, and was consequently null and void, and that therefore it would be of no benefit to the defendant to admit the proof of the facts, which show that this constitution was actually the work of the people—is begging the question. We deny the assertion that the people cannot act for themselves in the construction and change of government, without the permission of that government. The Court cannot take this for granted with our consent. We strenuously assert and stand ready to prove

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precisely the contrary, and by a weight of authority and opinion that has never yet been successfully resisted. The defendant does not ask as a favor or indulgence, but claims as the citizen of a free country, the right to show to the Court the entire validity of all the proceedings of the people in the adoption of their constitution; and the same right to exhibit the evidence of their votes and of his own election. There is no conjecture in a proof like this. The people set their hands to the work of the constitution. The prisoner offers their signatures to the jury. To refuse this inquiry of law and this examination of facts. is to cut off the right arm of his defense.

DURFEE, CH. J. We have decided this question. I am astonished that men of high intellect can take such views of it as they have. We cannot admit this testimony. In this stage of the proceedings, we cannot hear the argument to show its admissibility. After verdict we shall be disposed to entertain the question.

Mr. Dorr inquired whether this decision to hear no argument, and to reject the testimony offered, was the decision of the whole Court?

BRAYTON, J., said that it was.

Mr. Dorr. I have sought to conceal nothing in this case. I deny nothing except the falsehoods with which it has been sought to surround it. I should be the last man, I trust, to make any such denial, believing as I did, and as I now do, that I was in the right, and that my opponents were in the wrong. I have accordingly claimed here the right fully to justify myself to the jury, both in law and fact. Your Honors have come to a different conclusion, but not more honestly than I have to the opposite of it. As you refuse to permit me to justify myself, I shall now once more offer the same testimony, in a more general form than when Mr. Harris was called upon the stand, to repel the charge of treasonable intentions. Levying war is not enough. In the language of Chief Justice Marshall, the levying war must be with the intent to commit treason; and treason is not to be

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inferred from an assemblage in arms without an examination of all the circumstances and reasons that led to it.

Mr. Turner then made a third offer as follows:

"The defendant offers to prove, by the votes of the people, to be produced and verified, that a large majority of the whole resident, adult, male population of the State, being citizens of the United States, gave their votes for the adoption of the constitution, called the People's Constitution of Rhode Island, in the month of December, 1841; and also to prove that under the said constitution, the defendant was elected Governor of this State, in the month of April, 1842. And this testimony he now offers, to repel the imputation of malicious and treasonable motives and intentions, as charged in the indictment, and urged by the prosecution, in behalf of the State."

The COURT overruled the offer of the testimony, and the defendant excepted as before.

Mr. Turner then proposed to offer to the jury a copy of the People's Constitution, to show that the government provided under it was republican in its form, agreeably to the requirement of the Constitution of the United States.

The offering was overruled by the COURT, as being immaterial, irrelevant and inadmissible. Defendant excepted.

Mr. Turner then offered the Message of Governor Dorr, delivered May 5, 1842, before the General Assembly under the People's Constitution, to explain the motives and objects of the defendant.

Ruled out and exception taken by defendant.

Mr. Turner then claimed of the Court, in behalf of the defendant, the right of defendant and his Counsel to address the jury on all matters of law involved in the case, as their undoubted privilege; inasmuch as the jury, in all capital cases, are the judges both of the law and of the fact, the province of the Court being, in such cases, to lay before the jury their views of the law, and of the jury to judge of them, as they do of the testimony.

DURFEE, C. J. The Court entertain a different opinion.

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We must have the duty and responsibility of deciding upon the law.

Mr. Dorr urged upon the Court his right to be heard by the Court upon this question, and to argue the law to the jury, who did not sit in the box as ciphers, but to hear, judge and determine for themselves. If they could not do this, then, as the Court had made up their minds, the jury were to be governed accordingly, and this was but the shadow of a trial.

DURFEE, C. J. This question has been fully and ably argued in a former case before this Court, and must be considered as settled.

Mr. Dorr. Until it be overruled. The decisions of the Court are not irreversible; and as there are no published reports, from which we can learn the reasons of them, there is good cause for asking to be heard in a case of this importance.

Mr. Turner. I have authorities that will convince the Court, if I can be permitted to produce them, and if your honors will listen to them, which will satisfy your minds, that the prisoner has this right to go to the jury, in a capital case, upon the law; and that the jury have a right to judge of it, however they may be advised by the Court. I have, among the cases which I wish to bring to your attention, the impeachment of Judge Chase, of the Supreme Court of the United States, for official misconduct; one of the principle charges against whom was, that, in the trial of Fries, charged with treason, he refused to permit the counsel to argue the law to the jury. His own counsel on this occasion, admitted the right of Fries to have the law argued to the jury, but denied that he (Chase) had refused to permit it to be so argued.

HAILE, J. This State must have been extremely ignorant when they passed a law making it a special duty of this Court to instruct the jury in matters of law. This question was settled at Providence, in a license case, some time ago.

Mr. Dorr urged upon the Court his right to have the authorities read, and to go on with an argument upon them.

DURFEE, C. J. Well, go on.

STAPLES, J. I am opposed to a reargument of this question

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at the present time, in the course of a jury-trial. I am willing to hear it reargued when the Court are at leisure.

HAILE, J. Nor am I disposed to hear a reargument during the trial, when this question has once been solemnly settled. At a proper time it can be heard. But it ought not to be heard in the hurry of a jury-trial.

Mr. Dorr. It falls strangely upon the ear of a man in my position, when I hear the Judge of a Court, in a case of this kind, and involving principles of such moment, make use of an expression like this. The "hurry" of this trial. I must be hurried through to judgment then without a hearing; and after conviction I may be heard! Is the liberty or life of a man to be disposed of in this way? If there are any reasons why a conviction should not take place, why should they not be heard now? What reparation is it after conviction to hear the reasons why it was unjust? This is literally, according to a common observation, hanging a man first, and trying him afterwards.[16]

STAPLES, J. The jury are kept here under much restraint; and can they be kept here week after week, while we are hearing arguments which belong to another stage of the case?

Mr. Dorr. The jury do not complain. I think they will hear all my defense patiently.

STAPLES. J, They are men.

Mr. Dorr. I also am a man, and claim the rights of one.

Mr. Turner. We ask an opportunity to convince the Court, by the authority of the greatest Judges that have ever lived in this country—

DURFEE, C. J. The Constitution of this State settles our duty to charge the jury upon the law; and are we to sit here with our juries receiving the law from Judges of other States? The only duty of the jury is to take the law as given by this Court and to judge whether it be applicable to the facts.

[16] [Here one of the spectators remarked in an audible voice—*That is the way of this Court.* The Court ordered him removed. But he presently returned with the Sheriff, and made an apology, stating that he was in the habit of speaking out, and had not the proper command of himself. He was permitted to return to his seat.]

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Mr. Dorr. I wish to give some reasons for the position taken from high sources. Do the Court refuse to hear authority and argument?

DURFEE, C. J. The Court decide not to hear any argument upon this question.

The defendant excepted to the ruling of the COURT.

The COURT, after some consultation together, announced that they would hear an argument on the first point; which sets forth that treason can only be committed against the United States; as this was a new question, not heretofore discussed before them.

Mr. Turner said that he should be ready to argue this point in the morning; and the COURT adjourned.

May 4.

Mr. Turner and *Mr. Dorr* argued at length that treason could not be committed against a State, but only against the United States.

Mr. Turner then took up the second point, that the Algerine law, so called, which makes political offenses indictable out of the county where charged to be committed, is against common right, unconstitutional and void, and claimed to be heard upon it.

The COURT declined to hear any argument upon this point, as they had already expressed an adverse opinion upon it in a former case.

Mr. Dorr urged upon the Court the importance of this point, and earnestly contended for his right to be heard upon it. If he were wrongfully indicted here, the whole proceeding was invalid and void; and a fair trial was not a trial pursued contrary to law.

The CHIEF JUSTICE remarked that this was not the proper time to hear an argument on this point, but that it could be properly considered after verdict, should this be desired by the defendant.

STAPLES, J., remarked that this and other questions, which would now interrupt the case, would be properly heard after verdict and before sentence.

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Mr. Dorr said he despaired of being able to say anything which could change the determination of the Court, though he had expected to be heard upon this question, in this stage of the case, after having withdrawn his plea to the jurisdiction. He was now satisfied from the action of the Court that they intended to withhold from him the fair trial to which by law and justice he was entitled.

STAPLES, J. If I were in your place, Mr. Chief Justice, I would not hear such language as that from counsel, whatever the prisoner may take the liberty of saying.

Mr. Turner then took up the third point, if the defendant were properly indicted here, he could not according to law be tried here, as the Algerine act is in derogation of the right of a prisoner in the county where the offense is charged to be committed and had made no provision for a *trial* out of the county.

The *Attorney General* remarked that this and the preceding point were involved in the plea to the jurisdiction which the prisoner had withdrawn.

Mr. Dorr said, the plea was withdrawn in order to obtain a speedy trial by jury; but that he had not waived his right to raise the question in another stage of the case.

Mr. Turner referred to some authorities to show that this point respecting the jurisdiction of the Court might be raised during the trial of the case.

The COURT refused to hear any argument until after verdict, as they had considered and decided this point in a former case.

Mr. Bosworth for the State admitted that treason could only be committed against the sovereign power of a State, and also that the sovereign power in a State resides in the people as organized and defined by law; and it was therefore unnecessary to consider or reply to the long list of authorities which the defendant and his counsel had introduced. He must however deny in toto the doctrine of defendant's counsel that the whole People of the United States are sovereign in this State. The States were as sovereign as ever within

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their own jurisdiction, although they had given up certain powers to the General Government, which was also a sovereign, but not over the States.

What reason is there why acts which amount to treason should not be punished as such by a State? Without this power to punish, a State cannot protect, defend or preserve itself.

Treason may as well be committed against a State as against the United States; and the power of punishing it has not been surrendered to the United States. The Constitution defines treason against the United States only; and it also provides that a person charged in any State with treason, etc., and who flees from the same into another, shall be delivered up on demand of the Executive, to the State having jurisdiction of the crime; thus recognizing the offense of treason against a State. Besides this, in many of the State Constitutions, and in many more of the State laws, treason is defined and punished as a crime against a State, as well as against the United States, when it takes that direction. Writers on law also so regard it; and in proof of this he read a number of authorities.

The *Attorney General* offered to put into the case the Proclamation of Gen. Jackson against South Carolina, at the period of a threatened nullification. The COURT said it was hardly an authority. *Mr. Dorr* did not object, but said, if it were admitted, he should offer other messages and documents of that distinguished individual.

The *Attorney General* did not put it in.

May 6.

Mr. Dorr spoke at considerable length at the close of the question, on his side, respecting treason as an offense against the United States, and not against a State.

Mr Turner. Gentlemen of the Jury:

You will recollect that in the first remarks that I made, in opening the defense of the prisoner at the bar, I said that I proposed to rest that defense on *five points* which were then stated to you.

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"1st. That in this country treason is an offense against the United States only, and cannot be committed against an individual State."

It was my purpose, and we deem it the *right* of the prisoner, to have argued this, as well as the other questions of the law, directly to you, as the judges in all capital trials, as well of the law as of the fact; but we were overruled by the Court; and permitted only to argue it to the Court, in your hearing. What their decision may be, will be made known to you, in their general charge; if it sustains the ground we have taken, then you can only acquit the prisoner, because the State Courts can have no jurisdiction over the offense laid in the indictment.

Upon the second point of the proposed defense, viz: "That the fourth section of the Act of Rhode Island, of March, 1842, entitled 'An act relating to offenses against the sovereign power of the State,' is unconstitutional and void, as destructive of the common law right of trial by jury, which was a fundamental part of the English Constitution at the Declaration of Independence, and has ever since been a fundamental law in Rhode Island." The Court would not suffer us to use argument to you, as it was a question of law; nor would they, for reasons which you heard, permit us to argue it to them, on the ground that it was a closed question, decided by them, after solemn argument, in another case.

A similar decision has been also made on the third point, "That that act, if constitutional, gave this Court no jurisdiction to try this indictment in the county of Newport, all the overt acts being therein charged as committed in the county of Providence." Because being also a matter of law, to be argued to the Court, they will not interrupt the progress of the trial to hear it reargued at the present time.

Upon the fourth point. "That the defendant acted justifiably as Governor of the State, under a valid constitution, rightfully adopted, which he was sworn to support," which was the right arm of our defense, and which if made good by the evidence, all which we had at command, must have

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acquited the prisoner; the Court, by ruling out that evidence as irrelevant and inadmissible, have very much abbreviated the labors of us both; and having deprived us of all the technical and purely legal grounds of defense, leave us none except the first and the last.—"That the evidence does not support the charge of treasonable and criminal intent in the defendant." On this point alone has all the testimony as well for the government as for the defendant been introduced.

It has at no time constituted any part of the prisoner's plan of defense against this indictment, to disavow or deny any act by him done; nor would he allow us to do for him, that which he would not do himself. All the prominent and leading facts of the case he avows and justifies; and to save himself from misconstructions and false imputations, he has himself presented evidence before you for the purpose of removing false impressions; disabusing the minds of the jury and the public; and of placing himself, his character and his cause before you in a right point of view. With the same view also it is, that I will ask your consideration of some parts of the testmony in the case. If the defendant in what he has done himself, or commanded others to do, has not acted justifiably and from a high sense of right and duty, he must suffer the consequences of his acts; but if the whole evidence and circumstances go to show that he has throughout acted justifiably, without traitorous intent, and believing himself to be right, with every reason so to believe, then you will give a verdict in his favor accordingly.

The counsel on behalf of the State, have been permitted to introduce testimony before you to show a criminal intent on the part of the prisoner as far back as the third of May, the time when the legislature first met under the People's Constitution at Providence, for the purpose of organizing the State government according to the provisions of that Constitution; it is proper therefore for me to carry your attention to the testimony, back to the same period.

It is in evidence, that on that occasion, Gov. Dorr and the

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members elect of the Legislature, passed from the Hoyle Tavern, on Christian Hill, through several of the streets of the city, of Providence, to a building called the Foundry, where they were to convene, attended by a numerous procession of citizens: and an attempt was made by the witness Burroughs to give the affair something of a warlike character: but the testimony of Salisbury and Carter place it in its true light—it was a civic procession, with a military escort, in honor of the occasion and to manifest respect in the usual way; there was nothing extraordinary or unusual about it—it was just like that which in a few days will in all probability attend the Assembly here, at the organization of the State government for the ensuing political year, according to a long established custom. And all the testimony agrees that it was conducted in the most orderly manner. The evidence of the witnesses as to the transaction and proceedings at the Foundry fully establishes the facts, that the votes given in the election were duly returned, committed, counted and reported, that Mr. Dorr with others was declared duly elected, that he took an oath of office, that proclamation of his election was made, and that all was done for the full and complete organization of the government, required by the constitution, with the formalities and ceremonies usual on such occasions: the organization was perfected, and all, the Governor and the two Houses, acted in every respect like other legislative bodies, and as though they had a perfect right so to act: Governor Dorr delivered an address of the usual character—laws were enacted, and others repealed or amended—resolutions were passed—officers, both civil and military, were elected under the new constitution and according to the ancient usages of the State the usual committees were appointed to attend to the transfer of the public property and records from the old to the new officers; in fact, every thing that a new Legislature could rightfully do, was done in a legislative and proper manner. The prisoner was called and treated as the Governor of the State; and having received a greater majority than had ever before

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been given to any one for the same office, he had every reason to believe, and did truly believe, that he was the constitutional legal Governor, elected by the free votes of the free people, of a free State. There can then be no presumption drawn from these facts, that he possessed at that time the traitorous intent charged in the indictment. If he was vested with rightful authority as Governor, then he acted rightfully in attempting to enforce that authority. His intention to take possession of the public property for the uses of the State, was fully warranted by the provisions of the constitution under which he acted, and which, as has been shown, he was sworn to support; as well as by a resolution passed by the Foundry Legislature at that time.

Shortly after the adjournment of the Foundry Legislature, it is in evidence that the prisoner left the State—and it has been charged by the prosecution that he *escaped* from the State to avoid apprehension, to excite sympathy and to solicit aid in New York, Philadelphia and elsewhere, in furtherance of treasonable purposes; and by the introduction of *foreign* mercenaries, to subvert and overthrow the charter government of the State by force of arms. Upon this point, gentlemen, the evidence is, that in consequence of indications received, that the power and force of the United States would be put in requisition to sustain the charter government, and to defeat the operation of the People's Constitution, at a large or numerous meeting of the Suffrage Association of the City of Providence, a resolution passed unanimously, requesting the prisoner to go to Washington and disabuse the President of the gross misrepresentations under which he was supposed to act, and to explain there and elsewhere the true nature and points of the question at issue between the two parties who were contending for supremacy in this State. The prisoner in a few days left the State and went to Washington in compliance with the request before mentioned, and on his return, whilst in New York, he addressed a very great assemblage at Tammany Hall, explanatory of the situation of affairs in Rhode Island. The coun-

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sel for the State have said it was an harangue soliciting aid in men and money to carry on a war against his fellow-citizens in this State. But it is in evidence by Burrington Anthony, Esq., who was present and heard the address, that Governor Dorr in express terms *"repudiated the idea"* of using any force from without the State, except in the contingency of the troops of the United States being brought to support the charter government, in which case he should expect and gladly receive the aid and assistance of the other States.

Pursuing the chronological order of events the evidence proves, that on the sixteenth day of May, Mr. Dorr arrived in Rhode Island by the Stonington train of cars, attended by a few friends who had met him for that purpose at Stonington; he was received at the depot in Providence by a large concourse of his fellow citizens and friends; the whole number assembled from curiosity or sentiment of respect, was unquestionably very great, although no witness has attempted to fix the number; a procession, however, was formed to escort him to the place of his temporary residence, at Mr. Anthony's, on Federal Hill, in that city; this procession, according to the testimony of the witnesses, was composed of from twelve hundred to eighteen hundred men—in all probability, considering the population of the city, they might have amounted to fifteen hundred; a portion of whom, say three hundred or four hundred, were under arms, and as is usual in Rhode Island, and I believe everywhere, did escort duty on that occasion. There was an attempt on the part of the government, but wholly without success, to prove that on this occasion the military portion of the procession was furnished with *ball cartridges,* and thereby to give it a warlike, hostile and treasonable character; but the whole evidence on this point, when taken together, shows that like the one before mentioned, its sole purpose was *respect* and *honor* to the Chief Magistrate, and not *war* upon the citizens or *treason* to the State.

When the procession arrived on Federal Hill, it is in evi-

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dence that the prisoner, from the carriage in which he rode, surrounded first by the military, next by the unarmed procession, and last by the spectators at large, except that a very few personal friends were surrounding the barouche within the military lines,—that the prisoner, I say, addressed the assemblage at considerable length giving in detail a report of his proceedings during his visit to Washington, his reception in Philadelphia, New York and elsewhere.

The address delivered by Mr. Dorr on the occasion has been the source of much misrepresentation, not entirely confined to irresponsible newspaper publications, but widely circulated throughout the State and the country. He is represented as having while abroad excited sympathy, and solicited the aid of men and money to carry into effect the government under the People's Constitution, against that portion of the citizens of Rhode Island which adhered to the charter government; and through the instrumentality of such means to effect his purpose by force of arms and civil war. The opening counsel for the government took the same ground, and the effort on their part has been made to support such representations by proof. The falsity of these statements, gentlemen, is clearly established by the testimony of the government witnesses. On this point the testimony of Mr. Pearce, who was in New York, Philadelphia and Washington at the same time with Mr. Dorr, and who was also one of the commissioners sent to communicate with President Tyler on the subject of Rhode Island affairs, is clear and explicit. "The prisoner repudiated the idea of bringing force from other States, unless in the event of the interference of the General Government." Mr. Burrington Anthony, who heard Mr. Dorr's address delivered at Tammany Hall, in the City of New York, the tenor of which Mr. Dorr was recapitulating at Federal Hill, uses the language: "He repudiated the idea of bringing forces from without the State, unless to repel the force of the United States." These two witnesses, both summoned by the government, testify to the expressions of the prisoner, made

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before and at the time of the Tammany Hall address; while the only testimony of a contrary character is that of Col. W. P. Blodget and Edward H. Hazard, to which, as it is relied on by the government, I will ask your attention for a moment. Blodget says, "The prisoner said he had been accused of having procured the aid of five hundred men from abroad, but the charge was false. He had been promised the aid of 5000 men, and could have them at any time. He drew his sword and said it 'had been dipped in blood, and rather than yield the rights of the people of Rhode Island, it should be buried in gore to its hilt.' I cannot recollect his other expressions used at that time." "I heard no reference to the General Government." Mr. Hazard's testimony is to the same effect, and in nearly the same words; he, however, added, "I am not positive that he made any explanation;" and on cross-examination, he said, "I have no recollection that the prisoner said the aid would be furnished him in the event of the interference of the General Government—he might have so qualified it." These are the only witnesses sworn in behalf of the State, who have testified to this point, except Orson Moffatt, whose testimony is quite vague and indefinite. On the other hand, gentlemen, and in confirmation of the statements sworn to by Messrs. Pearce and Anthony, we have the testimony of Col. B. M. Darling, Col. S. Wales, Mr. Anthony and Mr. N. Porter; Col. Darling sat in the barouche, in which Mr. Dorr was standing at the time, the other three witnesses stood around it, within the space occupied by the armed escort; whilst by their own showing, Blodget and Hazard, as mere spectators or rather hearers, were situated entirely without the circle formed by fifteen or eighteen hundred men, who had composed the procession; they must, therefore, have labored under great disadvantages in hearing accurately and may have been mistaken; I think and I fancy you will think, they *must* have been mistaken. Because, Gentlemen of the Jury, you will recollect what was sworn to by Mr. James Thurber, Jr., in relation to Col. Blodget, who smarting under a conviction of kidnapping,

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at a Court in Dedham, come up here to procure the conviction of the prisoner, if he could; you can judge then under what feelings he must have testified on this trial; and you could not but notice the manner of Mr. Hazard, his apparent willingness to put into this case much that as a lawyer himself he must have been sensible was not legal testimony. What had the foolish fears of Jo. Sweet to do with the crime of Treason, charged against the prisoner, by this indictment. What a cutler said about Parmenter buying a pistol. Or the floods of tears that deluged Weybosset street. And who on another judicial trial before him is reported to have said that he "did not care a d—n for the letter of the law! !" The evidence is with you, and will decide whether in any degree, the expressions of the prisoner, on that occasion support the allegation of criminal and traitorous intent charged in the indictment. It is in evidence that when speaking of the apprehended interference of the President with United States troops, in favor of the charter government, Mr. Dorr, represented such to be the state of public feeling abroad, that in that event he should call on other States for aid, in the cause of the people against the President, and such had been the assurance given him, that he could rely, not on five hundred only in such event, but on five thousand or more if he wanted them; but as between the two parties in this State, the Suffrage party and the Charter party, the former, being the large majority, needed no aid; and if they did not choose to maintain their own rights, they were unfit to enjoy them. But if the President should employ United States troops to suppress the People's Constitution, and the government under it, other States would be then equally interested, and would be called on for aid:—In such case, the question would be entirely changed, because if the President could in this summary way decide on the validity of the new Constitution of Rhode Island, he might do the same of other States also. How far the President, by the course he did pursue, by the aid he gave and promised—and by ordering at that time United States troops, of a certain description

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into Rhode Island succeeded in the overthrow of the People's Constitution, is not a fit subject of inquiry here, it is however a subject now undergoing inquiry before a committee of Congress.

But, gentlemen, further use has been made of the proceedings on the sixteenth day of May, and in order to give plausibility to the charge of long premeditated treasonable intents on the part of the prisoner, the same witnesses have sought to represent him, in manner and action, as a desperado, and a fiend; a man bent on destruction, reckless of civil and social duties—wantonly regardless of human life; and a slave to the worst sort of mad ambition; they have commented on his fiendish looks and appearance, whilst making his address; and have spoken of the cheers with which some passages of it were received by the audience, as the yells of fiends from the infernal regions; although I lived through the Log Cabin and Hard Cider campaign, I have little knowledge of such things; these gentlemen, however, seem well acquainted with the appearance and yells of fiends; but I shall leave you to compare their testimony with that of Darling, Wales and Porter, who describe the day as dusty, the wind very fresh, and Mr. Dorr as having been riding bare headed, in an open barouche, through nearly the whole City of Providence; and you will then say, whether the facts in proof before you, will warrant you in drawing the same conclusion that they seem to have drawn from the prisoner's appearance.

It next appears in evidence, that, on the afternoon of the next day, the seventeenth of May, the prisoner in broad and open day sent a small detachment of men, from Federal Hill to take possession of the cannon of the United Train of Artillery, in the name and for the use of the State, the result of a deliberation previously had by Governor Dorr, and a council of his officers; it has been charged by the prosecution that these guns were stolen, and it constitutes one of the many calumnies which have been heaped upon the head of my distinguished client. If the prisoner was Governor of

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the State, he not only had a right to order possession of these guns to be taken, if they belonged to the State; but he was bound to do so, by his oath of office, as well as by a special resolve of the Foundry Legislature.

There was, however, nothing secret, felonious or like stealth, to mark the transaction, notwithstanding Col. Blodget says they were stolen. In the first place the guns did not belong to the State, but to the company; they were taken as appears from the testimony of Captain Reed and Lieutenant Studley by an arrangement made with the prisoner, by consent of all the members of the company; the key was passed to them to open the door for the purpose; and as has been stated all was done in open daylight, in the very heart of the City of Providence, without any attempt at privacy or concealment. Upon such evidence can you believe that these guns were feloniously taken; that the prisoner, to accomplish any object, however important in his estimation, could commit a felony of that description. You do not believe it, gentlemen, nor does any one who has ever known him. The foul and slanderous charge has been made, and reiterated against him, solely for the purpose of attaching a stigma to the purity of his motives, and the honorable consistency of his character.

It has also further appeared in evidence that at the council of officers mentioned, it was determined that on the same night, of the seventeenth of May, 1842, an attack should be made on the State Arsenal, situated not far from Federal Hill, where were kept in deposit the arms belonging to the State, with a view to obtain possession of them, and thereby prevent their being turned by the charter government against that established under the People's Constitution, and secure the use of them for its support, against any unwarranted interference on the part of the President, in the pending difficulties. It was known that aid and support had been pledged from that quarter, to Governor King; and it was also known, as has been shown by the evidence, that the Arsenal was manned (to what extent was uncertain), and un-

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der the command of a brave officer, Col. Leonard Blodget, who has been examined before you as a witness for the government (you are in no danger, I think, of mistaking him for *the other* Col. Blodget), with a view to the contemplated attack, the cannon mentioned had been procured, and other necessary arrangements made or ordered by the prisoner. It also appears by the testimony of Col. Carter, a witness summoned on the part of the State, that when it was understood that Governor Dorr, intended to conduct the attack in person, he (Carter) and a number of the officers present endeavored to disuade him from so doing, as unnecessarily exposing the person of the Commander-in-Chief; to all which the prisoner —so liberally slandered by cowards—made this pithy reply —"That he had often publicly stated at the Town House, that when danger should happen he wished to be found anywhere but in the rear; that he should be as good as his word, and would not send others where he was not willing to go himself."

You will bear in mind also, gentlemen, as relating to this period of time, the testimony of Walter S. Burges, Esq., by which it appears that the prisoner on the evening of that day previous to the advance upon the Arsenal had an interview with his confidential friend, the witness, and with him made all the necessary arrangements of his business concerns, private, professional and fiduciary, for the worst and most fatal event. It seems the prisoner at that time held several important trusts, yet on the very eve of a desperate adventure, as though to give the lie to all the floating calumnies against him, he could deliberately arrange and securely guard all the diversified trusts confided to him, whether of a pecuniary or public nature; exemplifying by that act, the high and honorable character of his own mind.

To return however to the attack on the Arsenal. The number of men engaged in that attack has been greatly exaggerated, and is differently estimated by the witnesses who have been called to the stand, as well by the prisoner, as by the government. On the part of the government witnesses,

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they are variously estimated at from three hundred to five hundred. Henry S. Hazard says four hundred or five hundred. George O. Bourne says four hundred or five hundred, and a large body unarmed; on the other hand, we have the testimony of Col. Carter, Darling and Aldrich, all of whom were present taking part in the affair, and as you will observe had much better means of knowing the actual number, who estimate them at from two hundred to two hundred and fifty. None go beyond that number, and Colonel Carter swears that before they left Federal Hill he counted them by sections and found their number to be two hundred and thirty-four. So that it seems certain that it could not have exceeded two hundred and fifty men. It had also appeared in evidence before you that the night of this attack could not have been selected on account of its darkness, as the first part of it was moonlight, and that after the moon set a heavy dense fog came on, settled on the earth and enveloped everything in its folds. So noticeable was it that Col. Carter, in speaking of it said, "It seemed like an interposition of Divine Providence." The witnesses agree that the force under the command of the prisoner on arriving near the Arsenal took their position in its front, within musket shot of its walls, the two pieces of artillery on a line, at some distance asunder, levelled at or flanking the door or gateway; and a small party of infantry, lying in ambush, on the ground at the left in advance and quite near the gate, so as to rush in whenever that should be opened to return the fire of the assailants. These dispositions having been made, the prisoner directed the usual and proper formalities in attacking a garrison to be observed: An officer with a flag of truce was sent to demand a surrender of the Arsenal, which was refused, nothing then remained but to take it by force of arms, or for the prisoner to suffer the People's Constitution and the government organized under it to fall to the ground; so far as it depended on him, he resolved on the former alternative. The plan was to make a simultaneous attack with the artillery for the purpose of forcing the doors of the Arsenal, or cause the defenders to throw them open, to return the fire, and then

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for the flanking party lying in ambush, as has been stated, to rush in at once, and overpower the men, who were in possession of the lower floor of the Arsenal, the number of whom must necessarily be very limited; when all those in the upper part of the building could in the end do nothing but surrender. It was however ascertained, in consequence of the density of the fog and darkness of the night, that a change of position of the two pieces of artillery was desirable, and they were severally removed nearer each other, and more directly in front of the Arsenal gates, remaining, according to the testimony, about twenty feet apart, or as near as they could be conveniently worked. In the meantime, it appears that portions of men, especially after the return of the flag of truce, availing themselves of the surrounding obscurity, began to retire, some leaving the field entirely, and others seeking shelter behind piles of wood that were somewhere near. Even the gallant Col. Despeau, according to Carter's testimony, who commanded a Volunteer Company of ninety men, about two-fifths of the whole force, then before the Arsenal, awakes suddenly to the idea *that there was danger there,* and marches his men from the field! ! Col. Wheeler, who had been entrusted by the prisoner with immediate command of the attack, who had himself sent to demand the surrender of the Arsenal, and who probably thought *"discretion the better part of valor,"* before Col. Carter could look to the further end of the line and back, *"had gone off in the fog."* Finding that the commanding Col. Wheeler and Col. Despeau with his command had left the field covered by the fog, if not with laurels, parties of other men followed and passed Carter, who had gone to persuade Despeau to return; so that when the moment arrived for the firing to commence, the force of the prisoner had dwindled down from two hundred and fifty to from forty to fifty men only; and the command of them was by the prisoner conferred on Col. Carter.

When the order was given to fire, the pieces in succession flashed only; and being reprimed flashed again, both pieces thus proving unserviceable, at least for the time being. In

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consequence of these misadventures, and the delays occasioned by them, the time for successful action had passed. It was now after daylight—the force remaining was totally inadequate—the men hungry and tired—the fog liable to disperse in a moment, and the City troops might place them between two fires, whenever they choose to do so. Under this accumulation of untoward circumstances, the prisoner felt himself compelled to order a retreat, which was accordingly executed, with only about fifty men; Col. Carter, with a part of them, carrying off one of the guns, and the prisoner, with the remaining men, assisted in taking off the last; reaching Anthony's, on Federal Hill, at about sunrise on the morning of the eighteenth.

Such, gentlemen, is the history of the attack on the Arsenal, furnished by the evidence in the cause; you will however recollect, gentlemen, that you were told by the opening counsel for the State, that "the prisoner sought the bad eminence of distinction in crime," "and descended from the *dignity* of a *rebel commander,* and condescended with his own hand to apply the match to light the torch of civil war." The uncalled for and unwarranted coarseness of these epithets, will be passed over without notice; the language was used as applying to the conduct of the prisoner on this occasion, and with much of a similar character, was doubtless intended to create in your minds the most unfavorable prepossessions toward him, and his general character and conduct. The prisoner is charged with having taken in his own hand a torch, and touched off one of the guns at the Arsenal himself; had such been the case, in my opinion, it would have been neither criminal nor derogatory for the prisoner, under the circumstances to have done so; the counsel for the State have thought otherwise, and have introduced a witness, Orson Moffatt, to prove it. This witness swears that the order to fire was given by the prisoner, whilst he (witness) "was in the midst of his lines," and "near enough to have touched him easily," when the gun flashed, "heard Mr. Dorr call for the torch."—"saw him holding the torch," and "saw the other gun flash." Yet

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gentlemen, this witness, who swore that he had once or twice that night made report to Col. Blodget at the Arsenal of movements on the outside; and also, that he knew the prisoner perfectly, upon his cross-examination, could not name another person upon the ground—could not tell whether the prisoner wore a hat or cap—a belt or not—nor describe the position of either of the guns. You will recollect, gentlemen, that these guns were about twenty feet apart, and within musket shot of the Arsenal, which was thoroughly defended by artillery and infantry both; and in case of an assault, the doors were to be thrown open, and five six pounders were to be run out and fired—that the witness, if his statements be true, which by the way are far from confirmed by that of Gen. (then Col.) Blodget, must have been aware of these facts; yet this witness tells you that he stood near enough to Mr. Dorr to touch him when he flashed the gun, at a moment, too, when he might instantly expect to receive the whole deadly fire from the infantry and artillery of the Arsenal, without any possible motive other than mere curiosity. Now, gentlemen, can you believe one word of the testimony of this Mr. Moffat? I do not, and upon the testimony taken by itself, no man but a mad man or a fool, could or would needlessly put himself in such a situation; it is not in human nature to suppose it possible, and I trust that you will not give to his testimony a particle of weight, the more especially, as the testmony of several other witnesses proves it to be groundless. Capt. Wade stood within two feet of Mr. Dorr when the first gun was flashed, and swears that he did not know the man, but that it was not Mr. Dorr. Col. Carter, then in command, swears that he himself gave the several orders to fire; that Mr. Dorr stood close by him, all the time, between and a little in the rear of the guns; that a man named Andrews flashed one, and a man named Hathaway the other, that Governor Dorr had no torch or port-fire in his hand that night, and that Moffat's testimony, which he had heard, was false. Thaddeus Simmons was one of Governor Dorr's body-guard, was near his person all night, and swears posi-

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tively that Mr. Dorr did not flash the gun. The statements of these witnesses are confirmed by the negative testimony of several others, all of whom would be more likely to know the facts than Mr. Orson Moffat.

At about 7 o'clock on the morning of the eighteenth, after the return to Anthony's house, on Federal Hill, it was ascertained that twenty-seven men only remained under arms, attached to the cause, and the fortunes of the prisoner. In the meantime the guns had been examined, bored out, and reloaded; no plugs were in them, according to the testimony of Hathaway, who bored them out with a gimlet, as had been reported and sworn to by Hiram Chappel. His testimony on this point, however, was sufficiently contradicted by that of Col. Dispeau; upon the examination it appeared that the powder was bad; that in consequence of the dampness of the night, it had first dissolved, then hardened, and would not ignite.

By this time, the charter troops of the City of Providence, reinforced by those from Newport, Bristol and Warren, were in motion. The concerted signal, a gun on Federal Hill, had been fired for a rally of the supporters of the People's Government, but instead of being answered to by men in arms, as had been pledged to Governor Dorr, he received a written communication from some of his friends in the city that he could not expect such support under present circumstances; those circumstances were the strength of the charter military force then embodied in the city—the aid promised them of United States troops from Fort Adams, and the apprehensions entertained by many of the legal consequences of coming in conflict with the General Government. Under all these circumstances, according to the proof in the cause the prisoner urged by the advice of the few gallant officers, who still adhered to him, and his hopelessness of maintaining a position on Federal Hill, issued orders for the few remaining men to retire and disband themselves, and withdrew himself beyond the lines of the State; assuring his officers, however, at the same time, that whenever the people were

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ready to support their own government in the great cause in which they were engaged, he should be prepared to return and join them. And for this act of prudence and necessity, also, had the prisoner been branded as a coward!

From this period, up to about the twentieth of June following, the prisoner appears to have remained out of the State; it is in proof, however, that in the north and northwest part of the County of Providence a determination still existed to sustain and establish the government under Mr. Dorr, and as the People's Legislature had adjourned to meet again on the then coming Fourth of July, a collection of military officers and partisans met at Woonsocket; it was resolved to purchase a suitable lot of land for an encampment and put themselves in a situation to sustain, and if need be, to defend the Legislature during its proposed session. This was as early as about the twelfth of June. A committee was appointed and Acote's Hill, contiguous to the village of Chepatchet, in the town of Glocester, about sixteen miles from the City of Providence, was the spot selected. It appears to have been understood, gentlemen, that the People's Legislature would convene and sit in that village. According to the evidence, companies and parties of armed men began to assemble there on the twenty-second of June. Governor Dorr was known then to be at Killingly in the State of Connecticut. It further appears that a written communication was made to him by some of the military officers, urging his immediate return, to assume command; and giving assurance that fifteen hundred men were detailed from different parts of the State to support him:—such at least is the testimony of Col. Carter—six hundred of whom were to be furnished from the City of Providence alone.

Upon such representations and assurances, thus urged, the prisoner, escorted by a very few officers who had gone from Chepachet to Killingly for the purpose, arrived at the former place on the morning of Saturday, June 25—the day on which the overt act of levying war in the third count of

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the indictment is laid. Upon his arrival, instead of the fortified camp and a garrison of fifteen hundred men, which he had a right to expect, he found in arms about two hundred men; a camp on two sides partially defended by very slight embankments or breastworks, composed of brush and earth, and five mounted and one unmounted old pieces of artillery of different calibres and descriptions. Evidence has been introduced on the part of the prosecution, however, (the Court overruling our objection, that it was irrelevant to either count in the indictment), showing that several days before Mr. Dorr came into the State, and before he was in any way connected with the military movements of Chepatchet, in consequence of a rumor that the charter troops were about to attack the place, and arrest Lieutenant Governor Eddy, who resided in Chepachet, Charles J. Shelley, an emissary from Providence, had been on the twenty-second taken as a spy, and detained as such until the next day, when he had been discharged, two days before Mr. Dorr arrived there; which, as I have before said, was on the twenty-fifth. This evidence was thrown in as matter of aggravation, although it is manifest that the prisoner could in no way be legally implicated by it, nor held responsible for it.

It has appeared in evidence that Mr. Richard Knight was also made a prisoner on the evening of the twenty-fifth June, the day of Mr. Dorr's arrival at Chepachet; and I call your attention to this testimony, with a view of noticing some of his statements, which are calculated to create false impressions on your minds and intended to confirm newspaper assertions. He has testified that on his entrance into the village he was fired on by one of two men who were running down the hill as if with design to head him off. Upon this point we have the testimony of Mr. Dorr's Adjutant General, William H. Potter, who was on the ground, and swears that he never heard of it, and that if such had occurred, *he must have known it.* Mr. Knight also swore that at the same time he saw three black men on the hill,

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one of whom had a gun also. Gentlemen, you all know how often during the period of these troubles it had been asserted that Governor Dorr's forces at Chepachet were the off-scouring of the land, black, white and gray; and this testimony is given by Mr. Knight, who had been a prisoner there to give color to such reports, and to convey the idea that blacks constituted a part of the soldiery and were on the hill serving as troops, that a prejudice might be raised in your minds against the prisoner. But what is the true state of the case, as shown by the whole evidence on the point? That there were but three blacks connected in any way with the troops there, and that they were merely waiters or servants, attached to the Commissary Department of the camp, as sworn to by B. M. Slade, who acted at the head of that department.

The evidence produced relative to the gathering at Acote's Hill, from the time when the prisoner arrived there, and it is with that only we have to do, shows that it was throughout conducted in a most orderly and proper manner; orders were immediately issued by him that all private rights and private property should be respected; and three instances only of the violation of those orders occurred; they were insignificant in themselves, but promptly repaired by the prisoner's orders, and in one instance he made pecuniary reparation out of his own pocket. As one means for the preservation of order, he caused the bar of the tavern of Gen. Sprague to be shut, so that no liquor should be sold, and none was furnished to the men. It appears in evidence, that on the afternoon of that day, the twenty-fifth, the Governor examined the works of defense on the hill, the munitions of war there collected; reviewed and ascertained the number of effective men assembled, and made a speech to them. Very exaggerated and extravagant accounts of the number of those men have been made and circulated by those opposed to Governor Dorr and the cause he was engaged in, as an additional pretext for charging him with poltroonry and cowardice in abandoning the post as he

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did, on the evening of the twenty-seventh. But it appears by the evidence of Potter, Comstock and Carter, confirmed by others, that the force of men under arms was fluctuating—constantly coming and going. On Saturday, the twenty-fifth, there were two hundred and twenty-five; on Sunday, the twenty-sixth, somewhat more; on Monday, the witnesses agree that they did not exceed two hundred and fifty in all. The proclamation which had been issued by the prisoner, calling for the men promised before he came into the State, and on the military of the State generally, was not responded to; of those present about two-thirds were sufficiently armed, the residue were miserably equipped.

Some expression used by the prisoner in the speech delivered to the troops, has been seized on, and tortured into fancied evidence of traitorous malignity, derogatory to the character and to the purity of the motives of the prisoner, and two witnesses, Willis Bowen and Caleb E. Tucker, have been called on to establish the fact and prove the expression, the attempt, however, signally failed of success, and was disproved by a number of witnesses called for the prisoner.

On Sunday, the twenty-sixth, the interview took place at Gen. Sprague's, then Governor Door's headquarters, between the prisoner and Mr. D. J. Pearce, the particulars of which have been fully detailed to you by Mr. P. on the stand, giving expressions and stating the views, objects and intentions of the prisoner; and I leave you to judge, gentlemen, whether the testimony does not negative in the clearest and strongest terms the corrupt and traitorous intent with which the prisoner by the indictment is charged.

You will bear in mind, also, gentlemen, some important facts sworn by the witness, as having been stated to Governor Dorr in that interview—that he had seen twenty-three hundred charter troops pass by his boarding house in Providence the day before; that five hundred or six hundred in addition were then expected from the Counties of Kent and Washington; that a requisition had been made on the President, which would without doubt be favorably answered on

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Tuesday morning; that Col. Bankhead was in Providence, awaiting the arrival of orders; and that many of his warmest political friends and officers under the People's Constitution had not only resigned their offices, but he had seen some of them the day before in the ranks of the charter troops.

Some stress has been laid on the attack, which it is supposed was intended on the advanced post of the government troops stationed at Greenville, but it does not appear by any evidence that such an attack was ever contemplated by the prisoner. His object throughout appears to have been, and was avowed to be, to protect the People's Legislature, which was to be convened at Chepachet on the Fourth of July, and it was clearly intended to adopt, as far as practicable, every measure necessary for that purpose, and to sustain and defend the People's Constitution and government, and nothing more; the purpose being *defense* not *offense*. The private opinion of Col. Carter, respecting the taking possession of the Colleges in Providence, converting them into barracks, and preparing a furnace for heating shot, is not material to the issue you are trying, and in fact has nothing to do with the present indictment. The prisoner had no knowledge of and is not implicated in such intention; nor is there the slightest proof or ground for supposing that he ever contemplated any such movement.

Early on Monday, June 25, the prisoner received intelligence that the charter troops were at Greenville and Scituate; in the meantime his friends in the City of Providence were deserting him and the cause; fourteen members of the People's General Assembly had resigned their office at one time; no additional force coming to his aid and support; the charter and government force then, according to the information of Mr. Pearce, amounting probably to three thousand men, within six or eight miles of him; his own position unskillfully selected by others; other heights in the vicinity commanding his slight fort; having no extensive or adequate Commissary Department; no ammunition sufficient for an action of more than fifteen or twenty minutes' duration; his military chest

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containing only $70, raised among the officers by voluntary contribution; — under these pressing circumstances the prisoner deemed it his duty to call a council of war, and disclose the true situation in which they were placed. A council was accordingly called, and held at Gen. Sprague's, his headquarters, All these facts were fully laid open to his officers, and deliberately discussed. The final result of their deliberations was a resolution to disband forces, forthwith, as a measure dictated by the severest necessity. The order for this purpose was issued at about four o'clock the same afternoon, sent to the Hill by Gen. D'Wolf, accompanied by Col. Comstock, and was then and there duly read to the soldiery; upon which the men immediately separated, and as expressed by Col. Comstock, "dispersed as is usual after dismission," and as stated by Col. Carter, "without any haste or disorder." It appears also by the evidence of Gen. Sprague and Col. Carter, that Governor Dorr himself remained in the village, at Sprague's, until about sunset, which, at that season, would be about half past seven o'clock; when accompanied by Col. Carter and a driver, he went to Thompson, Conn., passing in the route several parties of the retiring men. And yet, gentlemen, Governor Dorr has often been charged with precipitately running away from his men at Chepachet.

It is also in evidence, that on the same day, after the order for disbandment had been issued by the prisoner, he enclosed a copy of it for publication in the party newspaper in a letter to his friend, Mr. Burges. It will be recollected that the prisoner's headquarters were in Chepachet, sixteen miles from Providence—that one body of the charter troops were at Greenville, on the direct road, and another body in Scituate, on the south road; so that the messenger, Mr. Eddy, was intercepted and probably somewhat delayed; yet Mr. Burges states that he received the communication at about dark, the same evening, while he was reading a newspaper by the remains of daylight—that he read the letter in the presence of the two charter officers who brought it to

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him, and, though not by the request of Governor Dorr, immediately submitted both the letter and the copy of the order for disbanding to Gen. McNeill, and to the charter Governor and Council. The next day at about eight o'clock in the morning, their troops took possession of the evacuated fort; and, I had almost said, sacked the village of Chepachet. While the place was in possession of the forces of the prisoner, the rights of person and property were held sacred, with the slight infringements before explained; and when they left, they left it in peaceful security. What the condition of the village and its inhabitants was when the charter troops abandoned it, I am not permitted by the Court to prove or state. And such was the victory of the charter troops at Acote's Hill, and the termination of the Chepachet war—*Entering an entrenchment thirteen hours after it was known to be abandoned!*

But, gentlemen, it has been charged upon the prisoner, here and elsewhere, that he brought to Chepachet from New York the *Spartan Band,* with the design of leading them to the City of Providence, to sack the city and cover themselves with spoils. Of the Spartan Band I know only that in the popular slang of the day, they, with Governor Dorr, and all his friends and the adherents to the People's Constitution, were classed under the general name of *rowdies,* and these were said to be *foreign* rowdies; and it has been said they were to advance to the work of violation and havoc under the watch words of *"The Banks and the Beauty of Providence."* Of all the thousand slanders circulated in the community to the prejudice of the prisoner, this was the most infamous and base as it was false. But with regard to the Spartan Band—the only evidence in the cause touching the point is, that there were from ten to fifteen (being differently estimated by different witnesses) who joined the encampment at Chepachet on the twenty-fourth of June, the day before the arrival of Mr. Dorr, from Connecticut—they came direct from New York, and there is no evidence to show any improper design on their part; he found them

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as he found the others, on the hill, at his arrival—they were there as military men, they were treated, and did their duty in common with the others as such, and for aught that appears were as orderly and well behaved. They may have been foreigners, or they may not; they were not Rhode Islanders; and there were also two persons there from the adjoining State of Massachusetts, Gen D'Wolf and a private; if however this be matter of reproach to the prisoner, the charter government are equally liable to it. Maj. Gen. McNeill and some of his officers were invited here from other States—and why, I can scarcely tell. It could not be from any deficiency of native military talent or capacity. That we have men among us, "Fit to stand by Cæsar (or Napoleon) and to give directions," we have the very best evidence; it may be derived from the mouths of some of the government witnesses themselves, when speaking of their own exploits!! With the exceptions, however, that I have mentioned, the men composing Mr. Dorr's force were all Rhode Island men—men of landed estates, or hard handed, enterprising mechanics—men who had voted for the adoption of the People's Constitution, and for Mr. Dorr as Governor under that constitution. Such men (and I can say nothing against those excepted) as would be no disgrace to the service and the cause of political freedom.

I have now, gentlemen, briefly gone over the prominent points of the testimony in the cause, so as to give you a clear and connected view of all the transactions in which the prisoner was concerned, during the period of time embraced in the several counts in the indictment, which charges the overt acts of levying war against the State, on the seventeenth and eighteenth days of May, and the twenty-fifth and twenty-seventh days of June. I have done this for the further purpose of calling your attention, more particularly to the question of *criminal and malicious intent,* on the part of the prisoner.

There can be no crime, where there is no criminal intention —intention is the very essence of all crime. There can be no

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treason where there is no *traitorous intention;* the mere act of levying war, whether it be actual or constructive, does not, necessarily amount to treason; to constitute that crime, it must be levying war with a *malicious* and traitorous intent, and such is the averment of each count of the present indictment. If no such avertment were there, the indictment would be fatally defective, and you could not find the prisoner guilty under it; and the question here is, does the evidence offered on the part of the prosecution, support the allegations, so as to justify you in finding a verdict against the prisoner?

You have been already told by the Court, that there was no evidence or pretense of *express* malice, or treasonable design on the part of the Traverser; but that such malice and such intent, where an overt act of levying war was proved, was a *presumption of law,* and changed the burden of proof from the government to the prisoner, as in homicide, the intentional killing a man, the law presumed to be murder, until the person charged offered evidence that should reduce the offense to manslaughter, or something less. This *presumed traitorous intent,* after all, is but a *presumption*—not a fact proved; and may be rebutted by facts and circumstances disproving the possibility of its existence. Such, gentlemen, we contend, is the present case. You will recollect that, according to the testimony of the witness, it was with much reluctance, and after at least three other persons had been put in nomination and declined, that the prisoner consented to a nomination as Governor, at the election in April, 1842; that he received upwards of seven thousand votes for that office; that the votes were duly returned to the Foundry Legislature; that a committee was appointed to count them; that the committee reported that the prisoner was duly elected; that the usual proclamation of such, his election, was made; that he took the required oath of office; that he delivered an inaugural address or message to the legislature; and that a government under the People's Constitution, was fully organized and put in operation, superseding, as we contend, all other government in this State. You will also

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bear in mind, an admission made by the Attorney General, that, "if the prisoner was in fact Governor, he was justified in all he did." Now, gentlemen, taking that evidence and that admission along with you, trace every act done, every expression used, and every measure proposed by the prisoner, from the assemblage of the People's Legislature, on the third of May, to his leaving Chepachet, on the evening of the twenty-seventh of June, 1842; compare and weigh the evidence whenever it conflicts, and say, if you can, where you find any evidence calculated to support this charge of *treasonable intent.* On the other hand, gentlemen, you will find him actuated by principles of the highest standard; intent, not on *subverting,* but on *establishing* the government of the people; controlled by an all-pervading sense of official duty, and governed by a religious sense of the oath he had taken to support the People's Constitution, and discharge his duty faithfully to the people of the State. I shall not attempt here to recapitulate the evidence of these particulars, having somewhat glanced at them in passing; but it is such as frees the character of the prisoner from every imputation upon the purity of his motives, and the unshaken consistency of his conduct. You have the evidence all before you, gentlemen, and, under your oaths as jurors, you are "true deliverance" to "make between the State and the prisoner at the Bar."

After all, gentlemen, who is the prisoner at the Bar? And how came he now before you for trial? Mr. Dorr is an educated gentleman, a professional man, a member of the Rhode Island Bar and of the most respectable family and connexions. It is also in evidence that he, personally, has stood high in the confidence and esteem of his fellow citizens. He has represented for three years and a half the city of Providence in the General Assembly. At the time he is charged with having levied war against the State, he was the Treasurer of the Rhode Island Historical Society, and had in his hands, the funds of that institution to a large amount. He was a Commissioner of the Scituate Bank, having control of its funds and securities, under an appointment of the legislature. And

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he was President of the School Committee of the city of Providence. It appears also, that as administrator or trustee, he had in his hands large amounts of the property of private individuals. During the troubles that followed the affair at the Arsenal—the destitution of men, arms, ammunition, provisions and money of the Chepachet campaign—during his protracted exile from the State, did Gov. Dorr embezzle, divert or misapply these funds, or a farthing of them? No, gentlemen, as is shown by the testimony of Mr. Burges, he guarded the whole with the most scrupulous care, guided by the highest sense of honor; and placed them, undiminished, beyond the reach of the perils which environed his own position. With this evidence before you, does he carry about with him any of the marks of that rowdyism, of which we have heard so much? Has not his whole course of life, his sentiments and his actions, been such as to free him from the imputation of having in any thing been governed by other motives than a desire and a zeal for the best interests of his fellow citizens and of the State?

It has been urged by the opening counsel for the State, that the prisoner, taking counsel from his fears, at Chepatchet, escaped from the State. It would have been an act, not of wisdom or courage, but of the wildest folly for Mr. Dorr, to have bared his devoted head to the whirlwind of Algerine fury, that then swept over the State; or under legislative Martial law, to have confided his fate to the tender mercies of a Drum head Court Martial. But when the tempest had passed over, when the excitement had become somewhat allayed by time, when martial law no longer fettered the legal tribunals of the State, he came voluntarily back to the State within the reach of its tribunals. He came when large rewards failed to bring him, because this was his native State, his home; and because he expected, and had a right to expect that he should be tried by a jury of his peers of the vicinages, amongst whom he had always lived. He is now *in your hands*. And I repeat, gentlemen, that in deciding on his case, you may decide upon your own fate and that of your

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posterity. Your decision *may* involve the fate of American Freedom, nay, of Civil Liberty itself.

Finally, gentlemen, if the evidence to which I have directed your attention, should fail to satisfy your minds fully, as to the purity of the prisoner's intentions, and the absence of treasonable design on his part, and doubts remain on the subject, you are bound, and will be so instructed by the Court, to throw those doubts into the scale of the prisoner, and return a verdict of acquittal. I now leave him with you, under the conviction, that the moment you take his life and liberty into your hands, you at the same time commit your characters through life, and your memories after death, to the award and decision of the great tribunal of Public Opinion; and I hope and trust, that at its hands you may *receive* that justice, which, in behalf of the prisoner, I *claim* at your hands.

Mr. Dorr. Having addressed to the Court all I had to say on the subject of treason, which I had contended was an offense against the United States, without admitting that any such offense had, in this instance, been committed, I now thank the jury for the patience which they have thus far manifested in attending to the proceedings of a trial necessarily protracted beyond the usual length. Although the duration of the trial has been more than once alluded to by one of the Honorable Court, I desire to assure the jury, that I have not intentionally trespassed on their time. Much of it had unavoidably been spent in empannelling the jury, which in a case of this moment could not be hastily done. I had a right by law to twenty peremptory challenges; and a large number of those who had been called as jurors had disqualified themselves as they were called, by replying to the questions proposed to them, that they had formed and expressed an opinion upon the charges laid in the indictment, rendering it necessary to issue new process for summoning an additional number. It would also be recollected that I had been brought here from the county to which I belonged, professedly for a more impartial trial, and among those with whom I was but little acquainted, and whose quali-

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fications and opinions could not be investigated and ascertained without special inquiry, which it had been sometimes necessary to make through witnesses, to whom the jurors were better known than to myself. The jurors now empannelled had severally responded, under the oaths, that they had neither formed nor expressed an opinion upon the matters now in issue; and only through their avowed impartialty could the object be obtained, for which the case had been, in this unusual manner, removed from the county where the offense was charged to have been committed, into another, which had been equally pervaded by the political feelings and discussions, which had pervaded the whole State, in the eventful period of 1842.

As so much had been said about foreign notions and foreign interference, it is proper for me to remind you that I was no stranger in your midst. I had not come here from abroad to proclaim new and strange words, at war with the original doctrines upon which our government was established. I am a native citizen of Rhode Island; and a portion of those from whom I claim descent were among the earliest settlers of the State. I am by birth, and still more in principle and feeling a Rhode Island man. I do not stand before you as an alien to the common inheritence; and I am ready to meet my opponents in any attempt they might make to show that my efforts had been directed to any other object than the reassertion of the ancient liberties of the State, and the inherent rights of the people.

The case now presented to the jury is one of no ordinary importance, and is not lightly to be disposed of by a hasty and inconsiderate judgment. It is not a matter of dollars and cents to be decided by an average of opinions, but a question affecting the rights and freedom, and, to all intents, the life of the accused. The sentence consequent upon conviction, is perpetual imprisonment, with the attending deprivation of the social and political privileges of a man and a citizen,—an infliction which might induce some minds to prefer the more friendly missive of the military tribunal. It is the duty

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of the jury to contemplate the results of their verdict. For though they are not directly responsible for the law, and sit here not to make but to administer it, they may well be inspired, when they regard the personal rights which are now put in issue, with a solemn caution, with a spirit of sincere and earnest inquiry; fearful themselves of doing a greater wrong than that which is alleged against the individual they are called upon to try, and bearing in mind that the justice of the law is not revenge, and insists upon no doubtful constructions of the acts of the accused. The jury must be satisfied beyond a reasonable doubt not only of the facts, but of the legal meaning and purport of the facts, and they are not called upon to offer sacrifices to State policy or to the dignity of the law. At this distance of time from the date of the transactions in controversy, a more dispassionate and candid investigation was to be expected and demanded.

The offense charged is *political,* not against individuals, but against the State, under a system now no longer existing. The defendant necessarily does not stand alone. He acted for others. In trying him you try also the fourteen thousand citizens, who voted for the People's Constitution in 1841, and who, if there be any guilt in the doctrine of '76, are equally guilty with him; nay, more, you will try the principles of the American government and the rights of the American people; and you yourselves will in turn be tried for any wounds you may inflict upon American Liberty. You are not sitting here in one corner of a small State, out of the reach of observation; and beware that no political bias incline you to do any injustice to the defendant, by way of retribution to the party with which he is connected; or how you permit yourselves to defeat the ostensible object of a fairer trial in the removal of this case; and let the public have reason to believe that it has been more fair than was intended.

The opening counsel for the State (*Bosworth*) had not been satisfied with the customary epithets which the forms of indictment bestow on those who are brought within the pale of the Courts; but he had launched out into the language of

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vituperation and calumny, the not uncommon substitutes for reasoning and argument. These ebullitions of malignity do not so much indicate the character of the object upon which they are poured as the condition of the source from which they spring. Real valor never seeks to magnify itself by depreciating the character of those who have been overcome by the fortune of the day, and avoids all questionable exultation. An honorable mind, in a great political controversy like this between the two parties of the State, conscious itself of good motives, will be slow to impute the reverse to a fair and open political opponent. The coarse remarks of the assistant to the prosecutor are left to you with all the weight to which they are entitled. If he be not ashamed of them, they may cause some of his friends to be ashamed of him.

Without any proof that it was known at the time to the defendant, the aid of the prosecutor has laid much stress on the fact that some of his relatives by law or blood, were found in array against him on the seventeenth of May, 1842; and it is insinuated, by way of arousing the prejudices of the jury, that the object of the defendant was the destruction of his own relatives and friends. In reply to this false and malicious charge, I say, that, in periods of excitement, it might happen, and sometimes did happen to those who were near, and painfully to those who are also dear to each other to be widely separated even to the conflict of war. I stood almost alone in my political opinions among those who were connected with me by blood. Without consulting interests I had asked myself what was right and pursued it. If my views of the sovereignty and action of the people were correct then, they who placed themselves in opposition to the government, and attempted to prevent the recovery of the public property, whether strangers or relatives, did so in their own wrong, and might with equal propriety be said to have been bent upon his own particular destruction. I leave them to their motives and claim respect for my own. There are obligations of duty from which no interest or consanguinity can furnish a discharge. I was not aware at the time that

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any person related to me was engaged in the defense of the arsenal; but, from what had fallen from one of them, had supposed that he intended to be. This person was not my brother, (now absent from the country) whose name had been forced in here with a very apparent object; and who, though opposed in politics, was entirely capable of appreciating my motives, as I was making the same estimate in return. But if I had been aware that all my clan were enlisted against the law and Constitution of the State, I should not have been deterred from discharging the oath of duty which rested upon me.

The offense charged is somewhat of a vague nature. What is levying war? It is not a gathering of men merely with arms in their hands. This is the description of every military training or review. Against whom is it levied? The State. Who represented the State at the time in Rhode Island? Which was the true government, or, more properly, which was the government? And again, for what object was war levied, if at all? Was it for any lawless, unjustifiable purpose, or in defense of government and the most valued rights of the citizens? Here we have, in addition to the mere question of fact, were certain things done or not, the much larger and more important questions of rights, of motives and intentions. The indictment charges that the acts laid in it were maliciously and traitorously done. To constitute a levying of war, as it was held in 4 Cranch, 75, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against government is not sufficient. It is not treason, it thus seems, to enlist men for service even against a lawful government, much less is it to enlist them and to bring them into service against an unlawful one, existing by usurpation and contending with force against that by which it has been rightfully supplanted. You will also bear in mind the admission of the Attorney General, who properly stated in the outset of the case, that, if the defendant were the Governor of the State, he had a right to do what he did. It is thus

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perfectly evident that the true question, essential to a fair trial, is that of *Rights* and *Motives*. There must be a treasonable intent in the levying of war to constitute any treason at all; not a mere knowledge of what one is about, but a deliberate, set purpose and treason of mind; as in cases of homicide the act may be murder or manslaughter, or no offense at all, according to circumstances and intentions.

I have in the argument of this case, the disadvantage of appearing before the jury without the aid of my principal counsel, Mr. Atwell, upon whom I had relied for all the closing arguments, who had been overtaken and disabled by a severe illness, just before the commencement of the case, when it was too late for me to make any preparation. While I desire to acknowledge the zeal, fidelity, ability and industry of the gentleman who assists me, I can not but feel the absence of a counsellor, whose legal eminence and eloquence, practical experience, and just weight as a lawyer in this Court, were of so much importance to his clients. If I have anything to advance in my own favor, it will be said to come from a too partial source, and it weighs nothing. What I admit is taken strongly against me, and what I may say concerning myself may be, for the most part, better said by another.

The defense, as well as the prosecution, has drawn out upon the examination of witnesses a long detail of facts. My great object, has been to have all the facts of the case correctly ascertained, to disabuse it of all the falsehoods and calumnies with which it has been invested, by the malignant ingenuity of political enemies, and to disprove all the pretended charges that have been so often repeated against myself, my political associates and the political party with whom we have acted. I have aided by questions, and by witnesses in bringing all the facts to light. There are and have been no secrets in the cause in which I have been engaged: there is nothing, so far as I am aware, that might not safely be brought to the light of day. In August last, I published, over my name, a statement of all the transactions now in controversy, from beginning to end, which was generally circu-

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lated in this State. It does not differ perceptibly from the present testimony. I am willing to put it into the case, as a part of it, if the prosecutor do not object. I should have been willing to save this investigation by so doing; but it was not for the defendant to prescribe the mode of proceeding by the prosecutor, who of course would not have admitted the account of the defendant to be correct, and expected to make a case much more favorable to his own side of the question.

And here let it be asked, of common candor and fairness, after listening to the testimony, what has become of the shameful and groundless imputation conveyed in the fabricated watchword of "beauty and the banks," of the "foreign desperadoes," who were to plunder and burn the city of Providence, and to invade the domestic purity of its homes, of the intervention of citizens abroad for any other object than to arrest the unjustifiable interference of the President with State rights, of the general appropriation of private property to military uses; of "the lawless and intemperate character" of those engaged in the people's cause; of the "forcible enlistments;" of the "State script;" of the "sword dyed in blood;" of the "waving of the torch and the firing of the gun;" and the hundred other stories and inventions that were got up by political managers and editors for effect, and have had their day, and have answered all that was expected of them? They were no doubt believed by some with that credulity which alarm creates. And there were others who availed themselves of this slight pretense to go over and basely and treacherously abandon the cause of the people to the enemy. Henceforth let the retailers of these calumnies, which have been put down in and out of Court, hold their peace.

The alleged invasion of private property by the suffrage men at Chepachet, of which so much had been attempted at the time to be made by their opponents, was reduced to three instances: a horse borrowed, used and returned; a cow taken and paid for; and a few boards burnt on the hill!

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The question was asked whether the village of Chepachet, the day after it was left by the suffrage men, was not sacked by the charter troops. But this we were told had nothing to do with the issue and could not be gone into! It was irrelevant. There was a contrast to be disclosed.

Of all that was really done by me, (aside from the fabrications alluded to,) or that I had a part in doing, I deny nothing. I should disdain to make such a denial here or elsewhere, to preserve either liberty or life.

My defense before you, is a justification throughout. What I did I had a right to do, having been duly elected Governor of this State under a rightfully adopted, and valid Republican State Constitution, which I took an oath to support, and did support to the best of the means placed within my power.

I must call your attention to the extraordinary embarrassment in which I was placed in this portion of the defense, by the refusal of the Court to permit me to make good my justification by exhibiting the proofs of my election as Governor, and the proofs of the adoption of the *People's Constitution*, under which I had been elected, the votes given upon it having been brought here for the express purpose of authenticating it to the jury. Nor was I permitted directly, or otherwise than in incidental remarks, to maintain either to the Court or jury, the right of the people of Rhode Island, upon American principles, to form and adopt this Constitution; nor to argue any other question of law to the Court or jury than, whether treason be an offense against a State or against the United States; nor to introduce proofs of my election and of the Constitution to repel the charge of malicious and traitorous motives; nor to show by authorities that the jury are in capital cases the judges both of the law and of the fact.

It was with extreme surprise and regret that I thus found myself debarred from my true defense. The facts being thus plain before the jury, that I had on several occasions attempted to carry into effect by military force the constitution

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and government of the people, and as the Chief Magistrate of the State, the jury will very naturally ask—how did all this come to pass? By what authority did the defendant these things? The reply to your very natural inquiry is a blank. The defendant is most anxious to proceed before you, and to establish all these rights; but he is not permitted. He must look to you to take care of them. He is in the condition of the mariner whose bark has been stript by an adverse gale, and who in directing his course to the land, can expect to reach it only with the aid of a jury-mast.

The votes that were cast for the People's Constitution are at hand. They who gave them are not far off. The acts of the People's Legislature under this constitution can be proved in a moment. These and the unanswerable proofs that popular sovereignty is the just source of government, were what it was desired to lay directly before you. By the refusal of the Court, the defendant feels that he has been deprived of a great right, and that justice has been denied him. Whether the doctrines on which the Republic rests be admitted here or not, they are unchangeably the same. The defendant has no desire to retract his subscription to them.

Some ages ago a natural philosopher was accused and silenced before the Inquisition, for teaching that the earth turned on its axis. As he retired, after his forced confession to the contrary, from the presence of the officers of the justice of *that* day, he exclaimed, "still it turns;" and, in spite of all opposition of false philosophy it has turned ever since. There are other immutable doctrines, and other honest convictions which cannot be forced out of a man by any human process.

The sun will not rise, upon any recantation by me of the truths of '76, or of any one of the sound principles of American freedom.

The servants of a righteous cause may fail or fall in the defense of it. It may go down; but all the truth that it contains is indestructible, and will be treasured up by the great mass of our countrymen.

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If I have erred in this Rhode Island question, I have the satisfaction of having erred with the greatest statesmen and the highest authorities, and with the great majority of the people of the United States; and I have the satisfaction also of reflecting that all errors of judgment here will be corrected by the great tribunal of public opinion, which assures to all ultimate and impartial justice.

Here the defense might end. The facts are before you. You cannot avoid the question of right imperfectly as it comes to you. But there is one remaining point, the amount and purport of the evidence. It is due to myself that I should make some further allusion to it by way of explanation of my conduct and motives during the period of affairs that has passed in review. To this subject the remainder of my remarks will be confined.

It has been charged against me, that I had originated an unnecessary movement in this State, and that it had been persevered in without good reasons. Both these charges I propose now to consider.

It is impossible that any man should stand alone in any attempt at political reform like that which has recently taken place in Rhode Island. It is not within the compass of human ability to create a set of circumstances to suit a scheme of ambition involving any considerable change in the affairs of a State. The utmost that any individual can do, is to be present and to take a part more or less efficient in a movement originating in general causes, and affecting large portions of the people. The people of this country, and of this State, and it may be added, of the race to which we belong, are not addicted to change for the sake of change merely. It is a libel upon them to say that they are not capable of thinking and acting for themselves. In all those movements, relating to the organization and the amendment of forms of government, there are deeply laid causes beyond the control of individuals, and most frequently of remote origin and long continuance, to which the final result is to be attributed. The events of 1842 grew naturally out of a long train of evils and abuses

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running far back, and which require a brief consideration, in order fairly to indicate the remedy which was proposed, and to explan the conduct of those who were concerned in applying it to the existing condition of affairs. A glance at our political history will exhibit the origin of all the troubles which have of late agitated and distracted this State.

Mr. Dorr said he desired to repel the imputation, which had been cast on those with whom he had acted and himself, that they commenced their undertaking with a disparagement of their ancestors, the venerable founders of our civil polity. Much had been said about the Charter government and the early institutions of the State. He then paid a tribute to the character of Roger Williams, as the founder of American Democracy, and the author of the true system of religious liberty, in its relation to the political system, and the inalienable rights of conscience and private judgment. To this illustrious man, (the greatest in the ante-revolutionary history of the country) was the Colony of Rhode Island mainly indebted for the unexampled degree of freedom here enjoyed, and for democratic institutions, to the origin of which every right minded son of this State must look with a just and honorable pride. In the heat of political controversy the sins of the royal grantor of the charter, and of those, whose mal-administration of the government under it had subsequently planted the seeds of future evils, had been laid upon the charter itself, which was in its day, and long subsequently, a monument of liberty. The charter had well done its office; and, at the period of the revolution, or as soon afterward as circumstances would permit, should have been consigned to the archives of the State, to be held in perpetual veneration for the benefits that it had bestowed.

It was the patrimony of Roger Williams and his associates which the Colony long enjoyed. It possessed the freest government on earth, with a remote dependence on Great Britain. The result of the efforts and doctrines of Williams was the formation here of a peculiar people, in advance of the times in which they lived, jealous of their rights, fixed in their

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opinions, disposed to think and act for themselves, and to exercise freedom of speech without regarding personal consequences. This spirit was confirmed by the local position of the colony, with a limited domain, between two stronger neighbors, bent on aggrandizing themselves at its expense, and never relinquishing, down to the period of the adoption of the Federal Constitution, the design of annexing it to their respective territories. The way of our fathers was to hear freely, discuss openly, to conceal nothing and to act without fear. They were not to be driven by authority or dictation of any kind. This old fashioned spirit, it is to be regretted, has been depressed by recent events; but, let it be hoped, not beyond the possibility of ultimate recovery.

This originally free Democratic government passed through a period of degeneration, from which it has of late been partially restored. It is now one hundred and twenty years since the first definite landed qualification of voters was established by law. It was at first a qualification for suffrage; it became at length a limitation of suffrage, and a badge of exclusion from political rights. Nearly all the adult inhabitants, were at first, as now, among the western settlements, the owners of land. This landed qualification may have been justified at the time by the State policy, of resisting undue influences from abroad, through a requisition upon all, who came to incorporate themselves with the colonists, that before they became a part of the political body, that they should identify themselves with the population by this visible sign of adhesion and permanent residence. But such a policy has long ceased to exist; and through the property restriction as this qualification at length became, the government of the State was transformed into a landed oligarchy.

Up to the period of the revolution, when the population was about three-fifths of its present number, there were no complaints. But with the increase of population they were manifested; and, through neglect, were deepened into a strong disaffection toward the existing order of the State.

A committee consisting of the Governor and other distin-

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guished individuals, was appointed at the breaking out of the revolution of 1776, to inquire what changes in the government were requisite to adapt it to the new order of things. But the committee made no report. The subject was again revived about the period of 1799, without a result. In 1811 a bill (drafted by the present District Judge) to extend suffrage to all persons paying taxes and performing military duty, was passed by the Senate and was laid on the table in the House of Representatives. A bill of half a dozen lines would at any time have accomplished the desired end, and have prevented all the subsequent difficulties. In 1819 the defects in the State government were again brought under consideration, principally as connected with the grossly unequal representation in the lower House; the County of Providence, in its ratable property, being liable through direct taxation to the principal burdens of the State, while it was entitled to a disproportionate force in the body by which they were imposed.

In 1824 a freeholders' convention was held for the formation of a State Constitution, which was rejected. A proposition made in this body to extend suffrage beyond the landed qualification received three votes. The next attempt to obtain an extension of suffrage was commenced in 1829, by the non-freeholders, whose memorials to the General Assembly were treated with contumely in the report of a committee of the House, which described them as unworthy of any serious consideration. In 1834 the attention of the freeholders was again called to the restricted condition of suffrage in the State. In that year the defendant was elected a representative from Providence, as the advocate of political reform, and of a Republican State Constitution; and should my political life be now brought to a close, as one of the results of this protracted contest, it will end as it began, in the just cause of the disfranchised inhabitants claiming their due share of the birthright of American citizens. The Constitutional party of freeholders, which was this year formed, received but little encouragement and expired after an ineffectual struggle of nearly four years.

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The condition of things brought to the consideration of the legislature was hardly to be paralleled in any of the States. A majority of the House of Representatives in this body was chosen to represent less than one-third of the inhabitants of the State; and the electors of these representatives were about a third of the adult male population in the towns that sent them, so that the conjoint operation of unequal representation and of limited suffrage was to vest all the political power of the State in about one-ninth part of the resident citizens of the United States in Rhode Island; an equality too unjust and oppressive to be much longer tolerated in the land of Roger Williams, so long as there survived among the people any portion of the ancient spirit of the State.

A freeholders' convention was again called in 1834, in which as a member from Providence the defendant, as he had before done in the Legislature, urged upon his associates the immediate duty and expediency of redressing the political inequality of the State, through the forms of law. A proposition made by me for the extension of suffrage received but seven votes; and the convention dissolved without proposing any constitution to the freemen.

The natural conclusion, from this brief view of the facts, in the mind of every man of ordinary intelligence and candor, will be that the responsibility for all consequences is on the heads of those who have so long denied, or have exerted themselves to defeat the just rights of the people of this State. And every one will see at a glance the futility of the attempt to ascribe to the dissatisfaction or to the ambition of any individual, or a few individuals, the rising up of the men of Rhode Island, under a sense of common wrongs for the final attainment of just and equal rights.

It was in vain on the part of those who undervalue the right of suffrage, and who flatter themselves with the ability to govern others better than they can govern themselves, to repel the non-freeholders with the answer that they were better off under the protection of the landed system. While the British

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subjects claim to be well governed, it is the birthright and glory of American citizens to govern themselves. The right of suffrage is the guardian of civil liberty. The only security for just and impartial and beneficent legislation is in the universal right to participate in choosing those who make and administer the laws. The non-freeholder who was worthy to be counted among the represented population felt himself equally worth to vote for the representative himself. He came to this conclusion from a just estimate of his own character; of his worth and natural equality as a man; of his proportionate contribution to the support of the public burdens, State and national; of his productive industry in creating the common wealth, and contributing to the common welfare of the State; from a view of the free institutions of other States, by which he was constantly reminded of his own privations, and which held up before him rights, from which he felt himself to be debarred by no natural mark of inferiority or incapacity, but by the arbitrary and selfish exclusion of men no better than himself.

The result of this long denial of justice was the creation of two distinct classes of citizens, the people at large, claiming, by virtue of the revolution, the sovereignty of the State, and the qualified freemen, who possessed and exercised the political power, and governed the rest, according to their will and pleasure. And this state of things, always dangerous to the tranquility of a country where all are professedly equal, led to a collision between the two classes, and to the events of 1841-2.

The next and final attempt to obtain their rights was begun by the non-freeholders in 1840, through the general organization of a political party. With its proceedings you are already acquainted. The non-freeholders were excluded, as they always had been, from any participation in the choice of delegates to the convention to frame a constitution, which was called by the General Assembly in January, 1841. They knew from experience what was to be expected from such conventions. But before they proceeded to assert their own

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rights, they looked once more to the Legislature for a concession to their reasonable claims. At the subsequent May session a bill was presented to the House of Representatives by Mr. Atwell, which was drawn by the defendant, and which provided that the citizens generally should be authorized to vote for the delegates to the convention. At the June session it was amended of his own motion by the member who had introduced it so as to confine that temporary extension to taxpayers only; a proposition which received but ten votes.

The door was thus closed upon the non-freeholders of the State; and they turned away from the existing government with the entire conviction that the time had now arrived to redress their own grievances through that power which is the superior of all others. They called a popular convention on a free basis. That convention framed a Republican Constitution, which three months before the rejection of that of the landholders' convention was adopted and ratified by the votes of a vast majority of the whole people. This would have been demonstrated to you if the Court had permitted the votes, which have been brought here for the purpose, to be presented for your examination, as the defendant most earnestly desired. Under this constitution the defendant was duly elected to the office of Governor of the State; a fact which he is debarred from proving by the prohibition of the Court. In the name and by the authority of those who are the true source of power, he has acted in the capacity to which he was assigned, not to his own will but the will of the people of this State. This is his true and sufficient defense.

The defendant was nominated for Governor shortly before the publication of the letter of President Tyler, in which he threatened his intervention in the political affairs of the State. The defendant accepted the nomination, though his means did not warrant him in so doing, at the urgent request of political friends, after three others, one of them connected with the opposite political party in general politics, had declined it, and it had become apparent, that unless the defendant ac-

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cepted there would be no candidate, and an organization under the constitution might be defeated. This he would not suffer to occur, if he could prevent it. As chairman of the State Committee, he would not see the constitution die in his hands. He did not seek the nomination, nor did he decline it, when the absolute necessity had arisen, nor shrink from any duty or responsibility connected with the office. He was elected by the people. At the appointed time the General Assembly was convened; and was attended by a military escort to the place of meeting. It is unnecessary to repeat the proceedings of that body, many of which have been detailed to you. By a remarkable oversight they permitted the judiciary to remain unchanged.

Upon a proposition, made in the House of Representatives, to instruct the Sheriff to take possession of the State House, for the use of the Assembly, there was a division of opinion; three-fourths of the members being opposed to such a step, and in favor of a simple request only for the opening of the building. This ill-judged omission was of fatal consequences. The day was thus lost, and ultimately the cause itself, through the vacillating and retreating disposition of its friends. They held on that day everything in their own hands. All might then have been accomplished without loss or injury to any one.

My views to the contrary of the course then adopted are well known to you and to my fellow citizens. I have been accused of dictating to others the conduct of our affairs. If this had been the case, and it had been in my power to enforce an implicit compliance on their part, it is not a little singular that at this most important crisis, my associates should have sacrificed my judgment to their own. Believing that a government on paper was no government at all, I desired to see it put immediately into action, by taking possession of the public property, and bringing the whole case to a practical issue at once. This was my opinion, desire and advice. They yielded to other feelings and opinions, dreading also the interference of the National Executive. The first and best opportunity was suffered to pass by. The cause declined

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and died. Had the Legislature been disposed on that day to avail themselves of that "tide in the affairs of men, which, taken at the flood leads on to fortune," the people's government would have gone fully into operation and the State would have peaceably acquiesced. But although the Legislature did not incline to active measures at this time, they nevertheless very near the close of the session passed a resolution requiring all persons having possession of any of the public property to surrender it to their successors in office; leaving to the defendant, as Governor, the responsibility of carrying this act into effect under his oath of office to execute the laws.

The time of the defendant was occupied with the signing of commissions and with the other business of the Executive until he left for Washington at the request of a number of his friends, and of a large public meeting held by the Suffrage Association in Providence. The object of this visit to Washington was to make a true representation of our affairs to the President and to avert his intervention to suppress the rights of the people. No favorable result was attained.

The defendant remained some days on his return at New York, and conferred with friends in that city upon one special subject, by which he had been mainly induced to leave Providence at this interesting period of events. I refer to obtaining assistance of men from abroad to repel this threatened interference of the President; which I and others believed to be unconstitutional, and a most unjustifiable outrage on the rights of the people of Rhode Island. He addressed the Democratic citizens of that place at Tammany Hall; stating to them most explicitly the sole ground on which they were called upon to act, not as intermeddlers between two political parties in a State, but only in the case distinctly proposed, freely avowing that if the people of Rhode Island, when left to themselves without the interference of the United States, were not capable of maintaining their own rights, they did not deserve to be free. The appeal was cheerfully responded to. The answer was the outburst of warm and gen-

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erous hearts, devoted to the great cause of popular rights. Five thousand, nay, almost any number were disposed to pour themselves out to arrest this great injustice now threatened to the more numerous party in Rhode Island by throwing into the opposite scale the military forces of the United States.

Mr. Dorr then alluded to his interview at New York with Major Wm. G. McNeill, who had stated here in his testimony that defendant had, in a half jesting way, offered to him the command of his men, and who, as defendant supposed, was friendly to the Suffrage cause. The comments on Mr. Pearce's testimony which fell from McNeill had been occasioned by a misapprehension by Mr. Pearce of defendant's conversation with him. Defendant did not say that at Chepachet he had been a few days before advising with McNeill respecting military affairs. Defendant meant to be understood that he had seen this gentleman not a long time before, alluding to this meeting in the City of New York. Defendant had never seen him since, nor had any correspondence with him during the recent difficulties, nor had he any reason to suppose that he had not been faithful to the charter government; though defendant was surprised to hear of his appointment as the Charter General, having supposed him to be favorable to the other side.

Mr. Dorr then passed to the public meeting on Federal Hill upon the day of his return to Providence. The reason of his producing a number of witnesses who stood very near him, when he made his address on that occasion, was to refute the testimony which had been given by two political opponents, respecting "the sword dyed in blood," an expression which they had attributed to him. This testimony was not founded in fact and had been clearly and sufficiently contradicted. The object evidently was to hold up the defendant as blood-thirsty and desiring destruction for its own sake—a representation which would not be readily credited by those who were acquainted with him.

Affairs had now arrived at that point where the defendant must either surrender to the charter government, who aimed at his arrest, resign his office or enforce the laws under

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the government of the people. The defendant had no disposition to abandon the cause while there was any ground to stand upon. He could not retire from the contest believing himself to be on the just side of it, and encouraged by the voice of the citizens, who had so often and unequivocally avowed their intention and readiness to support the government whenever they should be called upon. Not to have proceeded would have been to incur imputations which no honorable man would suffer to rest upon him.

The time had now come to carry the laws into effect. The Assembly had directed that all the public property should be delivered up. This resolution had not been complied with. It was of great importance that the arms of the State should be recovered from the opposing government which had rightfully ceased to exist. After consultation with the military officers present at a meeting in the evening of the seventeenth of May, the defendant ordered that a movement should be made to gain possession of the Arsenal in Providence, where these arms were deposited. A force of two hundred and thirty-four men proceeded to execute this purpose, not far from two o'clock on the morning of the eighteenth of May; first repeating the demand which had been already made by the General Assembly for the surrender of this portion of the public property.

Mr. Dorr then described the proceedings at the Arsenal, after a demand for its surrender had been made and refused; the placing of the men and pieces in position; the change of position in consequence of the darkness, occasioned by a dense fog which had come up after the force had been put in motion for the Arsenal ground; the detachment of a body of men to lie very near to the building, to carry it by assault, so soon as the door should be opened to return the first fire of the artillery without; the order to fire; the flashing of the pieces, which were rendered unserviceable by dampness or water, and could not be discharged; the immediate disorganization and retreat of the men without orders; the withdrawal of the pieces and the return of the defendant after daylight

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with the last of the men, about thirty in number, to headquarters at Anthony's house.

The statement that the defendant had attempted to fire one of the artillery pieces was not true. The tendency, if not the intention, of this story was to show a development of destructiveness on part of the defendant, which could not entrust to subordinates the performance of duties which they were ready and more competent to discharge. The defendant did not that night wave a torch or apply it to either of the guns. A commander may be placed in a position where it devolves upon him to do the work of others. No such necessity there occurred. The defendant gave the order to fire the pieces. The whole responsibility rests on him.

Mr. Dorr then further proceeded to describe the occurrences of the morning of the eighteenth; the return to Anthony's house of only sixty men; the appointment of new officers; the preparation to maintain the ground; the firing of the signal guns at seven o'clock without the return of more men; the receipt of a letter from several members of the Legislature in Providence, stating that the members in the city had resigned their places, and that all support was withdrawn from the Governor; the report to defendant of the commanding officer that the men who had remained were leaving; the alternatives of a surrender or a retreat; the order to the commanding officer to fall back with those who were left and to dismiss them in his discretion; the departure of defendant at half past eight o'clock; the arrival of the charter forces, six hundred to eight hundred in number, from one to two hours afterward in the forenoon; the conduct of the twenty-seven Suffrage men who fell back with the pieces and kept them; the pretended "compromise" with which defendant had, and could have nothing to do, the suggestion to compromise a constitution bearing absurdity on its face.

If a rally had taken place in Providence, after he left on the eighteenth, it was his intention to return.

Defendant went directly to the City of New York, where he remained till the twenty-first of June, when he left that place for Norwich in the State of Connecticut.

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It will here be asked, why, after so unpromising a result, and such a failure of support, any further attempt was not abandoned as impracticable and hopeless, and the defendant did not regard himself as discharged from any further obligation to the cause and the government which he had thus ineffectually endeavored to carry into effect. The reply is that rights and duties are not to be measured by degrees of success or failure. The cause was the same; the obligations resting upon the Commander-in-Chief were not relieved by any events which had as yet occurred. The constitution was valid and subsisting. The people could abandon it by their votes or by their acts. They had done neither. This misadventure in the City of Providence was attributed to unforeseen circumstances, to accident, to the want of a more general notice in the country towns for a general rally at the headquarters of the State, to a temporary panic in the city, to the pusillanimity of leading friends of the cause in that place, from whom better things were expected and whose hearts had failed them in the moment of trial. Encouraging reports and statements were received by the defendant through letters and by visitors, from various parts of the State, all indicating an earnest desire to retrieve the late disaster, to regain the position that had been lost and to carry into complete effect the constitution and government of the people. A second opportunity, he was assured, would not be lost upon the defenders of the common cause, whom defeat had aroused to new exertions. Favorable expectations were entertained by them from the transfer of the Legislature to the country from the city; and which would have the effect of drawing together a great body of men for its protection, and to overcome resistance to its laws. The quotas of men in the several towns, including Providence, who were pledged to support the defendant, whenever he should call upon them, amounted to thirteen hundred.

It was my duty to give the people another opportunity to sustain their government; and if it had not been given, the loss of the cause and the death of the constitution would

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have been laid at my door and by many who had promised to stand by them to the last. No such charge now rests upon me or can impeach my memory.

I left New York with the general intention of carrying into effect the government under the People's Constitution, but not without a proper consultation as to the time and manner of proceeding.

I reached Norwich on the twenty-second of June, and sent an order to Glocester to convene a council of military officers, who were to consult whether any steps could now be taken, and if so, what. If they should deem it expedient to select a spot of ground for defense, they were cautioned to find a position that was tenable. No council was held. A precipitate gathering of men took place at Chepachet, without orders, on the twenty-third. The capture of Shelley and his associates gave the first impulse. They were supposed to be the scouts of an attacking party on the village of Chepachet. When Col. Comstock in his testimony stated that this was an "accidental meeting," he meant to be understood that it was voluntary and without command, or the specification of any definite object beyond the present protection of the place.

Having been informed that five hundred men in arms were already thus assembled at Chepachet, the defendant set out and arrived there on the morning of the twenty-fifth of June. He forthwith issued a proclamation to convene the Legislature at that place, instead of Providence, on the Fourth of July. He also issued and repeated special written orders to the military in all the towns of the County of Providence, and as much farther as practicable, to repair to headquarters and support the government of the State against all oppositions, present or intended. Ample notice was given to a large majority of the friends of the constitution of the exigency which now required their services; and those who had pledged themselves to respond to the call of their commander, had now the desired opportunity to manifest the sincerity of their professions, and the reality of their devotion to the cause of the people.

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The appearance of things on his arrival was to the defendant justly the occasion of surprise and disappointment. A slight breastwork was found thrown up on two of the sides of a hill, which was commanded by several other heights. There were then about one hundred and forty persons in arms. On Saturday afternoon an order was given on the hill by defendant to count all the armed men; and the return consisted of one hundred and eighty or ninety; some thirty of whom shortly after left the ground and returned to their homes. It was a volunteer movement. None were forced into the ranks, and until Monday, the twenty-seventh, all were at liberty to depart as freely as they came. On that day all who took up arms were required to retain them, and to submit to the usual discipline of the camp.

Of the large number of spectators from various quarters, few remained to share the fortunes of the field with those who occupied Acote's Hill. Their curiosity was satified and they departed. Of the four hundred to six hundred who were pledged in the City of Providence, thirty-five men and ten officers arrived at the camp. The greatest number of the military at any time during the affair at Chepachet, including all in the place who were under arms, and subject to orders, was about two hundred and twenty-five. This was the average statement also of all the witnesses who were in the best position to know; and you have heard their testimony. Among them are the Colonel in command, the acting Adjutant General, one of the Aids of the Commander-in-Chief, and several spectators who visited the hill and took no part in the transactions of the time.

Mr. Dorr alluded to the perversion by political malice of some of the expressions in an address to the troops; to the thirteen "Spartans," as they were called, from New York (whose numbers and designs were so much magnified at the time by opponents for political effect) as a company of mechanics, whose leader was an engraver and a man of remarkable abilities; to the capture of Mr. Knight as a spy, from whom it is now first heard that he was fired upon before

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his capture by one of the guards; to the national flag under which the men were assembled; to the defective supply of provisions, sufficient only for a few days, and received by contributions or purchased with means collected on the ground; to the want of balls for the artillery, there being only enough for an engagement of about fifteen minutes; to the means for carrying on a campaign, which were too small to be named, the reliance being on the prompt action of the great mass who voted for the People's Constitution; to the temperance which was maintained by closing and keeping closed at defendant's request, the bar of the public house; to the respect paid to private property, which was enjoined on all by the Commander-in-Chief.

With regard to the design to take the City of Providence, of which so much has been said, all that could have been implied in it was to seat the Legislature in the House which was appropriated to them, to defend them there; to place the public officers where they belonged, and to sustain them and the government generally by all necessary means. But there was nothing in the condition of affairs at Chepachet to suggest this step, and no such plan was ever suggested among the officers, whatever might have been the wishes or the words of individuals. Of course there was no proposition for occupying the College buildings in Providence as barracks; though they were tendered by the President of that institution to the charter troops, and occupied for this purpose. All the surmises of an intention on the part of the Suffrage forces to enter Providence with the watchword of "beauty and the banks," and to invade the property and the homes of the citizens, were the base inventions of the enemy.

I point the jury with feelings of just pride to the general appearance of the "men of Chepachet," who had been summoned here as witnesses, if the jury were desirous of seeing what description of persons they were, who took up and retained arms for the constitution and rights of the people. It appears from the testimony that these brave and true hearted men were, for the most part, hard handed farmers and

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mechanics already possessed of suffrage themselves and coming forth to contend for the rights of their unfranchised fellow citizens, who chose to stay at home. Let no reproaches be cast on these men of Chepachet. Let them rather fall on me, in whatever form or on whatever pretense, rather than on the associates who so nobly responded to the call of duty, in the discharge of which they were ready to sacrifice their lives. They were not only, with the vast odds against them, ready to defend their post, but to meet their opposers half way upon the road. When the rumor of an approaching force reached them they stood at their quarters to return with interest whatever they might receive. However, it might now be the fashion to disparage the men of Chepachet, the time was not distant when a general public opinion would attribute to their agency all the political liberty that is now possessed in Rhode Island. It is a fact that may be denied, but which is fully sustained by evidence, that the bill to call a convention to frame a constitution was not introduced and passed in the charter Legislature of 1842, until the Legislature had become satisfied that an actual gathering of men in arms had taken place at Chepachet. The shield of their attack upon one constitution was the promise to substitute another.

Mr. Dorr then referred to the mortifying but indisputable evidence presented to himself and his associates, that the people of the State had ceased to desire that their government should be defended and carried into effect. They had been called like "spirits from the vasty deep," but they did not come. No attention had been paid to the military orders sent to the towns. We were not supported by the people. We had assembled at Chepachet not as a faction, to contend for our own special interests, but for the common welfare. We were not only abandoned by our party men, but remonstrated with, denounced and condemned by them. They were even taking up arms against us. We were reduced to the necessity of fighting both our friends and our enemies. The will of the people thus manifested was obeyed, and we ceased to contend.

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Mr. Dorr went on to describe the call and proceedings of the council of military officers and their deliberations on the course which it was most proper to pursue. The defendant laid before them the state of affairs, and his own opinion that it was impracticable for them of themselves and in the midst of a general desertion, to maintain the position which they had assumed. The conclusion of the Council was that duty required us to disband. The order to this effect was approved by the separate voice of the members. It was communicated to the men in camp by the General commanding between six and seven o'clock in the afternoon of June 27th. As it had not been discussed among the men, it may have occasioned surprise and dissatisfaction with some who were not aware of all the facts. But the feeling was momentary. And we separated though with bitted regrets, yet with the conviction that our duty had been fully discharged to ourselves and to the cause. The order to disband was given when no enemy was near, and it could be issued and obeyed without dishonor. The charter forces did not present themselves in the village of Chepachet till the next day, thirteen hours after the disbandment; and then they would have found no trophies, had the order to dismantle the hill been complied with.

A letter containing the order to disband was forthwith communicated to Mr. Burges, a friend in Providence, for publication in the Express, the paper of the Suffrage party; but the order was intercepted in Providence, delivered to him, read by him in the presence of the captors, and shortly after, in the same evening, before the Governor and several of his Council, and the commanding General, McNeill; all of whom were thus early informed that they had no enemies to contend with, and were able to govern their future movements accordingly.

The defendant left Chepachet about an hour after the disbandment had taken place, at a quarter before eight, in company with Col. Carter, one of his aids.

Thus ended all attempts to carry into effect the government

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set up under the constitution of the people. It was abandoned by those who had most solemnly resolved to maintain it by all necessary means, and who had given to the defendant the assurance of their prompt and unfailing support whenever it should be called for. He retired from the field conquered, not by his enemies, but by his friends.

Mr. Dorr then proceeded to speak of his motive in returning to this State. He had intended to do so before the revocation of martial law; and aware of the consequences, but not at liberty, in the view of honorable considerations, or desiring to avoid them, he addressed a letter to some of his friends in Providence, early in August, 1842, to ask them if any duty in their political service remained undischarged; and if they had any further claims upon him. The reply was that his personal liberty was still of value to them, and that he might serve their cause by preserving that liberty, and prolonging his absence from the State; while they were exerting themselves to retrieve their losses and save themselves by the power of the ballot box. But this instrument the suffrage men of Rhode Island seemed to hesitate in employing at the vitally important election of April, 1843, as they had before hesitated to employ the cartridge box, when force had become indispensable to the safety of their cause. Through desertions they were overthrown at this election. The defendant's resolution was immediately taken to return to the State; and his return was deferred to the month of October, only by his private concerns and by bodily illness. He returned here not in the spirit of defiance, or courting prosecution, but as a Rhode Island man who had a right to be here, who desired or sought no domicil abroad, and was unshaken by defeat in the avowal of the doctrines of liberty, which he had ineffectually attempted to reassert in the land of Roger Williams. The return of the defendant was voluntary and free. He was not forced back by the efficacy of rewards promised his captors, or by any compliance abroad with the requisition of this State, in a case when no wrong was deemed to have been committed. The consequence of

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having thus obeyed, by his return, a sense of honor and duty, is attested to you by the proceedings which have now so long occupied your attention.

Mr. Dorr enforced upon the jury the conclusion which fairly and unavoidably resulted from this rapid survey of the course of action which he had pursued; that as the rightfully elected Chief Magistrate of the State, he had acted strictly in conformity with his duty and obligations, not omitting on the one hand what the constitution and laws required of him, or exceeding on the other the bounds of authority in the adoption of measures which the necessity of his position required; not inviting other men into dangers which he was not ready to share with them, not drawing the sword for mere destruction, but in the support and defense of the government, which had been intrusted to his charge. The jury were thus brought back again to the great and vital question of the case, a question of rights and of principles, affecting not merely the fortunes of the defendant, but the liberty of the people, and reaching to the foundation of our republican institutions.

Gentlemen, if I am in the right as I then believed, and now believe with an unshaken confidence—in the truths for which I have contended in this State, then the blame, if any, is not that I served too well, but that I did not serve still better in this righteous cause. Claiming no exemption from the frailties of our common humanity, but at the same time conscious of having been animated by good motives in the pursuit of justifiable and honorable ends, I commit my cause into your hands, with a just hope of your favorable consideration, and with a firm confidence in the final verdict of my countrymen.

Joseph M. Blake (Attorney General) began by remarking that there had been introduced such a mass of testimony in the case, so many motions made, and inquiries started, with which the jury had nothing to do, that he feared they might lose sight of the true question, and the only one they had to decide—whether in fact the defendant levied war against the

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State, as alleged in the indictment. He said there were many subjects intimately connected with the crime for which the defendant was on trial, about which great diversity of opinion had been entertained; and which, on a proper occasion, were worthy of serious discussion; but that on the trial of the issue before them the jury were not required or expected to give any opinion.

He then went on to enumerate some of them, such as whether a majority of the male adults of the State actually voted for the so-called People's Constitution; and if they did, whether they intended anything more than a simple expression of opinion in favor of a written constitution for the State; how far *suffrage* should be extended; and what *residence* should be required as a qualification; whether a *majority* of the people of a State, without the assent of the *minority*, and without any authority by law, have a natural right at their pleasure to change a government founded on compact, and declare and make such new government binding on all. With all these, however important, and greatly as they had been agitated during the late disturbances, the jury were not to meddle; all evidence on those points having been ruled out by the Court, leaving them only to decide whether the defendant had levied war against the State. If he did so levy war, then he was guilty of treason—the highest crime known to the law. That it embraced or led to all other crimes—murder, rape, robbery and the whole catalogue of human transgressions. That it aimed at the sovereignty of the State, and the subversion of all government. That no attempt at revolution can by any government be admitted as legal. That there could be no ranker absurdity than a *legal* or *constitutional* rebellion. That the *success* of rebellion gave it its legality. That in despotic governments attempts at revolution were often morally right and patriotic, even when unsuccessful; because in them there might be no other available mode of redress of grievances; and justifiable, as in the language of the Declaration of Independence, when government becomes destructive of the true ends of government—the se-

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curity of life, liberty and the pursuit of happiness—and when all other means of redress have been resorted to perseveringly, in good faith, and failed. In no case can such an attempt be justified, unless the change would promote the general good —or unless the means are obviously adequate to the end. Bad government is better than none—and no condition of a people can from oppression be so bad as not to be made worse by frequent insurrections and civil war.

Mr. Blake next spoke in terms of commendation of the principles of Rhode Island government as securing the people from oppression, and of its correcting itself through the force of public opinion; and instanced the existing State Constitution, made and adopted by the freeholders liberally extending and securing the right of suffrage.

He next took up the history of the suffrage cause in this State, in reply to the remarks of the prisoner. He denied that there was any evidence that the Legislature had at any time refused to conform to what they knew or believed to be the wish of a majority of the people on this subject. That prior to 1841 there never had been a majority in favor of a written constitution:—he stated that even a small party in its favor could keep up its organization, but for short times:— and that the prisoner himself, after he had been instrumental in that organization, had once been a candidate for Congress, without making that a test question or placing his pretentions to support on that ground:—that he was run as a Democrat merely, and on that principle received the support of the Democratic party.

He then proceeded to a review of the legislative proceedings upon the petition of Elisha Dillingham and others, presented in January, 1841, praying for an extension of suffrage; stating that the General Assembly promptly responded thereto, by calling a convention to frame a constitution.

The sages who founded our institutions were fully aware of our danger, and with the wisest forecast provided against it. And constructed as our national government is, and as our State governments are, and connected together

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as they are, we have a more effectual safeguard against revolution than is possessed, or ever was possessed, by any other nation on earth. We look to the Federal Government to regulate our intercourse with foreign nations and to protect us against foreign aggression; but it is not a more effectual defense against assaults from without than against domestic faction and insurrection. The States are sovereign within their spheres, but all are intimately connected together. The sovereignty of one cannot be affected without affecting the sovereignty of all. No one of them can be stricken from its orbit, without disturbing, if not destroying, the whole system.

By the Federal Constitution, the United States are to guaranty to the several States the republican forms of government existing when the constitution was adopted, and protect them against domestic violence. The State governments being thus protected by the General Government, it is hardly possible that a faction can ultimately prevail by force in any of the States. From these premises I argue that no successful rebellion or revolution could ever occur in this country—however it might originate or however widely spread, until a great majority of the people of a majority of all the States shall become infatuated for the horrors of war, rather than resort to the peaceful remedy of the ballot box.

The defendant was aware that the United States would be bound upon application of the Governor or the Legislature to protect the State against domestic violence; and intended to call in forces from other States to resist the power of the General Government and commit treason against the United States also; and therefore admitting the extent of the grievances to have been such as would justify revolution, still, he had no right to resort to arms, unless he had adequate means to insure success or strong reason for believing so. With all the aid derived from the sympathizers at the Pewter Mug and Tammany Hall, New York, his whole force either at Federal Hill or Chepachet was but three hundred or four hundred men! This was the extent of his means, and with them he commenced a revolution of this State and the

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United States. But the prompt action of our own authorities, and of our own citizens rendered the interposition of the power of the general government unnecessary. Rhode Island proved able to take care of herself. The spirit that was with her early citizens in their struggle for regulated liberty, is still alive, and her sons still possess hearts to cherish, and arms vigorous to defend her institutions, against assaults from within or without!

I propose now to consider the question which has been previously argued to you by the prisoner's counsel and himself, viz.: whether treason can be committed against an individual State.

DURFEE, C. J. It is unnecessary for you, Mr. Attorney to take up any time on that point. The Court are unanimous in opinion on that point.

Mr. Blake. Since then gentlemen of the jury, the Court deem it unnecessary for me to say anything on that subject, we may well take it for granted that treason may be committed against a State. That levying war against a State is not necessarily treason against the United States, but is treason against the State. There is no dispute as to what is levying war. An assemblage of men for the purpose of making war against the government, and in a condition to make it (not to make it successfully) is levying war—is treason. Enlisting and marching men are sufficient overt acts without coming to battle. If an army avowing hostility to the government should march and countermarch before the enemy, and then disperse, without firing a gun, it would be levying war. I had intended to go into an examination of the testimony, but the defendant had admitted the facts, and I really do not know that I might not with safety have asked for a verdict against him, as upon a confession made in open court. It was, however, proved and admitted that the defendant collected forces, commissioned officers and directed the troops as their commander, in May, at Providence, and in June at Chepachet—that he attempted to take the public property, and ordered the guns to be fired upon those

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who defended it—that the troops under his command took prisoners of war, and conducted in all respects like a hostile army. That the object of all these movements was to overthrow the existing government and to establish another in its stead. That the whole case was made out. But it is contended that in all these proceedings the motives of the defendant were pure and patriotic and not traitorous. You can judge of a man's motives only by his acts. There is no process for seeing the workings of the heart by which to determine the secret springs of action. The defendant says he did not intend to commit treason. But he intentionally levied war against the State, and the law makes that treason, whatever else he might have intended. The law affixes the intent to the act. A man who should burn his neighbor's dwelling, might as well set up in defense that he did not intend it should be arson. A man accused of theft might have a good defense on the ground that he took the goods by mistake; but it would hardly do for him at this day, to admit the intentional taking, and contend that he did not intend to commit theft, for the owner was rich, and he sincerely believed a more equal distribution of property would promote the public welfare. I suppose that there never was a rebellion in which some of the parties implicated did not believe their conduct justifiable; but a jury cannot consider that question. The pardoning power may; juries and courts must be governed by the law and evidence. Did the defendant levy war? is the only question you have to answer by your verdict; and there is no way for avoiding the question, for the facts are all proved and admitted. He has given you a history of his arraying troops, of the attack upon the Arsenal, of his leaving the State, of his encampment at Chepachet, and his plan of attacking the forces of the United States. Is it not astonishing that a man of intelligence, in a country like this, more blessed in her political institutons than was ever any other country on earth, should openly admit his intention to overturn the government of his native State by civil war, and carry on the war, if need be for the attainment of his pur-

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poses, against the United States, and detail the particulars of the whole affair as though it were a matter of every day occurrence, and as coolly and with as little emotion as he would detail the progress of a negotiation for merchandise, or any other business transaction! He would even arraign the counsel who opened for the Government, and place him on the defensive, because he characterized the treasonable acts of the defendant as they are characterized by law. He would have had him concede that in his attempts to shoot down his fellow citizens, his motives were most honorable and disinterested, and for aught I know most benevolent and christian.

No small portion of the defendant's testimony was irrelevant to the issue the jury were trying; but intended for effect out of Court; although I well might, I did not object to its introduction;—yet that on the part of the Government, none had been offered, which had not a direct hearing on the question before the Jury. Such matters as had been thus thrown into the case by way of embellishments I should not stop to discuss; but merely allude to some portion of the testimony in justice to some of the witnesses whose credibility was impeached.

Mr. Blake next commented on the testimony of Col. W. Blodget and E. H. Hazard, that they without doubt heard what they swore, although none of the defendant's witnesses should have heard the same, they might also have sworn to expressions used by the prisoner, which neither Blodget nor Hazard could recollect; and that the characters of the two government witnesses were too well known to require any vindication.

It is contended that whatever acts were done by the defendant connected with the charges laid in the indictment, he did as the agent, in the name and for the benefit of the people, and therefore you are urged to infer the purity and patriotism of his motives. Now what portion of the people was he the agent of? and how many of them were in favor of civil war? There could not at that time have been in the

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State, less then six or seven thousand men in arms; how many of them were his followers? Why two hundred and thirty-four at the Arsenal and two hundred and fifty at Chepachet, these were for subverting the State government by a civil war and their will he was willing to regard as law and to sacrifice himself in effecting it.

His own Legislature in May would not give him countenance in using force; so, soon after he on his own responsibility resorted to it in open defiance of their will and authority; the prisoner may have been governed by principle; if so, it was a cold, abstract principle, a principle which petrified the heart.

The defendant declared he should not resort to other States for aid, unless upon a requisition the President should order United States Troops to support the State authorities; in that event, he did expect aid, and intended to resist the troops of the United States; and he very coolly tells you his design was in that event to commit treason as well against the United States as against this State. For such is the law as laid down by Judge Story in his charge to the Grand Jury, in this Court House, in relation to this very case.

It was the defendant's intention then, as he admits, to levy war against the United States, at the risk of involving the whole country in all the horrors of civil war—was ever so great a work undertaken with means so disproportionately small? with so little prospect of success?—was there ever a calamity so great produced by so trifling a cause. Admitting the establishment of the People's Constitution to have been just and desirable after the question of suffrage had been conceded, I ask if the cost of affecting it, as estimated by the defendant himself, would not have been greater, infinitely greater, than the good sought to be obtained.

Many of the original members of the *Suffrage party* when they found the defendant intended a resort to force, deserted —denounced him, and took up arms with the Charter Troops to oppose him; must be ascribed the bloodless issue of the contest, to the overruling care of a special Providence, that would still continue to guard and protect us.

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But it is urged by the defendant, that in trying him, you also try the fourteen thousand men who voted for the People's Constitution; if you were trying him for voting for the constitution, that might be true; but you are trying him for levying war; and if any body else, it would be more proper to say the two hundred or three hundred, who were with him, and willing to carry out his plans by force. You however are not trying the validity of that constitution, or the legality of the existing government; but a naked question of fact. Did the defendant levy war, or not? If he did, he committed treason.

It is the duty of the jury to stand by the law; their own interest and the peace and security of the whole alike require it. There might have been brave men with the defendant, but very few, and Colonel Wheeler, who ran off in the fog, I consider a good type of the insurgents, generally.

All the points of law raised by the defendant had been ruled against him by the Court, but the defendant after a verdict against him could move the Court, for a new trial or in arrest of judgment; or apply to the Legislature for a pardon. If the defendant did levy war, you must find him guilty—you have nothing to do with the law, the Court would take care of that. The defendant himself, had confessed all the facts, and if you refuse to find him guilty, it will be the severest blow which you can inflict upon the judiciary of the country—the Palladium of your rights and liberties. The defendant says that the public will hold you responsible for the verdict you may render in this case; well be it so, gentlemen, and recollect that nothing will so brace up a man, amidst friends or foes, in the conflict of parties, as being conscious, that in trying times, regardless of consequences to himself, he had performed his duty.

Gentlemen, you are the sworn guardians of the law, in a case of momentous importance—one involving principles that reach to the very foundations of civil government; I will not doubt that you will prove true to the trust; without regard to personal, or political or party considerations, nor suffer

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them to deter you from a faithful performance of the obligations imposed upon you by your oaths.

THE CHARGE OF THE COURT.

Chief Justice DURFEE. Gentlemen of the jury: In delivering the charge in this case, I shall confine myself very strictly to the notes which I have prepared for the purpose, making, however, such remarks in illustration of the general propositions which may be advanced, as may seem necessary, in order to render them more intelligible. I take this course that we may not be misunderstood here, nor misrepresented elsewhere, without having it in our power to apply a corrective. We find it necessary in this case to guard against misrepresentation, not particularly against misrepresentations made to the people of this State, who know us, but against those which may be made to the people of the United States, and perhaps to posterity. For no one wishes to disguise it, aye, let it be proclaimed to the whole world, and through all time to come, that the principle which is involved in this issue, lies at the very foundations of all our political and social institutions, and that upon your verdict does the future confidence of all considerate men in the durability and safety of our institutions depend. We have, therefore, some ambition to appear as we really are.

The constitution of this State, and the act under which this court is organized, make it our duty to deliver to the jury, in all cases, the law in charge—no very desirable responsibility in any case; least of all, in one that has so roused the passions and deeply stirred and agitated the popular mind; but bound from the nature of our organization as a court, and with the oath of God upon us, we shrink from no duty, we recoil from no consequences.

In discharging this duty, (I speak not for myself merely, but for the Court,) it is of some importance to know what the duties of a Court are, and what the duties of a jury are, for they cannot be one and the same in relation to the same case. If it be our duty to decide what the general law of the

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land is, it is not your duty also to decide it. If it be your duty to ascertain what the facts are, and then apply the law to the facts as you find them, it is not our duty to do the same. A judicial tribunal, which is but a growth of the wisdom of ages, is not so absurdly constituted as necessarily to bring the Court into conflict with the jury, and the jury in conflict with the Court; and thus to defeat all the ends of justice. If such were the state of things, we could have no law; what the Court did the jury might undo; what the jury did the Court might undo; and thus at the very heart of the system would be found in full operation the elements of anarchy and discord. Let us see if our duties are so jumbled together, that we, as a Court, can perform the duties of a jury, and you, as a jury, can perform the duties of a Court. It is the duty of this Court, and of all other courts of common law jurisdiction, to decide upon what evidence shall pass to the jury, and what shall not. Questions as to what is evidence and what not, will arise, and in all time it has been made the duty of the Court to decide them. It is the duty of this Court, as of all others of like jurisdiction, to decide what shall pass to the jury as the law of the land, touching the indictment on trial, and what shall not; for questions as to what is law, and what is not law, will in like manner arise, and the law has appointed none but the Court to decide them. If it errs in its decisions, it can correct them on a motion for a new trial if the verdict be against the prisoner: if it willfully decides wrong, its members are liable to impeachment and disgrace. When the evidence has passed to the jury, it is their duty to scan it closely, to decide what is entitled to credit, and what not; and when they have determined what the facts are, that are proved or confessed, they apply the law which has been given them to the facts thus ascertained, and then acting as judges both of the law and the evidence, return a verdict, as to them, deciding under their oaths, may appear to be right. Here is no conflict of duties. The jury act in harmony with the Court, and the Court with the jury.

Gentlemen, it has been our desire in this case, to adhere

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strictly to our ordinary course of ruling upon all questions that were brought before us. We were determined, if possible, to go not one hair's breadth beyond our duty, nor fall one hair's breadth short of it. In the eye of the law, all men who stand at the bar of this Court, accused of crimes, stand equal. We have no favors to deal out to the man of distinction or notoriety, which we deny to the lowly and obscure. In the eye of this Court all are equal, and while we allow them the same rights, we subject them to the same rules. We have been earnestly pressed in this case to depart from our ordinary course of ruling in criminal cases. This I attribute mainly to the want of familiarity on the part of the accused and his Counsel with our usual course of ruling here in criminal trials. We have been urged to permit them to argue questions of pure law to you, gentlemen, questions touching the jurisdiction of this Court; questions touching constitutional law; to argue over again questions which have once been solemnly decided after full argument by eminent Counsel, and which we considered closed questions, and that in the midst of a jury trial. All these motions we have been obliged to overrule, reserving to the accused the right to be heard, should it become necessary, on a motion for a new trial. Not that we have any doubt of the correctness of our former rulings, but that we will not refuse him a hearing in the proper stage of the proceedings. And now after those rulings, the case comes to you to be decided according to the evidence which has passed to you, and the law which shall be found applicable to it.

What is the crime set forth in the indictment? It is treason against the State—the highest crime known to the law; in this State, punishable with imprisonment for life, in all others where it is named, punishable with death; and if we pass from our own to foreign lands, and particularly to that country whence we derive all our political and legal institutions, punished with death inflicted under circumstances calculated to strike the greatest terror, and to fix on the memory of the criminal the most lasting infamy. I mention

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this, not forgetting that many noble hearts have fallen victims to the accusation of treason under arbitrary Governments; but simply that you may estimate the universal sentiment of abhorrence with which this crime is regarded, and that you might, while you thus estimate it, feel that it is your duty to require the most satisfactory evidence that it has been committed, and that the defendant is guilty, before you return a verdict against him on the one hand, and that you may feel on the other, the necessity of discharging with firmness and fidelity that duty which every juror owes to his country, under the oath which he has taken; to return a verdict of guilty on legal proof of guilt. It is no less the duty of the jury than of the Court, to secure the peace of the State, by aiding in the firm and impartial administration of the laws.

Now, the first question is, can this crime be committed against one of the States of this Union? This question can be considered wholly irrespective of this indictment, wholly irrespective of the guilt or innocence of the prisoner. It involves no fact *in pais*. It is a question of mere constitutional law, and for the Court alone to decide. And as the organ of the Court, I say to you, gentlemen, that wherever allegiance is due, there treason may be committed. Allegiance is due to a State, and treason may be committed against a State of this Union. The defendant and his counsel have gone into an argument to show where the sovereign power is, and that it is in the people of the United States considered in their primary or natural capacity, and that it is that people which is sovereign in the State of Rhode Island, and not the organized people of the State itself. In answer to that it is sufficient to say, that we know of no people of the United States, save that which the constitution of the Union has organized and formed, and they are sovereign only to the extent and in the qualified sense, which that instrument expressly grants and defines. Against the natural people, the *primary capacity* people (I wish I could command a better phrase) no crime whatever can be committed, save that, which, in violation of

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the laws of God, one man may perpetrate on another. It is against an organized people only, that any crime, and especially the crime of treason, can be committed. We cannot enter into those speculative inquiries as to the origin of Government. Sufficient for the Court and Jury is it, that Government exists. They must take it as it is, and where the plain letter of the law prescribes to them their course, that course they are bound to pursue, no less from a sense of duty, than by the requirements of the oath of God which is upon them. The constitution of the United States itself, an instrument in which it is hardly to be sought for, recognizes the fact that treason may be committed against a State, by an implication too strong to be resisted. It expressly provides, that a person accused of treason in any State, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

The result of the debate in the convention that formed the constitution of the United States, in reference to the article defining treason, is in accordance with this view. The decision of all the courts of these States, that have had occasion to touch the question, the opinions of all our commentators on constitutional law, recognize the same fact. The Circuit Judge of the United States who presides in this district, Justice Story, in his recent charge delivered in this district, in contemplation of the then unsettled disturbance in this State, repeating almost verbatim the language of the Virginian commentator on Blackstone, distinguishes between treason against a State and treason against the United States. As I understand his views, treason against the State, and treason against the United States, are to be distinguished, the one from the other, by the immediate objects and designs of the conspirators. If the blow he aimed only at the internal and municipal regulations or institutions of a State, without any design to disturb it in the discharge of any of its functions under the constitution of the United States, it is treason against

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the State only, though, if the object be to prevent it from discharging those functions, as the election of Senators or electors of President and the like, it becomes treason against the United States. If any further judicial opinions, delivered with reference to our recent troubles, were wanting, in order to confirm these views, we have them in the opinion of the same court, and the same Judge, deciding on the sovereign authority of this State to proclaim martial law. Can it be doubted, that that power, which, of its own constitutional authority, can proclaim martial law, is sovereign, or a delegated sovereignty, and that it may define and proclaim what treason is? If any further authority were requisite on this point, we have it, in the fact shown in the argument of the question to the Court, that eleven out of twenty-six States of our Union, have inserted an article in their constitutions, defining the crime and providing for its punishment, and that two others have made the same provision in their statute laws. The statutes of no other of the States have been referred to, nor have been examined by the Counsel. The probability is, that, if they were examined, we should find, not that thirteen only of the States, but that the whole twenty-six, have defined this crime, and made provision for the punishment of it.

The power to provide for the punishment of this crime, the Legislature derives, not from the United States, or the people thereof, but from our own people, from the organized sovereign people of the State. That Legislature exercising this power has declared, that treason against this State shall consist only in levying war against the same, or in adhering to the enemies thereof, giving them aid and comfort. This law, we now say to you, is constitutional and binding on all, and that the sovereign authority of this State is such, that treason can be committed against it.

We are now prepared, gentlemen, to consider the indictment. The indictment consists of four distinct counts, upon either or all of which you are to return a verdict of guilty or not guilty, according to the evidence which has passed to

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you, and upon that evidence alone. Nothing that comes within your mere personal knowledge, is to be taken into account. You are to presume that the defendant is innocent at the outset, and to be led to a conviction of his guilt, if to that conviction you come, solely by force of the evidence given to you, or of the admissions made.

Each of these counts substantially charges, that the prisoner, being under the protection of the laws of this State, and owing allegiance and fidelity to the said State, not weighing the duty of his said allegiance, and traitorously devising and intending to stir up, move and excite insurrection, rebellion, and war against the said State, with force and arms, unlawfully and traitorously, did conspire, compass, imagine, and intend to raise and levy war, insurrection, and rebellion against the said State, and, in order to perfect, fulfill, and bring to effect the said compassings, imaginations, and intents of him, the said Thomas Wilson Dorr, he, the said Thomas Wilson Dorr, with a great multitude of persons, amounting to a great number, armed and arrayed in a warlike manner, being then and there unlawfully, maliciously, and traitorously, assembled and gathered together, did falsely and traitorously assemble and gather themselves together against the said State, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said State, and then and there, in pursuance of the said traitorous intentions and purposes aforesaid, he, the said Thomas Wilson Dorr, with the said persons so as aforesaid traitorously assembled and armed and arrayed, in manner aforesaid most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said State, contrary to the duty of his said allegiance and fidelity, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

The particular overt act charged on the Prisoner in each count, is, that he, together with the armed multitude described, with force and arms, did falsely and traitorously, and in a war-like and hostile manner, array and dispose themselves

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against the State. The only essential difference in the counts is, that the first two charge the overt acts to have been committed in Providence, the first on the seventh of May, 1842, the second on the eighteenth of the same month. The two succeeding counts charge the overt acts to have been committed in Gloucester, in the County of Providence, one on the twenty-sixth day of June, 1842, the other on the twenty-seventh of the same month.

The overt act charged in each of these counts, must be proved by at least two witnesses, or by the Prisoner's confession in open court. They may be the same two witnesses, or other two witnesses, but two witnesses at least there must be. There must be two witnesses to prove the particular overt act or part which the Prisoner is in each count charged with having taken in the levying of war; and when once any particular overt act is fixed upon him by the two witnesses required, or by the confession, he must be deemed guilty of levying war, as described and proved under that particular count which contains such overt act. The acts of the armed assemblage then become his, unless he prove that he had abandoned the conspiracy, or was so absent that he could not have participated in it.

Now, the first question of law is, what is it which constitutes the levying of war within the meaning of the act? In giving you the meaning of these words, we shall rely as little as possible upon our own judgment. We shall endeavor to be governed as much as possible by the opinions of those able jurists, who, undisturbed by the excitement and alarm of an agitated community, have, after calm and deliberate consideration, pronounced their meaning. "To constitute," says Justice Story in the charge to which I have already referred, "an actual levy of war, there must be an assembly of persons met for the treasonable purpose, and some overt act done, or some attempt made by them with force, to execute, or toward executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use it,

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if necessary, to further, or to aid, or to accomplish their treasonable design. If the assembly is arrayed in a military manner, if they are armed and march in a military form, for the express purpose of overawing or intimidating the public, and thus attempt to carry into effect the treasonable design, that will of itself amount to a levy of war, although no acutal blow has been struck, or engagement taken place." This construction of the meaning of the words levying war against the State, accords entirely with the opinion of Chief Justice Marshall, delivered in the case of Aaron Burr, and in the main with that of all eminent American jurists and writers on the same subject; and we now give it to you as the construction which this Court places upon those words.

Let us now consider this construction of the meaning of those words with reference to the evidence which has passed to you under the first two counts in this indictment. It is for you to say what that evidence proves, but I may put these questions to you. Has it been proved by two or more witnesses, or by confessions in open court, that on the seventeenth and eighteenth of May, or either of those days, there was assembled in Providence, a body of armed men, arrayed in a military manner; that they had provided themselves with artillery, musketry, or like implements of war, for the express purpose of making an assault upon, or taking possession of the State's arsenal or magazine of arms in Providence; that they marched on the night of the seventeenth, or morning of the eighteenth, with intent of carrying into effect their design; that they arrayed themselves in arms before the arsenal; that the arsenal was at that time in the actual occupation of the military forces of the Government of the State; that they sent a messenger with a flag to demand its surrender; that upon the refusal to surrender the messenger returned, and that upon his return, or before it, one or more of the guns were aimed at the building; that there were two attempts made to discharge them into the building. If you believe these facts have been proved by the two witnesses, or by the confession of the prisoner, it is the opinion of this Court

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not only that war was levied, but actually carried on against the State, although not a single gun was discharged and no engagement actually took place.

But supposing you should be satisfied that war had been thus levied, this will not justify you in returning a verdict of guilty; you must be satisfied by the two or more credible witnesses, or by confessions in open court, that the prisoner took a part in it; in other words, his particular overt act must be thus proved upon him. It is observed in the case of Bollman and Swartwout, that if a body of men be actually assembled for the purpose of effecting by force, a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors. Both circumstances, says Judge Marshall, must concur. They must perform a part which will furnish the overt act, and they must be leagued with the conspirators. He who comes within this description levies war, arrays and disposes armed men against the State. If this applies to the private in the ranks, it pre-eminently applies to the Commander-in-chief. As to him, it can only be necessary to prove that he claims to be such Commander, and to prove his presence at the scene of action, for it cannot be supposed that an assault can be made on an armed arsenal or fortress, in the presence of the Commander-in-chief, without his orders, unless it be made so to appear. Indeed, it has been declared by the highest authority, that to appear at the head of a rebel army, is itself an overt act of levying war. The main question, then, is, did the prisoner march with this body of men to the arsenal, or was he then and there present, and is the fact proved by the two or more credible witnesses, or confessed by him in open court? If you believe from such evidence or confession, that he was leagued with the conspirators and performed a part, the overt act or acts charged are fixed upon him, and there is no alternative but to return a verdict of guilty on one or both these counts in the indictment.

I now pass to the other two counts in the indictment. These

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charge the levying of war against the State, in Glocester, on the twenty-fifth and twenty-seventh of June. Was war then and there levied within the meaning of the law? That is the first question which you have to decide. An assemblage of armed men for a treasonable purpose, may sometimes accomplish its object by the terror which it inspires, and hence it has been decided, that actual violence to external objects, is not necessary to constitute the levying of war. It can hardly be doubted, that "if a rebel army," to use the language of Chief Justice Marshall, "avowing its hostility to the sovereign power, should front that of the Government, should march and countermarch before it, should manœuvre in its face, and should then disperse from any cause whatever without firing a gun," it can hardly be doubted, I say, that it would amount to an act of levying war. True, the Government troops were not present and under the eye of the insurgent force at Chepachet, as at the arsenal, but a portion of the State, if not actually invaded by a foreign force, was nevertheless, as all the testimony goes to show, in the actual occupation of a body of armed men hostile to the Government. The laws of the legal Government did no longer there afford protection to its peaceful citizens. Men were taken and treated as Prisoners of war; property was seized by the strong arm of military force. The hostile force occupied an entrenched camp, on a hill commanding the public highways, and a number of pieces of ordnance were mounted, and loaded, and so directed as best to defeat an assailing force. Ammunition was there; a Commissary department was established, and from two to three hundred men were daily drilled on the height, as preparatory to further operations. Everything indicated preparations for a permanent military occupation of a portion of the State. Knowledge of these facts threw the whole State into military array, and subjected it to martial law.

This was the external appearance of the movement, and certainly it does present an appearance of a movement of a warlike character, and equalling, at least, a mere military

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manœuvring in front of the Government forces, as mentioned by Chief Justice Marshall.

Should you be satisfied by the confession in open court, or by other evidence, that an armed force of two or three hundred persons was actually embodied at the time and place mentioned in the indictment, there entrenched in a fortified camp, with the avowed object of overturning the existing Government, and establishing a new one on its ruins, and to that end taking prisoners of war and seizing private property, there is no doubt in the mind of this Court but that such acts amount to a levy of war within the meaning of the statute. But though from the proof in the case, you should come to this conclusion, you still cannot find the prisoner guilty, unless you are also satisfied by the two or more credible witnesses, or by his confession, that he performed a part which will be the proof of the overt act. Here also to prove that he was present acting as Commander-in-chief, is, as under the two preceding counts, at once to prove that he took a part and was leagued with the conspirators.

The material point here to be proved, is the overt act, and any two credible witnesses who swear that they saw him with the insurgent force, armed, marching with them, or performing any other part in furtherance of the common design, are sufficient to establish the overt act. The intent with which he was there, or the character which he, as their Commander-in-chief, assumed, may be established by proof of his own admissions, or by his declarations in open court, or by his acts, and may be proved by one, or any number of witnesses, each testifying to a distinct admission or a distinct fact. Now, gentlemen, if it has been thus proved, under either or both counts, that he performed a part with the insurgent force, that he was their Commander-in-chief, these two counts also are sustained, and it will be your duty to return a verdict of guilty; otherwise, a verdict of not guilty on the same counts or either of them.

But it is due to the prisoner, since such has been his course, to say, that from the testimony which he has put in,

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and his declarations here in court, he has seemed to be rather ambitious to show that he was there performing a part, what that part actually was, and how he stood related to his associates.

It may be, gentlemen, that he really belived himself to be the Governor of this State, and that he acted throughout under this delusion. However this may go to extenuate the offense, it does not take from it its legal guilt. It is no defense to an indictment for the violation of any law, for the defendant to come into court and say, "I thought that I was but exercising a constitutional right, and I claim an acquittal on the ground of mistake." Were it so, there would be an end to all law and all government. Courts and juries would have nothing to do but to sit in judgment upon indictments, in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit it, and, according to this doctrine, you must acquit. The main ground upon which the prisoner sought for a justification was, that a constitution had been adopted by a majority of the male adult population of this State, voting in their primary or natural capacity or condition, and that he was subsequently elected, and did the acts charged, as Governor under it. He offered the votes themselves to prove its adoption, which were also to be followed by proof of his election. This evidence we have ruled out. Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted, or a Governor elected, or not. Courts take notice, without proof offered from the bar, what the constitution is or was, and who is or was the Governor of their own State. It belongs to the Legislature to exercise this high duty. It is the Legislature, which, in the exercise of its delegated sovereignty, counts the votes and declares whether a constitution be adopted or a Governor elected or not, and we cannot revise and reverse their acts, in this particular, without usurping their power. Were the votes on the adoption of our present constitution now offered here to prove that it was, or was not adopted, or

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those given for the Governor under it, to prove that he was or was not elected, we could not receive the evidence ourselves, we could not permit it to pass to the Jury. And why not? Because, if we did so, we should cease to be a mere judicial, and become a political tribunal, with the whole sovereignty in our hands. Neither the people nor the Legislature would be sovereign. We should be sovereign, or you would be sovereign; and we should deal out to parties litigant, here at our bar, sovereignty to this or that, according to rules or laws of our own making, and heretofore unknown in courts. In what condition would this country be, if appeals could be thus taken to courts and juries? *This* jury might decide one way, and *that* another, and the sovereignty might be found here to-day, and there to-morrow. Sovereignty is above courts or juries, and the creature cannot sit in judgment upon its creator. Were this instrument offered as the constitution of a foreign State, we might, perhaps, under some circumstances, require proof of its existence, but even in that case, the fact would not be ascertained by counting the votes given at its adoption, but by the certificate of the Secretary of State under the broad seal of the State. This instrument is not offered as a foreign constitution, and this Court is bound to know what the constitution of the Government is under which its acts, without any proof even of that high character. We know nothing of the existence of the so called "People's Constitution" as law, and there is no proof before you of its adoption, and of the election of the prisoner as Governor under it; and you can return a verdict only on the evidence that has passed to you. Our ruling on this point, is in exact accordance with that on the same point in the trial of the indictment of the State against Franklin Cooley, where, after an elaborate argument, it was unanimously decided, that no such evidence could be received by the Court or pass to the jury.

This case is now with you, gentlemen; you can find the prisoner guilty on one or more counts in the indictment, and not guilty on the residue, or you may return a verdict of

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guilty or not guilty, generally, according as you find the law applies to the evidence given you.

The Court has now performed its duty; go ye, gentlemen, and do yours.

Mr. Turner. We wish the Court further to charge the jury that in criminal trials for capital offenses, the jury are the judges of the law, as well as of the facts in the case: and also, that the evidence for the State does not support the charge of traitorous and criminal intent, as laid in the indictment.

Chief Justice DURFEE. We can charge the jury only as we have charged them: they are to apply the law, as laid down to them by the Court, to the facts as they find them proved before them. On the other point, the only question of intent which the jury have to consider, is, if they find all or any of the overt acts of levying war sufficiently proved, whether the defendant at the time, intended to commit those acts.

THE VERDICT AND SENTENCE.

May 7.

The *jury* then, at a quarter before eleven p. m., retired, and the Court took a recess. At twenty minutes before two o'clock on Tuesday morning, the *jury* came into court and pronounced a verdict of *Guilty,* which being duly recorded and read, the prisoner was remanded to the custody of the Sheriff, and the COURT took a further recess until eight o'clock a. m.

After the verdict of the jury had been received and recorded by the *Clerk,* Mr. Justice HAILE, (C. J. DURFEE being absent,) in dismissing the jury, thanked them "for their punctual attendance, and for the faithful manner in which they had discharged their duty."[20]

[20] One of the jury, immediately after they separated, being asked whether there had been any division among them, about their verdict, replied, *"No. There was nothing for us to do:—the Court made every thing plain for us."*

Another juror, being asked why they remained out so long, said, *"they agreed upon their verdict immediately; but remained out, so that the crowd might disperse to their homes."*

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Mr. Blake, Attorney General, moved that Thomas W. Dorr be brought into court to receive sentence, upon the verdict rendered against him.

Mr. Turner, when *Mr. Dorr* came in, moved the Court to stay the sentence, until he could prepare a Bill of Exceptions, and file a motion for a new trial.

Mr. Blake did not object.

After some discussion between the Counsel, the prisoner, and the Court, as to time, the motion was granted. Ten days were allowed for filing the motion, and the court adjourned for the hearing, to the second Monday (the tenth) of June.

The counsel for the defendant afterwards filed their exceptions. Moved for a new trial and for the arrest of the judgment. Elaborate arguments lasting over several weeks were made by counsel for the defendant and the State and by *Mr. Dorr* himself. The Court overruled the motion and refused a new trial on June twenty-fourth.

THE SENTENCE.

June 25.

The Court met in the Town Hall, the State House where it usually sits being occupied by the Legislature.

Mr. Blake, Attorney General, moved for sentence.

DURFEE, C. J. Mr. Clerk, ask the prisoner at the bar, if he has anything to say why sentence should not now be pronounced against him.

The *Clerk.* Thomas Wilson Dorr, I am directed by the Court to ask you, if you have anything to say why sentence should not now be pronounced against you?

Mr. Dorr. The Court have, through their officer addressed to the defendant the usual questions, whether he have anything to say why sentence should not now be pronounced upon him. I have something to say, which shall be brief and intelligible to the Court, though it must be necessarily unavailing. Without seeking to bring myself in controversy with the Court, I am desirous to declare to you the plain truth.

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I am bound, in duty to myself, to express to you my deep and solemn conviction that I have not received, at your hands, the fair trial by an impartial jury, to which by law and justice I was entitled.

The trial has been permitted to take place in a county where, to say the least, it was doubtful whether the defendant could be tried according to the law of the State; and in a case of doubt like this, he ought to have had the benefit of it, especially as the trial here must be in a county to which the defendant was a stranger, in the midst of his most excited political opponents.

All but one of those freeholders, one hundred and eight in number, who were summoned here for the purpose of selecting a jury to try the defendant, were of the opposite party in the State, and were deliberately set against the defendant with the feelings of partizan hostility. The single democratic juror was set aside for having expressed an opinion. Of the drawn jurors, sixteen in number, two only were members of the democratic party; and one of them for cause, and the other for alleged cause, was removed.

Every one of the jury finally selected to try the defendant was, of course, a political opponent.

And even as so constituted, the jury were not permitted to have the whole case presented to their consideration. They were not, as in capital, if not in all criminal cases, they are entitled to be, permitted to judge of the law and of the fact. The defendant and his Counsel were not permitted to argue to the jury any matter of law.

The Court refused to hear the law argued to themselves, except on the question whether treason be an offense against a State or against the United States.

The Court refused to permit the defendant to justify himself by proving the constitution, the election and the authority under which he acted; or to permit him to produce the same proofs, in order to repel the charges of malicious and traitorous motives made in the indictment, and zealously urged against him by the counsel for the State.

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By the charge of the Judge, the jury were instructed that the only question which they had to try was, whether the defendant intended to do the acts which he performed: a question of capacity rather than of motives and intentions.

It is true that the jury were absent more than two hours; but not for deliberation. One of them was asked, immediately after the verdict was delivered, and the jury was discharged, whether they had been detained by any disagreement. He replied, "we had nothing to do. The Court had made every thing plain for us."

On hearing a bill of exceptions to the verdict thus rendered, the Court promptly overruled all the points of law.

The Court also denied to the defendant an opportunity of showing to them, that three of the jurors, before they were empanelled, manifested strong feelings, and had made use of vindictive and hostile expressions against him personally; after the defendant had established by his affidavit the fact that he was not informed of this hostility of feeling and expression before they were empanelled, and with regard to two of them, before the verdict was rendered. The defendant expected to prove, by twelve witnesses, that one of these jurors had expressed a wish to have the defendant put to death, and had declared, shortly after the verdict, to a person inquiring the result, that "he had convicted the defendant, and that this was what he intended to do;"—that another juror had also declared, that the defendant ought to be executed; and that the third had frequently made the same declaration, with a wish that he might be permitted to do the work of an executioner, or to shoot him as he would a serpent, and put him to death.

Nor would the Court permit the defendant to show by proofs, which he declared on oath to have been unknown to him at the time of the empanelling of the jury, that an array of twelve men, summoned on venire by a deputy sheriff, were, or a considerable part of them, at least, the same persons who had been selected by an attorney of this court, who assisted the officer in the service of the summons.

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These, and other matters which I will not stop to enumerate, show that this trial, which has been carried through the forms of law, was destitute of the reality of justice, and was but a ceremony preceding conviction. That there is any precedent for it, in the most acrimonious period of the most excited party times in this country, I am not aware from any examination or recollection of its political history.

In a trial of an alleged political offense, involving the feelings of the whole community, and growing out of a condition of affairs which placed the whole people of the State on one side or the other of an exasperated controversy, the strictest and most sacred impartiality should have been observed in the most careful investigation both of law and fact by the jury, and in all the decisions and directions of the Court. In what case should they have been more distrustful of the political bias of their own minds, more careful in all their deliberations, more earnest in the invocation of a strength above their own, that they might not only appear to be just, but do justice in a manner so above all suspicion, that the defendant and all those with whom he is associated, might be satisfied that he had had his day in court, and that every requisition of the law had been observed and fulfilled. In how different a spirit were the proceedings of this trial conducted! And with what emotions must the defendant have listened to the declaration of one of your honors, that "in the hurry of this trial" they could not attend to the questions of law, which he so earnestly pressed upon their immediate consideration, as vitally important to the righteous determination of his case!

The result of this trial, which your sentence is about to proclaim, is the perpetual imprisonment of the defendant, and his seclusion from the face of society, and from all communication with his fellow-men.

Is it too much to say, that the object of his political opponents is the gratification of an insatiable spirit of revenge, rather than the attainment of legal justice? They are also bent upon his political destruction, which results from the

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sentence of the Court, in the deprivation of his political and civil rights. They aim also at a social annihilation, by his commitment to the tomb of the living, from which, in ordinary cases, those who emerge are looked upon as marked and doomed men, to be excluded from the reputable walks of life. But there my opponents and persecutors are destined to disappointment. The Court may, through the consequences of their sentence, abridge the term of his existence here; they can annihilate his political rights; but more than this they cannot accomplish. The honest judgment of his friends and fellow citizens resting upon the truth of his cause, and faithful to the dictates of humanity and justice, will not so much regard the place to which he is consigned, as the causes which have led to his incarceration within its walls.

Better men have been worse treated than I have been, though not often in a better cause. In the service of that cause I have no right to complain that I am called upon to suffer hardships, whatever may be the estimate of the injustice which inflicts them.

All these proceedings will be reconsidered by that ultimate tribunal of Public Opinion, whose righteous decision will reverse all the wrongs which may be now committed, and place that estimate upon my actions to which they may be fairly entitled.

The process of this Court does not reach the man within. The Court cannot shake the convictions of the mind, nor the fixed purpose which is sustained by integrity of heart.

Claiming no exemption from the infirmities which beset us all, and which may attend us in the prosecution of the most important enterprises, and at the same time conscious of the rectitude of my intentions, and of having acted from good motives, in an attempt to promote the equality and to establish the just freedom and interests of my fellow citizens, I can regard with equanimity this last infliction of the Court; nor would I, even at this extremity of the law, in view of the opinions which you entertain, and of the sentiments by which you are animated, exchange the place of a prisoner at the bar for a seat by your side upon the bench.

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The sentence which you will pronounce, to the extent of the power and influence which this court can exert, is a condemnation of the doctrines of '76, and a reversal of the great principles, which sustain and give vitality to our democratic Republic; and which are regarded by the great body of our fellow-citizens, as a portion of the birthright of a free people.

From this sentence of the Court, I appeal to the people of our State and of our country. They shall decide between us. I commit myself without distrust, to their final award. I have nothing more to say.

Chief Justice DURFEE, after a few remarks, in which he observed that the matters stated by the prisoner had all been considered by the Court; that the Court had been swayed by no political motives, and had been governed in their proceedings by the law of the land; and that, in consequence of the terms of acquaintance which had existed between himself and the prisoner, he now discharged with regret this last duty which the law imposed upon him—said—Listen, Thomas Wilson Dorr, to the sentence of the Court, which is "That the said Thomas W. Dorr be imprisoned in the State prison, at Providence, in the County of Providence, for the term of his natural life, and there kept at hard labor, in separate confinement."

On June twenty-seventh, Mr. Dorr was removed by the Sheriff of Newport County, from the County Jail in Newport, and committed to the State's Prison in the City and County of Providence, pursuant to the sentence.

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THE TRIAL OF JOHN DEGEY FOR DISTURBING DIVINE WORSHIP, NEW YORK CITY, 1823.

THE NARRATIVE

On a Sunday morning in October, 1823, one John Degey attended the Ebenezer Baptist Church in New York City. The sermon did not please him, nor did it please a friend of his, who had accompanied him. Nevertheless both of them went again on the next Sunday. This time he was even less content with what the minister said, and he took the liberty of interrupting him, and telling him that he contradicted what he had said on the Sunday before. The minister replied that at another time and place he would be pleased to explain. And the next week the grand jury indicted Degey for his conduct, and after a trial before a jury, he was convicted and fined.

THE TRIAL[1]

In the Court of General Sessions, New York City, November, 1823.

HON. RICHARD RIKER,[2] *Recorder.*

November 10.

The prisoner, John Degey, was arraigned today for trial upon the following indictment heretofore returned by the Grand Jury of the City and County of New York:

"The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oath present, that John Degey, late of the first ward of the City of New York, and the County of New York aforesaid, laborer, on the twenty-sixth day of October, in the year of our Lord, one thousand eight hundred and twenty-three, being Sunday, with force and arms, at the eighth ward of the City of New York, in the County of New York

[1] Wheeler's Criminal Cases, see 1 Am. State Tr. 171-174.
[2] See 1 Am. State Tr. 361.

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aforesaid, in the Ebenezer Baptist Church there, during the celebration of divine service, unlawfully, unjustly, and irreverently did disturb and hinder one Jonathan Vanvelser, then being the minister officiating in the said church, and then being in the discharge of his sacred functions, and in the performance of the divine service, in contempt of the law of this State, to the evil example of all others in the like case offending, and against the peace of the people of the State of New York, and their dignity."

Hugh Maxwell,[3] District Attorney, for the People.
Mr. Scott, Mr. Price and *Mr. Wilson,* for the Prisoner.

THE EVIDENCE

The evidence before the jury was as follows: The defendant in company with a friend, visited the Ebenezer Baptist Church, of which Mr. Vanvelser was pastor, on the day set out in the indictment and felt himself displeased at some words uttered by Mr. Vanvelser during the service. He and his friend again visited the church on the following Sunday, and during the service he interrupted Mr. Vanvelser by observing that he had contradicted himself in using language now, against that which he had uttered on the Sunday evening preceding. Mr. Vanvelser replied that an explanation might be had at another time and place. The defendant answered he might go on, if he used decent language.

Mr. Scott (to the jury). This offense was not indictable at Common law. The Statute law of our State had provided a remedy which must be followed: that statute (Revised Laws, Vol. 2, page 195), declares, "That if any person or persons whatsoever, on the first day of the week, called Sunday, or any other day or time shall wilfully, and of purpose, disquiet, interrupt, or disturb any assembly of the people met for religious worship, by making a noise, or by rude and indecent behavior or profane discourse, and shall be thereof legally convicted, before any justice of the peace of the county, or any Mayor, recorder, or alderman of any city where the offense shall be committed, shall for every such offense, forfeit and pay to the use of the poor, a sum not to exceed twenty-five dollars." The Statute proceeds, and authorizes, on non-payment of the penalty, a committal of the party to the common jail, for the

[3] See 1 Am. State Tr. 62.

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period of thirty days. We contend the only remedy is under this Statute; that it must be strictly followed; that the offense as charged in this indictment had not been recognized at common law.

Secondly. It was the right, and perhaps was the duty of those worshipping at the church when doctrines were publicly taught derogatory to Christianity, to object, to oppose them by publicity in the church; and if done decently, and with decorum, it was not an offense at common law or under this statute.

Maxwell, District Attorney. It was clearly an offense at common law. There was a precedent in Chitty in a similar case; it could not be tolerated for a moment that the worship of the whole congregation might be interrupted in a manner charged in this indictment, and yet not be punished at common law. I might have proceeded against the defendant for the penalty under the statute, but I chose the more effective remedy under common law.

Secondly. I deny the right of the defendant or any other person to obstruct the worship in the manner charged upon the defendant. It was obvious that he went to the church with bad motives, and not for the purpose of worship. He was guilty of indecorously disturbing divine worship.

The Recorder. The Court is of the opinion that this is a good indictment at common law, and could be sustained. If the law was as contended for by the counsel for the defendant, the important provision in the constitution which guaranteed the free enjoyment of religious principles and worship to every person, would be nugatory. No man has a right to disturb another in the exercise of that important privilege. If he did, he might be indicted and if convicted suffer a penalty, a fine or imprisonment, or both. By the evidence in the case, it appears the defendant had disturbed the worshippers in the Ebenezer Baptist Church, by an indecorous controversy with the officiating minister in that church, during divine service; the motives of his attendance at the church appeared by the evidence, if not bad, very suspicious; he was not a member,

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and had no right to interfere at all in the mode and manner of the worship; or at least, not by disturbing the congregation during service.

The Court is, therefore, clearly of the opinion that the offense charged in the indictment was an offense at common law, and that the evidence against the defendant, fully proves the charges set forth in it.

The *Jury* immediately returned a verdict of *Guilty*, and the prisoner was fined by the COURT.

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THE TRIAL OF BATHSHEBA SPOONER, WILLIAM BROOKS, JAMES BUCHANAN AND EZRA ROSS FOR THE MURDER OF JOSHUA SPOONER, MASSACHUSETTS, 1778.

THE NARRATIVE

On the morning of March 2, 1778, a servant of Joshua Spooner, of Brookfield, Massachusetts, came to Cooley's tavern, in that town, with an inquiry for his master, representing that he had not been at home during the night, and that his wife and family were greatly alarmed. This statement was received with much surprise at the inn, as Mr. Spooner had spent the previous evening there with some of his friends, and had left at an early hour for his own house, which was only a short distance. A few of the neighbors immediately called on Mrs. Spooner, whom they found in the greatest apparent distress. Upon an examination of the premises, in the neighborhood of the house, they observed the tracks of several persons on the snow, and on further search, the mangled body of Mr. Spooner was discovered in the well, near his own door. The family of the deceased, with the exception of his little daughter refused to look at his body, but his wife, at the urgent request of one of the jury, at length put her hand on his forehead, and exclaimed "poor little man."

Mrs. Spooner was the daughter of Timothy Ruggles,[1] a dis-

[1] RUGGLES, Timothy. (1711-1795.) Born Rochester, Mass. Graduated Harvard 1732, and soon after called to the Bar. Became Judge 1757, and Chief Justice of the Court of Common Pleas, which office he held until the Revolution. Was Colonel under Sir William Johnson in the expedition against Crown Point; second in command at Lake George, and Brigadier General under Lord Amherst in the expedition against Canada. Was several years a member of the Provincial Assembly, and Speaker of the House. Was a delegate from Massachusetts to the Convention at New York to inform the King of the

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tinguished lawyer and soldier, who had held high office in the Province, but who had taken the Royalist side in the Revolution, and was compelled to leave the country, and his large estates confiscated. She, then thirty-two years of age, was well educated, and renowned for her beauty, but her temper was proud and imperious, and her strength of character was marked. She had been married at twenty to Joshua Spooner, a trader, but the connection was not a happy one; he was feeble and mild, while she was energetic and masterful and even in her youth her passions had never been properly restrained.[2] She soon conceived an utter aversion for her husband and this in conjunction with a new relationship which she formed, drove her to the crime which ended her life.

Many months before the death of Mr. Spooner, a young man became an inmate of his house, under circumstances which were calculated to enlist the warmest sympathies of the family in his behalf. Ezra Ross, at that time a youth of sixteen, was the son of respectable parents in Ipswich, and with four brothers had joined the American Army on the commencement of hostilities. On returning from his first campaign, he was cast upon the hospitalities of Mr. Spooner, from whose wife, during a severe fit of sickness, he experienced every kindness. After this he became a frequent and welcome visitor in the family, and evidently an improper intimacy grew up between him and Mrs. Spooner, although her husband never seems to have lost his attachment for Ross.

Actuated by an aversion to her husband, by the blind impulse of unchaste desire, or by the fear that her conjugal infidelity must soon become known to her husband, she began to

Sufferings of the Colonies, and was elected its President. He refused to concur in the address to the King, setting forth the Colonial Claims, for which on his return, he was censured by the Massachusetts House, and reprimanded by the Speaker. He continued firm in his allegiance to the King, but was compelled to leave the country and his large estates were confiscated.

[2] Her father and mother had not set her a good example, for they lived unhappily together, and when he left his native land, she remarried. According to a local tradition, she once served up for her husband's dinner his favorite dog. Chandler Cr. Tr. 9 *note.*

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discuss with Ross a means of putting him out of the way. But becoming dissatisfied with Ross's dilatory proceedings, she resorted to a course so bold and open, that her guilt was placed beyond a doubt, and she involved herself and her confederates in a common ruin. Mrs. Spooner ordered a servant to call in any of the British soldiers who might pass the house: and about a month before the murder, and while Spooner and Ross were both absent, two men, James Buchanan and William Brooks, who had been British soldiers, were passing the house on the way to Springfield, when they were invited in by the servant, and on the solicitation of Mrs. Spooner, they resided in the family for two weeks, being treated with great consideration. There is little doubt that Mrs. Spooner made a direct proposal to these entire strangers to murder her husband, which they agreed to do on the first favorable opportunity. When Spooner returned, he expressed a dissatisfaction at the presence of these men. He requested a neighbor to remain in the house with him during the night, and ordered Buchanan and Brooks to depart on the next morning. They remained concealed in the neighborhood, however, and were a part of the time supplied with food by Mrs. Spooner. On the night of the murder, Ross came to the house either by accident or design, although there is reason to doubt that he had ever seen Buchanan or Brooks before. They laid in wait for Mr. Spooner as he came from the tavern, attacked and killed him, and threw his body in the well. The four then met in the house where Mrs. Spooner distributed among her confederates a quantity of her husband's wearing apparel and a considerable sum of money. The men left, but were soon arrested, with Mrs. Spooner and one female and two male servants, who were subsequently used as witnesses.

The Grand Jury found a true bill against the men for murder, and against Mrs. Spooner as accessory before the fact in that she "invited, abetted, counselled and procured" the murder to be committed. The Trial took place on April 24th, at Worcester, and was presided over by William Cushing, Chief Justice of Massachusetts, afterwards a Supreme Justice

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of the United States. The testimony was conclusive and all were convicted and sentenced to death. They were hanged on the same gallows on the second day of July, 1778.

THE TRIAL[3]

In the Superior Court of Judicature, Worcester, Massachusetts, April, 1778.

HON. WILLIAM CUSHING,[4] *Chief Justice.*

JEDEDEAH FOSTER,
NATHANIEL PEASLEE SARGEANT,[4a]
DAVID SEWALL[5],
JAMES SULLIVAN[6].
} *Associate Justices.*

[3] *Bibliography* • "Chandler's American Criminal Trials," See 1 Am. State Tr. 116.

Mr. Chandler's excellent account of this trial is taken from many sources, there being no authentic report of it made at the time. From the record of the Court, he reprints the indictment, the death warrant, the petition of the prisoners for a reprieve, the Reprieve, the Writ *de ventre inspiciendo,* the Return of the sheriff, and the opinion of the Midwives.

[4] CUSHING, William. Born Scituate, Mass., 1732. Graduated Harvard in 1751. Practiced law first in the District of Maine. Appointed first Judge of Probate Court of Lincoln 1760, and succeeded his father as County Judge 1772. His father was one of the judges who presided at the Trial of the British soldiers for the massacre of citizens in the streets of Boston in 1770. William Cushing became Chief Justice of Massachusetts in 1780; president of the Massachusetts Convention of 1787 to act on the Constitution of the United States. In 1780 he was appointed as an associate justice of the Supreme Court of the United States, the first representative of New England upon that Bench. He was appointed Chief Justice of the United States to succeed John Jay, and unanimously confirmed, but resigned a week later. He continued on the Supreme Bench until September, 1810, when he resigned.

[4a] SARGEANT, Nathaniel Peaslee. (1731-1791.) Born Methuen, Mass. Graduated Harvard 1750. Justice of the Superior Court of Judicature 1775-1781. Justice Supreme Court 1781. Chief Justice of Massachusetts 1789.

[5] SEWALL, David. (1735-1825.) Born York, Maine. Graduated from Harvard 1755. Began practicing law in 1759. Justice of the Peace 1762. Register of Probate 1766. Took an active part in the Revolution. Was member of the Legislature and Council. Appointed Justice of the Supreme Court 1777. Judge of the United States District Court of Maine 1789-1818.

[6] SULLIVAN, James. (1744-1808.) Born at Berwick, Maine. Mem-

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April 24.

The Grand Jury had previously found a true bill against Bathsheba Spooner, William Brooks, James Buchanan and Ezra Ross for the murder of Joshua Spooner.

The indictment charged, that William Brooks, of Charleston, laborer, James Buchanan, of the same Charleston, laborer, and Ezra Ross, of Ipswich, laborer, on the first day of March, 1778, made an assault upon Joshua Spooner, of Brookfield; that Brooks struck the deceased down, and with his hands and feet gave him several mortal bruises of which he instantly died, and that Buchanan and Ross were present, "aiding, assisting, abetting, comforting and maintaining the aforesaid Brooks." The indictment also charged, that Bathsheba Spooner was an accessory before the fact; that she "invited, moved, abetted, counselled and procured" the murder to be committed.

To this indictment the prisoners, on their arraignment, severally pleaded that they were not guilty, and put themselves for trial on God and country. Their trial was accordingly fixed for today to be held in the meeting house at Worcester.

The following were the jurors selected:

Ephraim May, Jonathan Phillips, Ebenezer Lovel, David Bigelow, Benjamin Stowell, Samuel Forbush, Joseph Harrington, John Phelps, Manasseh Sawyer, Elisha Goddard, Abraham Bacheler, and Mark Bacheler.

Robert Treat Paine,[1] for the State.

ber of Massachusetts Provincial Congress 1775. Judge of Supreme Court of Massachusetts, 1776-1782. Delegate to State Constitutional Convention, 1779. Delegate to Continental Congress 1784-1785. Member of State Legislature from Boston for several terms. Member of Executive council, and Judge of Probate 1787. Attorney General 1790-1807. Governor of Massachusetts 1807-1808. LL.D. Harvard 1780. He was a painstaking and conscientious judge, and executive and was the author of numerous works on History and Constitutional Law.

[1] PAINE, Robert Treat. (1731-1814.) Born Boston. Student Harvard 1745. Chaplain Provincial Troops 1755, and afterwards occupied pulpits in Boston. Practiced law also, and in 1770 was retained by the citizens of Boston to prosecute the perpetrators of the Boston Massacre. Member of the General Assembly 1773. Delegate

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Levi Lincoln,[8] for the Prisoners.

THE WITNESSES FOR THE PROSECUTION

Jonathan King. Am a physician, spent Sunday evening with Mr. Spooner, at Cooley's tavern, near Spooner's house; he went home well between eight and nine. Next morning, hearing that he was dead, I went there with all speed, and saw his body, which had been taken from the well. Found the face, above the nose, and temple very much bruised; the scalp was cut an inch and a half long. When the body was carried into the east room, Mrs. Spooner could not be persuaded to look at it, and the family, except his little daughter, declined going to see it. After the jury had finished their inquest, Mrs. Spooner, at my desire, went to the body and put her hand on his forehead and said, "poor little man." There was blood on the curb of the well.

Ephraim Cooley. Mr. Spooner was at my house on Sunday evening; he was pleasant and sociable, and went away well. Next morning Alexander Cummings, one of the family, came and inquired if Mr. Spooner was there. Being anxious for Spooner's safety, I went to his house and six more with me; we asked if Mr. Spooner was at home. Mrs. Spooner said no, and cried. Went to look among the neighbors and near the gate found the snow in a heap, and kicking it found Mr. Spooner's hat, which I carried in and said, "this is Mr. Spooner's hat, what do you think now?" Mrs. Spooner said, "it is his hat." After I had got about thirty rods, they called me back; the body was in the well. Saw blood on the curb in two spots; went immediately for the coroner and officer. Came down with Mrs. Spooner to Worcester, and at Brown's in Worcester, she spoke freely of the matter, and said she was the whole means of this murder being committed. She began the discourse herself, and wept when she talked about it.

Ephraim Curtiss. Having heard that the prisoners were at Walker's went there and found them on Monday evening. Stood at the door until they were taken; they were carried to Mr. Brown's to be examined. A few days after Buchanan was committed I found a ring, which was in court, in his possession; he had a wound on his arm.

to the First Continental Congress 1774-1776. Speaker of the Massachusetts House of Representatives, 1778. Attorney General of Massachusetts 1780-1790. Judge of the Supreme Court of Massachusetts 1790-1804. Founder of the American Academy 1780, and one of the signers of the Declaration of Independence. Received the degree of LL.D. from the University of Cambridge.

[8] LINCOLN, Levi (1749-1820.) Born in Higham, Mass. Graduated Harvard 1772. Began practice at Worcester. Member of the Massachusetts Senate 1797. Member Seventh United States Congress. Attorney General of the United States. Lieutenant Governor of Massachusetts. Appointed (1811) Associate Justice of the Supreme Court of the United States, but declined.

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Joshua Whitney. On March 2nd, was at Brown's when Mr. Curtiss came in, and said he heard Mr. Spooner was murdered, and three fellows were at Walker's who were suspected; went there and found them: Brooks had a watch in his pocket, and a pair of silver buckles in his shoes; I asked where the other fellow was; and went into an upper loft, where I found Ross, who trembled and appeared surprised. When I came down Buchanan was gone; saw Brooks turn round to the negro girl, who showed him the watch, and said Brooks gave it to her. The watch was in court. Brooks had a pair of buckles in his shoes with the initial letters of Mr. Spooner's name. Upon the watch being shown to him he owned it was the same watch which he had in his pocket. I was set to watch the prisoners. Ross said he wished he could see a minister, for he was really guilty of his crime, but he did not strike the first blow, although he was aiding and assisting; they were then talking about the killing of Mr. Spooner—said he would confess the whole when the minister came. Ross said he had got Spooner's jacket and breeches; that he had let Brooks have his because they were bloody. I found in his pocket-book four ten pound notes and three eight dollar bills; he said the rest was his own; he also said he had Spooner's hose, shirt and saddle-bags.

Joseph Ball. On March 2nd, in the evening, went to Walker's and found Brooks. Captain Whitney ordered me to lead him down to Mr. Brown's and when they were there Ross was committed to my care. He had on a pair of black knit breeches and a cloth jacket with metal buttons. The horse that was there was one that I had seen Spooner and his wife ride formerly. Had seen Buchanan at Walker's some weeks before; he was a blacksmith. Heard Ross say he labored under a good deal of concern; he wished a minister was sent for.

Samuel Bridge. Went to Mr. Brown's, from thence to Walker's and when they came back to Brown's, Doctor Green's son said the buckles were his uncle Spooner's. The jacket Ross had on was of brown cloth with yellow metal buttons. Talked with Mrs. Spooner when she came down, and heard her say if she could see the persons face to face she could give satisfaction; said this was the effects of bad company.

Mary Walker. On Thursday evening, saw Brooks and Buchanan at mother's and after they had been there a little while Mrs. Spooner and a young man came to the door, when Mrs. Spooner asked if Sergeant Buchanan was there, and gave him a letter which she said came from her grenadier. The contents of the letter were, that he would meet him to go to the hill. She came back from Dr. Green's very soon, saying that she forgot to give him a piece of cloth which was his. She said she would knit for me, because she could not sew for want of sight. She stayed there two hours. Buchanan and Brooks were there all the time, and they stayed there until Sunday forenoon. Mrs. Spooner was often with them. Sergeant Buchanan wrote sundry letters which he said were to her servant. Brooks often laid his head upon Mrs.

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Spooner's neck, and oftentimes put his hands round her waist. The witness observing it, Mrs. Spooner said, "you must not wonder, Billy (meaning Brooks) has lived at my house and is as fond of me as he would be of a mother." Saw Buchanan divide powder into eighteen papers; they had talked about a sick child at Brookfield. She asked Buchanan when he would go; she said she would send a letter by him, and then said she would write a letter at Mr. Nazro's, it would not be any hurt to write to her father. Buchanan was very sorry that Mrs. Spooner did not come. On Saturday afternoon she came, and they having been in the chamber together a few minutes, she went away saying, "tomorrow night at eleven o'clock, remember, sergeant." He said, "tomorrow night at eleven o'clock." On the next night, Brooks, Buchanan and Ross came back, and in the morning early, they told her the Springfield guard were in pursuit of them, and Brookfield was searched in every house. Mrs. Spooner met them at Leicester and told them of it. I asked Ross if he had ever seen Mrs. Spooner, and he said he did not know as he had; but he had seen Mr. Spooner, and rode to Lancaster with him. Ross seemed to be very dull all Sunday. Asked him what made him so dull? He walked about the room and leaned against the side of the house and said, "Reason enough." Sergeant Buchanan desired me to rip off the ruffles from a shirt, and I ripped the ruffles off of the sleeves. Brooks told me that Mrs. Spooner gave him a shirt and pair of stockings. Buchanan bled himself on Monday morning.

Prudence (a negro woman). Buchanan came to Mrs. Walker's with Brooks on Thursday and talked about going to Mrs. Jones. Mrs. Spooner came there and soon went away and soon after came back again with Dr. Green's two sons. She stayed all the evening, and was often in and out. Mrs. Spooner told John Green he had better go and see if his mother was at home. Sergeant Buchanan offered her his handkerchief. She said, "G-d d--m the handkerchief, I will not touch it." On Friday morning, Buchanan had some powders which he did up in papers. Mrs. Spooner came in, Brooks told her Buchanan was sick, and she went into the chamber to him. I went up there after a broom, and saw them together. On Saturday, as Mrs. Spooner was going away, I asked her what Mrs. Green said; she said she told Mrs. Green she dined at Mr. Nazro's and drank tea there, and it was a pretty good lie. On Sunday, Brooks and Buchanan went away, but Sunday night they came back, and said they should have been taken if it had not been for a friend. Their dress was altered. I asked what became of Brook's they answered they sold it for want of money: they met with Ross two miles from Leicester tavern.

Thomas Green. The buckles were Mr. Spooner's; they were marked J. S. Had seen them in my uncle's shoes.

Charles Simson. Altered the jacket for Spooner, which Brooks had on.

John Hibbard. Lived with Mr. Spooner, and had seen Ross, Buchanan and Brooks there a week before Mr. Spooner was murdered.

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Reuben Old. Had frequently been at Mr. Spooner's the winter past, and about a fortnight before the murder, Brooks and Buchanan were there one evening. Mr. Spooner desired the witness to tarry with him that night. He did tarry there, and Spooner bade him to go out and see what they were doing in the kitchen. He went out and Buchanan said, "what is the old fellow about? (meaning Spooner) he will not come to say much to me, it will not be healthy for him, for I would put him in the well for two coppers." Next morning Mrs. Spooner told him she would go through with her plan; I supposed it was to go to her father.

Loved Lincoln. About February 1st, was at Spooner's, who wanted to know when I went out to Oakham. He and Spooner and Ross set out, and I went with them as far as Chadwick's, in Oakham. On the following Tuesday went to Spooner to see if he had done some business for me, and saw Brooks and Buchanan there. Afterwards Spooner was there and somebody looked into the window, and presently I heard Sergeant Buchanan speak. Spooner says, "how came you here?" They said to warm them. Spooner replied, "you may sit by my fire till morning, but you must not let me see you afterwards." Soon after I heard Buchanan say, "if Spooner turns me out of doors tonight, I will have his life before morning." The night after the murder, Mrs. Spooner said she did not know how her husband came by his death. She said the regulars went away the day before yesterday, and that Ross took Spooner's jacket and breeches, Mrs. Spooner said Ross was concealed there because he hurt the horse's back. She said the regulars and Ross went away together.

Charles. Am Captain Welden's negro; was at Mr. Spooner's the night he was murdered, and saw Ross there; it was about the dusk of evening.

Mrs. Wilson. About three weeks before the murder, was at Mr. Spooner's. Buchanan and Brooks were there, and a doctor was there. Alexander Cumings was whispering with Mrs. Spooner. Saw Ross there a little while before Thanksgiving, the last autumn.

Alexander Cumings. Had lived with Spooner from the time Burgoyne's troops came down. About a fortnight before the murder, Brooks and Buchanan came there. Spooner was gone. Mrs. Spooner was at home; they stayed all day and dined there, and Buchanan breakfasted with her. Mrs. Spooner had ordered me to call in all the British troops who passed along. Heard Mrs. Spooner tell Buchanan that she wished Mr. Spooner was out of the way; she could not live with him. Buchanan said he wished he was out of the way.

They stayed there, backwards and forwards, all the time Mr. Spooner was gone to Princeton. Ross had gone with Spooner. When Spooner came home, on Monday night, Brooks and Buchanan were there. Heard Brooks and Buchanan say, they would try to get Spooner out of the way. Sat up with Spooner at his request, who said he did not love to have Brooks in the house; he did not like the looks of the man. He desired his wife to get them off; he said if she did not he would send for the committee. Next morning I saw them in

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the barn; they lay there two days and two nights. Mrs. Spooner carried them victuals once. I carried them victuals once by her order. On Thursday morning they went to Worcester. On the Saturday night following Mrs. Spooner came home, and Ross was in the milk-room. Ross said he did not want Mr. Spooner to know he was there all day. On Sunday Ross was kept concealed in the chamber. On Sunday night saw Buchanan and Brooks there. Mr. Spooner was then gone to Cooley's. I went out of doors and saw Brooks who asked if that was Mrs. Spooner; I said no, and Brooks then told me to ask Mrs. Spooner to come out to him. I refused to do. Brooks told me, just before, that Spooner would not come home a living man that night. Went in and Mrs. Spooner was in the kitchen, then went to bed and slept about two hours and a half. Waked and smelt the burning of woolen, and got up, and saw Brooks, Buchanan, Ross, and Mrs. Spooner in the parlor. They were burning clothes; they asked me what made me look so sullen; they were then shifting clothes. Ross put on Mr. Spooner's jacket and breeches. Mrs. Spooner bade me go with Mrs. Stratten into the chamber to bring down Mr. Spooner's clothes. Mrs. Stratten got the black breeches and brought them. Buchanan had on a shirt of Mr. Spooner's; heard Mrs. Spooner say she gave Brooks a shirt and handkerchief; saw Brook's breeches thrown into the fire all bloody. Saw Mrs. Spooner take Mr. Spooner's money from the tin box, which was kept in the mahogany chest. Mrs. Spooner bade me go and get some water to wash Mr. Spooner's buckles, and I should have them; I said I would not have them, but I and Mrs. Stratten went to the well and could not dip the bucket. Mrs. Spooner asked me why I did not get the water, I said I believed Mr. Spooner was in the well; she said it was not true. Mrs. Stratten came in with me, frighted and cried, and run and got the Bible. Buchanan said to Mrs. Spooner, "should you've thought my man would do the job for him?" Mrs. Spooner, about a month before, had desired me to kill Spooner and she would make a man of me. Asked Mrs. Spooner if they cut Mr. Spooner's throat; she said, "no, they knocked him down." The night before they went to Princeton, Ross dropped some acquafortis into some toddy to poison him. Spooner said if he had any enemies in the house he should think they intended to poison him. Ross said to Mrs. Spooner, when he came, that he had no opportunity to give him the acquafortis while they were gone. Mrs. Spooner said he carried half a bottle full. When they went away, after the murder, Buchanan shook hands with Mrs. Spooner, and told her she might expect to see him in about a fortnight. On the next morning, Mrs. Spooner went to the well, and said she hoped he was in heaven. She ordered me to get a horse, and go to the tavern and inquire for Spooner. While we were at the well, she said she wanted to have him put in the bottom of the well.

Asa Bigelow. The foreman of the jury of inquest told Mrs. Spooner she must go to jail. She confessed that she hired the people to concert the murder; was to give them one thousand dol-

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lars, and had paid them two hundred. She mentioned the names of Brooks and the sergeant; she said they were all three together.

Sarah Stratten. Lived at Mr. Spooner's at several times. First time I saw Ross there was in the last fall of the year, between the two Thanksgivings. Spooner came from Boston after they were in bed; Mrs. Spooner got up to let him in. About three weeks before Spooner was killed, Buchanan and Brooks were there, and the night he was murdered one Gray and another man lodged there. I carried some supper into the room where Ross and Buchanan were. Mrs. Spooner supped with Mr. Gray and his partner. Did not see Mr. Spooner killed, but when I went to light Mr. Gray to bed, I saw Mrs. Spooner showing a money-box. She took me by the hand, and said she hoped Mr. Spooner was in heaven. When I went to light Gray to bed, his partner was in bed and asleep, as it appeared to me. I brought down the box, and soon after Mrs. Spooner asked me to go up chamber, and get a pair of black knit breeches but I could not find them. Mrs. Spooner was paying some money, and Buchanan had a great deal of paper money in his hand. Heard Mrs. Spooner tell Alexander to go and get some water, and he asked me to go out with him. Went out and Alexander said Mr. Spooner was in the well. They came in without any water. Had seen Mr. Spooner wear a ring very much like the one in court. Lodged a part of the night with Mrs. Spooner, who sighed and tumbled a good deal. Told Mrs. Spooner I would go and tell the neighbors. Mrs. Spooner said if I would keep it a secret she would give me a good deal. Mrs. Spooner often said she hoped Mr. Spooner was in heaven. When the men went away, Mrs. Spooner gave them money. I asked Brooks what he had been about; he made answer, "his time is come." The Saturday night before Mr. Spooner was murdered, Ross came in; said he had Mr. Spooner's horse a fortnight, and hurt his back, and was not willing he should see him. Mrs. Spooner came in soon after Ross came.

Jesse Parker. Lived at Mr. Spooner's at times; had seen Buchanan and Brooks there in the barn. About a fortnight before Mr. Spooner was killed they lay there two or three nights. Mr. Spooner, Alek and I carrier victuals to them. Mrs. Spooner told me to go to the barn to look at the horses and take care of the doors, but I did not, because the regulars were about. When Mr. Spooner came from Princeton, Mrs. Spooner said she never was so stumped in her life. Heard Mrs. Spooner say she had been to the west parish, and the regulars were gone to Worcester, and she wanted to go there to see her sister. She asked Mr. Spooner for a horse, but he declined letting her have one, and she sent to Capt. Welden's and got his. I went from the house on Sunday, and Ross was there.

Obadiah Rice. Sometimes before the murder, heard Mrs. Spooner say she wished old Bogus was in heaven. When Mrs. Spooner, Alek and Mrs. Stratten were brought to jail they came in my sleigh, and when they were on the road Mrs. Spooner

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said, "this don't seem like Christmas day." She said she had a great desire to see her Daddy, and if it had not been for that this murder would never have been committed. Heard Mrs. Spooner say she would suffer ten deaths for Mrs. Stratten and Alek before they should suffer, for they were innocent.

Elisha Hamilton. Am a constable. Mrs. Spooner took on much and said, "if it was not for this thing I could meet my Judge." She said, "this happened by means of Ross's being sick at our house." She told Cooley that she did not blame any body, for this was all her own doings. She said Mrs. Stratten and Alek were innocent. She had bribed them to do and say what they had done.

William Young. Am the justice of the peace, before whom the prisoners were examined on their first arrest. I produce the confessions of Brooks, Buchanan and Ross, which were freely given to me by these prisoners. Mrs. Spooner, since her commitment, confessed that she consented to the murder. The confessions of the three men were in substance, that the murder was committed by them at the instigation of Mrs. Spooner. When her husband was entering his yard on the evening of the murder, he was attacked and immediately killed, and thrown into the well. The four persons then met in the house, when Mrs. Spooner distributed among her confederates a portion of her husband's wearing apparel and a considerable sum of money. The men immediately left the house, and were arrested.

No evidence was offered in behalf of the prisoners.

THE SPEECH FOR THE PRISONERS

Mr. Lincoln commenced by alluding to the importance and novelty of the case. It was the first capital trial since the establishment of the government. Perhaps a more difficult or important case had never been committed to an American jury. The public mind was intensely excited; but he begged of the jury to banish all feeling and prejudice—all indignation at the enormity of the offense—all opinions from hearsay —all political feelings. By the great principles of the law the prisoners were innocent until proved to be guilty.

Murder was where a person of sound memory and discretion unlawfully kills a reasonable creature in the peace of government, with malice aforethought, either implied or express. An accessory before the fact was he who, being absent at the time, doth yet procure, counsel, and commend the crime. For if present aiding, and one only do the act, they are all principals.

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In order, therefore, to determine whether the prisoners had been guilty of the crimes charged in the indictment, the jury must keep in their minds the evidence against each one separate and distinct. It was necessary that they be convinced that each one was designedly instrumental in the death, which fact must be proved in such a manner as to leave not even a shadow of doubt in their minds.

Now the fact of killing was not denied; that it was murder in somebody was confessed. But it did not follow that A, B and C were the murderers, which must be proved beyond all doubt before the jury could convict them; for the jury could not infer from the murder itself, which did the act, when it might have been one of them. One must have done it. Could not all the facts have taken place as testified, and yet A not be concerned to that degree which this indictment supposed? If the proof was of a less degree of guilt than the indictment supposed, then in respect to this indictment, it was no proof at all.

It was not his business to defend either of the prisoners against the imputation of guilt; all had been wicked; all have been guilty in a degree. He could not deny he believed he might safely admit, that A was privy to, and concealed the death of the deceased, and, perhaps consented to it, or did not try to prevent it, and was guilty of misprision of felony—and yet firmly stand upon the only ground it behooved him to maintain. Principal or accessory was the gist of the inquiry, and the proof of nothing else was the purpose. Every thing that was proved respecting Ross was perfectly innocent in reference to the crime charged in the indictment. He was sure the circumstances, taken together, did not afford proof, presumptive, probability, or even suspicion of there being a design in Ross to hurt Mr. Spooner.

Was there anything in the nature of the things that Ross, doing so and so, necessarily implied the existence of all those circumstances that constitute murder? Was not innocency, in the sense of the indictment, perfectly consistent with the facts proved? And it was a rule, that no man's guilt could be

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proved by any evidence that was compatible with his innocence.

The proof of a crime might be divided into two classes, perfect and imperfect. Those were perfect which excluded the possibility of innocence. Imperfect, those which did not exclude this possibility. Of the first, one only was sufficient for condemnation; of the second, as many were required as form a perfect proof; that is, if each, taken separately, did not exclude this possiblity, yet if they did by their union, it was perfect proof, which was always requisite; but separate, independent proofs, which did not connect in time, so as at last to connect the fact to be proved, did not amount to perfect proof.

The confession of a criminal could rarely be turned against him, without obviating the end for which he must be supposed to have given it. It was uncertain; there had been instances of murder avowed that had not been committed, and confession of goods stolen that were never out of the possession of the owner. It was unjust and dangerous to suffer confession, dictated by the distraction of fear, or the misdirected hopes of mercy, to have much weight. Besides, the evidence of words ought to be received with great caution and distrust, which were spoken in unsuspicious confidence, or in the hurry and perturbation of a mind anxious and pressed by leading questions. The words might be very innocent when spoken, and criminal when related: much depended upon the time and concomitant circumstances.

The testimony was not sufficient to convict Ross of the offense charged in the indictment, although he might be guilty of misprision of felony and proceeded against as such. The mere fact of his being present was not sufficient. The jury must be satisfied, beyond all doubt, that he was present with a design to assist. Now if Ross had a design against Spooner's life, he had previously had frequent opportunities to take it—at his house—at Princeton—on the road—by poison. The matter had been long in agitation, and his neglecting various opportunities to accomplish it, showed that he had no

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real design to do it, but only wished to keep up the appearance of an intention.

In regard to Mrs. Spooner, she was not in a sound mind. The whole evidence was that of a fool or a distracted person. Born in a high rank of life—well educated and accomplished—a wife and a mother, and in the enjoyment of a good estate, what object could she have in undertaking such a detestable crime? What end could it serve? Were there any reasons persuading, hopes inviting, or advantages arising from the death of her husband? By it she would deprive her children of their father and guardian—herself of a husband, and would subject herself to the burthens of her family with only one third of the estate instead of the whole of it. Could she, then, have seriously projected this matter, with the design of having it executed? and if she did, could she have been in the exercise of her reason? If it was said she could not live with her husband, could she not have separated, and gone to her father, whose favorite she was—to her brother and her other friends? There, with her address, and engaging appearance, she might have had any gallant she pleased, not such as Ross, but one more fitted to her rank and station in life.

It was a well known principle, founded in nature, that the source of wickedness, the incentive to guilt, was the hope of impunity. But what hopes of being undetected, what presumption of impunity could she have? Was it possible to conceal the matter, considering the number of persons engaged, their character, their situation, and their profession, no plan formed to conceal it, no story agreed upon, no place to flee to—the matter entrusted to strangers, with no evidence of their fidelity? She is seen in company with them the night before, at Walker's—procures calomel—agrees on the time—reminds them of it before company, "at eleven o'clock." Why the calomel, if her husband was to be assassinated? She previously tells that Mr. Spooner is going a long journey, and inquires if anybody wants to hire his farm. After the murder, she gives the murderers his watch, buckles, waistcoat, breeches and shirts, and even puts them on, to be worn in the eye of the

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world, where they were well known to be Spooner's clothes, and from their goodness and fashion might be known not to belong to the persons wearing them, being low and vulgar. Was this the conduct of a person in the exercise of reason? Would it have been less rational to have written on their foreheads in capitals, "the murderers of Mr. Spooner!"

If, then the conduct was irrational, if it was what could not be directed by a person in the exercise of reason, there was the best evidence of a disordered mind that the nature of the thing would admit of. For there was no knowing the state of the mind, but by a person's conduct. The distraction, the disorders of the mind operate variously—mark the difference between a fool and a man disordered—the fool draws wrong conclusions from right principles—the disordered mind argues right from wrong principles.

As to confessions, they were not evidence any further than, from the nature of the thing and circumstances, they could be supposed to be true. If the confession of one was taken as conclusive evidence of the truth, then another's might be, which was different and inconsistent; but if the first was taken for true, then a confession was admitted as evidence of truth, which was necessarily untrue. Besides, a person confessing his own turpitude, was not to be regarded against others, and why against himself, seeing it could not be believed, on the veracity of the witness, for if that was the foundation of belief, it was as good against another person as himself. If the ground was, because it was against his interest, then if any reason could be assigned for his doing it, besides its being true it could be no evidence of truth. Then, why should he not make a wrong confession, as well as a true one? A man that has murdered could not feel an obligation to speak the truth.

Was it credible that it should ever enter into the head of a person of so much capacity and so much cunning, to entrust an affair so heinously criminal to strangers, deserters and foreigners, who, had they escaped detection here, would probably have boasted of their feats, after they got off to

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the enemy; and if she was afraid they would not disclose it, to entrust it with other women and boys? Must she not have had some chosen trusty confidant, or some reason to hope either to accomplish or conceal so detestable an action before she would have engaged in it, if she had been in her senses? It was perpetrated in the heart of a populous town, near neighbors where it must at farthest be discovered by the morning—liable to be heard in the time of it—by the people abroad, by the two travellers who lodged there that night, by the children, and others of the family.

Was it possible she would commit so atrocious a crime, and run so great a hazard from no motive? It was said she was upon ill terms with her husband. This was to trump up one crime, that there may seem to have been a motive to have perpetrated another from. But to whom did she commit the execution of it? Whom did she make use of as her accomplices? Whom was her confidant? Whom did she trust with the management of a villainy, that so nearly affected her reputation, her safety, her life, her children, the lives of others, and the happiness of her friends? The answer was, to prostitutes, tories, regulars, deserters, strangers and foreigners. Was a woman that is admitted to have sense, so stupid, if in the exercise of her reason, as to trust all that was valuable to her and hers, in the hands of such persons? Could there be a doubt, in the minds of the jury, that this woman was not in a state of mind which rendered her guilty in the eye of the law, of a most horrible crime, which would subject her to the last affliction of human power and vengeance?

THE VERDICT, SENTENCE AND CONFESSION

The *jury* returned a verdict of *guilty of murder,* and sentence of death was pronounced on the four prisoners by the CHIEF JUSTICE, the execution to take place on Thursday, the fourth day of June.

The trial occupied sixteen hours. During the whole of it, Mrs. Spooner manifested perfect composure and appeared

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to be utterly indifferent as to the result. Her demeanor was proud and reserved, and she submitted to her fate without a murmer. The prisoners awaiting execution were confined in the jail at Worcester. The three men seemed entirely broken down by their fate. They acknowledged the justice of their sentence, and, under the teachings of their spiritual adviser, they gave themselves to prayer, and "became mighty in the Scriptures, and were wont to make very pertinent observations upon many passages that were mentioned to them." They made the following full and particular confession of their guilt:

"On February 8th, 1778, James Buchanan and William Brooks left Worcester with an intent to go to Springfield to work. In passing Mr. Spooner's we were called in by Alexander Cumings, who we thought was a British soldier. Having stood some time by the fire, he told us his master was gone from home, but he would go and call his mistress, for she had a great regard for the army, as her father was in it and one of her brothers. He called her, and she came down, and appeared glad to see us. She asked us whether we came from the Hill? We told her we did, and were going to Canada, as I, Buchanan, had left my family there. She ordered breakfast for us, and as soon as it was ready we were desired to go into the sitting-room. We were very much surprised at this, for we should have thought ourselves well dealt by to have received any favors she might see fit to bestow on us in the kitchen. However, we all breakfasted together. The weather being very bad, we were asked to stay till it cleared up. As we had but little money, we accordingly stayed. The weather continuing very bad, we stayed there that day and night. I (Buchanan) am not positive whether it was the first or second day, she told me, when by ourselves, that she and her husband did not agree—that he was gone a journey to Princeton, and that he would not be home soon—that we should not go from thence until the weather was fair, there being a great fall of snow at this time.

"We very readily consented, and stayed from day to day, expecting Mr. Spooner home. Mrs. Spooner getting very free in discourse with me (Buchanan). One day she told me that she never expected Mr. Spooner to return, as there was one Mr. Ross gone with him, who had an ounce of poison, which he had promised her he would give to Mr. Spooner the first convenient opportunity.

"The reader must needs think this a very strange circumstance that she should make this discovery to an entire stranger. She said at the same time, we should stay till we saw whether Mr. Spooner returned or not. Accordingly we stayed, and were never in better quarters, little thinking of the bait the seducer of souls was laying for us; we were then in a disposition to catch at it, having no fear of God before our eyes, and being entirely forsaken of him.

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"Having tarried ten or eleven days, as nearly as can be recollected, her husband came home, and seeing us there, asked her who we were. She told him that I (Buchanan) was cousin to Alexander Cumings. He took no further notice of it, but going out among his neighbors, it is likely he was informed how long we had been there, and probably heard, at the tavern, of the quantity of liquor he had to pay for, since his going on his journey. Be that as it may, at night he came home, and seeing we were not gone, he desired us to go immediately. We begged he would let us stay till morning. He, after some time, consented that we should stay by the fire all night. He was in the sitting room by himself, and Mrs. Spooner went to bed. There was one Reuben Old came upon some business with Mr. Spooner, and after some time came out and told us that Mr. Spooner told him he was afraid we should rob him, adding that he had lost a silver spoon and a great deal of pewter. This vexed us, as we were conscious we had no thought of stealing from him. Had we been so inclined, we had as much opportunity as we could have desired. The spoon he found where he had laid it, and Cumings convinced him there was none of the pewter missing.

"Mr. Spooner went upstairs and brought down a box, which he had his money in, and lay down on the floor with it under his head. Everything Mr. Spooner did or said, Old came and told us, and was with us all the time he was asleep, and we were all merry together, sitting by the kitchen fire. Said Old declared in court, that I, Buchanan, said if Mr. Spooner came out, I would, for two coppers, put him into the well, which is false. In the morning, it not being convenient to see Mrs. Spooner, to take our leave of her, we, Buchanan, Brooks and Cumings, went to Mrs. Stratten's to pass the day, till we could get an opportunity to bid Mrs. Spooner farewell. We stayed at Mrs. Stratten's the best part of the day. Cumings having received five dollars from Mr. Spooner, to treat his pretended cousin with, we went to Mr. Cooley's tavern and had some drink, from thence to doctor Foxcroft's; stayed there until Cumings came and told us Mr. Spooner was in bed. We then went to the house, and had supper and liquor, retired to the barn and tarried all night. In the morning had breakfast sent to the barn for us. And as Mrs. Berry and Mrs. Tufts wanted to see me (Buchanan), I said I would go and see them. Mrs. Spooner said she would also go, which was agreed on. Buchanan and Brooks went there, and we all stayed at Mr. Green's, drinking until late; some distance from thence, she said she had given a handkerchief to a British soldier that had some words in anger with me, Buchanan, upon which Brooks went back on the horse, and she and I went home. Brooks missed his road on his return, but got to the house some time after us; but he did not get the handkerchief, as the soldier would not deliver it, until he saw Mrs. Spooner. Buchanan and Brooks stayed that night in the barn; in the morning went to Gilbert's tavern and stayed there some time, and on coming out from his house we saw Cumings approaching on one of Mr. Spooner's horses; he told us his master was gone to the tavern and that his mistress desired we would come there, which we did, and had supper; we went to the barn that night, and in the

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morning she sent us word that her husband was gone abroad into the country to get some oats.

"The boy Parker had proposed to Brooks, if he would come and meet Mr. Spooner and himself, on their return, the said Parker said he would help to take Mr. Spooner's life. We went over from the barn to the house, and found he was gone, and stayed there all day, and lived on the best the house afforded of meat and drink.

"Mr. Spooner came home in the dusk of the evening, so that we had like to have been seen; but we heard him come with the sleigh to the door and Brooks ran into the cellar, and I went and stood on the back stairs, until he went into the sitting room. We then came out and went to the barn, there stayed all next day, and at night when Mr. Spooner was in bed, we were sent for to the house and received supper and some liquor to encourage another plan, which Cumings and Parker (who have for this time escaped punishment) proposed to poor Brooks, which was, they all three to go up stairs, and Brooks to take his life from him; for which he was to receive one thousand dollars, Mr. Spooner's watch, buckles, and as much cloth as would make a suit of clothes; but Brook's heart failed him; and Mrs. Spooner said she did not think he was so faint hearted. Had this been done he was to be put into the well as he was taken out of bed; for she observed it would be thought he had fallen in while drawing water in the night; next day we had breakfast brought us by Cumings. He informed us there was another plan formed by her, which was as follows. Either Cumings or Parker were to tell Mr. Spooner one of the horses was sick and, as he came to the barn, to kill him, and put him amongst the horses' feet, to make people believe, when he was found, that the horses killed him. But Brooks told Parker not to tell him, but to make her believe he would not go over. The boy conducted accordingly. We stayed all that day and night. The next day being Sunday, we stayed there; she came over at night; we told her we should go away the next morning; she desired we would not; but we would not stay. We set out to go to Springfield; as we went through Western on that road, we engaged to work with one Mr. Marks, a smith; I, Buchanan, worked there two days; but as he had no files fit for the branch of trade Brooks followed, we proposed to go to Worcester to get home, which was agreed to.

"We set off on Wednesday about noon, and in going by Mr. Spooner's we called and told her where we were going; she said she would follow us down the next day, as she wanted to see her sister, saying she was glad we had got work so near; and further added, that she had got two notes, one of twenty pounds, lawful, and another of three hundred dollars, which she would endeavor to get changed, and let me, Buchanan, have one hundred dollars, to purchase anything I might want.

"We stayed in the barn till morning, and then set out for Worcester, and she followed us the same day and called at Mrs. Walker's for us, according to agreement; she came in and stayed some time, and gave me, Buchanan, a note, as much cloth as made a shirt, and six or seven dollars, observing that they came from one M'Donald,

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an acquaintance of hers; she then went to see her sister, and desired us to stay till she came back, which we did; she returned on Friday morning about ten o'clock, and stayed till night; she told me, Buchanan, at parting, that she had no more paper money, but what she had given me; but begged I would procure her some poison to give Mr. Spooner. I accordingly that day got one drachm of calomel, and made it into twenty papers. I desired her to give one in the morning; she told me she never gave him any; she went to her sister's late that night and called on us in the morning, about ten o'clock. I went to the door; she would not come in, but desired me to come up to Mr. Nazro's shop, and she would get files for us, as we had not money sufficient to get what we wanted; she asked me, when we would come through Brookfield. I told her if she would sit up, we would call on Monday night, at eleven o'clock; she said she would. I parted with her and sent Brooks up to the shop. But as he came in sight he saw her ride from the door, and therefore did not go there; we stayed at Walker's until Sunday afternoon, and then left Worcester, and about eight o'clock at night got to Mr. Spooner's; we saw Mrs. Stratten at the well. Buchanan spoke to her; she told me there was company in the house, but she would let Mrs. Spooner know we were there. Mrs. Spooner came out, and told us that one Mr. Ross was in the house, who had a brace of pistols loaded, and that he had promised her he would kill Mr. Spooner as he came home from the tavern. She desired us to come in, which we did; he showed us a pistol, and said Mr. Spooner should die by that tonight. Either Brooks or Buchanan said it would alarm the neighbors.

"Brooks said if Ross would help him he would knock him down; accordingly it was agreed upon, and there was a look-out kept at the sitting room door for his coming. In the meantime there was some supper brought by Mrs. Stratten to us; we had some flip before, and there was some rum brought, which we drank, each of us by turns giving a look out. We are certain Mrs. Stratten could not but know what was going forward. That we leave the public to judge of. Mr. Spooner was at length seen coming, and then was the time for the Devil to show his power over them who had forsaken God.

"William Brooks went out and stood within the small gate leading into the kitchen, and as Mr. Spooner came past him he knocked him down with his hand. He strove to speak when down. Brooks took him by the throat and partly strangled him. Ross and Buchanan came out; Ross took Mr. Spooner's watch out and gave it to Buchanan; Brooks and Ross took him up and put him into the well head first; before they carried him away, I, Buchanan, pulled off his shoes; I was instantly struck with horror of conscience, as well I might. I went into the house and met Mrs. Spooner in the sitting room; she seemed vastly confused; she immediately went up and brought the money which was in the box. She not having the key, desired me to break it open, which I did; at the same time Brooks and Ross came in; she gave two notes of four hundred dollars each to Ross to change and give the money to Brooks; but there was found some paper money, which Brooks received (two hundred

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and forty-three dollars) and the notes were returned. At the same time she gave Ross four notes, each of them ten pounds, to purchase camlet for a riding dress. Ross gave Brooks his waistcoat, breeches, and a shirt. She went and brought Ross a waistcoat, breeches and shirt of Mr. Spooner's. When they were shifted she asked me when she should see me again; I told her in fourteen days; but it pleased God to order it sooner, and in a dreadful situation. Had we all been immediately struck dead, after the perpetration of so horrid a murder, and sent to hell, God would have been justified and we justly condemned.

"About eleven o'clock at night we sent off for Worcester. About four o'clock in the morning we reached Mrs. Walker's house; Mary Walker and a negro girl were within; we told them a parcel of lies to excuse our sudden return; in the morning we went to drinking, to endeavor to drown the thoughts of the horrid action we had been guilty of. We stayed there all day with a view to go off at night, but it pleased God to order it otherwise; for Brooks, being in liquor, went down to Mr. Brown's tavern; there showing Mr. Spooner's watch, and the people seeing him have silver buckles, became suspicious of him, and one Ensign Clark going to Mrs. Walker's and seeing what passed there, gave information concerning us. The news of the murder had now reached town, and we were all taken, and brought before the committee, and examined, and committed to jail. On the twenty-fourth of April last we were brought to trial before the superior court, found guilty and received the sentence of death."

Petitions from the parents of Ross, who were respectable old people of the State, and who had given five sons to the cause of the country, and the plea of Mrs. Spooner that she was *enciente* caused the Governor's Council to grant a respite of four weeks, and a jury of matrons was summoned by the Sheriff to pass upon Mrs. Spooner's plea.[9] They returned a verdict that she was not with child, but the prisoner maintained that the jury was mistaken, and three of the jury now stated they believed they were mistaken in their verdict. But others of the jury holding to the contrary, the Council refused all further delay.

[9] The effect of this plea is that a jury of women called a Jury of Matrons, is summoned, and if they find it to be true, the execution must be put off until the woman's confinement.

The plea has been rarely made. It was set up by Catherine Webster, convicted of murder at the Old Bailey, London, in 1879, when all the lawyers admitted they had never heard the plea before; and the Judge in summing up to the matrons who had been selected from the spectators in the gallery, said: "This is a very unusual inquiry, ladies of the jury, and it has never happened to me before." They

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found against the prisoner. See 9 Central Law Journal 94. In December, 1913, Ada Williams was convicted at the Central Criminal Court at London of the murder of her child and sentenced to be hanged. She pleaded pregnancy, the matrons found in her favor and the Judge suspended the sentence. This is the only instance in London since the Webster case. See London *Times,* Dec. 19, 1913.

It has seldom been heard in the United States. In South Carolina in 1791, it was set up, and the jury of matrons found it was false, and the woman was hanged. State v. Arden, 1 Bay 478. In a larceny case in Arkansas, in 1848, the plea was disallowed, when the benefit was sought to save a female from the penitentiary. Holeman v. State, 13 Ark. 105.

The papers in this curious common law proceeding are reported by Mr. Chandler in an appendix to the report of the trial. They are (1) the writ *de ventre inspiciendo,* (2) the return of the Sheriff, (3) the second opinion:

(1)

The Government and People of the Massachusetts Bay, in New England. To the Sheriff of Worcester; Greetings:

Whereas, Bathsheba Spooner, late wife of Joshua Spooner, of Brookfield, in the said county of Worcester, stands attained in due form of law before the superior court of judicature, etc., held at Worcester, within and for the county of Worcester, on the third Tuesday of April, being accessory before the fact to the murder of said Joshua Spooner, for which she has received sentence of death, and a warrant has issued in due form of law, to have the same sentence duly executed on the fourth day of June next; and whereas it has been represented to us in Council that the said Bathsheba Spooner, that she is quick with child, and we being desirous of knowing the truth of said representation, do command you therefore that taking with you two men midwives and twelve discreet lawful matrons of your community, to be first duly sworn, you in your proper person, come to the said Bathsheba Spooner, and cause her diligently to be searched by the said matrons in the presence of the said men midwives by the breast and belly, and certify the truth whether she be quick with child or not; and if she be quick with child, how long she had been so, under your seal, and the seals of the said men midwives, unto the Secretary's office of Massachusetts Bay aforesaid, at or before the said twenty-fifth day of June next, together with the names of the matrons by whom you shall cause the said search and inspection to be made, hereof fail not, and make true return of the writ with your doings hereon.

Witness: The major part of the Council of Massachusetts Bay, in New England, at Boston, this twenty-eighth day of May, A. D. 1778; by their Honors' Order.

JOHN AVERY, *D'y Secretary.*

(2)

Worcester, ss.: In strict compliance with the within directions and warrant, I have summoned two men midwives, and twelve law-

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ful matrons, and caused the said matrons to be under oath, and in my proper person, with the said men midwives and matrons attended on the said Bathsheba Spooner, they have made searches as required in the within writ. The verdict of the above matrons is, That the said Bathsheba Spooner is not quick with child.

Given under our hand and seal, this eleventh day of June, A. D. 1778.

WILLIAM GREENLEAF, *Sheriff.* (Seal.)
JOSHUA WILDER, *Midwife.* (Seal.)
ELIJAH DIX, *Midwife.* (Seal.)

A list of matrons:

Elizabeth Rice.
Hannah Perry.
Christian Walker.
Margaret Brown.
Lidia Ball.
Mary Sternes.
Mary Todman.
Zurbulch Stowell.
Ezebel Quigley.
Mary Bridge.
Hannah Brooks.
Sarah Jones.

(Endorsed.)

Warrant for the examining of Bathsheba Spooner, respecting her being quick with child, with return of the Sheriff of the county of Worcester thereon; also enclosing her petition not granted. June 23, 1778.

(3)

Worcester, June 27, 1778.

To the Honourable Board of Councillors,
for the State of Massachusetts Bay:

May it please your Honours, we, the subscribers have examined the body of Mrs. Bathsheba Spooner (by her desire), to find whether she is quick with child or not, and although it was our and the jury of matrons, opinion on the examination of ye eleventh instant, that she was not quick with child at that time, yet upon this further examination, we would inform your Honours that we must give it as our opinion that we have reason to think that she is now quick with child.

JOHN GREEN,
JOSHUA WILDER, } *Midwives.*
ELIJAH DIX,
HANNAH MOWER, *Woman Midwife.*

Worcester, June 27, 1778.

To the Honourable Board of Councillors,
for the State of Massachusetts Bay:

Whereas, we, the subscribers matrons, on the examination of Mrs. Bathsheba Spooner, on ye eleventh instant, did give it as our opinion on oath that she was not quick with child at that time, have again at this day on her request examined her present circumstances, and give it as our opinion that she is not even now quick with child.

ELIZABETH RICE.
MOLLY TATTMAN.

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THE EXECUTION

On the morning of the second of July, 1778, the town of Worcester was filled by an immense throng of people, many of whom had come a great distance, to witness the execution of these criminals. The intense excitement of the crowd without was in striking contrast with the apparent calmness of the woman who was to suffer an ignominious death. Mrs. Spooner appeared more quiet than usual on this day; but she seemed more humble and penitent; and expressed her faith in the Saviour of the world, and her dependence upon Him. A few moments before she left the cell she was baptized. According to the custom of that day, a sermon was preached in the presence of the prisoners before the execution, by Rev. Thaddeus McCarty, from Deuteronomy xix. 13: "Thine eyes shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee." Mrs. Spooner, "through great bodily infirmity," was not able to attend. It was about half past two of the clock, in the afternoon, when the four prisoners were brought out of prison and conducted to the place of execution under a guard of one hundred men. The three soldiers went on foot. Mrs. Spooner was carried in a chaise, being then, as she had been for several days, exceedingly feeble. The procession was regular and solemn. Just before it reached the place of execution, one of the most terrific thunder storms that had occurred within the memory of the oldest inhabitant darkened the heavens. "There followed an awful half hour. The loud shouts of the officers, amidst a crowd of five thousand people, to 'make way, make way,' the horses pressing upon those in front, the shrieks of women in the confusion and tumult; the malefactors slowly advancing to the fatal tree, preceded by the dismal coffins; the fierce corruscations of lightning athwart the darkened horizon quickly followed by loud peals of thunder, conspired together and produced a dreadful scene of horror. It

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seemed as if the Author of Nature had added such terrors to the punishment of the criminals as might soften the hardest hearts of the most obdurate and abandoned."

At length, the place of execution having been reached, Ross, Buchanan and Brooks[10] ascended the stage, when the death-warrant was read to them. The former made an audible prayer; the other two were engaged in private devotions till they were turned off. Mrs. Spooner was suffered to remain in the chaise in which she had been conveyed until the last moment. She was seen to frequently bow gracefully to many of the spectators with whom she had been acquainted. "When called to ascend the stage, with a gentle smile, she stepped out of the carriage and crept up the ladder on her hands and knees." When the faces of the malefactors were covered, and all was ready, Mrs. Spooner acknowledged for the first time that her punishment was just. She took the sheriff by the hand and said, "My dear sir, I am ready. In a little time, I expect to be in bliss; and but a few years must elapse when I hope I shall see you and my other friends again."[11]

[10] "Of the three men, Ross seems to have been the best educated and the least hardened, and altogether of the most interesting character. The inducements to the crime on the part of Buchanan and Brooks were principally the promise of a pecuniary compensation. They deliberately and in cold blood planned the murder of one who was an entire stranger to them, and from whose death they could only hope for gold as a reward. Moreover, they had arrived at years of maturity. Buchanan, who was a Scotchman, and had been a sergeant in Burgoyne's army, was thirty years old, and a man of decent education and good appearance. Brooks, an Englishman, had been a private in the same army, and was twenty-seven years old. On the other hand, Ross was a mere boy. He was of respectable parentage, and had been well educated. He was also prepossessing in his personal appearance, and having been cast upon the hospitality of Mrs. Spooner under peculiar circumstances, he received many acts of kindness from Mrs. Spooner, between whom and himself there grew up an improper, but very warm attachment." Chandler, Vol. 2, p. 43.

[11] The following advertisements in the *Worcester Spy*, of that period, give an idea of the excitement on the subject:

"The selectmen of the town of Worcester, taking into consideration the large concourse of people that will probably attend at the execution of the unhappy persons under sentence of death here, as also that there are several hospitals in this county for the reception

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of persons having the small pox, do, in behalf of the public, caution and request all physicians and nurses concerned in such hospitals, and persons having lately had the small pox, not to appear in the assembly of spectators unless sufficiently cleansed. Otherwise their attendance may prove fatal to many, and render the execution which is intended for the warning and benefit of all, a public detriment.

By order of the selectment,

WILLIAM STEARNS, *Town Clerk.*

Worcester, June 24, 1778."

"*Worcester, July 2, 1778.*

"This day was published, price two shillings, the Dying Declaration of James Buchanan, William Brooks, Ezra Ross, who are to be executed this day for the murder of Mr. Joshua Spooner, late of Brookfield."

"Also this day published, a Poem on James Buchanan, Ezra Ross and William Brooks, who are to be executed at Worcester this day, being Thursday, July 2, together with Bathsheba Spooner for the barbarous murder of her husband, Mr. Joshua Spooner, late of Brookfield. Sold at the printing office, in Worcester and by I. Thomas, in Londonderry."

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THE TRIAL OF TEUNIS VAN PELT FOR BIGAMY, NEW YORK CITY, 1816.

THE NARRATIVE

A man married a woman, lived with her for several years, and then enlisted in the war between the United States and England, in 1812. After his discharge, he found that his wife had married again, and thinking he was free, he married another woman, who was also his niece. But the law said this was bigamy; but because he seemed to have acted in good faith, the Judge suspended his sentence and he was afterwards pardoned by the Governor.

THE TRIAL[1]

In the Court of General Sessions, New York City, September, 1816.

JACOB RADCLIFF,[2] *Mayor.*
GEORGE BUCKMASTER, } *Aldermen.*
ARTHUR BURTIS, }

September 4.

The prisoner was indicted during the last term, under the statute (1 Vol. N. R. L., p. 113) for, that on the twentieth of June, 1801, he married Margaret Day; and afterwards, to-wit, on the fifteenth of March, 1816, married Eliza Kelly, the said Margaret being then alive, the said prisoner then well knowing the same, contrary to the form of the statute. The statute says: "That if any person or persons, being married, or who hereafter shall marry, do at any time marry any person or persons, the former husband or wife being alive, then every such offense shall be felony." In a subsequent clause it is

[1] *New York City Hall Recorder. See 1 Am. State Trials 61.
[2] See 1 Am. State Trials 202-204.

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stated that this act shall not extend to "any person or persons whose husband or wife shall be continually remaining without the United States five years, or shall have absented himself or herself the one from the other for five years together, the one of them not knowing the other to be living during that time." The act does not extend to those who are legally divorced.

John Rodman, District Attorney, and *Mr. Hamilton,* for the People.

Dr. Graham, Mr. Van Hook and *Mr. Price,* for the Prisoner.

THE EVIDENCE

It was proved that the prisoner was married to Margaret Day, sixteen or eighteen years before, by a clergyman in New York City; that they lived together as man and wife for a number of years and had four or five children. During the War of 1812 with England, the prisoner entered the army, and on his return, found his wife married to another man. She resides at Manhattenville, about eight miles from New York.

Eliza Kelly. I am 25 years of age, and am the niece of the prisoner. We were married in the middle of March last.

Dr. Graham. When you married Van Pelt, did you know he was married? No. Did you ask him? I asked him nothing, and knew nothing about it. When I was very young, I knew him, and heard that he had been married, but did not know he was married then. He teased me to marry him, but I was soon sorry for what I did, because I thought I had no right to marry my uncle.

Bridget Smith. The prisoner is my brother, and boarded at my house. Eliza Kelly came there frequently. She was well apprised that the former wife was living, having been informed of the fact by me. His children came frequently from Manhattanville and Eliza knew them. The prisoner never went to see Eliza, and the match was made up in about a month. Eliza was as anxious to get married as the prisoner, because she wanted a home and expected his bounty in land from the United States would afford a maintenance, which, it appeared, never came into his hands.

Dr. Graham (to the jury). In marrying the second woman, he had no felonious intention. He thought it no harm to marry another, for his wife had done the same during his absence. I therefore strongly urge to the jury that although his offense comes within the strict letter of the statute, it does not come within its spirit and meaning.

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The MAYOR *(to the jury)*. Whatever may be the circumstances of mitigation in this case, the testimony is strong and conclusive against the prisoner. He married Eliza Kelly, knowing that his former wife was living. This offense is denominated in the statute, bigamy; an offense of a very serious nature, calculated perhaps more than any other, to impair the social relations in society and to sap and destroy public morals. From the testimony, it appears that at the time of this latter marriage, Eliza Kelly also knew the former wife to be living; Eliza Kelly was, therefore, equally guilty of this offense in a moral point of view; but this furnished no justification or excuse for the prisoner. In this case, it must be allowed, there are strong circumstances of mitigation; but the statute on which this prosecution is founded is plain and without ambiguity; and it is difficult to comprehend the distinction attempted to be drawn, between its letter and spirit, by the prisoner's counsel. Shall the jury, therefore, believe that the prisoner did marry Eliza Kelly, knowing his former wife to be then living, it is their duty to find him guilty. It is highly important and ought to be known and understood in the community that an offense of this description cannot be committed without receiving the penalties of the statute.

The *Jury* returned a verdict of *Guilty*.

Sentence was suspended, and a pardon was subsequently granted by the Governor of New York.

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THE TRIAL OF NATHANIEL CHILDS, JR., FOR EMBEZZLEMENT, ST. LOUIS, MISSOURI, 1849.

THE NARRATIVE

Nathaniel Childs was for many years first teller of the State Bank of Missouri at St. Louis enjoying the entire confidence of the bank directors, was a class leader in the Methodist Church and stood high in the community as a man of enterprise and integrity. From time to time large sums of money were missed from the bank, and after the most laborious examination, suspicion fell on Childs, and he was indicted and tried for embezzlement. It was almost impossible to induce the community to give credence to the charge, more especially as the evidence against him was entirely circumstantial. The fact that he had access to the vaults of the bank and lived and entertained far beyond his salary were about the only circumstances that were at first developed, and starting with them the prosecution went to work and in time presented such a strong combination of circumstances as to leave but little room for any doubt as to his guilt. But his church and friends, unwilling to believe that one who had been an expounder of the gospel and whose character before had never been subjected to any suspicion would be guilty of so grave an offense, rallied to his support. The witnesses at the trial included most of the men prominent in business and commercial circles and whose names are still preserved to the present generation in the names of the streets and squares of the great city they helped to build. And on both sides of the case were the most eminent lawyers of the day. So by the influence of his church, the aid of his great defenders and a divided public opinion, an acquittal was secured. But Childs was several years afterwards convicted of a similar offense and served a term of years in the penitentiary.[1]

[1] Bay, "Bench and Bar of Missouri," 300.

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THE TRIAL[2]

In the St. Louis Criminal Court, November, 1849.

HON. JAMES B. COLT,[3] *Judge.*

November 4.

The case was called for trial to-day.

Mr. Lackland,[4] Prosecuting Attorney, and *Messrs. Ryland,*[5] *Kirtley, Geyer,*[6] *Williams,*[7] *Leslie,*[8] and *Haight,* for the State.

[2] *Bibliography.*—"Trial of Nathaniel Childs, Jr., in the Criminal Court of St. Louis County on an Indictment charging him with the Embezzlement of Money Belonging to the Bank of the State of Missouri. November Term, 1849. St. Louis, Printed by Chambers & Knapp, 1850."

[3] COLT, James B. Born Hartford, Connecticut, 1818; was in ill health in his youth and lived for some years at Savanah, Georgia, and at New Orleans; returned to Hartford in 1836 and began the study of law; was admitted to the bar in 1840, and in the same year removed to St. Louis; elected Judge of the Criminal Court 1846; first by the legislature, and at the expiration of his term by the people. He returned to Connecticut at the close of his term and died there. See Trial of John C. Colt, 1 Am. St. Tr. 455.

[4] LACKLAND, James Ransom (1820-1875). Born Rockville, Maryland, moved to Missouri 1828. Educated at Marion College. Admitted to Bar 1846. Judge Criminal Court, St. Louis 1853-1859. "Was from then to his death a leading practitioner. The marked ability displayed by Mr. Lackland in the Childs case—he had then been only three years at the Bar—gave him a widespread reputation." Bay, "Bench and Bar of Missouri," 300.

[5] RYLAND, John Ferguson (1797-1873). Born King and Queen Co., Va. Went to Kentucky, where he was admitted to the Bar, but did not practice until he settled in Missouri in 1819. Circuit Judge 1830-1848. Supreme Court Judge 1849-1857. Practised law 1857-1873. Member State Legislature 1866.

[6] GEYER, Henry S. (1798-1859). Born Frederick Co., Maryland. Volunteer, War of 1812. Member Missouri Constitutional Convention and State Legislature and was elected Speaker. Author "Digest Missouri Laws" 1825. Was a leading Counsel in the Dred Scot case. Elected to United States Senate 1851. "If called upon to decide who in our judgment was the greatest lawyer at the Missouri Bar we should unhesitatingly say Henry S. Geyer, not that he was the superior of Gamble, Leonard or Field in his knowledge of the law relating to real estates, not that he was the equal of Josiah Spalding as a commercial lawyer, nor the equal of Edward Bates in impassioned eloquence; yet taking everything into consideration, he was the superior of all." Bay, "Bench and Bar of Missouri," p. 148.

[7] WILLIAMS, Willis L. (1807-1857). Born Williamsboro, North Carolina. Graduated Amherst College. Studied law in Washington, D. C. Removed to St. Louis 1842. Member State Legislature 1844. City Counselor (St. Louis) 1856.

[8] LESLIE, Myron. Born Bennington, Vt. Studied law there and

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Messrs. Bates,[9] *Polk,*[10] *Wright,*[11] *Field,*[12] and *Blannerhassett,*[13] for the Prisoner.

November 5.

Mr. Lackland, for the State, announced his readiness to proceed with the case, when the Marshal called the special

removed to Illinois in 1834 and to St. Louis in 1838. Circuit Attorney 1843. State Senator 1845. Delegate Constitutional Convention (Missouri) 1845. Died 1854.

[9] BATES, Edward (1793-1869). Born Belmont, Va. Removed to Missouri 1814, his brother being then secretary of the Territory and afterwards Governor. Delegate State Constitutional Convention 1820. Member Legislature 1822. U. S. District Attorney 1824. Member of Congress 1827. State Senator 1830. Judge St. Louis Land Court 1853. L.L. D. (Hon.) Harvard 1858. Attorney General of the United States 1861-1863. His fame and memory are perpetuated by a statue in Forest Park, St. Louis.

[10] POLK, Trusten (1811-1876). Born Delaware. Graduated Yale. Settled in St. Louis 1835. City Counselor (St. Louis) 1843. Governor of Missouri 1856. Elected United States Senator 1857, but expelled from the Senate at the beginning of the Civil War for disloyalty.

[11] WRIGHT, Uriel (1805-1869). Born Madison C. H., Virginia. Admitted to West Point. Left there before graduating to study for the Bar and practised for four years in Virginia before removing to Missouri in 1823. Member State Legislature for Macon Co. 1836. Became resident of St. Louis in 1837. Member State Convention 1861. Entered the Confederate Army 1861, and became Major. At close of the war settled at Winchester, Va., where he practised law until his death. "There was scarcely a case of homicide or any other important criminal prosecution in which his services were not employed and his success far exceeded that of any other criminal lawyer. Many hardened criminals who richly deserved the halter escaped through the powerful appeals of Major Wright." Bay, "Bench and Bar of Missouri," 501.

[12] FIELD, Roswell Martin (1807-1852). Born Newfane, Vt. Graduated Middlebury College. Studied law in his native state and practised there from 1825 for fourteen years and was a member of the legislature and State's Attorney. Removed to St. Louis in 1839. Had an exceptional matrimonial experience in 1832 which is reported in 13 Vt. 460. Was counsel in the Dred Scott case. Was father of Eugene Field, the poet.

[13] BLANNERHASSETT, Richard S. (1811-1857). Born Ireland. Married in 1831 a granddaughter of Jean Jacques Rousseau and the same year emigrated to America. Landed at Quebec and taught school for a time at Hamilton, Ontario. Removed to Attica, N. Y. Studied law and was admitted to the Bar. Removed to St. Louis in 1841, and practised there for the rest of his life. Was City Counselor of St. Louis 1848-1850. "Mr. Blannerhassett as a criminal lawyer has never been excelled at the Bar." Bay, "Bench and Bar of Missouri," 68.

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venire—thirty-seven. Of these, fifteen proved themselves disqualified, and were excused by the Court; seven were challenged by defendant, and three challenged by the prosecution.

The jury selected were: Samuel Johnson, Moses Taylor, J. H. Barnard, A. F. W. Webb, H. D. Hart, Lewis Bauman, Abram Keller, James Mallender, Walter A. Chapman, William Crane, David Keller, and John Barnhurst.

Mr. Haight, for the prosecution, said, before proceeding with the case, it became necessary for him to state to the jury the law and facts which it was expected to produce. They were already apprised that the indictment they were called to try was against Nathanial Childs, Jr., charging him with embezzlement. The indictment he held in his hand charges that defendant, while an officer or servant of the Bank of Missouri, and while performing the services of such officer, had entrusted to him large sums of money, a portion of which he embezzled and appropriated to his own use, so that the corporation of the Bank of Missouri was defrauded. The difference between the crimes of embezzlement and larceny was very slight in a moral aspect; still there was a marked and clear difference in the crimes. This difference, as well as the punishment provided by statute, under the general law, and the charter of the bank, were explained at some length.

It would appear in evidence that very soon after the Bank of Missouri was incorporated, the defendant was appointed Specie Teller and continued to discharge this duty to a period not long before the discovery of this loss. Defendant's connection with the bank terminated about the thirtieth of June or the first of May last. During the time he was so employed as Specie Teller, he was also Paying Teller; and in that capacity not only had charge of all specie in the bank, but also paid all the checks that were presented. Another person employed, who was Receiving Teller, received all paper money paid into the bank. The duty of the defendant, then, was to receive and pay out all the specie,

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and also to pay checks and other demands presented at the counter in notes, if coin was not required. The fact of defendant's being there in that capacity, subjecting him to the charge of this offense, will not probably be controverted.

The evidence which they should introduce to establish the guilt of defendant was, in a great measure, circumstantial, though of a character affording strong and irresistible presumption of guilt. He made this remark at present, not for the purpose of discussing in any degree the weight of that kind of evidence, but that their attention might be closely directed to the examination of witnesses; that they might carry in their minds, as the trial progressed, all facts and circumstances which may be detailed. In relation to the evidence they propose to introduce, he would endeavor to give a general outline, deeming it due to the accused party, in order that, if any explanations are needed, he may have an opportunity to make them. With regard to the main circumstances—whether the money was there at all, and how the business of the bank was conducted—it was not necessary to give the defendant any information: he understands that better than we do.

In August last, after defendant left the bank, and after his successor had been appointed and was in the discharge of his duty, a call was made upon the bank for coin. And before going farther, he would tell the jury how the funds or coin of the bank was kept. The banking house, where the business is conducted, is in one room; adjoining is the Cashier's room, used by him and for the meeting of the directors; the vault was downstairs, under this banking room. To get to the vault you must pass this room and go down the stairs.

At the period of this loss large amounts of money were kept in the vault; in February or March preceding it was counted by the Directors, when there was nearly two millions of coin, all of which, except such as was in daily use, was kept in this vault. There is, also, in this vault two chests in which is kept gold put up in bags for ready use. At the bank was received a great deal of gold of the coinage

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of Europe and the South American States, differing in its nominal value, some of which it was more profitable to keep on hand and have recoined, and other more profitable to pay out.

This being the state of things in August last, a call was made for coin—first by E. W. Clark, for $50,000, and then by Page & Bacon, for $40,000, which was directed to be paid in sovereigns. The chest that was in the vault containing the ready coin being locked, and one of the Directors having the key, the Cashier was directed to pay the draft of Page & Bacon from the gold which had been put up in boxes and counted in February or March last. The porter of the bank not being present at the time, Mr. Hurshburgh went down into the vault and got a box from the pile. Not wishing to remove them all, he took one of the top boxes, which was numbered "thirty." This box should have contained four bags of sovereigns—every bag marked with the amount and kind of money it contained, as well as the Director's name who counted it.

On opening this box it was discovered that one of the bags was gone; instead of containing four bags of sovereigns, with $4,850 in each, it only had three bags containing that amount. This box purported to be counted by Mr. Walsh, who was sent for. He could give no explanation. It was thought to be barely possible that a bag, by some means or other, had got into another box. The result was, the other boxes were opened, when it was discovered that $120,000 had been taken from them, or at least that amount was missing, according to the marks of the February count. Of the money which was so missing, over $100.000 was of one peculiar kind of coin, viz.: ten thaler pieces; these pieces had been put up in bags, each bag containing one thousand pieces, or $8,750. Of course, as was very proper when the loss was discovered, the defendant was sent for and came to the bank. Neither he nor any one else could give an explanation. As to the amount of money on hand, there could be no difference of opinion, as the amount was kept by de-

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fendant himself, who must necessarily have kept the cash book. His statements will show the amount of coin on hand, at all the various periods which may be involved in this enquiry. Well, the defendant was sent for. The person to explain the matter was the person who had charge of it; no explanation could be made. The next thing was to charge defendant, at some period while he had charge of the money, of abstracting the amount missing.

Mr. Wright moved the exclusion of all witnesses from the court room during the statement and examination. An order was made by the Court to that effect—Mr. Hughes, the President of the Bank, and Mr. Polk, counsel for defendant, and Mr. Ellison being exempted from the effect of the order.

Mr. Haight resuming, proceeded to call the attention of the jury to the counting of the coin. It so happened that the missing money was of a peculiar description. The counting, which took place in February, ended in March—it was an actual counting—it so appeared, all the money being on hand at that time. The counting commenced about the fifteenth of February and continued three or four consecutive days; after that the counting was only made every other day, at the suggestion of defendant, who stated he had not time to attend to the arranging of the money and his business at the counter, if it was counted daily. Going on in that way, excluding Sundays and regular discount days, they were engaged nine or ten days in actual counting. As the gold was counted, it was put up in bags—the person counting it placing his name on each bag; these bags were sealed and placed in a box, which was also sealed. This gold was not for ordinary use, and not to be used unless some great exigency of the bank called for it. The boxes in which the coin was placed were numbered, beginning with one and ending with thirty-seven. The boxes from which bags were missing, were numbered 2, 3, 4, 5, 6, 8, 11, 14, 15, 16, 17, 18, 19, 30 and 37. When the counting took place, these boxes were placed in the vault in piles, beginning No. 1 at

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the bottom and going up to ten in each pile, then eleven at the top of the next pile going down to twenty, and so on along the side of the vault. It will appear to the jury that during the counting, so far as bringing the gold up to the Director's room and returning it to the vault was concerned, it was done under the direction of defendant. It will also appear from the testimony of various persons employed in the bank, so far as a negative can be proven, that this gold could not have been taken out of these boxes except by those who had access to the vault. We expect to give testimony to show that even such persons could not have taken the amount of coin here missing, at any period after the counting and up to the time of discovery. These large bags of gold could hardly have been taken out, if taken at all, one, two or three times without calling in such aid as must have caused detection.

If he understood the manner in which the counting of coin had previously been made, it was by weight—say the gold in chests on the first day, the silver next, and then the loose gold upon the shelves would be counted, and so on. The person having the keys, if so disposed, has an opportunity of so changing the coin from the chests to the shelves, during the counting, as to hide or make up an actual deficiency.

They would show that only one person in the bank had any special charge of the cash, and that was the Teller; it was for him to show that his accounts corresponded with the cash on hand. Some slight circumstances tended to show that this money was used by a person who had an interest in covering up some defalcation—some use of money on various occasions.

During the counting the person having charge of the bags and boxes could easily take a bag containing one thousand thalers and by placing them in different bags and boxes, have the same money counted different times and carried to the general account. None could have such an object except the Teller. If the money was not taken away after

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it was counted by what *hocus pocus* was the correct amount represented to be in the vault?

They would then show the jury that defendant was frequently absent from the counter of the bank, down in the vault for hours at a time, and on more than one occasion, down in the vault alone of evenings; that during the period of counting, defendant obtained some old specie bags, although a number of new bags were in the vault out of use, etc.; that during the counting a bag of these thalers was sent up, counted and returned to him, and another bag sent up.

They would show that at the time defendant went into the bank his salary was $1,000, and that $1,200 a year was the most he ever received; that his style and manner of living was extravagant; that some of the Board of Directors called upon him for a statement of his affairs, which statement was made and left with the Cashier of the bank; that some time after defendant borrowed this statement from the Cashier, in order to make a copy for his own use, and had refused to return it; according to that statement, defendant made himself worth about $8,000, his property consisting, with small exceptions, of the house and lot where he lived; that the by-laws of the bank forbid its officers engaging in speculation or other business; that at the present time he is possessed of a much larger amount and has more than $8,000 or $10,000 ready means besides his house and lot; that by his own declaration he has offered to furnish $8,000 to $10,000 capital to go into business. They would show that great confidence was reposed in defendant about the bank, and as somebody must have taken the money, his opportunities were the best. We hope that defendant may be able to acquit himself of the accusation, and that the guilty person may be found out by the examination.

November 7.

WITNESSES FOR THE PROSECUTION.

H. Shurlds. Am Cashier of the Bank of Missouri, and have been since the institution was incorporated, in May, 1837; defend-

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ant, about the same time was elected Specie Teller, and has so continued up to the thirtieth of April, last, at which time he resigned. My duty as Cashier, under the direction of the Board of Directors, was a general superintendence of all the affairs of the institution; the duty of defendant was to receive all specie paid in bank; he was also Specie-paying Teller, and paid out the coin of the bank upon demand being made for it. Since 1842 I have been in the habit of receiving from the Receiving Teller, in the morning of each day, a certain portion of paper money, in case that if checks were presented by a party who did not want coin, it could be paid in paper. The Receiving Teller is the principal Teller of the bank; his business was to receive all payments in bank, excepting coin, which was received by the Specie Teller. Sometimes he received small portions of coin, say in sums less than ten dollars; the Paying Teller kept small books, in which he made entry of the coin received and paid for by him. Weekly statements were always made up of the general condition of the bank, except when sickness occurred to prevent it; this was seldom. The statement of the amount of coin on hand was made from data furnished by the Specie Teller to the Teller.

During the first portion of the period spoken of Mr. Grubb was Receiving Teller; about July, 1837, he died; after his death H. L. Clark was elected, and has been Receiving Teller ever since. Mr. Wm. Hurschburg succeeded Mr. Childs, and is now Specie Teller.

Mr. Childs was absent from the bank on two or three occasions previous to the time he handed in his resignation—once sent on East, and on one occasion at Palmyra attending to some religious duties. Weekly statements were made up from his data; there never was any examination of the data he furnished the bookkeeper; there were none other than semi-annual examinations by the Board, until in the months of February and March last. There was no examination of this data by the clerk, when the cash balance was furnished by him to the Board. I never attended the counts; they were attended by Childs, as the person in possession of the coin. From my own knowledge, I am not able to state the detail of the examinations made by the Directors. Had seen them operating, sometimes counting and sometimes weighing. In regard to the examination of the Legislative Committee, it was under the whole superintendence of Mr. Childs—I had nothing to do with it.

On Friday, the tenth of August, last, in the forenoon of that day, application was made by the Specie Teller to me, stating that a check had been presented from Clark & Brothers for $50,000 in coin; as usual, on such occasions, the Teller referred the matter to me to have instructions as to what peculiar coin it should be paid with. I told him to pay it in sovereigns. In course of the same day, application was made a second time, stating that Page & Bacon wanted $40,000 in coin. At that time the bank opened at nine and closed at two. In consequence of having paid so large an

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amount in the morning, the Teller found, when he went to count the money, that he had not as much as $40,000 of sovereigns on hand. This was owing to the chests in which the business gold was kept being locked, and Mr. Barnes having the key, he having taken charge of the key because there was a parcel of mutilated notes in it, which had been counted and registered, and were designed to be burned by the Directors at some convenient period. In consequence of this the Teller found it necessary to have recourse to a quantity of coin that had been counted by the Board in February and March. I am not prepared to say that I gave directions to take this particular coin. I believe there were sovereigns in the chest of which Mr. Barnes had the key. The Teller selected for this purpose a box, No. 30, upon opening which it was discovered that a bag of sovereigns were missing, containing $4,850. I was absent from the bank at the time, and when on my return met Mr. Hurschburg at the gate —the bank having closed; he advised me that something was wrong; we went into the bank, and found that there was but four bags of sovereigns in the box instead of five, which the marks on the outside called for; on the box was marked the description and amount of coin it contained, as well as the Director who counted it. This box purported to be counted by Mr. Walsh, who was immediately sent for; he immediately came up to the bank. We consulted together, and the conclusion was that we would get together all the members of the Board who were engaged in the February count, and open other boxes and see if the missing bag had not slipped into some other box. In the meantime we sent for Mr. Childs, under whose superintendence the funds were placed in the vault after they were counted. I sent for the Directors and defendant. On the morning of the eleventh they came and opened nine boxes and examined them; out of these nine boxes, from one of them (I think box No. 37) was found missing, a bag of ten thalers, containing $7,850, as purported by the marks on the box. Not finding the sovereigns, and discovering that one bag of thalers was also missing, suggested the propriety of pursuing the examination further not knowing where it might end. As the Board of Directors met on that day, it was agreed by those present to defer the matter until they should have the meeting. At that meeting it was determined that the examination should progress at three o'clock the same day. I was instructed by the Board to address Mr. Childs a note requesting his attendance at that time, which he complied with. The remainder of the boxes, forty-seven in number, were then brought out of the vault. Upon examination of these boxes, in the presence of defendant, we found that from fourteen boxes abstractions had been made; thirteen of these boxes contained ten thaler pieces; according to the marks upon them each box purported to contain two bags, and each bag one thousand pieces; the other box from which abstraction was made contained sovereigns, from which was missing a bag containing $6,171.62. The gross amount of thalers and sovereigns abstracted

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was some $120,900; the remainder of the boxes were perfect according to the marks upon them.

The fifty-seven boxes that I have spoken of contained foreign gold exclusively, as well as I can remember; these boxes were counted and put up, the counting beginning fifteenth of February and ending on the second of March. I was in the banking house during the counting, but in no wise engaged in it. During that period I had seen defendant going into the vault and packing the gold out, sometimes assisted by the porter; he would bring the gold to the Cashier's room, occupied by the Directors at that time. The number of boxes deficient I cannot state unless I make reference to a list prepared by myself, according to which, abstractions were made from boxes Nos. 2, 3, 4, 5, 6, 8, 11, 12, 14, 15, 16, 17, 18, 19, 30 and 37.

Boxes Nos. 11 and 30 contained sovereigns, from each of which a bag was missing, the bag from the first amounting to $6,000, and the bag from the latter amounting to $4,875—from each of the other boxes a bag containing ten thaler pieces was missing—two having been put in each box, according to the marks. The counting of February and March was done in the Directors' room; the coin being brought up from the vault by defendant, some in bags and some in boxes. After being counted the bags were counted, put into a box, and the box screwed down and sealed in the presence of the Committee of the Board—some four or five in number. After being put up in this way, they were taken in charge by defendant and placed in the vault. Of the arrangement of the boxes in the vault I know nothing; I never went down into the vault unless in company with some officer of the bank.

The bank was not in the habit of paying out ten thaler pieces; they were a coin designed to be kept by the bank, in order that if demand should come from the east, they would be more profitable to use there than paid out here. Never knew, except on one occasion, such coin to be paid out; a box of coin came from the sub-treasury and paid out at the rate it was received, $7.80 or $7.82—could not say which; it was paid out immediately by defendant, the coin distributed through the community and paid back to the bank at $7.85; this was reported to me by defendant. When the thalers were received in bank they were put in bags, except a small quantity, and the bags placed in the vault in boxes, which defendant had made. These were common boxes, or more properly chests, made to contain a great number of bags. But one of these boxes was there now; it had a common lock upon it, the other box was taken away by Mr. Childs when the resigned, he having paid for them out of his own pocket. The other gold in the vault, so far as I know, besides the fifty-seven boxes of foreign gold, was kept in bags. Some gold received from the subtreasury in boxes was so placed in the vaults; as I never examined these boxes, cannot say whether it was foreign gold or not. A portion of this gold in the fifty-seven boxes may have included some of the gold received from the subtreasury and

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some received in the ordinary business.

During the time Mr. Childs was at the bank he had a set of keys to the vault and carried them; I had another set, which were never used except by defendant; it has occurred that his keys had been left at home; in that case he obtained mine, in order to enter the vault, which he would return at the closing of the bank.

The bookkeeper that made out the general statements during the last year was A. S. Robinson. Besides the persons above stated, others were employed about the bank, viz.: two individual bookkeepers, one note-clerk, one discount clerk, a porter, and two watchmen. Previous to the robbery of Nisbet & Co. but one watchman was employed. One of the officers generally lodged in the bank—the note-clerk that was, and bookkeeper that is. Mr. Corcoran now lodged in the bank, and has done so for a year past. During the cholera, when he was sick, Mr. Barry lodged in the bank, for a period of two weeks or less. There was no access to the vault except by going through the bank room. At the time, or previous to the discovery of the loss, there was no appearance about the vault doors, indicating they had been forced; at least I heard of none. I heard of no evidence that force had been used against the doors of the bank.

Prior to the tenth of August, I had not observed the situation of these boxes in the vault; since I had only been in once, seen them, without knowing their particular situation. I have been in the vault prior to that time, but only for a moment or two; I never was in there five minutes at any one time, and never there unless with an officer of the bank.

At the time the deficiency was discovered, I did not examine the boxes in the vault; they were brought out of the vault without my going down. When brought up, did not examine them particularly; some of the Directors did; they reported the deficiency; I cast my eye over them during their examination. The marks of the contents of some of these boxes was in the handwriting of Mr. Childs, signed by the Director who made the count; I speak of the boxes generally; cannot say whether it was the case with any of those from which abstractions were made.

The counting commenced Thursday, the fifteenth of February, and was continued on Friday and Saturday. On the Monday following, defendant remarked to me, it was too onerous for him to stand at the desk all day and prepare business for the Board in the afternoon. I submitted his suggestion to the Board at their meeting at twelve o'clock, when they agreed to count that afternoon and on alternate days until the counting was completed; the counting commenced at three o'clock that afternoon, and on Wednesdays and Fridays following until completed. These boxes were sealed with wax and stamped with a seal having the words "Bank of the State of Missouri" upon it. This seal had been laying about the bank; being too large for letters, it had been abandoned and a smaller one obtained. A number of days after the sealing of the boxes, it was thrown about

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the table in the Directors' room; and then, at the suggestion of some one of the Directors that I had better take charge of the seal, I did so; I locked it up in a small drawer in my room. A common tin lock was on this drawer.

Mr. Childs kept the keys of the vault until he left the bank; they were then kept by Mr. Hurschburg; some time during the cholera and during Mr. H.'s sickness, Mr. Clark, bookkeeper, took charge of them; during the time Mr. H. was sick, Mr. Way acted as Specie Teller. After Mr. Childs' resignation, he was engaged at the bank one or two weeks; in consequence of sickness, and being short of hands to perform the duties of the bank. I went to see Mr. Walsh, and consulted him on the propriety of sending for Mr. Childs, knowing that he understood the duties of the desk; he was sent for, came accordingly, and remained until Mr. Clark resumed his duty—about two weeks. During this period Mr. Hurschburg was in his place.

The set of keys that I had to the vault were kept up stairs in my private room; no one had access to them but myself. In the vault was an iron chest used by the Receiving Teller, in which he kept his paper; he always carried the key, and none but himself had access to it. The Receiving Teller had no key to the vault; he would have to wait for the Specie Teller to come in and unlock the vault before he could get in.

The watchmen are in front, down the alley and at the back part of the banking house; their duty requires them to be there all night.

The porters have been Wm. Hammond, then John Bowlin, then Mr. Christy, and now Mr. Hefferman. Bowlin sent in his resignation last May—Christy succeeded him. For nine or ten years, Walter Burke has been watchman; since the robbery of Nesbit & Co., Hefferman assisted him, and since Hefferman's election as porter, a man named Henschen has been in that capacity.

Mr. Lackland. Was defendant at any time requested to make a statement of his property; if so, when and by whom?

Mr. Bates objected. Did not appear to him the question had any thing to do with the case. It did not appear from the opening remarks of the counsel for the State, that the bank had ever asked for such a statement; nor did it appear that the bank has ever made such an examination. It may be that defendant, at some period when they were co-laborers, had handed to witness a statement of his affairs; if that was the case, we had nothing to do with it.

Mr. Haight believed he stated in his opening remarks that in February last some one or two of the Directors got into their heads that the accumulations of defendant were larger, and a good deal more than they ought to be, and to gratify them, defendant was called upon for a statement of his affairs; he made it; that it was left with the Cashier of the bank after being laid before the Board; that some time after defendant borrowed it under pretense that he wanted to make a copy; and that afterwards he refused to give it up. They desired to show the existence of such a paper, etc.

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Mr. Wright contended that it was a private paper in every sense of the word, drawn from defendant by the suspicion of a man who himself got rich suddenly, and feared that others got rich by the same means. It was a hasty memorandum made by Childs of his private affairs, which was examined by the bank Attorney, and proved satisfactory to the Board, (whether *the man* or not is of no importance,) and then Childs resigned. Let them show it is a bank paper, and they may ask for it. He regarded this as a fishing prosecution, and in destroying that paper his client had done as he was advised, and was right.

Mr. Geyer. The Court must decide whether the paper is one we have a right to ask for, but should first hear what it is.

The COURT decided the question should be answered, in order to show the character of the paper.

Mr. Shurlds. Before resignation of Mr. Childs was handed in, I did, at the request of some of the Directors of the bank, speak to him of the propriety of furnishing a list of his property and accumulations while he had been in the bank, to be laid before the Board. He made out a statement in his own handwriting and handed it to me, and by me it was laid before the Board. It was satisfactory.

It was afterwards given to me, with a verbal order of the Board to file the paper. Subsequently, Mr. Childs called on me and asked what had been done with the paper; I told him I had an order to file it. He remarked he had not taken a copy when it was furnished, and desired me to lend him the paper with that view, and he would return the original to me. This paper was given and never returned. When I applied for it, he positively refused to give it up. The request for him to make the statement was after the counting of the money. Am not sure whether it was before or after he left the bank that he applied for the paper; think it was after; it was before he went east last summer. It was after his arrest that I applied for the return of the paper.

Cross-examined. At the meetings the Board generally had five present, seldom less. There was no order of the Board for this paper. Defendant borrowed the paper in May, the request to return it was in August, on the thirteenth. I don't know that he gave any reason for refusing to return it. I told him I understood it to be a point of honor between him and myself. He said he thought no honor was involved. About that time I was excited, and had a good deal to excite me; I made the request in as mild a manner as possible. The matter was often talked about by the Directors. The paper was laid before the Board and was satisfactory; I congratulated Mr. Childs upon it.—The paper was filed by direction of the Board; no vote of the Board was had upon it; it was not marked as filed; with papers in my office I make no difference between keeping and filing; I call all papers deposited in the bank as filed.

In a second note, defendant said it was out of his power to comply with the request, and even if it were not, he was advised by his counsel not to do it. As they insist and he concurred with

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them, he should not return it, neither did he consider that any point of honor was involved in it.

Thought I could get the paper whenever I wanted it, and that was the reason I did not apply for it before the explosion. When I orally applied for the paper, defendant did not tell me it was a private paper; I did not *demand* it; the order to file the paper was made in a cursory manner; I never act upon the say-so of any one Director; if general acquiescence is expressed of any act, I do.

[A note was shown witness which he admitted to be written by him. It was addressed to Mr. Childs, requesting him to return the list of property loaned him, which was made to the Board in April last, regarding its return as a matter of honor between him and witness.

A notice, signed by *Mr. Ryland,* counsel for State, and served upon defendant, was then read. It set forth that by a request made of defendant by order of the Board of Directors, a list of his property and manner of its accumulation was made; that said original paper was obtained from H. Shurlds, Cashier, under a promise to return the same, which had not been done; and requiring him to produce the original report to the Cashier forthwith, and to fail not.]

The *Jury* presented a petition to the Court, asking to be allowed to go to their homes during the vacation of court.

Mr. Shurlds. In speaking of the general duties of the officers of the bank, I mean such duties as are pointed out by the charter and by-laws, and such as are required. I had not the benefit of the experience of any Cashier of the bank before me, I being the first Cashier. I established the duty of the office, by sanction of the Board of Directors. If a Director had ordered me to take a certain course, I would not do it; but would by order of the Board.

The by-laws make it my duty, under the direction of the Board, to superintend the general affairs of the bank. As Cashier, it is my duty to be the keeper of the cash of the bank, through the officers of the bank. I have superintending control of the books; no officer in the bank has authority to keep from me any money or book; I have access to, and a right to control, any portion of the money in bank I please. I have not the means, at all times, to get to this money; when the vault and bank doors are locked, I have not access to the vault. I would consider it a disobedience of lawful orders for the Specie Teller or other officer to refuse me such access. The general duties of the Specie Teller are not defined in writing or print, but only by the practice in the bank; under this practice he receives and keeps the specie of the bank, has keys of the bank, accessible to myself and no body else. I am superior to all except the Board. I can control the Specie Teller at pleasure; I keep a set of keys to the vault and can go into it; but I have never done so.

The Specie Teller gets money upon his desk for everyday operations.

In entering the vault and bringing it out, nobody but himself took cognizance of the amount so brought out; he should have reported the amount

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brought out every morning, but I don't know that he has done so; at the close of the day he reports how much he has brought up during the day; I don't know that he has done so; his daily account of specie is but an item in the account of the Teller. I don't know any officer that is unchecked by another officer; their cash accounts must balance, and that is done every day.

Mr. Bates. If I go into the bank and pay the Receiving Teller $1,000, and he fails to make an entry of it on the books of the bank, and appropriates it to his own use, is there an officer of the bank that will find it out? Not on that day, except by the check book of the depositor. Then evidence that the money was deposited must be obtained out of the bank? Yes; it is my business to see that the cash accounts balance, which I do by the reports. Charged with the duty of general superintendence, it is my duty to see that these reports are correct; in ordinary run of business, these reports are stated to me as correct, and so I receive them; the Receiving Teller counts his paper and the specie, and reports so much on hand; at the close of each week the amount on hand is ascertained from the reports of these two Tellers; the report is but the aggregate of the six days work. Suppose the Specie Teller makes a mistake in a day's report, is there any way to find it out? If he shows a deficiency or overplus, he would be called upon to show how it was made. Suppose he don't choose to show it? Then the only way to find out the mistake is by counting over all the money in the bank; there was entire dependence on the man, except by counting over the coin. Has it been a habit in the bank to keep all coin loose and accessible instantly? No sir; in regard to the gold, defendant had possession and kept the keys. Did you ever take it upon yourself to ascertain that the balance stated was a true balance? No man physically constituted could do it. Did you consider it a prudent thing to thus keep all the funds of the bank open to daily use? Having confidence in the officers of the bank, I did.

Mr. Shurlds. I kept my set of vault keys in my private apartment; when absent from home or the city, I left them at home, locked up, and carried the key in my pocket. Mr. Childs had another set of these keys; how he kept them, at home, I cannot tell: he lived some distance from the bank. It was not usual for officers to remain in the bank after bank hours and they had settled their cash accounts. Funds have been received at the bank after bank hours, and placed in the vault that night. If I was in my room at the time and the vault was open, I would send them down by the porter; sometimes would go down with him; if defendant was not present, would always place such funds so that they would be seen by him in the morning. At periods of time the keys to the chest in the vault would be kept by the Examining Committee of the Legislature, during their counting. A parcel of gold would be weighed and placed in it, and if not through weighing that day, they would keep the key. For some time, Mr. Barnes, one of the Directors, had the key to one of these chests; I think at the close of the accounts on the

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thirtieth June he had the key with a view to the duty mentioned in the chief examination. There is no rule in the bank to authorize a Director to have a key or be in charge of the funds of the bank. I have seen Directors at the counter receiving funds for the bank; don't know of their receiving money at any other place for the bank. It was a regular thing to have semi-annual statements of the amount of funds on hand; can't say whether they merely took the word of the Tellers for these statements or not. I do not know that the bank of Missouri ever had its funds counted before this year. The Committee of Directors went in and made their report; the statements made upon this report were sworn to.

When the payment of very large checks was demanded in coin, it was usual for the Specie Teller to consult the Cashier as to the character of the coin in which they should be paid, and in some cases, the Cashier would rather consult the Board before he determined; for the accommodation of the bank officers, the payment of such large drafts was sometimes deferred until the afternoon, after bank hours. Foreign coin, as bullion, was more valuable than American coin; their nominal value as currency is established by act of Congress; their actual value by weight I cannot state, as I never tested them; had seen them weighed and seen them counted.

Previous to the March count, it was customary to weigh some of the gold and count some to arrive at the amount on hand; some was weighed in bags; don't know whether in weighing allowance was made for tare. Whenever a Committee of the Board reported to me a statement as facts, I was bound to believe them as such, and act accordingly. When the Legislative Committee came to make their examination, they were turned over to the Specie Teller. My statement, as printed, shows that the foreign and American gold on hand are so much; the Tellers furnish it to the committee, it agrees with the books of the bank. In point of fact, as Cashier, I make my report under the direction of the Board. The report goes from me predicated upon the report of the officers of the bank; the certificate attached does not say so.

There never was an order made by the Board to have an actual count of the funds, but it was done by a tacit understanding among the members; in the semi-annual report it was recommended, and that report was adopted by the Board. I said when this counting was going on it was under defendant's superintendence. I mean by that, he had direct control of it. I can't say that the vault doors were open during that period; had seen defendant putting the coin in boxes after it was counted; saw defendant packing the gold in boxes; this was done before the face and eyes of all the Directors present; he was only acting in strict subordination to the Committee; he was there presenting to them the funds he had in the vault; whenever they ordered gold to be brought up, he did it; when told to stop, he did so. In this business he was assisted by a porter.

Mr. Bates. At the time of counting, do you know that any of these Counting Directors ex-

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pressed suspicion that the funds were short? I do not; never heard of such a thing until afterwards. Do you recollect of having assigned for the counting that a supposition was entertained? Don't remember that I did. Immediately after the completion of the counting, when the result was known, did you not inform Mr. Childs that some suspicion against him was the cause of the counting? I thought so; I thought I discovered an indication of it. He then immediately intimated to me that he would resign his place, and would not stand behind the counter under a suspicion. From my confidence in him, I endeavored to persuade him from such a coarse. The closing account was on the twenty-fourth March, he resigned on first of April; cannot say he remained until that time to enable the bank to supply his place. When his resignation was handed in and accepted, did not the Board pass a complimentary vote to Mr. Childs? When the resignation was handed in, Mr. Sarpy moved it to be accepted, and Mr. Barnes moved to amend the motion by adding that Mr. Childs enjoyed the confidence of the Board; the amendment was adopted, and so the motion of Mr. Sarpy passed. The resignation was handed into the Board by myself. After he resigned and during an emergency at the bank, he was called back; he came and discharged duties; he was not then a sworn officer of the bank, or under any bonds. While discharging such duty, large amounts passed through his hands.

Mr. Shurlds. I was very rarely in the vault; don't believe I was ever in there five minutes at any one time in my life. Upon some of the boxes brought up for examination, I recognized Child's hand writing and also the signature of some one Director. The seal that was thrown about the bank, before referred to, was too large for letters, and not used for anything else, except occasionally for large packages; it was thrown about in the Directors' room both before and after the sealing of the boxes was made. It was by a mere matter of chance; after they had used it, not believing there was any body there that would do wrong, it was allowed to be so thrown about. These boxes were sealed and stamped in order that it might be known whether they were opened or not. This seal lay about several days after the sealing; I did not notice it until I was told that it was wrong to leave the seal lying about; I then locked it up for the first time. Persons have frequently gone into the Directors' room, other than officers of the bank; it has been possible for persons going into that room to take an impression of this seal in wax, and go off and have one made, but I don't believe it ever was done. Can't say positively how many boxes of the gold was counted, sealed, and packed away; had nothing at all to do with the handling of the coin. I slightly examined the sealing wax on some of the boxes, after the loss was discovered; some that examined the wax thought they saw a difference in it; I saw Mr. Childs sealing some of the boxes.

It was customary for some clerk to sleep in the bank; those that lodged there may have been

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there at other times during the day, except while at their work; may have been there on Sunday; have sometimes done part of their work on Sunday; I never allowed them to have convivial meetings, or receive their company in the bank; except when thus engaged at work on Sunday, no body stayed in the bank; can't say the clerk who slept in the bank spent his Sundays there, unless at work. On some occasions I would go into the bank on Sunday to work; when these persons were in the bank on Sunday, I did not superintend the making of fires, when needed; I cautioned them to be careful.

On Saturday instructions were given to the officers to allow nothing to be taken from the defendant's house: cannot say by whose authority they were given.

Pay was promised to the men who guarded the house, and they obtained pay for it; my impression is that officer Felps made out an account of $50 against the bank for that service, including pay for all the officers, and it was paid; never saw a guard standing about defendant's house, or standing about Mrs. Hayden's house. Can't say I ever had a search-warrant in my hand; knew one was issued, and think it embraced both houses—defendant's and Mrs. Hayden's; from my own knowledge I do not know that it was ever in the hands of an officer at all. The cost for these officers were charged to the expense account of the bank. If the bank will pay the fees of the legal gentlemen engaged in this suit, it will be charged to same account.

When I made affidavit for the search warrant, I think I made statement of the character of coin abstracted. If the gentleman sent in search of coin found or returned anything else to the bank, I do not know it; can't say whether they brought papers or not; papers were handed to me, by whom I cannot say; one of those papers was a check on Clark and Brother for $1,800, which I think was sent for collection by order of a Director present; I did not see any money brought back; perhaps money was brought back and invested in a certificate of Page and Bacon, which certificate bears interest; the investment was made by direction of the bank; cannot state the day it was done, whether before or after the twenty-first August; the other papers brought in I have got yet; they were put in my charge by the Board; I first got them on the thirteenth of August; it occurs to my mind the check was demanded.

Understanding that Dr. McDowell was going east, he was requested to call at various points at the east to ascertain whether Childs had made any investments; he went by various points, Baltimore, Philadelphia and New York; being on his way to Virginia, he was requested to call and see about this matter; to my recollection he was not requested to examine in the Banks of other cities than those stated; he was to be paid his expenses at the several points at which he was stopped, and he was to report from time to time; think one despatch was received from him; cannot say this case was continued last term, for want of information from him; his pay came out of the expense account also; McDonough did not go any where to my recollection, Cozzins

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was sent for Bowlin, late porter of the bank; when Bowlin got here he was talked to by Directors of the bank; I never had any conversation with him as to what he would testify to; cannot say that any inducement was held out to Bowlin in order to get him here; he was porter in the bank for more than a year, and lived on the lot; never saw his wife making fires in the bank: think I have seen her in the bank dusting, etc.; have seen her in the bank with him; never saw her there by herself; I may have got the keys of the bank from her, in order to go in, when he was absent from home: he was married before he first came there; knew his wife before they were married; had, at one time, some business to transact for her; forgot her maiden name.

I think some of the Directors were directed to go around and to see Mr. Childs after the loss was discovered. I don't know in point of fact that he ever gave a lady a small, gold pencil; I have heard his tailor was requested to give in his expenses for clothing; have heard that other persons with whom he dealt have been similarly requested, but don't know the fact; directors themselves were generally appointed for this purpose; cannot say they employed persons under them; I cannot say that any of these lawyers for the State were employed for such a purpose; it may be that one of these gentlemen said he was going up the Mississippi, and that fact coming to knowledge of the bank, he was desired to ascertain if a certain witness was in the neighborhood of Hannibal; I presume he was directed to inquire for the witness and see what could be gathered from him.

The *Counsel* agreed to allowing the jury to go at large, and so reported.

The COURT doubts the propriety of the matter, and takes it under advisement until to-morrow.

November 8.

Robert A. Barnes. I am one of the Directors of the bank of Missouri, and have been since December, 1840. Am acquainted with the manner in which the count of February and March was conducted; that count was made by the President and Directors, divided into three different committees, each committee counting every fourth day. The committees were arranged in alphabetical order from the list of Directors; the committees with which I was engaged was composed of Messrs. Angelrodt, Brant, Christy and Hughes, President of the bank; on the first day's count Mr. Helfenstein acted in place of Col. Brant, who was absent. In making the count, Mr. Childs would bring up into the Cashier's room each day, such portions of coin as he thought could be counted during the afternoon; he had been previously directed to put it in bags, as near as possible, containing one thousand pieces, and to keep the different denominations of coin to themselves. The counting was made in the afternoon altogether; no directions were given as to what kind of coin should be counted first. When the coin was brought up, each Director would take a bag and count it; when he got through with it, and if it corresponded with the amount

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marked upon it, Mr. Childs would generally be called upon to shovel it in the bag again, he being most expert with the shovel; a memorandum of the contents of each bag was generally in the mouth of the bag, in Mr. Childs' handwriting. When the money was replaced in the bag, I think almost invariably it was handed to Childs, who tied and resealed them; the number of pieces, description of coin, the amount, as well as the initials of the person who made the count, and generally the day upon which the count was made, was placed upon each bag. When I said that defendant was directed to put one thousand pieces in each bag, I meant one thousand full pieces; if there were half thalers or half sovereigns, two were considered one piece. At the close of the counting each afternoon, the boxes were brought to the Directors' table and the contents of each taken down; box No. 1, for instance, was said to contain the bags, as they were put in, and also name of the party counting them; in every instance it was intended that the amounts counted by each man should be put in the same box, where there was a sufficiency counted by him to fill the box; Mr. Childs generally packed the bags in the boxes; I think such as I counted was put in the box by myself. After putting the coin in the boxes, they were sealed in the presence of the committee, and their contents marked upon the outside of the box. Excepting the top, the boxes were dove-tailed; the top was screwed down, and a seal of wax placed in the joint that separated the top and bottom from the sides. The boxes were then left in charge of defendant.

Mr. Childs kept a memorandum of all the gold brought up during each day to be counted, and at night would examine the count of the same to see if his memorandum corresponded with the actual count; it did tally; these memoranda were examined daily until the fifty-seven boxes of foreign gold were counted.

None of the silver was counted by tale. From a memorandum taken down at the time of weighing the silver, it appeared that one hundred and eleven boxes were weighed, containing seven thousand two hundred and forty pounds, or $111,000. In addition to the above, a keg of silver thalers was weighed, the gross amount being $3,048.42. These thalers had been in the bank a long time and were taken for sixty-nine cents each. At the conclusion of this count, the whole amount of coin found to be on hand was then ascertained, which was satisfactory, and balanced with the statements of the bank.

After the February count, I had a conversation with defendant, in which he expressed himself gratified that every thing had come out perfectly safe; this conversation took place after Mr. Childs had furnished a statement of his affairs. In this conversation I told him that this counting had been brought about by my agency, and hoped he would not think the suspicion that had been expressed had any influence upon my mind. I never heard any suspicion against defendant until the month of December last. Defendant said his financial situation had been greatly overrated; that he was acting as agent for different parties, and stated them, etc.; that he had been thinking

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for some time past of leaving the bank and going into business for himself.

The June count, for this year, commenced on the twenty-ninth of June. I was on the committee and have a memorandum of the counting. We commenced that count by checking off from a book furnished by Mr. Childs to his successor, the boxes of foreign and American gold that were counted in February; in so checking them off, we compared the marks on the boxes with the amounts called for on the memorandum book, and found they corresponded. According to their marks and the memorandum book, the fifty-seven boxes of foreign gold contained $969,360.92; the fifteen boxes of American gold contained $296,665; the aggregate amount of coin on hand, including such as was in bags and trays for daily uses, was, on the seventh of July last, $1,724,490.61. During this counting none of the fifty-seven boxes of foreign gold were counted.

Prior to the discovery of the loss, I had the keys to a chest in the vault; I obtained them under the following circumstances: At the July count we counted $150,000 in circulating notes, $9,000 in notes for circulation which had not been registered, and $24,000 in notes mutilated and unfit for circulation, and also a quantity of coin for ready use which was not put up in bags, all of which were placed in this chest by Dr. Forbes and myself after we got through the July counting. The mutilated notes it was designed to burn, and in talking over the matter I was designated as a committee to burn them; this I declined in consequence of my business at that time being pressing. I kept the key and so continued to keep it up to the discovery. I kept the key with a view of saving the Directory the trouble of counting these mutilated notes again, when they might find time to burn them, there were two chests in the vault. I think that I used but one. I was present on Saturday evening when the great majority of these boxes were opened; and assisted in opening a portion of them myself. Mr. Childs was also present; boxes No. 3 and 6, each of which were counted by me on the first day of the February count, were each deficient in a bag of ten thalers, containing one thousand pieces. None of the other boxes from which abstractions were made were counted by me. I took a memorandum of the other boxes in which deficiencies were found to exist; they were boxes 2, 4, 5, 8, 12, 14, 15, 16, 17, 18 and 19, from each of which a bag containing one thousand ten thalers was missing, and box No. 11, from which a bag of sovereigns, containing $6,171.62, was also missing; there were two other boxes, Nos. 30 and 37, in which I understood deficiencies occurred. I was not present when they were opened; the top of each box was screwed on by four screws, three of which were only taken out in order to get into the box. To open these boxes, after they passed the February count, it was only necessary to disturb one seal; that on the top; the boxes were sealed where the top and bottom came on to the sides, in the crevice; it would not be necessary to disturb the bottom seal to get into the box.

I have frequently been on com-

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mittees of the directory for counting this coin, previous to this last count. On these occasions, Mr. Childs had charge of the specie both before and after the counting. On previous occasions it was customary to weigh ten or fifteen thousand dollars of this foreign coin as a test, and if it showed no deficiency, to weigh the balance accordingly.

I have always understood that defendant and Mr. Shurlds each had a set of keys to the vault; when I went to the vault I always found the doors open, the vault was so arranged that nobody could get to it except by passing in view of several persons engaged in the institution; I never was at the vault except in banking hours or when I was engaged on the counting committee; Mr. Childs on such occasions was generally in attendance when we were making the examinations; we never went into the vault to weigh the coin, unless attended by him. Since Mr. Childs has left the institution, I presume his successor has his set of keys to the vault. The Cashier had nothing to do with the various countings; he would sometimes drop in and ask how we got along, etc., but never took any part in it. When we have got through these countings, Mr. Childs has always compared his account of the coin with our own, and generally found a little overplus; his account and mine generally balanced; if a few dollars overplus was found, we did not state that in our statements. The specie account was verified with the account of Mr. Childs, and then compared with the statements of the bank made up on Saturday evenings. In consequence of these statements being made up on Saturday, the semiannual report was never closed until then, to see if it corresponded with the general statements of the bank made up at that time.

While I was opening a box of the foreign coin, after the loss was discovered, Mr. Yeatman, who was sitting to my right, said he thought there was a difference in the wax of the two seals upon the box; I looked and thought so too; I took it to the window and examined it, and the difference was clearly perceptible: that in the crevice between the top and side there were two descriptions of wax; the outside wax was darker than the inside wax, and the inside wax appeared to be of the same color of the wax on the bottom seal. Almost immediately after this, several boxes being in the room unopened, Mr. Yeatman examined the outer seals on one, and from the manifest difference in the wax of the two seals, said, "open this box; I'll bet there is a deficiency in it," and on opening it, a deficiency was discovered. After this, as the boxes were opened, more attention was paid to the seals, and I think in all the boxes in which deficiencies existed, there was a manifest difference between the top and bottom seal; the color of the wax with which the boxes were sealed was red.

In regard to previous examinations of the coin in bank, when we got through weighing in the evenings, such as we had weighed was put in a chest, which was locked, and one of us took the key; in no instance did I ever have the keys of the vault. The lock on the chest to which I refer was a common chest lock.

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Some one or two of the Directors spoke a good deal about it having been told them out of doors, regarding the acquisition of property by Mr. Childs, and his extravagant manner of living; and connecting that with his salary, said the suspicion was abroad that Mr. Childs was the robber of a keg of gold, containing some eighteen or twenty thousand dollars, which was missing some time since, and before I went into the institution. The matter was talked over a good deal, and for the satisfaction of these gentlemen, Judge Shurlds was requested to ask Mr. Childs to give in a statement of his condition; the request for this statement was a sort of informal action of the Board; these conversations took place at a meeting of the Board. Judge Shurlds spoke to Mr. Childs on the subject, and he promised to make a statement of his affairs. It appears to me there were several meetings of the Board after this, before this statement was provided; I think probably two weeks had elapsed from the time the matter was first talked about; various observations were made about it before it came in, as to the prospect there was for obtaining this statement; it was finally produced and read to the Board. When I went into the bank one afternoon, I found it there; it was handed to me before the Board went into session; it was communicated to the Board.

When I read the paper, before the Board met, I threw it to some one present and remarked, "would that be satisfactory to them?" After the business of discounts was over and through the regular business, Judge Shurlds read it to the whole Board. According to the best of my recollection, he was then directed to file the paper and preserve it.—That was all that was done in relation to the paper. The paper was in the hand writing of Mr. Childs, and purported to be a statement of his property; whether it was signed or not, I cannot say positively After Mr. Shurlds was directed to file the paper, it being late, the Board was about adjourning, when some one suggested to me that as the statement was satisfactory, some expression to that effect should be made. At my suggestion, a resolution was passed that Mr. Childs enjoys the confidence of the bank. It being late, there was not a disposition to act upon it that evening; I insisted that when a man was tried and found innocent, we should express it; a vote was taken and the resolution adopted.

Mr. Bates. How many Directors expressed it that suspicion was abroad in the community? But three; it occurs to me that they were Messrs. Brant, Walsh and Sarpy, and their expressions were that some persons in the community had that supposition. Was such suspicion ever directly expressed by the Board of Directors, or any member of the Board? No; I don't think there was; never heard any member say he had a personal knowledge of it. Did the Board, as a Board, ever act upon that subject before the paper was read by Judge Shurlds? There was, as stated before; Judge Shurlds was requested to procure it; it was the effect of a conversation that passed through the Board; it was asked for by the sense of the Board.

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Judge Shurlds has been requested to do certain things that were considered matters of no great moment, that were not put on the minutes of the Board; conversations would pass around the Board in an informal way, and he requested upon such conversations to do so and so.

November 9.

Mr. Lackland announced it was now his purpose to prove by the witness on the stand, (Mr. Barnes,) the parol contents of a paper furnished by defendant to the Board of Directors of the bank; and which paper was subsequently obtained from the Cashier of the bank and never returned. They proposed such evidence, because they understood from defendant, after furnishing him a notice to produce said paper, that the paper was not now in existence.

Mr. Wright objected. The notice served upon defendant to produce the paper, described it as a paper that was previously requested of Mr. Childs by order of the Board of Directors of the bank. According to the testimony no such paper ever was in existence. The Directors, in the exercise of their corporate authority, had never called for it: consequently, there was nothing to produce and nothing upon which parol evidence could be given.

Mr. Geyer: The notice was given, not under the statute, but upon the right which exists in every case, that where a document is in the possession of an adverse party, and they fail to produce it when called upon, secondary evidence of its contents could be given.

Mr. Wright called for the production of any book or authority that would authorize a notice in a criminal case, for the production of any document in the hands of defendant, when it was designed to use such document on trial, in evidence against him; he called for the authority which would authorize parol evidence to be given of the contents of any paper not connected with the matter of trial. He denied that the paper was an official document of the bank, and if it was, then the State had no right to serve this notice for its production; and even were it an official paper of the bank, then the State had no right to introduce it, for the reason that the bank was no party in the suit.

Mr. Blennerhassett denied the right of defendant to produce the paper in evidence against himself, or the right of the State to produce evidence of its contents.

Mr. Leslie. The existence of the paper referred to had been proven; it was claimed as evidence in the cause; the defense say it has been burned or destroyed. Could evidence be destroyed by a party to a suit and by advice of his counsel. As the written document could not be produced, and as parol evidence of its contents could be given, he claimed it perfectly legal that it should be done.

Judge COLT said it was proposed to go into an inquiry of what was stated in a paper given by defendant to the Cashier of the bank; and decided that the State could do so.

Mr. Barnes. I examined the statement furnished by Mr. Childs to the Board of Directors; it stated, so far as my recollection serves me, that when he left Maryland, to come to St.

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Louis, he sold out his interest, amounting to about $1,200, in a factory; that after his employment in the bank of Missouri, he made it an invariable rule to save a certain portion of his monthly salary—which, I think, was $30 each month; that, in 1838, he purchased from Col. O'Fallon a piece of ground on Franklin avenue, containing about fifty feet front, for which he was to pay him about $3,000 —the payments to be one-tenth yearly; that by his partnership with his brother in a saw-mill, he acquired the lumber to build a house upon the lot; that afterwards he had built in the rear of the lot some four or five buildings, which had been rented out for a certain sum—about five or six dollars per month each. It appears to me there was something in the statement as to the cost of these small buildings, and that it was $1,500 or $1,800. He also stated that he had several transactions in ground and loaning money; that he was the agent of Mrs. Corbin, and as such, had made purchases of real estate; that in consequence of the relations existing between Mrs. C. and her husband, these transactions were in his own name, but that he had no interest in them; that he had also purchased some ground in the cemetery of the Centenary Church, which he had an interest in, but that it was to be transferred to the church again whenever his advances or loans to the church should be refunded to him. He also stated that he had purchased a house and lot in Christy's Addition, and sold the same—making by the transaction about $600; that he had loaned some money to a man named Degg, for the purpose of building a house, and Degg failing to get through the building, had given Mr. Childs a deed for the property, by his assuming or agreeing to pay the debt on the ground, and, perhaps, some claims that were on the house for building it; that he had purchased, at different times, some four or five lots on Fifteenth street, near where he lived—the whole making some one hundred or one hundred and twenty-five front, and that the cost of these was about $15 per foot: these were the lots upon which he erected his dwelling. No statement as to the cost of the dwelling was given: he wound up by stating, that the property where he lived, and the house and lot obtained from Degg, (the ground not being entirely paid for) was all the property he possessed, and that it has cost him a little rising of $8,000. He stated that the statement was made from memory, as he kept no books or papers of the transactions—my impression is, that he stated, in general terms, that there might be some slight discrepancy in the statement, and I think he also said that the amounts saved from his salary, and obtained by other means of trading, which he could show, came to within a few hundred dollars of the value of his property. I have been a director in the bank since 1840; during that period Mr. Childs' salary was $1,200; I don't know that it was ever any more or less.

Cross-examined. There may have been some conversation among the Directory on the contents of the paper; after it was discovered that the paper was absent. When the paper was read by the Board of Directors,

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were they fully satisfied? All of them did not appear to be satisfied; the majority was; I was satisfied. Colonel Brant and Mr. Walsh were not satisfied. I judge a majority of the Board were satisfied by their voting confidence in Mr. Childs.

There was another statement of property that appeared in Mr. Childs' name; it had been procured by the Bank Attorney, by the direction of the Board.

Don't know that he was notified of it by the Board; I don't know that instructions were given to Mr. Bay, bank Attorney, to investigate Mr. Childs' affairs. He was sent to a second time for his statement; I think the last time was after Mr. Bay's statement came in; if there was any extra cost attending the procurement of this paper I am not aware of it; that paper was not communicated to Childs after his answer, and there was no consultation among the Directors that it should be concealed from him; Mr. Bay is dead; I have not that paper with me; believe it is in the bank. Whatever were the contents of that paper, was known to the Directors before they had Mr. Childs' paper; and in passing a vote of confidence, it was done with a knowledge of both papers; it had not been read before the Board that day, but had been accessible to the Directors some days before. In stating my remembrance of Mr. Childs' paper, I did not pretend to state everything that was in it; it was written on a single sheet of paper; I can't say whether or not Mr. Childs was in the banking-house when the paper was presented; it was the day after the paper was presented to the Board that I had the conversation with him as to the suspicion of his growing rich, etc.

Mr. Bates. Are there not several other officers in the bank who have grown rich rapidly? Don't know; I am sure I have not. Had not Colonel Brant grown rich rapidly? Don't know. Did you ever hear him boast of having an annual income of $50,000? No, sir.

Something was said about Mr. Childs carrying on an out-door business—do you know of any other officer of the bank doing the same thing? Mr. Childs stated that to me himself; don't know of any other officer of the bank shaving notes, and have no personal knowledge of any officer buying property.

Has not Judge Shurlds, the Cashier, bought lots around the Common, in some of which he keeps a garden? I think he has; never knew him to shave; have refused myself to shave notes, because I could not do it legally. According to your manner of counting, is there any one acounting officer in the bank unchecked by another? Should suppose if there was, it would be the Tellers, both specie and receiving; they both receive and both acknowledge the balances of their respective amounts; I suppose they are checked by the deposit account and the general ledger; they have to put their two sums together to balance. When the Specie Teller receives money at the counter, does he do it without passing a ticket or evidence of the amount received? When I have deposited specie, he has given me bank notes for it, and I have taken them to the Receiving Teller to deposit, and he has marked the amount in

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my check book. Can you tell one case in which the Specie Teller has received money without its being noted? Mr. Childs never made any entry in my book. I would deem it a breach of duty in any Teller to receive money without some proper evidence of the fact; the Receiving Teller, when he received money from me, always gave evidence in my book. What evidence of its receipt does he give to the officers of the bank? I don't know, and could only go upon presumption to answer. The subject has never been a question before the Board. Reports are made to us by the different Tellers, and from a comparison of these the statements are made. During the counting these officers compared with us to see that their own respective funds came out right. The money we counted was then compared with the books of Mr. Robinson. The money we counted weekly was always counted to our satisfaction as committeemen, and always found out right. Don't think I ever took any part in the examinations made by the Legislative committee. When the semi-annual examinations are had, a statement is made up for publication. In our semi-annual examinations we counted some and weighed some of the coin. We have always been satisfied that the money was there. In making these examinations three persons were engaged. For what I would not count or weigh myself, I would take the word of my fellow-committee men for the correctness of their examinations. The Tellers would express anxiety to compare their memorandum of funds on hand with our counting of them; suppose it was done that in case any discrepancy existed it might be looked into immediately, before the funds passed into use for another day. Mr. Childs, in point of fact, was a ready, capable officer in his place; and so far as my examination has gone, was always correct. Was there any peculiar reason for the count in February and March? I urged that count; was not satisfied with the manner in which counts were usually made, by weighing the gold; in weighing, the foreign gold would generally go over, the American fall short of the test; the test was made, as described before, by counting a particular sum and weighing it, and testing the balance acording to that weight. I had been endeavoring to get an actual count for two years past; it was generally agreed that it should be done, but nothing was done toward it; no special action was had by the Board in reference to it, farther than to adopt a report in June, 1848, in which an actual count was recommended; I don't know that it was undertaken at last because Childs was suspicioned; I don't know to what extent the source of that suspicion was known among the Directors.

Mr. Barnes. Before the February count, it was said there was a suspicion abroad against Mr. Childs. On commencing the February count, I did not go into the vault to make an inspection to see if it had ever been forcibly opened; we commenced that count with the understanding that the gold was to be bagged, one thousand pieces in a bag; Mr. Childs was always about; he and the porter always brought up the gold into the Cashier's

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room; Mr. Childs assisted in separating the coin, after it was poured from the bag, so as to facilitate our counting; he was not commanded or requested to do it; he was not engaged in the counting, the responsibility of counting rested with the Directors. As stated before, each bag, when brought up into the room, had a piece of a paper in its mouth, on which Mr. Childs had marked the character and amount of coin it contained; when the contents of the bag were counted, this paper was examined to see if it corresponded, which it generally did; the money was then replaced. Mr. Childs and the porter, Mr. Bowlin, generally went to the vault together. The money was in his charge; he was responsible for the money brought out, and, of his own accord, generally remained in the room; in the evening, after the countings was over, he would compare his memorandum of the money brought out with our memorandum of the count to see if they corresponded. When I say he had charge of the money, I speak it from the fact that all specie in the bank was under the charge of the Specie Teller. The Cashier nominally had charge of it; I have heard he has a set of keys to the vault, they could not get into the bank, after it was closed without getting the key to the back door from the person who carried it.

Mr. Bates. Are you familiar with the by-law that says, the Cashier shall have charge of the cash of the bank? I know there is a rule of the bank that places all the money in charge of the Cashier nominally. Do you know a by-law that places the cash in charge of any other Officer? No. sir; I know that Childs had charge of the specie; never saw any body else have anything to do with it; by saying that Childs had charge, I give it as my opinion that he had charge of the safe-keeping of all the specie in bank. The Cashier would be the person responsible to the directory and stockholders; don't know whether he was legally responsible or not; Cashier took no part in the counts.

There was no count of the coin conducted as carefully as the February count? That time we counted piece by piece; before, we weighed it. I can now look back and find two acts of caution omitted during and after that count; they are, not taking the keys of the vault and securing the seal placed upon the boxes. I saw this seal outside the Cashier's room; at the June count we then used it to seal some boxes near the head of the vault. We never counted all the coin before; when we counted sufficient to fill a box, it was placed in, the lid screwed down by Childs, and then the box was sealed and left in his charge. In sealing we used the wax in the bank; wax was melted by a sperm candle; sometimes the stick would be lighted a second time before the hole bored into the side of the box was filled; when the hole was filled the seal would be impressed; the pressure would cause the wax to be cohesive, it being warmer. The boxes that were opened when the loss was discovered, such as had no deficiency were resealed; I was not present at the resealing, being at that time on the Grand Jury. In regard to box No. 9, when we examined it in August,

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it was not deficient; No 3 was deficient a bag of ten thalers; it was unfortunately counted by myself. L. Pickering and J. E. Yeatman each counted a bag of its contents.

I do not know what measures were then taken to bring anybody to justice and reach the facts in the case.

Mr. Childs was present during the afternoon of Saturday, he remained there when Mr. Shurlds and Mr. Hughes went out; don't know that they slipped out and locked the door after them. Mr. Childs was arrested there that evening; don't know that any remonstrance was made by an officer of the bank against his giving bail; don't know of any officers being sent to guard his house; don't know of his house being guarded after he gave bail; don't know of accounts for police officers' services being paid; don't know of a search warrant being sued out for stolen gold; matter of a search warrant was never brought before me as a Director; don't know what officers or Directors were sent out with the search warrant; was on the Grand Jury that found the indictment against Mr. Childs. Can't say how many agents were appointed to examine the eastern banks to see if Mr. Childs had money on deposit; Cashiers of different banks were asked by letter regarding that matter; Dr. McDowell being about to go east at the time, was requested to make inquiry at certain places; can't say positively whether he took letters on this business or not; if he did, they were from the Cashier and not from Col. Brant, his father-in-law; saw one letter from him, in which he said he had found nothing. Think Mr. Childs resigned about the last of April; the deficiency remained undiscovered until the tenth of August; can't say during this interval who had the seal; Judge Shurlds ought to have had it. During the interval of Mr. Childs' resignation and the discovery of the loss, there was as great facilities for the Cashier or Specie Teller to have access to this money as there was before.

The east door in the Cashier's room opens almost immediately to the entrance into Judge Shurlds' residence; it is fastened inside by a bar; besides this there are two other doors to the floor of the banking house—one front, the other in the rear.

November 10.

E. Walsh. Had been a Director in the bank of Missouri, without intermission, since the existence of the bank; had served as a member of the committee to examine into the condition of the bank, and on semi-annual examinations; served regularly on the semi-annual examinations for the first four years, and since that time have served perhaps two or three times. Am acquainted with defendant; the duty incumbent on him as Specie Teller, was to receive all specie paid in and pay all certificates on the bank where specie was required; occasionally he would pay certificates in paper money, where specie was not required; in the discharge of these duties he would render an account to the Cashier of every day's transaction; he kept an account with Mr. Clark, the Paper Teller, in transacting their business, Mr. Clark giving him as much paper as he wanted to pay out when specie was not required.

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At the semi-annual counting we got possession of these specie from Mr. Childs, who had charge of it, and conveyed it to and from the committee counting room, assisted by the Porter. Am familiar with the manner in which the funds were counted in March and February; the paper I hold in my hand is a memorandum of that count, and made during its progress. The counting commenced on the fifteenth of February and ended on the twenty-fourth of March; at that time I counted of the foreign gold, boxes Nos. 13, 15, 30, 37, 36, 53, 54, and part of box 55. The last of the foreign gold was counted and boxed up on the second of March. After the money was counted, it was placed in bags, which were tied and sealed, then in boxes, which were screwed up and sealed—the amount, kind of money, and director's name that counted it, being placed on the box, and then the boxes were left in the charge of Mr. Childs. The boxes of foreign gold, so counted, numbered from one to fifty-seven. Did not count them after they were placed in the vault. Saw the manner in which they were arranged; they were placed at the south-end, against the wall, in piles of ten high. When we went through the process of counting, the gold was brought to us principally in bags; there might have been one or two boxes; after counting each bag, we compared our count with the memorandum on and in the mouth of the bag; independent of these comparisons, we each day compared our countings with a memorandum kept by Mr. Childs of the amount of gold brought up—they generally corresponded.

We made no statement of the count until the counting was over on the twenty-fourth of March; when this was done, Mr. Childs came to me to get the aggregate amount of the coin counted; I gave it to him; there was a difference in our count and his statement of the amount of coin on hand of about $100; he readily pointed out the mistake, and then his statement balanced with ours, leaving $5.80 over. Being on the last day's count, it devolved on me and two others to settle the counting and take charge of the papers; at that time I was acting as President. The object of the settlement was to see if the coin and cash on hand balanced with the books of the bank. The aggregate amount of the foreign coin in these fifty-seven boxes, as ascertained by the count, was $969,-361; in the same boxes at the count in August, after the loss was ascertained, the amount found in them was $848,439.38—leaving as the amount abstracted $120,921.62; the books of the bank called for the first named amount. The aggregate of the other gold, that was loose in trays, was $40,279.81; the American gold amounted to $364,265; and the silver coin, not including $50 in coppers, amounted to $192,548.40; the aggregate amount of coin on hand in February and March amounted to $1,566,554.16. This amount of specie in bank corresponded with the Cashier's account and the books of the bank, and $5.80 over.

Was present when the boxes were opened on the eleventh of August, to see if there were any abstractions. My attention was called to the loss by Mr. Shurlds;

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box No. 30, as I understood, was paid to Page & Bacon, from which a bag of sovereigns was missing. I counted the contents of that box when it was put up in February, and was sent for to see how it was that it did not tally with the marks on the outside. I remarked probably it had estrayed into some other box, and suggested that all counted on that day (the date on which it was counted being marked on each box) be brought up and examined. It was done; and from box No. 37 a bag of thalers, amounting to $7,850, was missing. The examination was pursued, and from sixteen boxes abstractions were found, amounting to $120,-921.62. The boxes were opened in the Cashier's room, and in the process a difference in the top and bottom seals was noticed--the top was of a dark hue, and the bottom lighter. There was a count in August, after the discovery of the loss, and the sum total of coin on hand at that time amounted to $1,577,734.53. Both at the February and August counts, the total amount of coin on hand was reported; the difference between the two counts was $11,180.27; at the August count we had no data to ascertain what amount of coin ought to be on hand; had no statement to show how much coin had been received and paid out between these two intervals. There was a semi-annual count in December, 1848, made by Messrs. Christy, Sarpy and Helfenstein; there was a semi-annual count in June, 1849; I was not on either committee.

Cross-examined. The sum total given in my examination, was given from a memorandum which I believe to be correct; don't know of a semi-annual committee ever making an actual count.

When it was resolved to count this money, there were whisperings that Mr. Childs was not above suspicion. There was something said, as to the manner in which he lived; some thought he lived too high, and got property too fast. Mr. Childs was engaged before the counting began in making preparation for it; when the money was brought up to be counted it was mostly in bags containing a certain number of pieces. Being the man in charge, Childs was thought to be the proper person to bring the coin out; the Board assigned the Cashier's room for the counting.

Childs was not the sole keeper of the keys of the vault. Cashier Shurlds had a set; it took two keys to get into the vault. There was considerable excitement among the Directors at the time; they directed the President and Cashier to procure a search warrant to look for lost gold; some of the Directors accompanied the officers with the search warrant, I never saw the search warrant, and never heard that the bank got any gold in consequence of it; think it likely Mr. Childs' and Mrs. Whitlock's houses were understood to be searched. Believe the search warrant directed the seizure of all effects of Mr. Childs in the shape of money.

The bank Attorney had authority from the Board to inquire into Mr. Childs' private dealings, as well as to give his law opinion, there has been a good deal said among the directory, and perhaps the gentlemen named, in regard thereto; have heard something said about pianos being given to ladies.

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James M. Hughes. Am President of the Bank of Missouri; was elected on the fifteenth of January last, and qualified about the twentieth. Was present during the count in February and March, from the fifteenth of February up to the second of March, and may have been in the bank afterwards during the counting. Was present every day except one or two; and counted some of the money in the fifty-seven boxes of foreign gold. The specie was brought up in bags and boxes, each bag having a piece of paper in its month, giving the amount of coin it contained, which I supposed to be in Childs' hand writing; in almost every case we found this memorandum to correspond with the amount counted; when a mistake did occur, Childs would point it out very quickly. Each bag was tied with twine and sealed, then the amount, and name of the individual counting was marked upon it; the bags were then placed in boxes, screwed up and sealed, and the amount and kind of coin it contained marked upon it, signed by the Director who counted it; Mr. Childs assisted generally in the sealing. After the gold was placed in boxes, he took charge of them; I saw him carrying them off with assistance of the porter. Was taken sick in June, and did not come back until the loss was discovered; have always understood that all the money was found except the amount abstracted, as compared with the account in February and March. From box No. 14, a bag of ten thalers, containing $7,850, was abstracted. This is the only box of my counting from which an abstraction was made. When I came to the bank as President, Childs was acting as Specie Teller, and, in connection with the Cashier, had charge of the specie. I have seen Childs going into the vault, and bringing money out, and paying it out. I never saw Mr. Shurlds go into the vault. When I returned to the bank in May, I found Mr. Hurschburg acting as Specie Teller.

Cross-examined. Never served as a Director of the bank; can't say I am familiar with all the duties of the officers of the bank; I can state generally the duty of the Cashier—he is entrusted with the funds of the bank and has superintending control of all funds and officers; and has supervisory control over the institution; he generally recorded what the Directors required him to record. I understand that the Specie and Receiving Tellers have charge of the money, but don't know whether by the by-laws or not; they have by practice; the Specie Teller has a set of keys to the vault, and has, in that respect, control of the Receiving Teller, he keeping his money in the vault. Suppose the Specie Teller has charge, from the fact that he can get to it and does go into the vault and get it out; don't know whether or not the by-laws say he shall have charge; don't know that he ever had charge of it to the exclusion of every other officer of the bank; don't know that he is an officer subservient to the Cashier. There are a good many things done by the Board that are not entered on the minutes. I know instances where the Cashier has been directed to do certain things that they did not think of any moment, which were not entered on the minutes, and it would depend on the importance of the

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thing whether it was entered or not. The bank appointed a committee to enquire into this matter of embezzlement; and I think Messrs. Yeatman, Sturgeon and Barnes composed said committee. I think the search warrants were issued by direction of the Board.

November 12.

Mr. Hughes. I never was in the vault but once previous to this loss, and then went in with the Cashier; think this was shortly after I went into office. As to the manner in which the gold was kept know nothing but what I derived from others. In all reports or statements made to me, the foreign gold was reported so much and the American gold so much, and so on. Suppose, as a matter of convenience to the institution and its officers, they kept the different kinds of coin separated as much as possible.

Under the charter it is made the duty of the Directors of the bank to count the money in the vault twice a year, and also a committee to be appointed to make semi-annual examinations. Don't know that it is the practice of the officers of the bank to go into the vault from time to time to inspect with the eye the contents of the vault; there may be such a practice for what I know.

Mr. Bates. On the evening after the loss was discovered, and when the Board was assembled at the bank, do you recollect of stating to Mr. Childs that the Board had concluded to have him arrested? Yes, sir. Do you recollect of saying that all of us are implicated, you can defend yourself and we will defend ourselves? No; I stated to Mr. Childs that we had taken the necessary steps to arrest him, and that he could defend himself; I don't recollect of stating to him that I could prove my innocence; under the excitement of the moment, I may have made remarks which I have no recollection of; there might have been something said about others vindicating themselves. I recollect that in reply to the remarks I made, Mr. Childs said he was innocent, and asked if he was to be arrested there; I think I told him the officers were at the door; when the door was opened the officer was there and he was arrested. Mr. Shurlds and myself went to the Justice's; I can't say whether the doors were locked after we went out or not.

A. S. Robinson. Am general ledger Bookkeeper in the bank, and have been engaged there since the autumn of 1838. Prior to January, 1840, I was engaged as general Clerk. The duty of the general Bookkeeper is to keep a record of the business of the bank in a general way. The accounts in the general ledger are various, comprising the deposit account and the accounts with foreign banks. There is a debit and a credit side to this ledger. The debit side showed the receipts each day, and the credit side the deposits, etc. The Bookkeeper gets the debit and credit from the Receiving Teller, and his books, and has no other account than what is got from him. There is a general cash balance made daily by the Receiving Teller, after the close of the business of the day. This is derived from his receipts, etc. It is the duty of the Specie and Paying Teller to receive the coin paid into the bank. The amount he receives and pays out is given to the Re-

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ceiving Teller in the shape of tickets. The Specie Teller pays out bank notes, gold and silver, and sometimes coppers. The notes he pays out he receives from the Receiving Teller each morning, and receipts to him the amount he has on hand at the close of each day. He also reports daily, at the close of business, the amount of coin he began with in the morning, the amount received during the day, the amount paid out, and the amount then on hand. The Receiving Teller makes up a statement of his paper in the same way, and from combining the two the cash balance is derived. The specie taken in during the day is always counted after the bank is closed, and the Teller makes an entry of the balance on hand in a book kept for that purpose. The weekly statements of the amount of cash on hand are made from these daily reports.

The book I hold in my hand is the regular specie book, kept by the Specie Teller; it commences twenty-seventh December, 1847, and ends twenty-fifth August, 1849; up to the seventh of May last the entries are in Mr. Childs' hand-writing, and from that period to its close, in the hand-writing of Mr. Hurschburg, the present Specie Teller. In making up my weekly statement I am furnished with a copy of the entries in this book, which shows the amount of coin on hand; the entries in this book are as follows, as an instance of the manner in which it is kept, for the week ending March twenty-fourth, 1849, the Specie Teller enters

Silver on hand....	$192,542.44
American gold on hand	$ 360,000.00
Foreign gold on hand	1,014,005.92
Aggregate of gold..	$1,374,005.92
Aggregate of gold..	$1,566,548.36

These statements are made by the Specie Teller to me weekly, and in connection with the report of the Receiving Teller, enables me to make the weekly cash balances.

Generally, the amount of coin on hand is in the writing of Mr. Childs, but in some instances it was not; sometimes he would be pressed with business when called upon for this statement; and would request the bookkeeper to make such and such alterations in the preceding statement, and he would arrive at the correct cash balances. Of these statements handed me, those for the weeks ending January six, thirteen and twenty-seven; February three, ten, seventeen and twenty-four; March three, ten, seventeen, twenty-four and thirty-one; April seven, fourteen, twenty-one and twenty-eight, and May five, are all in Mr. Childs' hand-writing; the statement for January twenty is not, it being an instance where the entry was made at his request during a press of business. The statement of May fifth, was the last made by Mr. Childs.

I believe all the specie received into the bank was under the charge of the Specie Teller; when specie was to be paid out, it was brought from the vault by him, with the assistance of the porter; he had charge and supervisory control of the vault, and I think that was a part of his duty. I don't know anything of the count in February and March; I only

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had a general knowledge that such a count was going on. During this counting Mr. Childs did the duty of Specie and Paying Teller; I believe that occasionally, during temporary absence, he had assistance from other officers of the bank; I think Mr. Way and Mr. Hurschburg assisted him; can't state positively whether this was the case in February or March, or not.

When engaged with my books I don't see what is going on particularly. Until the last twelve or fifteen months the vault doors have been kept open during bank hours; since, they have adopted a plan of closing them during bank hours, and to open them as occasion required. I have no access to the vault.

Cross-examied. On one or two occasions the memorandum of the weekly statement of coin was made out by myself acording to the direction of Mr. Childs; I always compared these with the book and found them correct. It is the duty of the Specie Teller to take charge of the specie, he always did so; knew no written rule to that effect; believed there was a by-law which says Cashier shall have charge. Mr. Corcoran sleeps in the bank, and while he was sick, some time since, Mr. Barry took his place; when Christy was porter, he stopped at a hotel; when Bowlin was porter, he occupied a room attached to the bank yard. There is a back window near the grate that leads into the vault, and the back door that leads to the yard is also near the vault door; money may have been carried out the back door, but it was never done to my knowledge. Always required of the Specie Teller to make up his account of specie on hand—the specie was under his charge, and these statements were due from him; it is always necessary for the Specie Teller to strike a balance every day, as well as the Receiving Teller. Always got the Specie Teller's business from his books; I made up my reports from both statements, deriving the aggregate from the paper of one and the specie of the other. I only made up weekly statements, and the statement of both were generally handed me by the Specie Teller, he being the last one to make up his account.

I proved their accounts by comparing them with the general cash balance on my book, which embraced the whole cash assets, both specie and paper. The Receiving Teller could not each day render an actual cash balance, without including the Specie Teller's work.

Henry L. Clark. Am Receiving Teller in the Bank of Missouri, and have been since August, 1837; my duty is to receive the bank notes coming into the bank, and to take charge of and keep them—that comprises my whole duty. I make entry in the bank book to persons making deposits. When specie is deposited it is uniformly carried around to the Specie Teller, except when in small amounts, then I would receive it myself. At our counter we receive no notes but those of our own bank and branches. I enter all deposits made in the bank; I get the amount of specie deposited by tickets issued from the Specie Teller, and credit the depositor accordingly. Have never counted or examined the specie. At the close of each day's business, I uniformly make up a cash account; I charge myself with the

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receipts, composed of deposits and collection checks sold on different banks, and the amount of money brought out in the morning—both paper and specie—from this I arrive at my cash balance. I receive the specie I use from the Specie Teller, who brings the specie from the vault; from this his date I put down the specie brought out each morning and his operations during the day, to which I add my own statement, and then the cash balance must be shown.

When I go to the bank in the morning, I take out a certain amount of bank notes, and the Specie Teller takes out a certain amount of specie; the first entry I make is the amount of notes brought out; I do not enter the specie until the close of business. I very rarely want specie, but what I use I get from the Specie Teller; in the morning I may receive $100 from him; if I only use but $50 of that during the day, the balance is handed over to him when business closes; he takes charge of every thing in the way of specie. The Specie Teller is in the habit of paying out bank notes, which I give him each morning, he acknowledging the amount he receives by a ticket; at the close of business he returns such as he did not use and enters the amount used as so much cash in hand. The daily statements always include the operations of the Specie Teller and myself, and every item of each received during the day; for the amount of specie taken from the vault, and received or paid out during the day, I have only the authority of the Specie Teller; the paper I have under my own control.

Discrepancies may occur in various ways—either by the negligence of the Specie Teller or my own; our duties are directly at variance.

Am very well acquainted with Mr. Childs; we have been together in the bank nearly fourteen years. Was told of the counting in February and March, but never saw a dollar of the money counted. Recollect of Mr. Childs being absent on several occasions, but cannot say whether during that period or not; I once asked him why he was so often absent from the counter, and he replied, he wanted to give Mr. Hurschburg, his successor, a chance to practice; I have sometimes found him in the vault when I called him.

If an error should exist in the report of the Specie Teller, it could not be corrected without counting all the coin. Have an iron chest in the vault, in which I keep every thing I have in my charge; the key of this chest I keep myself. The Specie Teller keeps a key to the vault. When I wanted to get into the vault, I had to apply to him for the keys. Never acted as Specie Teller in my life. Since Mr. Childs left the bank, Mr. Hurschburg was sick on several occasions, when Mr. Way would act in his place. I carried the keys to the vault during that time. When I went to the bank in the morning, the porter would open the vault doors, when Mr. Way and myself would go down and take out the amount we wanted—he specie and I paper; and when it was brought out the doors were closed, and remained so until after the close of business, when the porter would again be furnished with the keys, the doors unlocked, and the cash again re-

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placed in the vault. I don't know that I was ever present when the porter unlocked the vault doors; it was his business to carry the coin up and down into the vault. During the period the keys to the vault were in my charge; I carried one in my pocket and locked the other in a drawer in the bank.

Cross-examined. There are two sets of keys to the vault, on one set two keys, and on the other three; originally there were three keys to each set, but Mr. Childs lost one from his set some eight or nine years since, and from that period to the present but two have been used; the Specie Teller has charge of one of the sets of keys, and the Cashier has charge of the other set; the Cashier's set containing the three keys, he don't have to use his third key in order to get into the vault.

As Receiving Teller, I kept possession of all paper money, which is placed in an iron chest in the vault, after the bank is closed; I cannot get at this chest without first obtaining the keys of the vault. The Cashier, although possessing keys to the vault, cannot get at this money except through myself; it is under my own control in toto. I have never counted the specie, nor the Specie Teller the paper, and the Cashier has never counted either to my knowledge. I recognize the Cashier as a superior, and would have rendered my key to him whenever he called for it. I was bound to obey him in every instance.

I think there is no officer of the bank that is unchecked by another. We could readily form an estimate of the amount of money necessary for each day's operations, which would be brought from the vault each morning by the Specie Teller and myself; the entire funds in the vault, however, were open for daily use; there being no occasion for their use they were left in the vault, subject to the controlling officer.

We only receive one kind of paper at the bank, at this time, consequently when a large check is made upon the bank, and paper demanded, I do not have to consult the Cashier as to what kind of paper in which it shall be paid; it has been customary when large checks were presented and specie demanded, for the Specie Teller to call on the Cashier to know from what kind of coin it should be paid; this has been a practice in the bank; cannot state whether Mr. Childs' successor pursues the same course or not.

In making the weekly statements, they comprised not only the daily operations, but the amount of cash we started with at the beginning of the week; every weekly statement contained the amount of coin in the vault at the close of the week. It is enjoined upon the tellers to furnish these weekly statements. In making up these statements, if one million dollars of gold is in the vault boxed up, it is necessary for the Specie Teller to show it in his report, as so much cash on hand; don't think he counts it each week to ascertain that it is all in the boxes; don't know that he even counts the boxes or compares the marks upon the boxes with the memorandum he keeps of their contents. I take his statement in the evening of each day, for the amount he brought out as well as his operations dur-

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ing the day. I always give the Specie Teller a round amount of paper each morning—say $50,000—in order that where specie is not demanded he pay checks in paper; for this amount he gives me his ticket and charges himself with it; I make no entry, as I would recollect the amount at the close of business; I only see that the amount is correct and that his ticket conforms with it. Saw the Cashier once superintend the counting of some gold; when Mr. Childs was absent to the east, the person officiating for him, in paying out some gold, made a discrepancy. I think Mr. Shurlds with some other officers counted over the loose gold in order to ascertain about it; the discrepancy was only a few hundred dollars, which might easily have existed previously.

The Cashier never had any other charge further than having a key to the vault; can't say where he kept it; have never seen him open or lock the vault door; had seen him more than once loan his keys to Mr. Childs, when he would leave his set at home, to obviate the necessity of his returning for them; to obtain the keys the Cashier would have to leave the banking room; always understood he kept them up stairs; never saw him with them unless he was requested by Mr. Childs to get them. Have seen the Cashier in the vault sometimes, but never saw him there unless with others, and while they were ascertaining the funds; don't think his visits to the vault would average once in six months. The Cashier never counted any paper; think it has been counted repeatedly, both by the committee of the Board and the Legislative committee. The paper was not counted in February and March; it was counted at the semi-annual examination in December.

Mr. Childs was a remarkable expert and exact officer, and efficient and capable in the discharge of his duty; when Specie Teller, he discharged certain duties now devolving upon myself, from the fact that his successor declined them. My duty has never been defined; my predecessor left certain duties which he had been performing and which I have since discharged. Mr. Childs had paid out paper for several years; Mr. Hurschburg declines to do so, from the fact that he is not as capable at counting and unable to pay paper and coin. I know of no written instrument defining the duties of either of the Tellers.

November 14.

H. L. Clark. Have frequently been in the vault; never heard the right of the Specie Teller to go there questioned—his duty requires it of him. Don't know that Mr. Childs was directed to prepare the coin for counting in February; when he would go into the vault during banking hours, Mr. Hurschburg acted for him; if anything occurred, while he was absent, that required his presence, he would call him up.

My weekly statements to the General Clerk embraced all the paper money in the bank; could very readily have found out any large abstraction of paper money. There is a discrepancy between the general and individual ledgers; the discrepancy is more likely to exist in the individual ledger, as the general ledger is tested once a week; this discrep-

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ancy might affect the cash balances. In the event of an error existing in check, a discrepancy may occur; there is a daily list of the checks paid kept by the bank. There was an overplus discrepancy in the cash which had never yet been found out. Do not think when Mr. Childs left the bank, that he left a bag containing two or three hundred dollars; being a small overplus of coin which had occurred at various times; have heard of an overplus existing but never examined into it. Don't know that a special package was left at the bank, to be delivered to nobody but Mr. Childs, Mr. Bates, Mrs. Whitlock or Mrs. Hayden, and that it was opened and examined. During the time I kept the keys to the vault, Mr. Corcoran slept in the bank; it has always been my understanding that somebody slept there. When I kept the keys the porter every morning and evening opened and shut the vault doors; never went to see him shut them, or examined them afterwards to see if they were locked; the doors made considerable noise in shutting, and I could always tell when they were closed. Have seen Mr. Childs entrust the keys to the porter for the purpose of opening and closing the vault, and had seen him standing by the grating just above the door to see that he done so; don't know that he made a daily habit of so doing.

James E. Yeatman. Am a Director in the Bank of Missouri, and assisted in making a count of the coin in February and March last; the committee with which I acted was composed of Messrs. Pickering, Walsh and Sarpy, and Mr. Hughes, the President, who was a member of all committees.

The committee would meet in the Cashier's room, and the gold would be brought to them by Mr. Childs, generally in bags; we took our seats around the Directors' table, and when each gentleman counted sufficient to fill a bag, it was put in, tied up, the bag sealed, and the amount and kind of coin it contained, as well as the Director's name who counted it, marked on each bag. Mr. Childs kept a memorandum of the amount of coin he would bring up each day, and when the counting for the day would be over, compared his memorandum with the amount we derived by counting; the two accounts generally corresponded. At the close of each day, the bags would be placed in boxes, the top screwed on, and two seals placed upon them—one at the top the other at the bottom seam. Our committee was engaged two days in counting the foreign gold, viz: on the third and sixth counting days; on the third day we counted boxes No. 13 to 20 inclusive, and on the sixth day boxes 31 to 36; the aggregate of the foreign gold that was counted and boxed by the committee with which I was engaged, amounted to $428,858.28; this was a portion of the fifty-seven boxes. There was other foreign gold in the bank, not boxed up that the committee counted afterwards.

Was present at the bank after the abstraction from this foreign gold had been discovered. The box in which the loss was first discovered was box No. 30, counted on the last day of our counting. On the morning of the tenth of August I was summoned to the bank, as a member of the Committee that counted the box, in order, if I could, to explain

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the matter; all who counted on the day that box purported to be counted, were present, except Mr. Pickering. Thinking to find the missing money in some other box, we commenced an examination of them, and at the close of that day's examination found an abstraction had also been made from box No. 37.

Mr. Childs was present during this examination; on opening the boxes, I discovered a difference in the two seals, on one of them—the wax on the top seal being darker than that on the lower. I mentioned this fact to a Director, when Mr. Childs looked at the seals and said there was no difference in the wax, but that the top one had been smoked in sealing; gentlemen around me then looked and thought they saw a difference; the box was then opened, and there was a deficiency.

On the next day (Saturday) the Board met at twelve o'clock, and when the business of exchanges had been gone through with, the President stated that the bank had been robbed, and he was determined to go over the gold that had been counted in February. The Board met in the afternoon of that day, and proceeded to open the remainder of the boxes; quite a number were opened before further abstractions were discovered; at length a box was found in which there was an abstraction. We then examined the wax, and without any difficulty could distinguish a difference. The difference was so perceptible, that almost every other box from which abstractions had been made was designated before opening. The total amount of coin abstracted from these fifty-seven boxes, appeared to be $120,921.62.

Shortly after ascertaining this loss from the boxes of foreign gold, the committee proceeded to count all funds in the bank. Was not present during all that count and was not present when the result was ascertained.

Cross-examined. Have been a Director three years next December. In that time have not become personally acquainted with the mode in which the bank accounts or books of the bank are kept, and excepting as they are given to us to make our reports I knew nothing about them. The Directors never did, to my knowledge, examine all the books in the bank. As an individual Director, I had no business behind the counter of the bank, unless engaged in counting the coin or making the semi-annual examinations. Am not able to say that the Board, as a Board of Directors, ever assembled to take any steps to examine the books of the bank. Am not able to say the books of the bank ever underwent any particular scrutiny; the only scrutiny the cash balance of the two Tellers ever underwent, to my knowledge, was at the semi-annual examinations. The amounts on hand were furnished the Board by the General bookkeeper—he taking the accounts of the Tellers. We know the condition of the bank every week, as furnished by the weekly statements, which are made to the Cashier, and by him to the board. The weekly statements may be considered a report to the Cashier, as a statement of the funds on hand, and the general condition of the bank. The persons who make up these statements derive the data of the elements of their contents very readily, I suppose, from the Tellers. The condition of the funds is easily

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ascertained: if there is one million of dollars in the vault of the bank, and $50,000 is taken out each week by the Teller, he knows that $950,000 remains, and he would subsequently know the amount put in and could make the addition. This is the means by which the amount of specie is ascertained, based upon the original amount and subsequent transactions. If somebody, other than the Teller, slips into the vault during his absence and takes $50,000 out, then I suppose the Teller would have to count all the coin in the vault, in order to ascertain the deficiency.

The Cashier finds out the amount of money in the vault by the reports of the Teller; the Teller ought to know how much specie is there, because it is his duty; I know it is his duty because he is delegated by the Board to attend to that business; I don't know any special rule or by-law defining the duties of the Tellers and Clerks of the institution; they were originally appointed to such and such duties and have been going on in the discharge of them.

Mr. Bates. Is it really a truth, that in the operations of the Bank of Missouri, that the Teller is the only man who knows how much specie is in the vault? A. He is, unless the Cashier goes into the vault and counts it for himself. The Cashier has a set of keys to the vault, but don't know for what purpose he is intrusted with them; I presume it is in case of loss of one set, that it may not be necessary to delay until another set it had; never knew until recently that he had such a set. Never saw the Cashier open the vault or go into it

Mr. Yeatman. I never knew the Cashier to verify the accounts of any of these Tellers; his reports made to the Board at its semi-annual examinations, constitutes the documents showing the condition of the bank; for these reports he obtains his data from the two Tellers. Never knew the Cashier to count the specie or paper; or I never knew him to touch a dollar of the money in the bank. When we make the semi-annual counts, we take the statements of the Tellers to verify them; the Receiving Teller gives us his paper, which we count; and then compare the amount counted with his statement and the amount called for on the general ledger.

Then we take the Specie Teller's account of specie on hand, and make an examination of the gold and silver in the vault; after making this examination we compare our account with his statement and then by the books of the bank. The custom has always been, to the best of my knowledge, to count the paper, weigh the silver, weigh a certain portion of gold and ascertain the amount, and then average the remainder by it. I have been on two semi-annual examinations and at both of them we counted the paper. In June last, we made no actual count of the gold; we assumed that the boxes of foreign and American, boxed up, contained what they represented to contain; the loose gold we actually counted, it was not a large amount; we did not count it piece by piece. I presume the committee examined three boxes outwardly; I think they examined the seals; I took no part in it.

The Directory requires the Cashier and Tellers to give bonds

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—the Cashier's bonds are much higher than the Teller's.

Before the count in August never heard suspicion expressed against Mr. Childs. When the committee were making their count in February, they thought it necessary to have Mr. Childs present to assist and facilitate their operations, he having charge of the funds. He did the manual labor for the committee, bringing up and carrying down the gold; suppose any other man could have done it as well; the committee, or any one of them, as they had to make the count, could have gone to the vault and had the money brought up without his assistance. The count was to ascertain whether the money was all there, as reported by the Specie Teller, and if any deficiency had existed, he would have been held responsible. We did not require the assistance of the Cashier during that count. Have no doubt but that Mr. Childs would have been excluded from participation in that count had we not every confidence in him. Although we took the statements of the Tellers for the money being there, we thought it necessary for the counting in order to verify these statements. I cannot say that the paper money was counted in February; I have no memorandum to that effect or any recollection of it.

In the boxes 30 and 57, opened on the tenth August, when the deficiency was discovered, we noticed a difference in the seals; on the succeeding day, as the remainder of the boxes were opened, the difference was particularly noticed and enabled us almost immediately to point out deficient boxes before they were opened; the difference in the color of the wax was apparent. We did not examine impression of the seal or use the original seal to see if it corresponded or fit. After the boxes were opened, two stratas of wax was perceptible. I suppose the original seal was in possession of Judge Shurlds; I understood he had been directed to lock it up. The seal on the boxes from which there was no abstraction presented but one strata of wax, and the two seals upon them corresponded.

I don't know that Mr. Childs was locked in the bank while the officers went to procure a warrant. I think the President of the Board told him the Directors had determined to have him arrested, and that shortly after he was arrested; I don't recollect of hearing the President remark, "all of us are implicated; you can defend yourself and we will defend ourselves;" I should have protested against such an imputation.

E. C. Angelrodt. Have been a Director in the Bank of Missouri for the last seven years, and assisted in the count of February and March last. The committee was composed of Messrs. Hughes, Barnes, Christy and Helfenstein. While on that committee I counted $50,742.29 of the foreign gold that was boxed, sealed and marked. Was present at the closing up of that count, and from a memorandum kept by me at the time, it appeared the result of the counting of the coin was as follows:

Foreign gold in the fifty-seven boxes, sealed and marked	$ 969,360.95
Loose foreign gold.	40,379.81
Total foreign gold counted	$1,009,740.76

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American gold counted	364,264.00
Whole amount of gold	$1,374,005.76
Silver counted	392,548.40
Total gold and silver counted .	$1,566,554.16
The statement of the bank called for	$1,566,548.56
Overplus according to statement	$5.60

Of the above amount of foreign gold counted $428,858.38 was in ten thaler pieces, most of which were counted at the value of $7.85.

I was absent from the city during the August count and when the abstraction was discovered.

At the count of February, I kept no memorandum of other foreign gold than thalers. The circulating paper was counted in February, piece by piece.

Recollect one evening, after we had got through the counting for the day, I was sitting alone in the Directors' room, when Mr. Childs came in and handed me the seal, saying Judge Shurlds was not present and I had better take care of it; can't say whether or not we had used it on that day. Think he threw the seal upon the table to me, and am not able to say where he procured it. I took it home with me and brought it to the bank next morning and gave it to Judge Shurlds.

F. Christy. Am a Director in the Bank of Missouri, since 1842, and assisted in counting the coin in the bank in February and March last. Assisted in counting a portion of the fifty-seven boxes of foreign gold, which was boxed and sealed, and detailed the the amount counted by myself —the aggregate was not given. Was not present at the counting of the coin in August.

On the sixth of September last, and after the abstractions were discovered, an invoice of the fifty-seven boxes of foreign gold, as put up in February and March last, was taken by the Directory. According to that invoice, it appeared that these boxes contained $428,858.38 in the ten thaler pieces, as put up in February; when the inspection was made in August they contained only $318,952.38 in ten thaler pieces — showing that $109,900 in ten thaler pieces had been abstracted from them during the interval.

Messrs. Sarpy, Helfenstein, and myself, composed the committee to make the semi-annual examination in December last. The counting of the funds at that time commenced on Wednesday the twenty-eighth, and ended on Saturday the thirty-first. On the first day we counted, we weighed the two chests of gold that were in the vault—chests that were kept there for the purpose of holding loose gold; am not able to specify particularly what was done on the second day but will state that on the second and third days the counting was completed. The last thing that was done was to weigh the shelf gold, and the silver in the vault.

Mr. Childs, the Specie Teller, was present, and attended us during the counting. The gold on the shelves was put up in bags, but the invoice of that count, which I hold in my hand, does not specify what kind of coin they contained.

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Messrs. Helfenstein, Sarpy and myself were appointed a committee to make the December examination of the money. We went down into the vault, Mr. Childs with us on the twenty-eighth, and concluded the examination on the thirty-first. Mr. Helfenstein and Mr. Sarpy did the weighing and I took down the statements as they called them out. The papers before me are the memorandums made in that examination.

Mr. Childs had a memorandum of the contents of each bag and box, the amount and kind of coin, and when we stopped we compared with him to see if we agreed. We generally agreed. On one occasion we made a mistake of one thousand dollars against him. It was an error in the addition; which, upon examination was discovered, and the statements balanced. We called over our statements and checked them, and made the total of gold and silver $1,914,383.91. Mr. Helfenstein generally opened the bag, examined the ticket in it, which was in Mr. Childs' hand writing, specifying the kind and amount, and when we got enough on the scales for a draught, we weighed it. The bags were then returned to the chests. We had ascertained what a pound of gold amounted to, by weighing and counting one pound, and took this as a standard.

November 14.

Mr. Christy. Noticed after the loss was discovered, that the top seals upon the boxes from which abstractions had been made, appeared to be larger and darker than the top seals upon those from which no abstractions was made. They had the appearance of having been opened and resealed; never examined the bags at that period, to ascertain whether or not they had been opened. Cannot state that at particular periods of the year foreign gold accumulated in the bank faster than at other periods. My experience as a merchant shows me that in the dead of winter, when the river is closed, less is in circulation; owing no doubt, to the fact that less is brought in.

On the seventh of last August, Mr. Childs loaned the firm of Woods, Christy & Co. $1,500. It was in a check drawn by E. W. Clark & Brother, in our favor, upon Clark & Dodge, New York. In addition to this, I may have been indebted to Mr. Childs, at that time, some ten or fifteen dollars, balances on due bills; bought of Mr. Childs, four lots in the cemetery graveyard, for which I gave him my note for $200. Mr. Childs spoke to me on one occasion in regard to Mr. Hurschburg, and recommended his election as Specie Teller, saying at the time he intended to resign, and thought he would make a good officer in his place; don't know whether this conversation took place in the bank or on the street.

We were all satisfied from our examination at that time, that the count was right. I mean by all, Messrs. Helfenstein, Sarpy, Childs and myself.

Cross-examined. On the sixth of September an invoice was taken of the contents of the fifty-seven boxes of foreign gold. They were all brought from the vault and examined. The number of ten thalers put up in these boxes in March, was ascertained by reference to the invoice made of the coin at that time.

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The number found in the boxes at the September invoice was also ascertained. The invoice for the sixth of September was made with a view of ascertaining what kind and amount of coin was left in these fifty-seven boxes; and for that purpose we compared the invoice with that of February and March; think the amount of ten thaler pieces was ascertained before that time; know it was looked into as soon as the abstraction was discovered. The amount of thalers in March was ascertained to be $428,858.38. By the September invoice it appeared upon comparison with the March invoice, that $109,900 of this peculiar coin had been abstracted.

Did not see all the boxes which were counted in February and March, and placed in boxes. I only saw the bags that were put in the four boxes which I counted. I did not see the other bags until the September examination.

In December the paper of the bank was also counted. It was counted on the evening of the last day. We may have counted a portion of it on the second day, but not the whole. At that time there were very few notes in circulation, and the Receiving Teller, Mr. Clark, had but little to do. At that time we counted $14,050 circulating paper, $11,000 assorted mutilated paper, and a package of $980 mutilated paper.

In box No. 5 there was a bag containing 1,000 ten thaler pieces, which were counted at $7.90 each; this was in February; that bag was counted by Mr. Helfenstein; don't know of any ten thaler pieces coming into the bank from December to March last, at $7.90—I only heard of their being taken at $7.85; and all ten thalers were counted at $7.85 in the March count; I don't know of any being taken at $7.90.

When we counted in December last there were fifteen boxes of gold that had been received from the sub-treasury; we did not count this coin, but took it at the same rate it was received in the bank. We satisfied ourselves that the gold we counted was correctly put down in the memoranda. The amount of each particular kind of coin was in no instance put down; all the distinction we made was foreign and American gold; have no recollection of the committee opening any of the boxes received from the sub-treasury, but am confident they examined them satisfactorily; the contents of these fifteen boxes made a portion of the foreign gold counted and put up in February. Mr. Childs remarked, in reference to those boxes, that they had been received from the sub-treasury, that he had not counted them, and that they might be put down for the amount they represented.

On the boxes from which abstractions were made, there was more wax about the top seal than on the lower; the impression of the seal upon the wax was about the same; I tried the original seal upon several boxes, but could see no difference. I did not examine the screws upon the boxes in which there was a deficiency, to ascertain whether or not they came out easier than those in which no deficiency existed.

Judge Shurlds has supervisory charge of the bank, but never knew he had charge of the coin; when the vault door was opened

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there was considerable gold lying loose around and accessible to any one who could get into the vault; there were no peculiar apartments in the vault in which coin for daily use and other coin was kept. Although Mr. Childs had charge of the coin, Judge Shurlds had the superintending management of the affairs of the bank and its officers; suppose he would be bound to obey any directions that Mr. Shurlds should give him. Judge Shurlds is *general boss;* I never saw him do any thing in the vault or make any examination of the coin; never saw him pointing to any peculiar kind of coin for any purpose; had seen him down in the vault for a minute or two during the semi-annual examinations; never saw him use the keys of the vault.

When Mr. Childs loaned money to us, we gave him a negotiable note for it; the last time I saw that note it was in the hands of Mr. Gamble; I had been garnisheed by the bank; I owed Mr. Childs, due bills that had been given him on various occasions for small collections I had made for benevolent purposes—for collections in the church, or something in that way, for which I would not have the money about me when I would see him; or, they might have been thrown into a small basket taken around in church; Mr. Childs is not the only person who has loaned me or my house money; have borrowed money many a time, and from different persons; we have borrowed money from Jno. Bowlin, who was porter in the bank when Mr. Childs was there; he had lived with me five or six years before going into the bank, and was in the habit of depositing money with us on interest; we have not paid him yet; we have had a settlement with him, and he holds our due bill for the amount due him, which is something less than $1,000.

Mr. Childs mentioned Mr. Hurschburg to me as his successor just before he resigned. I understood at the time that Mr. Hurschburg would be an applicant for the office, and Mr. Childs said he would be a very good man to fill his place; don't recollect of ever saying that Childs had been active in producing Mr. Hurschburg as his successor.

The size of the vault is large, and so dark that we have always to use candles; there is a small grating, about a foot square at the top, which I think opens to the banking room.

Mr. Helfenstein. Am a Director in the Bank of Missouri, acted with the committee that made the semi-annual count in December, 1848; was present during the whole of the examinations by that committee, the committee was attended upon by Mr. Childs.

At that count there were fifteen boxes of gold counted on the third day; the contents of these boxes were given in by Mr. Childs as sovereigns, who stated that they had been received from the Sub-Treasury; understood Mr. Childs to say he had never counted them, but received them for what the boxes purported to contain; one of these boxes was opened and examined and the remainder weighed one by one. Large quantities of loose gold were in the vault at that time, and when defendant was asked why it was not boxed, he re-

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plied that he had not time to assort it out; I heard nothing said touching the character of the gold, whether it was domestic or foreign.

Was engaged in the February count, and the committee with which I acted was composed of Messrs. Hughes, Heiskell, Forbes, and Fisher; took the place of Col. Brant on the first day's count, who, from some cause, was unable to attend. During that counting counted the contents of boxes Nos. 5, 27, 32 and 38 of the foreign gold. Recollected counting these boxes from seeing my signature upon them, (the boxes being produced,) and believe that at the time I put my signature upon the boxes, they contained the amount and description of coin called for by the memorandum on them.

The memorandum of the contents of each box was written upon it before the boxes were closed, when they were sealed and given in the possession of Mr. Childs; some were taken from the Cashier's room by defendant, while I was present, and some were left in the room when he went away. Was not on the semi-annual committee last June; that committee was composed of Messrs. Barnes, Forbes and Heiskell.

Cross-examined. At the February count the boxes of specie were screwed up, sealed, delivered to Mr. Childs; they were delivered to him to take them to the vault, the committee saying they were done with them.

The Board was divided into committees to make the February count; the President was included upon every committee as its head, and believe attended to them; he counted with us in the Cashier's room. When we came across coin that we did not know the value of, we derived our information of its value from Mr. Childs; believe there is a standard in the bank by which the value of coins can be ascertained. Never referred to the law to ascertain the value of any coin by act of Congress. When the counting was over for the day, the members of the committee would generally leave the bank in a body. Always considered that the Cashier had superintending control, but knew that Childs was immediately in possession of the specie; the specie was not under the superintendence of the Board.

Col. J. B. Brant. Am a Director in the Bank of Missouri; have been, without intermission, since May, 1846. Was present at the counting of the coin of the bank in February last; the counting was done by committees of the Board. The arrangement by which the committees were appointed, placed Messrs. Angelrodt, Barnes, and Christy on the first committee. Having some business to attend to on the fifteenth February, the day the counting commenced, Mr. Helfenstein took my place, consequently I did not count on that day.

The first counting I did was the contents of box No. 8, being two bags of ten thaler pieces, amounting to $16,411.70; the next was in box No. 11, of the contents of which I counted one bag of sovereigns and two bags of 20 franc-pieces, amounting in the aggregate to $15,120.87; the next in box No. 23, containing two bags of ten thalers, amounting to $13,988.70; the next was the contents of box No. 40, in ten thaler pieces, amounting to $15,-

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700; the next was the contents of box No. 44, being one bag of thalers and one bag of guilders, amount in the aggregate to $16,-136; and the next and last foreign gold that was counted and boxed, I counted one bag of Prussian thalers in box No. 57, amounting to $1,264.00.

I counted other gold (that was not put in boxes) from the shelves and loose; it was not counted for some days after we had finished the fifty-seven boxes; of this I counted one bag of sovereigns and two bags of guilders, amounting in the aggregate to $11,830. I was also present and assisted in counting the American gold, and I assisted in taking an invoice of the entire count after it was completed. I only know how much American gold there was, by checking it off for the different members of the Board; the amount of American gold ascertained to be on hand was $360,-000. I assisted in weighing the silver coin, and am satisfied that the amount reported was so counted.

The counting of the coin was done in the Cashier's room; Mr. Childs and the porter of the bank would bring the bags of gold from the vault, they would be emptied separately upon the Directors' table and counted by the Directors present. Generally there was a ticket in each bag, when brought from the vault, purporting to be the amount of coin it contained; the coin when counted over, generally corresponded with the ticket; the ticket would then be put back in the bag, the bag sealed and placed in boxes; generally speaking, the amount of coin and the initials of the Director counting it, would be marked upon the bag; the person who counted the bag would generally seal it. After the bags were put in boxes the lids were screwed down and sealed; Mr. Childs, and sometimes the porter, assisted in screwing and sealing the boxes.

November 15.

Col. J. B. Brant. Was present at the bank on the afternoon of the eleventh August last. Before dinner on that day, nine of the fifty-seven boxes of foreign gold had been examined; I went to the bank immediately after dinner, and we got through examining the remaining forty-seven boxes that afternoon; the first nine that were examined, I did not see opened. There was a general counting of the cash of the bank shortly after the eleventh of August, which I think was not completed until about the sixth of September; I was present nearly all the time during that count; it was an entire examination or re-examination of the coin, to find out how much had been abstracted. I am not able to give the detail of that count. On examination of the boxes of foreign gold put up in February and March, we found that abstractions had been made from boxes Nos. 2, 3, 4, 5, 6, 8, 11, 12, 14, 15, 16, 17, 18, 19, 30 and 37. From box No. 11, which I counted in February, one bag of sovereigns was gone, and from box No. 11 one bag of ten thalers: the total abstraction from boxes which I counted, amounted in the aggregate to $14,021.62.

Took no part in the semi-annual examination of June. I think I assisted in counting some silver coin in August.

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Cross-examined. The proceedings in February and March were quietly conducted.

The statements of the condition of the Bank of Missouri are never made up until the reports from the branches come in; they come from different parts of the State, and I can't say the precise dates or periods they came to hand. Don't know that there is anything in these statements except what concerns the Mother Bank and its branches. I have not assisted to compile a semi-annual statement for two years, did not examine the August report particularly, because it was not my province to do so; it was the business of competent men and they have spread it before the country as it is.

Did not particularly scrutinise the boxes that were opened when I was present, or particularly examine all their seals; cannot say that all the Directors did examine the seals before the boxes were opened; think Mr. Christy and Mr. Yeatman did; recollect one of the gentlemen present saying, in pointing to a box before it was opened, "there is a box that has been opened, I judge from the seal," and the box was opened and an abstraction discovered. I think I examined one or two boxes by lifting them, to ascertain whether an abstraction existed; where a bag had been taken from a box it could be in most cases told by this means.

Mr. Bates. Does not the Board cause to be kept a record of its proceedings? Not habitually, or for every thing that may be reported; business of importance to the bank is always recorded. To whom is it left to determine whether the business is important or not? I suppose a report which in any way referred to the vitality or the bank management, they would order to be recorded; if the resignation of a member was offered, it would be recorded; if a Director should be ordered to do anything which was not necessarily a portion of the action, or business of the bank, don't think it would follow that it should be recorded; don't know that any action was ever had as to what should, or should not be recorded; frequently it might be the case that propositions would be suggested, and if no objection was made to them, they would be carried out, and the action not recorded. The Board may meet and pass upon bills of exchange, that is not entered upon record as it will be shown upon the books of the bank. The Board passed a vote of confidence to Mr. Childs. A majority of the Board did, not the whole of the Board. Did you dissent? Myself, and I think Mr. Walsh, stated that we were willing to give Mr. Childs a plain and simple resignation.

After it was discovered that there was a good deal of gold lost, were not stringent measures taken to scrutinize Childs' private affairs? There was some action of the Board—a plain common sense action that his affairs should be inquired into. Were they directed to inquire the amount of his tailor's bill? No.

Did you inquire? Yes sir. It was reported to me that Childs had run up unusually heavy bills at his tailor's, and I mentioned it at the Board; some one requested me to speak to Mr. Shelton about it, I being acquainted with him. I found out that the bill was not very large, and did

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not inquire about it. Did the inquiry extend to his bill with his family grocer? I don't know that. Did the inquiry extend to the amount he paid for a tombstone for the grave of a deceased child? Never heard that mentioned. No report was made to the Board, to my knowledge, about a piano being given to a young lady.

Col. Brant. Mr. Childs was arrested on Saturday evening, eleventh August, after we had gotten through with the examination of the forty-seven boxes; Heard the next week that Alexander and Wilgus went his bail; don't know of any effort being made to prevent them from going his bail; did not say to Mr. Alexander that Childs would run away in three days; I said this to Mr. Alexander —"that up to Saturday night I would have went Mr. Childs' bail as soon as any man in St. Louis"—he might have inferred that "I would not do it now," but I don't think I said so. Never offered to bet that Mr. Childs would run away before Wednesday. Went to Brewster & Hart, by request, to ascertain the cost of the house built by Mr. Childs; I went to Mr. Gay to ascertain about his indebtedness to Childs; I went to Geo. K. Budd to make inquiries, and about this—whether Mr. Childs had not offered to go into business with him and put in a certain amount of capital.

I asked Col. O'Fallon if Childs bought a piece of real estate from him; he answered that he did—this was before he left the bank; up to 1846 I went Childs' security.

The bank has lost gold before; think it was said to have been sent to New York, but never reached there; was not a member of the Board at the time, never was in a bank vault except in St. Louis. Don't know of another banking institution in North America where the total specie funds of the bank are open to the discretion of the officer received or paying at the counter.

Robert Fisher. Was a Director in the Bank of Missouri, took part in the counting of February and March. On that occasion I counted all the contents of boxes Nos. 10 and 47 and a portion of the contents of boxes Nos. 11, 27 and 49, which was all of the fifty-seven boxes of foreign gold I counted. The counting was finished on the twenty-fourth of March.

Recollect of expressing my satisfaction to Mr. Childs that the counting had come out a little over instead of under—that it had corresponded with the books of the bank and that he had shown an honest administration of his office.

Am in the book and stationery business. Defendant has made a proposition to me in order to go into partnership. He expressed a desire to buy out the interest of my partner—saying he was anxious to go into the business. Told him I had no knowledge of any desire of my partner to sell out, but that he could make inquiry himself. He asked how much I thought my partner's interest was worth; told him I thought about $8,000, and that if he sold out, I presumed he would want the cash; he remarked he could raise that much. He then mentioned from what sources he could get the money—said he had just been selling his property on Franklin avenue, for which he would get $6,000 or $7,000; that E. J. Gay & Co. owed him

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a considerable amount of cash, which he would get about the first of July. He made the proposition to my partner and he declined it.

I keep stationery to sell. Previous to commencing the count in February, Mr. Childs called in the store and got a pound of red sealing wax and a dozen or two bundles of tape, for the purpose of sealing up the boxes. A few days after the counting commenced, he called in the store for more sealing wax; I asked him how much he wanted, and he said about fifty cents worth; gave him some seven or eight sticks, and remarked to him he certainly could not have used all that he had bought before; he said he wanted this for his own use. This was a smaller wax than he bought before, and might have been of the same manufacture, but I think not. He remarked to me, at that time, that he intended to resign his Tellership.

It was understood by Mr. Childs, at the time we commenced counting, that the foreign coin alone was to be counted; but when telling me that it was his intention to resign, he desired me to urge upon the Board to have a full counting of all the other coin—that this was a good opening for him to retire from the bank. This was within a week or ten days after we commenced counting.

Previous to the election of Mr. Hurschburg as Teller, Mr. Childs spoke to me in reference to him, said he was the most competent man in the bank for the place; I remarked his being a German and speaking broken English would be some objection to him; he said he would soon understand the language well enough. Mr. Duncan was spoken of at the time, when Mr. Childs remarked he would not do—that he was too surly.

Mr. Childs had been accustomed to make purchases at my bookstore.

Mr. Geyer. Were his dealings unusual, or large?

Mr. Wright urged that it was not permissible in a charge of larceny to ransack a man's whole life and all his proceedings to discover his expenditures—that the inquiry was too broad, exceedingly tyrannical, and not indicated by the indictment—that it was a most extraordinary as well as oppressive proceeding to go back for years into every minute item of a man's expenditure, and ferret out how he and his family had lived, how they were clad, how they ate, drank and slept, what books they purchased and read, and whether their personal appearance indicated comfort or destitution He knew he had a client whose whole life could endure the severest scrutiny; but he raised the question —Is this lawful—is it just? The law of the land asserts that you cannot go back farther than three years to charge a man with any offense that does not touch his life.—Is that law to be violated? Where is this inquiry to stop? If you go back three years, why not six years; and if six, why not twelve years, and if twelve years, why not to the man's boyhood? Is a drag-net to be thrown over his whole life? Where is the law or the precedent for this? Suffer this, and no man is safe.—He must keep a secretary to record the most minute of his daily expenditures, or, at any time, he may be called into a Criminal Court to account

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for them, or else be branded a robber! Besides, diverse issues are thus raised in this case. Does the charge look to his expenditures and his manner of life; or did he steal $121,000 from the Bank of the State of Missouri, between February and August, 1849?

It is said that the defendant's expenditures have exceeded his means, as represented by his statement to the Board of the bank. That statement cannot be controverted; it must be taken as true. A statement called for which is irrelevant to a case cannot be traversed. That statement was called for and given to the Bank of the United States—I ask pardon—the Bank of the State of Missouri—(I designed not to *elevate* the concern too highly—I certainly don't respect it too highly)—that statement was called for by the bank, and belongs not at all to this case. They tell us that this man has been endeavoring to get into business. We thank them for their confidence. It was a laudable act. But a man who has just stolen $121,000 in gold, isn't the man to petition for a partnership in a book-store with Mr. Fisher. Finally, if a man is to be forced to unravel and detail all his course of life, and all his expenditures, what he gave for this, and what for that, and where, and when, and how he got every thing he possesses, and what he's done with money when he happened to get any—then Heaven help me if I'm ever charged with crime and I have thus to defend myself; and Heaven help many I see around me—Heaven help us all! For myself, I don't know, and I never did know what it costs me to live, nor what became of the little money I have happened to earn; and were I forced to explain it all, or go to the penitentiary, I would say to his Honor—"Enter up judgment! enter up judgment! I have nothing to say!" It is true a few exact and economical men, like my friend on my right, (Mr. *Bates*) or my client, may be able to detail all this. But as for myself, I can't do it, and all around me are persons in the same predicament!

Mr. Geyer, in behalf of the State, replied that when a man voluntarily makes a statement of his property, as the defendant had, and it could be proven that his expenditures exceeded his means as thus derived—such evidence would go to sustain a charge of fraud.

Mr. Field. How far back is this inquiry to go? The indictment charges the abstraction of this money since February last. Any inquiry as to prior expenditures has nothing to do with the case, and is utterly unlawful and lawless. This bank seems to think that *all* law must be prostrated in order that the thirteen honorable gentlemen who direct it may be shielded and protected from all suspicion of their having had any part in this abstraction. It is the law of the land that unless the accused is found in possession of the property recently after the robbery, he shall not be compelled to account for the mode in which he obtained it. But we are told it is legitimate evidence that this defendant has made large expenditures; if we suppose he has done this, and is unable fully to account for every expenditure, then presumption of guilt arises from the in-

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quiry. But how many men can possibly explain how they made their property? If the gentleman's witnesses themselves were called on to do it at once, or go to the Penitentiary, they would go there! Mr. Childs isn't the only man who came to this city a few years ago, and has now a little property. Some of these very Directors came here without a dollar in their pockets, and are now worth hundreds of thousands! Call on them to account, at once, for this sudden wealth, and see if they can do it! For ten days all these learned gentlemen have been trying—not to *convict* the man, but to *disgrace* him; and now, at the close of the tenth day, they come up here and modestly ask to be permitted to go back for years, rake up all his affairs, and make him explain them, item by item, to the smallest minutia, or be held guilty! But there's another suit—a civil suit connected with this case, and the evidence which they now discover may be invaluable there! A claim, such as this made, was never heard of before! Had this defendant passed off some of the peculiar foreign coin missing, shortly after the alleged abstraction, to sustain a sumptuous mode of living since, then there would have been some pretense for this inquisitorial conduct. Every section of the city has been ransacked to gather up an account of this man's purchases? Every dealer in every article has been questioned! The highest bids have, in a manner, thus been made for witnesses, everywhere—and every lawyer they could get they have retained! Surely this is most extraordinary conduct for thirteen honorable gentlemen!

It is the bank, not the State, that here prosecutes! They say, "If we can prove expenditures which you can't account for, then that inability is presumptive of your guilt." But *who* can possibly account for every expenditure? And if we fail, we are guilty! They swear this money was stolen after February last, and yet they go back and inquire for years before! This is a most remarkable and unprecedented proceeding. If the Legislature were now in session, it would be advisable to petition, and it would no doubt be granted, that the Criminal Court of St. Louis county should have but two sessions a year, and that *one* should be given these thirteen honorable men, to show that they haven't got any of this abstracted money, and that Childs *has* got it all!

The COURT decided that it was legitimate to prove extravagance of living, and excess of expenditure above visible means, as a presumption of guilt.

Mr. Field. Extravagance and excess back to what period?

Mr. Haight. That question has not yet arisen.

Mr. Geyer. What have been the expenditures of the defendant at your store during the past year?

Mr. Fisher. Nothing at all unusual or large.

November 16.

Mr. Haight rose in explanation of what he understood to be the present position of the prosecution, and said that it might be quite difficult for the State to prove that the money abstracted had been taken from the boxes in the bank since the sixteenth of February, and that the Court would not have been detained

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with the details of the February count of coin merely to determine that it was *there.*

Mr. Leslie urged that the State was not committed by a remark of Mr. Geyer's, that it was not confined to sustain that the money had been taken since February, or any particular time.

The COURT. The case has assumed a new phase. Yesterday, after discussion of two hours on the question whether the defendant had made unusual expenditures, the reply was *"Nothing unusual."* Now, a new aspect is given to the whole prosecution —a new position assumed.

Mr. Blennerhassett. For ten days a trial for embezzlement had been going on, and now, on the eleventh day, he for one, was utterly ignorant at what point the case had arrived, or where he was. The bank countings of coin of February, March, June, August and September, have been patiently gone through with, to prove the money to have been there, and that from sixteen boxes, $121,000 had been embezzled, in order to sustain an indictment for that embezzlement since the sixteenth of February last. And now, after all this, they go back and say that the money was not then taken: but Childs may have embezzled seven dollars in silver, fifty dollars in paper, and so on, until he made up $120,000 in a lump. Thus the defendant is left at the mercy of the prosecution, without being apprized of the nature of the charge which he is to defend himself against. The counsel of the accused, the Court, everybody who has heard the evidence, supposed that we were defending our client against the charge of embezzling sixteen bags of gold from as many boxes; but lo! and behold, that charge is in effect abandoned, and now we are to begin over again, and wander blindfolded over a large field of speculation and uncertainty, unless it be true in law and fact, that, if Childs stole a bag of gold, that is proof that he stole a quantity of paper—that if it be proved that he stole paper, it is, therefore, proved that he stole a quantity of silver—a proposition too absurd to require refutation. But in reply to Mr. Leslie, suppose I am wrong in the foregoing view I have advanced, and that the State need not prove the *corpus delicti* of the effense, and that anything or everything, relevant or irrelevant, is admissible, because they *may be able yet* to prove something, how far back can they go as to this charge? Three years as to the offense itself—but we are told that there is no statute of limitation as to proof. If that be asserted as having no exceptions, I deny it as correct in law.—If the inquiry be as to the character of the accused, or a witness to be impeached, then Mr. Leslie is right, and there is no limited time as to proof; but if we are inquiring about facts directed to the issue, then we cannot go beyond the time fixed by law for the punishment of the offense.

Mr. Leslie suggested that there was a piece of information which had come into his possession since the discussion commenced. It was the reading of the indictment.

Mr. Bates protested against an imputation that the counsel for the defense were ignorant of the charge against their client. He also entered a formal protest against any further proof of any

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kind until the *corpus delicti* of the crime was proven.

The COURT overruled the objection.

Mr. Fisher. Mr. Childs generally bought for cash, and has been dealing with me for four or five years; he has bought handsome bibles, hymn books, some annuals, and on one occasion, I think in the fall of 1848, he bought some fine writings—the price of this last article was $12; nothing was said to me about the purpose for which they were purchased. Do not recollect the cost of the bibles, hymn books and annuals.

Cross-examined. Have not been a regular attendant on the Board, in consequence of absence from the city a portion of the time. It was my impression that only the foreign coin was to be counted, cannot state how I got that impression, whether from the directory or not.

Have known Mr. Childs about six years, and have been on very good terms with him. He had dealt at our house during that time. Don't recollect how often during the year 1848 I sold him sealing wax. Don't know how much writing paper, wafers or quills he bought in 1848. Do not keep fishing tackle, caps, etc., to sell, and don't know of Mr. Childs ever going a hunting or fishing. Don't know of his buying paper, quills or wafers during January, 1849. Recollect of his buying some things in February, and recollect them from the conversations which took place at the time. When he came in he asked for some sealing wax, and I remarked certainly you have not used all I sold you before. He said he wanted it for his own use, and I then put up the wax for him. Presumed he was going to take it to the bank, as it was banking hours. The wax was red, and when he asked for it did not mention any particular quality. There are great varieties and qualities of wax; think the first he bought was "Hibernia" wax, and the second "Government" wax. The wax first bought by Mr. Childs for sealing the boxes was kept on the mantle piece in the Cashier's room; I saw the boxes there about the time he made the second purchase, but cannot say whether they contained wax or not; cannot tell how much of that wax had been used when he made the second purchase.

It was during the latter part of March or first of April that I had the conversation with Mr. Childs about the partnership; that was the first intimation or desire on his part ever expressed to me in regard to the matter; the proposition first came from him. I told him Mr. Bennett's interest in the concern was about $8,000, and my data for saying so were the books of the concern; at that time we had been in partnership about eight months.

Mr. Bates. What was the whole means invested in the concern of Fisher & Bennett at the time Mr. Childs made that proposition?

Mr. Geyer objected. The amount of capital invested in the concern of Fisher & Bennett had no reference to the statement of Mr. Childs, to prove the incorrectness of which testimony has been allowed to be presented. It was giving a wide scope to the examination, calculated to tantalize the witness and gratify a few individuals, and altogether foreign to the subject matter of inquiry.

Mr. Bates contended that as

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the prosecution had urged an inquiry into the private affairs of their client, they demanded the same privilege of inquiry to extend to all officers or agents of the bank, who have had equal facilities for abstracting this money.

The COURT sustained the objection, to which the *counsel* for defendant excepted.

Dr. I. Forbes. Am a Director in the Bank of Missouri. Assisted in the counting of the coin of the bank in February and March last, and on that occasion counted all the contents of boxes Nos. 9, 29, and 26, and a portion of the contents of box No. 60. In the early part of September there was a general count made, which was correct, compared with the March count, excepting the amount abstracted.

Was present at the examination in August—there was quite a full Board—and Mr. Childs was at the bank. After the examination was over and the loss ascertained, I was considerably excited, and while under this state of excitement thought it possible there might be some mistake. Left the Directors' room and went into the bank where Mr. Childs then was, for the purpose of having some conversation with him. He was at the time leaning against one of the desks near the counter, and as I walked past him I nodded to him, as if I desired to speak with him, continuing my course to the back part of the banking room; he recognized my sign and followed me. We sat down, when I remarked to him that this was a horrible affair, and asked if it was not possible there was some mistake, he said "no." I remarked, then the money is gone; he said "yes, 'tis gone." I remarked, he must judge of the motive that prompted me to come in to have a conversation with him; he said he "knew my feelings toward him." I asked if he could tell how it was possible that so large an amount of money could be taken away in so short a time; he answered, "no, I cannot." I then remarked, Mr. Childs, let us suppose, for instance, that you took the money, could you not have taken up a handful of bills and put them in your pocket, and altered your cash account accordingly; he said, "no, I could not." I then asked him if he could not have taken the coin out, handful at a time, at various times, and put it in his pocket; he said, "no, he did not think it was done in that way." I then asked how, in the name of Heaven, so large an amount of money could be taken out of the vault? He replied, "in large quantities, by a bag at a time." I then asked him who it was possible could do such a thing as that. He remarked, "nobody but the Cashier, my successor, or myself;" at the same time remarking, "I am innocent." I then inquired if it was not possible for some one else to take it out. He replied, "no it was not." The Cashier then came to the door and remarked, I was wanted in the other room, and I left Mr. Childs.

Was not appointed for that purpose but volunteered my services to accompany one of the Directors to Mrs. Whitlock's house. Messrs. Yeatman, Ryland, Williams and myself went to her house, and in going down, and in order to avoid any thing unpleasant about the premises or excite suspicion in the neighborhood, it was determined that Mr.

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Williams, being acquainted, should go to the door and knock, and if he went into the house after the door was opened, it was to be evidence that Mrs. Whitlock was at home, and we were to get out of the carriage and follow him; he went in and we did follow. On going in we passed the compliments of the day, and after some little conversation Mr. Williams remarked be had come on a very unpleasant duty—that as an attorney for the bank he had come to inquire, whether, according to rumor on the street, Mrs. Whitlock had in her possession any papers, documents or money belonging to Mr. Childs. Mr. Williams wanted to know, and asked her if Mr. Childs had made her presents of any consequence. She remarked she had not received any presents from Brother Childs. Mr. Williams then said that there was a rumor on the street that she received some books; she said she had not, and then recollected she had received a pencil. He said, you have received nothing else—that rumor said he had given her a piano; she said it was no such thing: that Brother Childs had bought her a piano in exchange for an old one, but the difference was money given him by her. Mr. Williams then asked if she had received other presents—that rumor said she had received from Mr. Childs a handsome silk dress; she said, "was it, was it so?" and turning round to me, said "You know it, Brother Childs did give me that striped silk dress." Mr. Williams then asked her if there was nothing else—that rumor said Mr. Childs had presented her with a negro girl; she replied "has it come to this, that Brother Childs is to be charged with making me all these presents," and then said no, it was not so; that he had been in the habit of doing their business, and had sold a servant of hers, which was part pay for the girl, and the balance was to be paid by the rents he was to receive for some building. Mr. Williams then asked if there was not any thing else; that it was a very unpleasant duty he had come to perform; that it was believed that she (Mrs. Whitlock) had in her possession some things belonging to Mr. Childs, and if she had, it would be better for her to give them up; said he, you are aware I have come here as a friend of yours, and do not desire that any thing unpleasant should be done; says he, officers are here at the door with a search-warrant to search your mother's house, and, if needs be, to search your very person; she replied she had nothing in her possession belonging to Brother Childs.

Judge Shurlds came in and inquired for Mr. Ryland, and then Mr. Williams and Mr. Ryland went out, leaving Mr. Yeatman and myself with Mrs. Whitlock. Mrs. Whitlock left the room and went up stairs, remarking she was thirsty and wanted to get a drink of water; she soon returned to the room, as did Mr. Williams and Mr. Ryand. Mr. Yeatman then asked her if she had anything belonging to Mr. Childs—any papers or box of any kind. She in the first place remarked she had not, and then said she had some papers up stairs that brother Childs gave her that morning. She said she would go up and get them; Mr. Williams or Mr. Ryland remarked that

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one of the officers had better go with her. She said "Oh no, no, you go with me, Mr. Williams;" and he remarked, "I will," and went with her up stairs. On their return, Mr. Williams had in his possession a little bundle of papers and a small book. She then remarked she had slept last night at Brother Childs' house, and on that (Monday) morning, in coming away, had said to him, "Brother Childs, can I do any thing for you?" "No," he said, "I don't think you can;" and on her coming off, he said, "stop, Mag, I expect my house to be searched to-day, and here are a few papers I wish you to take possession of"—then she remarked to us, "really I don't know whether I ought to say anything about them or not, or give them up, as they belonged to Brother Childs." I have a copy of these papers at my house, and if I thought it necessary would have brought them. The papers, she said, were received from Mr. Childs. They were a certificate of deposit for $2,000.

The original papers obtained from Mrs. Whitlock were then produced and read; one was the note of Wm. T. Christy, for $200, given for four lots in the Wesleyan Cemetery, and bearing date St. Louis, January 6, 1848; another was a certificate of deposit for $2,000, from E. W. Clark & Bros., payable to the order of Nathaniel Childs, jr., sixty days after date, bearing six per cent. interest, and dated August 10, 1849; another was an order for $100 on L. Swoutsy, in favor of T. A. Morris, and bearing date Augusta, Maine, July 10, 1849; and a little book, on the head of which was written "E. W. Clark & Bros., Dr., in account with Margaret A. Whitlock, Cr., May 15, 1849—to currency $2,000."

Cross-examined. Never saw the search warrant. When at Mrs. Whitlock's had officers with us; cannot say what they had or whether they had a search warrant.

November 17.

Dr. Forbes. I volunteered to go in company with Mr. Williams down to Mrs. Hayden's; Mr. Yeatman was asked to go by the Board. It was to see Mrs. Whitlock, and not to search Mrs. Hayden's house; we wanted all the members of the house to be present. It was our intention not to go into the house if Mrs. Whitlock was not there. Our object was to disabuse the public mind, if the rumors were unfounded. We heard since the defalcation that there was great intimacy between Mr. Childs and Mrs. Whitlock, and I think she was told so when we first entered her house.

Mr. Bates. Name the man who told her so? I think it was Mr. Williams. Did you ever hear a responsible man for damages say there was a criminal intimacy between Mr. Childs and Mrs. Whitlock? What do you mean by a responsible man for damages—one able to pay dollars and cents? Yes, sir. No, sir. Do you know what passed between Mr. Williams and Mrs. Whitlock before you entered the house? No, sir. Whatever was said to her about improper intimacy, was said before Messrs. Yeatman and Ryland. I don't know that they were acquainted with her. What benign object had you gentlemen to accomplish, by telling this lady, in the presence of strangers, that such was the re-

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port? In order that if she had anything in her possession belonging to Mr. Childs, she would give it up. I don't know any other object. It was not a gratuitous insult. Before she confessed to having anything—even the small pencil—she was told that there was a search warrant. Mr. Williams and myself told her we came as friends. Having obtained these papers in the manner detailed here, what did you do with them? I took them in my possession and delivered them to the officers of the bank; I can't say which officer; if Judge Shurlds was present, no doubt to him; I handed them to the bank as Mr. Childs' property. Why did you undertake to hand Mr. Childs' property to the bank, or any one of its officers? I did not choose to hand them to Mr. Childs, simply because there was a search warrant for them.

The COURT said it was in the province of the counsel to go into an examination in regard to the peculiar action of the Board —that it was legitimate to enquire of witness what were his transactions with a committee of the Board—but it seemed that the inquiry was more with a view to obtain evidence for a civil suit for damages, than to bear upon this case, and as such was illegitimate.

Mr. Bates said they expected to make out that while the bank was in a state of intense excitement, she sent out her agents to do an unlawful and unjust thing; that these gentlemen as members of the Board of Directors, and under a search warrant, obtained these papers, and brought them to the bank as Mr. Childs' property; that the bank claimed them and ratified and sanctioned all they had done under this search warrant. If he could show this on the cross-examination, it would tend so much to his end. The plan of their operations was laid by the Directors before they left the bank, and they meant to carry them out even if they had to enter a lady's bed chamber, or search her own person.

Mr. Leslie said he cared not how far a proper inquiry went, if there was no threat connected with it, but it seemed to him, from the great importance manifested about these papers and the manner they were obtained, that some corporate institution, or some person connected with it, was to go to the State prison —what that had to do with this examination he could not see.

The COURT said the inquiry for a day of two past had taken a wide range, and it seemed was foreign to the case under investigation.

Dr. Forbes. All the papers obtained from Mrs. Whitlock were left at the bank except one check on Clark & Bro. for $1,800, which I supposed was cashed; money was brought into the bank by Mr. Williams, which I supposed was received upon that check.

Mr. Ryland handed a certificate of deposit to Mr. Bates.

Mr. Bates read it: "Banking House of Page & Bacon—This is to certify that J. P. Sarpy has deposited $1,800 in this office, payable to his order, with interest at the rate of five per cent. Endorsed in blank, J. P. Sarpy."

Mr. Bates rose to make a motion. He held in his hand three papers—one a certificate for $2,000, another a draft in favor

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of F. A. Morris for $100, and another a note of Wm. F. Christy for $200—which papers, it had been stated by a witness, had been received by him as the property of Nathaniel Childs, Jr., and by him handed over to the bank. He moved,

1st. It being ascertained that these papers belong to Nathaniel Childs, Jr., and so recognized by the bank itself, that they be directed to Mr. Childs as their rightful owner; and

2d. If the Court refuse the above motion, then that these papers be impounded by this Court until we determine whether the manner in which they were obtained shall become subject matter of criminal prosecution.

Objection was made by the *State* to these motions, and after some argument, the first motion was refused and the second was granted.

Mr. Hurschburg. Am Specie Teller in the Bank of Missouri; since the beginning of May last; took charge of the vault on the sixth of May. My occupation before that was individual ledger bookkeeper; have been employed in the bank since September, 1843; succeeded Mr. Childs as the Specie Teller; he had already left when I took his place, and I cannot say the exact day he left. The day before I took charge Mr. Childs did the business of Specie Teller. When I entered upon my duty as Specie Teller, the money in the vault was counted over to me by Mr. Childs, in boxes and bags, and so I received it. There was no actual count at that time, except of the loose coin upon the trays. I ascertained the amount in each bag upon information from Mr. Childs; there were boxes of gold that had been counted by the Directors and sealed, of which no count was made at that time, and I took the amount in these boxes from the amount endorsed upon them; Mr. Childs had a book specifying what each contained; I then looked over them and he called out their respective contents as marked upon the book—the marks corresponded with the amounts he called.

After I took charge of the vault, in the morning, before banking hours, I would take out a certain amount of coin, mark it down on a piece of paper, and at the same time give the Receiving Teller $100 in coin, and mark it down on a separate paper. I would then commence daily operation—receive coin on the counter and issue tickets for it; if I had bank notes, I would pay checks with them. The Receiving Teller would daily give me an amount of paper when the bank opened, for which I would give him a ticket—I would then pay checks in coin or paper, just as it was asked after I went through these operations, and at the close of the bank, I would enter those tickets as receipts of money, to the amount taken from the vault in the morning; I would then take the checks and payments made, and deduct the payments from the receipts, and then my right balance would always agree with what I had on hand; when I saw it agreed, I would take the amount on hand down into the vault. Whatever paper that would be left on hand, would be returned to Mr. Clark, and marked as payments, same as I marked the checks; generally I got very little paper from Clark, because I objected to paying it as a duty

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not devolving on me; never received over $20,000 in the morning at any one time; did not continue to pay paper money long, and have ceased it altogether since this abstraction was discovered.

Every day's work would be settled in the afternoon, and my report taken by Mr. Clark from my memorandum. We ascertain the gross amount of coin on hand each day, by taking the statement of the contents of trays, bags, boxes, etc. At the end of the week the entire balance is made up of the coin on hand; we ascertain that by adding to the balance on hand the previous week, the operations of the week, say for instance: on August fifteenth the Specie Teller takes the balances of the previous week, brings them forward to the head of another page in this small book and makes the entry. Under this entry of balances he enters his daily operations, and at the end of the week again ascertains the gross amount of coin on hand and carries it forward. On August fifteenth, the amount of coin on hand was as follows, as brought forward on this book:

Foreign gold, including abstraction	$1,105,827.50
American gold	355,165.00
Silver	286,663.71
Total coin on hand.	$1,698,656.50

Was at my place in the bank at the count in August, but was not always present during the count; have no detailed memorandum of the count, but can state the result; my whole account was correct except $40 over. The whole amount said to be abstracted was included in my account.

Brokers frequently called on me for sovereigns, previous to tenth of August, when I told them I had not the key to the chest in which I kept loose gold —Mr. Barnes having the key at the time. On that day Clark & Bro. presented me a check, early in the morning, for $50,000, and not being able to get in the chest, I went to the cashier to ask in what kind of money I should pay it; he told me to pay it out of the boxes which had been put up by the Directors; I went to the vault and took two boxes of the sovereigns put up in June last, containing $19,400 each—the balance, to make up the $50,000. I paid in loose coin from the trays. Towards the close of business for the day, Page & Bacon presented a check for $40,000; at that time I was pressed with business, when I requested them to call in the afternoon and I would pay them the $40,000 in sovereigns; in the afternoon I stepped into Page & Bacon's and told them to come over and receive the money. When we came into the bank, I was obliged to go into the vault alone, the porter being absent. I looked on the endorsement on the boxes of foreign gold, and found one on top in the middle of a pile that suited my purpose—it was box No. 30.

I brought this box up stairs and delivered it, with loose coin sufficient to make the amount, to the young man of Page & Bacon; when I handed him the box I showed him the endorsement; while the gentlemen were counting some of the loose coin, I was attending to my business. When I went back to the place where

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they were counting, they said there was $50 short in the loose coin. I went back into the vault and soon found out how the mistake occurred, and rectified it. I then assisted them in counting. While standing at the table I perceived only four bags, including the one they were counting. I asked where the fifth bag was, when they told me there were only four in the box.—My first impression was, that it (the bag) had been taken over to Page & Bacon's, with some of the loose coin. I went over to Page & Bacon's, and finding it not there I went to the Cashier to tell him what had happened. When I saw Mr. Shurlds, he sent me after Mr. Walsh, one of the Directors, who came to the bank and ordered me to keep the box back until they took some action on it the next morning. There was another box in the pile in the vault, No. 48, that would have suited my purpose better than No. 30, but there were two boxes on top of it, which I did not feel like removing. I was not present when box No. 30 was opened. It was opened by the young man of Page & Bacon.

The following shows the manner in which these fifty-seven boxes of foreign gold, put up in February and March last, were piled in the vault—each box being numbered. Those to which a dagger is affixed, (†) are the boxes from which abstractions were made:

10	†11	†30	31	50	
9†	12	29	32	49	
8†	13	28	33	48	
7	†14	27	34	47	57
†6	†15	26	35	46	56
†5	†16	25	36	45	55
†4	†17	24	†37	44	54
†3	†18	22	38	43	53
†2	†19	23	39	42	52
1	20	21	40	41	51

On the next day the Cashier ordered me to bring up some of the boxes counted on the same day that No. 30 was. I was not present when these boxes were opened, or any others in the afternoon.

Soon after the count of February had taken place, Childs told me he was going to resign; I expressed my desire to be an applicant for his desk; at the same time he said it was the best period for him to resign, as the money had just been counted and put up and his successor could take charge of the vault; when I expressed my desire to succeed him, I asked if I should speak to some of the Directors about it; he told me he would like it to be kept secret, and that he would speak to some of them in my behalf; after that he told me he had spoken to Mr. Fisher; this was very soon after the count in February, but I cannot tell the exact time. Mr. Childs was not always at the counter, and when he was absent, I did his business at his request; I stood at the desk when the Directors were counting, a good portion of the time when he would be absent, down in the vault (this was during banking hours to arrange matters there).

Since I have been Specie Teller I have kept one set of keys to the vault; generally the porter opened the door in the morning and closed it at night. Mr. Clark has access to the vault, and sometimes other officers would go down to get out a book—the old books being kept there. Clark goes down each

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morning to get out his paper, and after bank hours to take it back; he keeps his money in an iron chest in the vault. The books in daily use remain up stairs until Saturday evenings, when they are placed in the vault after the bank closes; they are carried to the vault by the porter. Mr. Clark has no keys to the vault. When I am attending to my duties no one carries my set of keys but myself. Before this abstraction, I generally locked one door of the vault and kept the key in my desk during banking hours; no one else could go down without asking me for the key; during the latter part of Childs' administration, it was managed in the same way, he being very particular; it was not so when I first went to the bank. —When the porter went to the vault, he never was there longer than was sufficient for him to transact his business; sometimes when sent down for a book, he would be there longer than on other occasions—say two, three four, or five minutes; he never went down by himself, except when he was ordered to go down. Mr. Robinson, the bookkeeper, would sometimes get the keys to go to the vault for his papers, he having a chest there in which he kept them. He went down oftener than any other officer—sometimes two or three times a day, and sometimes not more than once or twice a week. At the close of the business of the day, I go to the vault before it is locked up; have never observed anything out of place on such occasions; I always go into the vault as soon as opened in the morning, and have never found anything disturbed from the order in which it was left on the previous afternoon.

November 19.

From the manner in which the boxes of gold and specie were piled in the vault, the first two tiers of boxes of foreign gold were accessible only by removing the American gold, which was piled in front, or by removing the four last tiers of the foreign gold. After the abstraction was discovered, and when ordered to bring these fifty-seven boxes of foreign gold up for examination, I commenced with box 57, on the top of the last tier, and so on the last tiers, until I arrived at the first two. The dimensions of the vault were eighteen feet four inches in length, eleven feet four and one-half inches in width, and 9 feet four and one-half inches high in the centre of the arch.

Cross-examined. Mr. Huttawa drew the diagram, receiving information from me as to the position in which these fifty-seven boxes of foreign gold previous to the abstraction being discovered—he was in the vault at the time I gave my instructions.

When Page & Bacon sent their clerk to the bank for $40,000, they demanded payment in gold, and desired thalers; I would not give them, as I had an order, at least had heard from Mr. Childs, that ten thalers and twenty francs would bring a better profit east than if paid out here. I turned out this box No. 30, and estimated it at its supposed value ($1,701.32) as marked on the outside, and then turned out loose coin sufficient to make up the amount of the check. I was not present when the box was opened, but afterwards ascertained that a bag of sovereigns, containing $4,850, was missing. This box, No. 30, purported to

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contain five bags but actually contained only four; don't know of another box that purported to contain five bags, that when opened contained but four, and yet contained the aggregate amount called for by the endorsement outside.

Henry Haight. Am employed in the banking house of Page & Bacon; on the tenth of August last, about noon of said day, a check for $40,000 was presented at the counter of the Bank of Missouri, and the payment demanded in coin; the Specie Teller being engaged, informed me that it would better suit to pay the check in the afternoon, after banking hours. At four of said day, I went over to the bank, when Mr. Hurschburg gave me about $19,000 in loose coin and a box of sovereigns purporting to contain about $21,000. The loose coin was counted over and an error of about $50 discovered, which was rectified by Mr. Hurschburg.

Shortly after I left the banking house, Mr. Hurschburg came to the office of Page & Bacon to ascertain about a mistake, when I added up the gross amount of the contents of the four bags that were found in the box and found it minus $4,850 of the amount of which it was delivered. I went to the bank in company with Mr. Hurschburg, when they refused to let us take away the box. The loose coin had been taken to the office of Page & Bacon. Don't think Cashier Shurlds was there when I went back second time, but met him at the gate, I think, as I was leaving the bank.

Israel R. Christy. Was porter in the Bank of Missouri; assisted in bringing up the cash each day; about eight o'clock each morning, Hurschburg would give me the keys, when I would open the vault and get a light, and then Mr. Hurschburg would show me what money he would want taken out for the day's operations; would take it up into banking room; during the day, if a book was wanted from the vault, would go down and get it for them. The vault was generally closed about three o'clock —some times half past two. Before closing it in the afternoon, the money from the banking room would be replaced. The door was locked by myself, and I gave the keys to Hurschburg, who I always understood kept them. After the money was gotten out in the morning, I would some times leave the vault open for a few minutes until convenient to lock it. During banking hours the keys were laid on Hurschburg's table. The young men generally when they wanted a book, would go down after it —Barry has gone down I think, and I know Robinson has; if I was there when they went down, I would open the door for them; when absent don't know who would open it; they would be in the vault but a short time—only a few minutes. When the vault was opened, Hurschburg would come down and show me what money he wanted brought up, take a portion of it and go out —I would have to make more than one trip to bring up the remainder; have been told that Judge Shurlds had keys to the vault, but I don't recollect of his ever going in, only on one occasion. When serving notices, I would be absent from the bank some few hours. On the occasion of Judge Shurlds being

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in the vault, I bursted a gas lamp and halloed for help; he came down, with others, to help me put it out; the evening the abstraction was discovered, was not in the bank.

D. J. Cocharan. Am employed in the Bank of Missouri; since October, 1848, as individual ledger keeper; previously, and when first appointed, was note clerk. From beginning of November, 1848, to the present time, have slept in the bank, with the exception of the period between the twenty-ninth of June, and ninth of July, 1849. The bed is over the passage which goes to the vault; get into the bank in the evening from the back door, which is close to my bed, the key of which I have kept myself since Mr. Bowlin, the former porter, left the bank; when he was porter, he lived on the bank yard, and generally kept the key during my absence, and when I wanted to go in I called at his house. I generally returned to the bank very early in the evening; sometimes as early as seven, and never later than 10 o'clock. There was no other way by which I could get in the bank, than by getting the key from the porter. Mr. Christy succeeded Bowlin as porter, who left the bank about the first of May, on account of sickness; between the period of Bowlin's leaving and Christy's appointment, a colored man discharged the duty of the porter in the bank; at this period I must have kept the key to the back door. Who opened and closed the vault at this time I don't know. I recollect one night, on the seventeenth of May, during the raging of the fire, I spoke to the Cashier about putting such books as were about the banking room in the vault, and afterwards went for Mr. Hurschburg; he came to the bank, opened the vault, and went in, and the watchman carried the books down to him. This is the only time I ever knew the vault to be opened at night.

Cross-examined. Judge Shurlds had a set of keys to the vault; never saw him in the vault but once, and that was at the time the lamp got broke. Since I have been in the bank, I have seen Childs, Clark, Robinson, McDonough, Bowlin and Christy go into the vault, but never saw Mr. Barry, discount clerk, go down. During the counting the Directors would occasionally have champagne drinkings at the bank, or at least I thought so from seeing champagne bottles lying about; don't know to what extent these convivialities would be carried on; never was in the room during the time; don't know whether the champagne would flow before or after the sealing and marking of the boxes; don't know that Mr. Pickering furnished the wine, but I think his basket is yet due, he being a newly elected member at that time.

R. F. Barry. Am employed in the Bank of Missouri as discount clerk. During the sickness of Mr. Cocharan I slept in the bank, and during that period the key to the back door was in my possession. While I slept in the bank, no person ever went to the vault after night.

November 20.

R. F. Barry. Have been employed in another banking institution—the State Bank of Illinois—and was employed there in

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1837-38; they only had one Teller, whose duty was to receive and pay out all moneys of the bank; the duty of the Receiving Teller in the Bank of Missouri is to receive all paper paid into the bank or on deposit. The Specie Teller receives all coin paid into the bank or deposited, and pays all notes or checks, when specie is demanded. In the Illinois State Bank the Teller had custody of the funds in the vault; the officers in that institution were a Cashier and Board of Directors, Teller, Discount Clerk, Bookkeeper and Porter.

Cross-examined. I had no other experience in banking, before going into the Bank of Missouri, than that obtained in the State Bank of Illinois, at Springfield; went into the bank in 1837, and was there a portion of 1838; in that bank there was but one Teller, who discharged the Teller's duty and was also individual Bookkeeper; kept the specie and paper and handled it all; had exclusive charge of the specie and the vault; never was trusted with the keys to the vault and never had access to it; don't know of the Cashier having anything to do with the cash in that bank; was never present at the examination of the funds of that bank. I don't know an instance in that bank where the Cashier had anything to do with the cash. Don't think that bank broke down while I was there—I left the bank in the spring of 1838 and don't think it broke until the fall of 1838, or spring of 1839. I know nothing of the condition of that bank; that bank never had one hundred and twenty thousand dollars stolen from it while I was there.

James C. Way. Am employed in the Bank of Missouri as individual ledger keeper; when first employed in the bank, performed miscellaneous duties, such as overhauling old ledgers, etc., and have since then acted as Specie Teller two days in June, and about a week in July. During that time the keys to the vault were kept by Mr. Clark, Receiving Teller, and the entries in the Specie Teller's book made by myself. When acting as Specie Teller, I would go into the vault in the morning and point out to the Porter such cash as I wanted carried up, and after balancing my cash in the afternoon, it would be sent down by the porter, Mr. Christy, the vault locked, and Mr. Clark would take possession of the keys. I have been in the vault some half dozen times, when engaged in assorting checks and overhauling the old books I have spoken of. I would then go down and point out to the porter what I desired to be carried up into the banking room; while I was acting as Specie Teller, the keys of the vault were kept on Clark's desk during banking hours, or may have laid a portion of the time upon the counter; never had occasion at that time to go into the vault during banking hours.

Stephen Reed. Am employed in the banking house of Page & Bacon; on the tenth of August that firm drew a check for $40,000 on the bank, which was paid in gold—while he was counting the contents of the box of gold, Mr. Hurschburg came along and said, did Reed take a bag away with him? I replied no, and then he said there was a bag short.—Judge Shurlds shortly afterwards

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came in and then sent for Mr. Walsh. The first I saw of the box, it was lying on the counter; never counted the contents of that box. The amount it purported to contain, with the loose gold, would have made the amount of $40,000.

Walter Burke. Have been watchman at the Bank of Missouri for near ten years; go on duty at dusk in the evening and leave duty at daylight in the morning. Since the robbery of Nisbet & Co., on Main street, there has been another watchman with me, but previous to that was by myself; both stay on duty all night; the key of the back door is kept by the porter until I come on duty, when I receive it and keep it until the clerk, who sleeps in the bank, calls for it. The other doors leading to the bank are barred inside. After I come on watch, any person wanting to go into the bank would have to get the key from me; when I first went to the bank as watchman, two young men slept in the bank, but for years back only one. Before May last had admitted persons into the bank besides those who slept there—admitted Mr. Childs in one night, about the latter end of January. It was about 7 o'clock in the evening when Childs came to the bank and was let in—he was alone, and remained in the bank about an hour; this was a very cold frosty night. The next time Childs went into the bank at night was about a week after, he obtained the key from Bowlin, who had left the bank before I came on duty—this last time he remained in the bank about an hour, and Bowlin was with him; the clerk who slept in the bank did not come at either time until after he was gone. The clerk sleeps there every night, but had not come to the bank when Childs went off. Had often let others in besides Childs and the clerk who slept in the bank—had let Mr. Shurlds in often, and would stop at the door while he was in, and would lock it after him when he came out; he would only be there a few minutes; the door would be kept open during the time. When Mr. Childs went in, the door would be locked after him; the lock upon the door is a spring lock and fastens whenever the door closes. If the door was shut and the key inside it could not be opened from the outside.

[To obviate delay in procuring the attendance of witnesses at the moment they are desired, the rule forbidding witnesses from being in the court room during the examination, was, by consent of counsel, rescinded.]

E. G. Wheeler. Am acquainted with defendant, and have known him since the early part of the year 1836; do not know what his circumstances were in 1837-38. [Boxes 18, 19 and 35 shown witness.] The memorandum on this box (No. 35) looks like Childs' handwriting, but I can't say positively that it is; I am not able to say that the writing on box No. 19 is in his hand, but there is a similarity with the writing on box 36; the writing on box 18 appears to be in a different hand. When I first knew Childs he was employed as a clerk by Mr. Corbin. After he left there, on my suggestion, he was employed in the agency of the Commercial Bank of Cincinnati in this city—think he remained

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there until the Bank of Missouri went into operation; at that time he was a single man. At the Commercial agency he was Note Clerk and received specie, etc. I was employed in Bank of Missouri when it first went into operation, and was general ledger bookkeeper—Childs had charge of collection book.

Cross-examined. Am acquainted with several gentlemen now in the Bank of Missouri, as Directors, and I think I might pick up several who were not in very good circumstances in 1836. When Mr. Childs was employed in the agency office he gave very general satisfaction.

W. H. Heiskill. Am a Director in the bank, was present at the count in February and March; think our committee was the only committee that had champagne. It was told me by older officers that it was customary for newly elected Directors to treat to champagne. I furnished the treat, and it seems to me that Mr. Fisher paid for a portion of the champagne. There was but one basket furnished, and I think but two or three bottles of that drank. The champagne was drank after the counting and sealing for the evening had been concluded.

Cross-examined. Don't know that at the time Mr. Childs was bagging the coin and assisting in counting, that suspicion was against him; at that time I had a good opinion of him; thought, as he was Teller, it was necessary for him to be there; was present when the boxes were opened in August, and observed the difference in the seals upon boxes where a deficiency existed; the wax used by the Directors was a bright scarlet; the outer strata of wax when they were opened was of a darker hue; think the wax used in resealing these boxes was the same used in the first place, or the wax furnished by Judge Shurlds. Don't know that anything has been done with a view to charge this abstraction upon any other than Mr. Childs; I suppose the Directors always thought he had taken the money, and I have not much doubt about it myself.

There is a deficiency of $120,000 in the cash account—I believe the bank has been robbed of that amount of money, but cannot say positively what kind of money or when it was taken; have not been active in spreading through the community that Childs was guilty.

Robert Rankin. Am acquainted with defendant; on the eighth of January, 1848, he purchased from me a piece of property in the country, situated on the Manchester road. Said lot was sold for $4,000—$2,000 of which was paid cash down, and the remainder on interest, and will not be due until January next. The interest for one year, on the amount due, was paid last January. This is the only purchase he ever made from me. The amount paid at the time of the purchase was by check upon Clark & Bro.

H. D. Bacon. Am in the exchange and broker business, and am acquainted with the defendant. I have had but little dealings with him. Sometime in July or August he said he had retired from the bank, and was anxious to get into some kind of business without interrupting other arrangements, and having a good deal of experience in our branch

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of business, he thought he could make himself useful to us, and proposed a business connection; he spoke of being able to put in some six or seven thousand dollars capital on his part; remarked that so far as his services were concerned, I personally should be much obliged to have him, but doubted whether his proposition would be received by my partner.

L. Clark. Am engaged in this city as exchange dealer, and in the firm of Clark & Bro.; am acquainted with defendant, and we have had dealings with him in our line of business. He had a deposit account with us for several years—don't recollect the exact time—they were never large, he oftentimes sent them by the porter in the Bank, a hundred or two dollars at a time. We have sold him exchange occasionally, but the only time that I remember was shortly before he went east, in May last; we then sold him some five or six thousand dollars—in two bills, on New York. We gave Childs a certificate of deposit on interest, at the same time he bought these bills of exchange. The arrangement for the certificate was made at the same time he bought the exchange. The certificate that is now outstanding is not the one I refer to—I refer to a certificate of deposit for $1,600, which I presume was paid while I was absent at the east last summer.

Wm. Edwards. Am acquainted with defendant—the firm of Edward J. Gay & Co. are indebted to him, according to the books of the concern, for $2,708.69, being on account of a note given by said firm in August last. The note was given for a former note, and the former note was based upon some money borrowed. The transaction has been standing two years back.

Rev. T. H. Capers. Am acquainted with defendant. The only business transaction of a personal character that I have ever had with Childs (excepting business in the church) was the borrowing of $800 from him in June, 1848, which is yet unpaid. Mr. Childs and myself were a committee to purchase a lot of ground from Mr. Briggs, for a grave yard. It was purchased for cash, and Mr. Childs advanced the money—$1,000; heard Childs say he had purchased a piece of land from Mr. Rankin, and I have heard him say he purchased some lots on Market street. He told me that these lots were not purchased for himself, but for the heirs of Mr. McAllister, for whom he was agent. Was Pastor of the Centenary church for two years, commencing January, 1847. The Centenary church was finished at the time I came here; when I came to the city I found a debt of $10,000 hanging over the church, and made an effort some time thereafter to liquidate the debt; a meeting was held for that purpose, and subscriptions were received for about $5,000, but I am not able to say what amount Mr. Childs paid. The subscription papers never were in my hands, but passed into the hands of the treasurer of the church (Mr. Childs) on the night of the meeting, who footed up the amount subscribed and reported it.

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November 21.

Rev. T. H. Capers. In stating as my impression that Childs told me the Market street lots were purchased for the heirs of McAllister, I was mitsaken; upon reflection, my impression now is that he told me they were purchased for Mrs. Corbin, the widow of McAllister. I have no recollection of any conversation with Childs as to his contributions towards liquidating the debt of the church—no recollection of ever hearing him speak of the contributors generally; as treasurer, he reported to the official body of the church, composed of leaders, trustees and stewards.

Cross-examined. Think it was in June, 1848, that I borrowed $800 from Mr. Childs. Borrowed it for the purpose of making payments on some lands in the country; when I first made application for the loan, he informed me he had not that amount of money by him.

Mr. Childs is the person in the church by whom its financial concerns are carried on; he generally paid the salary of the minister. When I was pastor he paid my salary; most generally by a check on Clark & Bro., but some times from money on hand. In regard to Mr. Childs' contributions, for benevolent or other purposes, believe he never let his left hand know what his right did.

Never knew one of the Bank Directors to give anything toward the church, or for any other benevolent purpose—if they have contributed to other churches, it has never come to my knowledge. I never knew any Teller, Clerk, or Porter in the Bank, except Mr. Childs, to give one single cent toward the support of the gospel, in any shape or form.

Re-examined. There was a Director in the Bank that belonged to the Centenary church, and he had given something toward the support of the church. I take back all I said as far as applied to him.

L. Clark. On reference to the books I found I was mistaken as to the amount of exchange sold Childs; on the seventh of May, we sold him a draft on New York for $1,500; on the eighteenth or nineteenth of May, we sold him one on Baltimore for $250, and on the same day one for $500 on New York. On the twenty-first of May, we issued a certificate of deposit in his favor for $1,700; on the tenth of August the certificate for $1,700 was rendered and cancelled, and a new one for $2,000 issued; those are the only transactions in exchange that I recollect. It would require but a small sum of money to keep up such an account as that just stated. Mr. Childs made his deposits in small sums. Mr. Childs kept but one account at our house; have no means of telling whether or not that account embraced his church financial business.

James McCoy. Am acquainted with defendant; am connected with the Centenary church, and have some knowledge of subscriptions being taken in the church. On one occasion a subscription was taken up to liquidate the church debt, and think on that occasion Mr. Gay subscribed $1,000, Mr. Childs subscribed $500, and my-

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self $250. Some one or two years previous, Mr. Childs helped to raise a subscription for the church, and at that time, I think, subscribed $250. All funds of the church passed through the hands of Mr. Childs, and all payments of necessary expenditures were made by him. All money transactions of the church, and the proceeds of the grave yard passed through his hands, as far as I have any knowledge. In order to get Mr. Gay to subscribe $1,000, each of us doubled our sums, and the old gentleman (Mr. Gay) doubled his, making it $1,000, with the understanding that he was not to be called on again. I don't know that Mr. Childs has paid a dollar.

Capt. W. C. Johnson. I was master of steamer "Edward Bates" in 1848; that boat was chartered on the fourth of July in that year for the purpose of taking the Sunday school children on a pleasure excursion up the river by Mr. Childs for the amount of $200, and a check was given to the clerk for that amount.

Cross-examined. We went above Alton on that occasion—some four or five hundred children on board—got back in daylight, time enough for the children to go home—no accident happened—and had a delightful day.

D. J. Childs. Am brother to defendant. I first came to St. Louis in 1834, from Maryland; my brother came in the winter of 1835.

After coming to this city he built a house on Franklin avenue—it was commenced in 1837 and finished in 1838. I furnished the lumber to the man he contracted with to build the house, and also furnished the contractor considerable other lumber towards paying for building the house. In furnishing this lumber, it was on my brother's account, to whom I was indebted at the time; we have had a running account from the time we were boys, and at the time of his coming from Maryland to this place, I was indebted to him. I furnished him lumber to the amount of about $2,000, but don't think I owed him quite that much; when we settled our accounts, a balance was due from him; the whole of my indebtedness to my brother was not contracted with him before he left Maryland.

Nathaniel and myself were in partnership in a mill for a short time, which ended in 1839; we were not in partnership when I furnished him the lumber for his house—the lumber for his house on Franklin avenue was furnished before the partnership.

John Hogan. I have made a negotiation with Mr. Childs for borrowed money; borrowed $1,000 from him for Mrs. Garnier. I think the arrangement for said loan was made in February, 1848, and the whole of the money obtained in July of that year; he gave it to me in instalments, and the money was obtained on two years' time.

Cross-examined. Had a conversation with Childs in February or March last about going into business partnership; his proposition did not suit me.

Am not prepared to say where the money came from, which he loaned me for Mrs. Garnier.

Was present on the boat, and took part in the excursion of the Sunday School children on the

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fourth of July, 1848. I addressed the children on that occasion—we sang together and had a very pleasant time. Some days afterwards I went to see Childs in reference to the expense of that excursion, and how it was to be met, when he remarked some seven or eight persons had handed him money to pay for it, and if I wanted to bear a hand in paying the expenses, I had better be quick, as there was but a small amount needed for that purpose; I gave him my five dollars. Have understood that instead of incurring a debt by that excursion, the Sunday School had made money by it in consequence of the subscriptions, and that after paying the expenses there was some little money paid into the treasury of the school. Dr. Potts' school went along with us by invitation, and there were some two or three hundred children on board; there was a very general turn out, not only because of the occasion, but because it was understood Mr. Bates was going along with us and would address the children.

Was at the house of Mrs. Hayden on the thirteenth of August, and an unpleasant reminiscence is connected with that visit—it was the first time I ever was in the calaboose, and don't want ever to get back again. Mr. J. H. and Ed. J. Gay and myself were returning home that evening from church, and in the conversation I remarked that late in the afternoon I heard a large quantity of gold had been found at Mrs. Hayden's house in the possession of Mrs. Whitlock. Mrs. Hayden being an old acquaintance of ours, the old gentleman (Gay) suggested that Edward and myself go around to her house and see if it was true. It being some years since either of us were at her house, when we got upon the street where we knew it was situated, we saw two men walking upon the opposite side of the street, when we went over and asked if they knew where Mrs. Hayden lived; they replied they did not. We then went and inquired at the first door we came to, (without entering a gate,) when the old lady who came to the door said Mrs. Hayden lived next door. We then went to the next door through a gate, and inquired if Mrs. H. lived there, when the old lady who came to the door told us no, that she lived the next door above. As we passed out of the gate, the door opened again, and a man's voice said "is that you, Gay?" Edward answered "Yes." He then came out and said, "Do you want to see Mrs. Hayden?" and Edward replied "Yes." He then turned to me and said, "Do you want to see Mrs. H. too?" I replied I did; "well," says he, "you shall see Mrs. Hayden—come on, Lawler we will take these gentlemen to the calaboose." It took me by surprise. I looked up at the man and said, "Well, I reckon you won't;" when he remarked, "Well, I reckon we will." I then said, if I am going to the calaboose, I want to know why, and want to see your authority for arresting us. "You want to know my authority?" said he, holding up his club, "this is my authority." I said, it had not come to that yet, that people should be arrested by virtue of club authority, and demanded to see some other authority. The

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man replied, he had authority to arrest any one inquiring for this house (Mrs. Hayden's). Gay got pretty salty, but by this time my wrath had cooled down, and I told him the reason we were arrested was because we were not black—that if we were black we would have the privilege of walking the streets until ten o'clock. We were near the Mayor's residence and concluded to go to see him; he not being at home, and we having got a short distance along, we thought we had better go and see the Captain of the Watch, and we went by club authority to the calaboose. We remained at the calaboose about half an hour, when we were told by the Lieutenant that we could go. The man who came out of the house, was in the house adjoining the one directed to us as Mrs. Hayden's. The man he addressed as Lawler was walking in front of Mrs. Hayden's house. The other man was named Amiss. I asked him his name with a view to a prosecution of every man who had anything to do with our arrest.

Mr. Bates, on behalf of the counsel on the other side and the gentlemen associated with him, requested the Court to allow the jurors to go at large during recess under the general charge.

Mr. Geyer urged the request to the favorable consideration of the Court.

The COURT granted the application, and instructed the jurors to hold no intercourse with any person in regard to the matter under examination, and if they were approached in any manner by any individual, in regard to the matter, to report the same to the Court.

John Davies. Am a clerk in the house of Clark & Brother; have been engaged there about two years, and am acquainted with the defendant; he has made deposits at that house, and drawn checks for the same. Made this entry of $2,000 to the credit of Mrs. Whitlock, but am not positive who deposited the money, and am not certain that I received the money. The lady whose name is here did not make the deposit.

I don't remember of seeing Childs there on any other business about that time.

John Gay. The impression with me is, that at the last subscription to raise means to pay the debt on the church, Mr. Childs subscribed $500; Childs was Treasurer, and attended to the collection of the amount subscribed; am not able to state whether he paid that amount or not.

Mr. Whitney. Am Teller in office of E. W. Clark & Bro.; Mr. Childs has kept an account there for some years back. Childs' accounts were in specie and currency on a deposit account. Don't recollect any particular amounts he has deposited, but think they would average from three to five hundred dollars. He has some times left notes with us for collection, and bought some exchange while I was absent this spring. Once or twice Childs paid me paper that was entirely new, as though it had been kept in the vault and had not been in circulation.

August Brewster. Am an architect, and I have been engaged by Childs in the way of building house in this city. In August, '44, we had a contract with him for four

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small houses in the rear of his residence on Franklin avenue; the contract was $1,600 for the four. In the fall of '47, we contracted to build the house in which he resides, on Fifteenth street; I think the house was built on a lot 150 feet front by 100 deep; it was built by contract for $6,227. The payments were made between November, '47, and twenty-fourth of June, '48.

There is another house, on Pine street, to which we built a back building and finished the front—this was for Childs, the entire cost of which was $1,551.-52, which was paid for in October, 1848; the work was performed between June and October. There was some grading and fencing at his house on Fifteenth street, which was extra, and made the entire cost $6,748.82.

Childs engaged us to have some work done at Mrs. Hayden's house, after the large fire in May; he paid for the work, the amount being about $130. At the time we built his house on Fifteenth street, ground in that neighborhood was sold at $20 a foot; ground near the Pine street house was sold at the time we done the work, for $40 a foot. I suppose there must be about thirty feet front in the lot upon which that house is situated.

Cross-examined. Property in that section of the city has increased very rapidly in value during the past season; at the time we commenced building his house he owned but one hundred twenty-five feet front, but has since bought an adjoining lot, making his front one hundred fifty feet.

Mr. Childs was an officer in the bank at the time; have had dealings with other men connected with the bank; have built houses for Col. Brant and Wm. T. Christy, Bank Directors. Had nothing to do with building Brant's row, but had with other buildings belonging to the Colonel. Had built that fine house of Mr. Christy's on Fifth street. These bank gentlemen always paid up very promptly. Part of Childs' payments, perhaps two-thirds, were made by checks on Clark & Brother.

As an Architect I had something to do with the construction of the Centenary church. Orders for work done were drawn upon Mr. Childs, as treasurer of the church, and I believe, he paid them. Don't know how he paid them, whether by checks on Clark & Bro., or by cash in hand. The orders were given to the workmen, and as they have never called on me in relation to them, I suppose they were paid. That part of the church which passed under my supervision cost about $10,-000.

November 22.

Mr. Williams read to the jury as evidence, the certified copies of nineteen different deeds (of conveyance and trust,) executed to Mr. Childs by different persons. The consideration involved in these several deeds amounted to about $9,000.

B. B. Austin. Am acquainted with defendant; knew him in Maryland, before he came to St. Louis. In the fall of 1835, he was first engaged as

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clerk in Mr. Corbin's printing office; after that he was engaged as a clerk in the agency of the Commercial Bank of Cincinnati in this city, and after that he was engaged in the Bank of Missouri. In 1839 he had a partnership in a saw mill, which I understood was a failure. Before Childs came to this city, and when I knew him in Maryland, he was an apprentice to a cloth manufacturer. I came here in 1821. Have no knowledge of Childs leaving any property in Maryland or of his bringing any with him.

Cross-examined. When I knew Childs in Maryland, he was a youth aged about eighteen years, and an apprentice in a woolen cloth manufactory. He did not tell me he had left property in Maryland, or brought any with him here. There are a good many gentlemen about the bank now, who, when they came here did not tell me how much they left behind, or how much they brought with them. Mr. Walsh never told me how much property he left in Ireland, or how much he brought with him. I don't know what property Col. Brant left in Vermont when he came here, or how much he brought with him—he never told me anything about it. I can't say how much property I brought with me—no great deal however; I have made it faster here than I did in Maryland—have got some little property now—and so far as I know about Mr. Childs' situation I think my property is greater than his. For three years after I came here was on a salary of $1,000—since then not on salary, but in business for myself—was a single man up to 1836, and was not on a salary after that time; when a single man saved pretty much all my salary, say about $800 out of the $1,000; after I got a family could not save so much; my family expense during the past year would be about $800 excluding house rent; was in Mr. Childs' house some years since; don't know how he lives now. My property has increased about sixty per cent in value during the past five years. My wealth may be a little above Mr. Childs', and I suppose I am worth about 25 or $30,000.

A. C. Williamson. Am acquainted with defendant and have known him about four years, during which period I have been in his house. The house in which he now resides and the furniture in it are plain; the furniture is plain mahogany. I am an upholsterer and laid down the carpets in Mr. Childs' house, two Brussels and two Ingrain carpets—they are common carpets—can't say how much they cost per yard. I have been in four rooms in his house—the two parlors and two rooms above; have worked in mechanics' houses which were furnished just as well as that of Mr. Childs.

I. H. Sturgeon. Am a Director in the Bank of Missouri and have been since June. Was present at an examination of the coin in the bank, in August last. On the day the abstraction was discovered was not present, but was present on the following Monday. The different kinds of coin in these fifty-seven boxes was ascertained by calling off, from the memorandum on each

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bag, the amount and description of coin it contained. The seals on one or two of the bags appearing to have been broken, they were opened and the contents found correct. All the gold in the bank was counted at that time. I was not at the bank either on the day the abstraction was discovered or the day after.

Cross-examined. Was appointed on a committe to gather all the information I could in reference to this matter; think every member of the committee acted for himself, independent of each other, and that no formal report of its proceedings was ever made; think each member reported to the Board; the line of duty for that committee was not pointed out by any action of the Board. I was not present when the writs against Childs were directed to be issued; as it was not done by action of this committee, it must have been done by action of the Board.

Hearing that Childs was in the habit of purchasing a great many clothes, I had a conversation with Mr. Shelton, his tailor, about it, and made inquiry of him, when I found his account was not so large as I had understood it to be; made no inquiry of his family grocer, heard of his purchasing annuals, but this was not my discovery. The records of the Probate Court were searched in order to ascertain to what extent Mr. Childs was administrator, or trustee.

Lewis T. Labeaume. I executed a writ upon Childs; dated August eighteenth, 1849, by which was obtained $1,800 worth of personal property. The list, together with the value of the property was furnished me by Childs, and consists of a mahogany piano, cushioned chairs, mahogany chairs, mahogany book case, dining and side tables, settees, etc. The property is bonded for $1,800. Was directed to garnishee certain persons, and among them was Willis L. Williams, Edward Bates and Trusten F. Polk. Believe it was after the Grand Jury had found a bill against Childs.

Robert Campbell. Was formerly President of the Bank of Missouri; was President about two years, and prior to my election to that office was a Director. During the period I was in the bank, the Cashier, by the charter and by-laws, was considered as having the whole management of the institution; and the Specie Teller was considered as having direct charge of the specie in the bank. During that period Childs was Specie Teller.

Cross-examined. The Specie Teller never was made responsible for the cash of the bank, from the fact that he had all to do with the specie, and kept the keys to the vault, I supposed him to be in charge. If we wanted to know what amount of any particular coin was in bank, we got the information from the Teller's memorandum. There has always been a large amount of coin in bank, not intended for daily use, but in one case only, to my recollection, has it been sent East to be recoined or deposited. It was always my understanding that there was no division in the vault, or any arrangement in the bank whereby the estimated sums of coin required for use from day to day were separated from the

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bulk of coin on hand, but that it all was open subject to the discretion of the one officer; such coin as was sealed up when I was in the bank, was received from the land offices, etc., the seals of which could have been opened by the Specie Teller at discretion; I believe the Cashier gives bond in $50,000, and the Specie Teller $10,000. While in the bank, I looked upon money coming in as being under the charge of the Cashier, as well as the general management of the bank and the duties of the officers. Have no knowledge of the Directors ever inspecting the interior of the vault. In my time, there were no losses except by bad debts; the amount of loss by the Illinois Bank is not yet ascertained.

B. Bennett. Am engaged in the book and stationery business, of the firm of Fisher & Bennett, and our store is on Main street. We have various kinds of sealing wax in our store—the Hibernia, Government and other brands. The Hibernia and Government wax are both of Scarlet color—the former bright and the latter of a darker hue.

November 23.

Greene Erskine. Am acquainted with defendant, have known him since the year 1835. Do not know what his pecuniary circumstances were at that time. I was not aware of his having any property. He was employed by me as a clerk in the latter part of 1835, at what salary I cannot say positively, but my impression is that I paid him $40 per month. He was little experienced in business at that time.

Cross-examined. Kept a store on the levee at that time, and my impression is that defendant was employed by me in fall of 1835, and remained with me during the winter. He was a young man at that time and without any family. Think there were a good many gentlemen here at that time who now flourish very finely; I have made some little myself since then; can't tell how much, probably within $25,000 of $100,000. Never was a Bank Director, but am acquainted with several of them who have risen finely—can't say whether after my fashion or not, as I had my own way of making money, it is impossible for me to say whether they made it out of the bank or in other ways; never followed them up to see how they made their money.

Was engaged as a merchant at the time spoken of and so continued up to 1840; have purchased real estate at several times, and my gains have arisen from both these sources. I have been very successful in business. I cannot say that my real estate has increased one hundred per cent in value since I purchased it—my impression is that it has not.

John Smith. Am acquainted with defendant; he is a man of family, and I think was married in 1838; how long he has been a housekeeper I cannot say; I was president of the Bank in 1837 and retired in the summer or fall of 1842—that was at the commencement of the institution; I cannot say exactly when Childs came in; was absent at the East on business of the bank in the spring of 1837, and he, with other officers, was elected during

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my absence. I think he was the first Specie Teller. While I was President, the Specie Teller in fact, had the custody of the specie of the bank.

Cross-examined. At the organization of the bank we had some experienced Directors, Col. O'Fallon was one; others I cannot recollect; I do not recollect that any of the Directors of the old Bank of Missouri were appointed at that time. I think all the experience Col. O'Fallon had in banking at that time, was derived from being President of the Branch Bank of the United States in this city; think we had no officer in the bank called Specie Teller, until after the passage of the Specie resolutions by the Board, in 1837; Mr. Childs at that time attended to the duties of Specie Teller, and was also a bookkeeper. After the organization of the bank, we dealt a good deal in Illinois paper, but had considerable coin on hand.

Jno. D. McMurray. Have made improvements upon lots of the Wesleyan Cemetery for Mr. Childs, by placing an iron railing around them, the cost of which was $364. I am not aware whether the lot referred to was the grave lot of N. Childs, Jr., or the lot of the Childs family.

Thomas R. Artell. I am State and County Collector; have been in office since 1841, and Principal Collector since 1847. It appears from the record in said office, that Nathaniel Childs, Jr., was assessed in 1848, of the following property:

In block No. 260, Franklin avenue, one lot, 31 by 200 feet, valued at.....	$4,000
In block 210, Fifteenth street, a lot 150 by 100 feet, valued at.....	2,800
Furniture, slave, watch, etc.	650
Total assessment in 1848..	$7,450

By the record, for 1849, it appears that Nathaniel Childs, Jr., is assessed of the following real estate—no assessment of personal property being made:

Block 210, a lot 150 by 100 feet, on Fifteenth street, valued at.....	$ 6,100
Block 260, a lot 51 by 212 feet, on Franklin avenue, valued at.....	3,900
Block 506, a lot 40 by 109 feet, on Pine street, valued at.....	2,480
Block 141, a lot 25 by 127½ feet, on Fifth street, valued at.....	1,600
Block 175, a lot 26 by 120 feet, on Morgan street, valued at.....	1,300
Total amount of taxable property	$15,380

Upon which the State Tax is $30.76, county tax, $30.76, additional tax, $7.69, and road tax $7.69. Total taxes $76.90. No other property is entered on this record except what I have read.

Cross-examined. This book does not show whether the lands described are held in fee simple or by leasehold. The lot on Fifth street does not appear here as leased; nor does this book show that any has been sold since the assessment, which was made in February last. (Witness directed to the assessment of Clark & Bro.) The house of Clark & Bro. is not in this record—the

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property of one of the firm is, which consists of furniture and real estate, but nothing in regard to loans. (Witness directed to turn to the assessment of Col. Brant.)

By this record it appears that Joshua B. Brant is assessed on the following real estate and personal property, viz:

In block 14, a lot 41 by 116 feet, on Front street, valued at	$ 16,644
In block 14, a lot 81 by 110 feet on First street, valued at	29,600
In block 27, a lot 51 by 150 feet, on First street, valued at	15,463
In block 28, a lot 107 by 137 feet, on Second street, valued at	18,000
In block 65, a lot 112 by 123 feet, on Second street, valued at	19,500
In block 66, a lot 32 by 128 feet, on Washington avenue, valued at	2,000
In block 91, a lot 153 by 110 feet, on Third street, valued at	32,000
In block 91, a lot 112 by 150 feet, on Washington avenue, valued at	18,000
In block 96, a lot 20 by 90 feet, on Fourth street, valued at	2,300
In block 60, a lot 42 by 74 feet, on Market street, valued at	10,450
In block 117, a lot 57 by 127 feet, on Fifth street, valued at	8,450
In block 96, a lot 44 by 88 feet, on Washington avenue, valued at	7,200
Money loaned	9,000
Four slaves	1,200
Two horses ($150) and two cattle ($20)	170
One carriage	400
Furniture	2,000
One watch ($50) one clock ($10)	60
Total amount of taxable property	$192,437

John Davies. Mr. Childs has borrowed bags from Clark & Bro., the exact time I do not remember; it was during the present year and before Mr. Childs left the bank. I applied to have them returned, after he left the bank, and made application to the present Teller—they were principally old shot bags, and twenty-four or twenty-five in number. There was no remark made at the time of borrowing as to what use they were to be applied.

Mr. Geyer asked the Court whether there was any rule or practice in the Criminal Court, by which argument was restricted to one specified number of counsel.

The COURT said there was no rule laid down to that effect. It was the practice, where there were more than one counsel on either side, for the prosecution to open the case, the junior counsel for defence to follow, then the junior counsel for prosecution, then the senior counsel for defense and the senior counsel for prosecution to close the argument.

THE WITNESSES FOR THE DEFENSE.

S. M. Bowman being shown an instrument of writing, which he says was drawn by him for N. Childs, Jr. Have no doubt but that the signature of Mr. Childs, attached thereto, is in his own handwriting. Witness did not see said instrument signed, but he drew it for that purpose. [A second document was shown witness, which he said was a blank deed, filled up by himself, by order of Mr. Childs. —Both of these documents were drawn at the same time, and given by witness either to Mr. Childs or Col. Long, he could not say which. Witness thinks

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the first instrument shown him was executed to Col. Long as attorney in fact, and son of Mrs. Corbin. The documents were written on the eighth of February, and executed about that time.]

These two documents were passed around the counsel, without being read aloud, and then handed to the JUDGE.

Mr. Kirtly said, the first paper shown the witness had been produced in court by defendant himself, and it was not competent evidence to go to the jury. The witness states the instrument was drawn by him for Mr. Childs, and given either to Mr. Childs or Col. Long—he would not say which; there was nothing to show that it was ever executed or out of defendant's possession.

Mr. Polk said the two instruments identified by the witness were offered to the Court and jury in explanation of circumstances brought out by the prosecution in their examination, by which circumstances they wished to make an inference of the amount of property owned by defendant, and then to make another inference, from the amount so shown, that the property had been obtained by money embezzled from the Bank of Missouri; to support this they had given in evidence the certified copy of a deed, by which certain real estate had been conveyed to defendant in his own name. *Mr. Polk* claimed it as competent for the defense to show that although the deed given in evidence vested fee simple title in the defendant, that said property was held in trust by him for Mrs. Corbin, and that at the time the deed was obtained, he executed process, showing that the property was in another than himself.

Mr. Geyer contended that this paper, as before the Court, was nothing more than a statement of defendant himself, no evidence being introduced to show that it was ever executed. He understood the matter to be, that in 1846 defendant obtained a certain piece of property unencumbered from any trust, which property he held from August, 1846, to February, 1848, without any declaration of trust, or any evidence of trust fund; that in February, 1848, this paper, purporting to be the declaration of such trust, was drawn, as appears by the evidence of the witness on the stand, who states that he either gave it to Mr. Childs or Col. Long, but knows nothing of its execution. Under these circumstances, and as the deed read in evidence was recorded without such declaration, he claimed it incompetent testimony to go before the jury.

Mr. Polk said the purchase of this Morgan street property (referred to in the paper) was made by Mr. Childs for himself in 1846, and that at the date of this deed (February, 1848) he sold it to Mrs. Corbin as her trustee, and instead of making a conveyance, the trust was declared in the mode proposed to be shown by the paper now before the Court.

The COURT said the paper had been produced by defendant himself, without evidence that it had been delivered or executed, and thought that sufficient ground had not been shown by the defense to admit of its introduction.

Mr. Polk said if the declaration in that paper had been

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made since this prosecution commenced, it would subserve nothing in the cause, but such was not the case. The defendant had made a statement of his affairs to the Bank Directors, in which statement, as it was detailed in evidence by a witness on the stand, he alleges that he was the agent of Mrs. Corbin, and in consequence of the relations existing between her and her husband, held certain property in his name in trust for her. This statement the prosecution had attempted to falsify, for which purpose certain deeds of conveyance to Mr. Childs had been read in evidence, and among them a deed from Parker to Childs for this Morgan street property. He claimed it perfectly competent to show that this piece of property was one of the pieces which did not belong to defendant, and which were alluded to in his statement, and for this purpose proposed to introduce his declaration of trust made in 1848.

Mr. Leslie said the evidence was of a dangerous character and came before the Court in a questionable manner. The prosecution had shown possession of property in defendant in a legal manner and by the recorded deeds of conveyance; to brush out this evidence the defense produce a declaration of writing, drawn up by a scrivener, who testifies he believes it was signed by Mr. Childs, but has no knowledge of its execution. This is introduced by defendant himself.

A party cannot make evidence for himself either in a civil or criminal case. Allow this character of evidence, and every party committing crime would shield himself behind its protecting power. Delivery enters into the very essence of a deed; a man can declare by deed of trust on what he choose, but to make that declaration legal and effective, it must be executed; he cannot put it into his pocket to be used whenever he may be involved either in a criminal or civil suit. Commence the defense by admitting such evidence, and there may be papers enough produced to show such question of right to all the property proven in defendant's name, etc.

The COURT said there was not sufficient foundation laid for the introduction of the paper as evidence. It purported to come from defendant, showing from what source he received a certain amount of funds for the purchase of certain property. A witness states the signature to be the defendant's, but does not know whether he delivered the document or not. If the delivery was in evidence, the paper might be introduced for what it was worth; it must be shown that it comes from some other source than defendant—that it passed from him after examination. The paper before the Court was nothing more than an open declaration of defendant, and could not be introduced as evidence.

November 24.

S. M. Bowman. Never saw the Morgan street property, to my knowledge, but bid it off for Mr. Childs in 1846. At the time the instrument of writing produced in court yesterday was drawn, Mr. Childs called on me, in company with Col. Long, and informed me he had sold said property to Mrs. Corbin; that Mrs. Corbin was owing some-

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thing to his ward, Miss McAllister, and he wished to hold said property as security for the debt; that a deed of trust was drawn, but whether ever executed upon Mrs. Corbin or not, am unable to say.

Mr. Polk read in connection with this evidence, an account between Mr. Childs and Miss McAllister, showing various amounts received by Mr. Childs at different times, and the amount now due to Miss McAllister.

W. M. McPherson. Am acquainted with defendant and have known him about seven years. I sold him 100 feet of ground on Fifteenth street for the consideration of $1,400. At the time of sale I owed R. W. Ulrici the sum of $1,000 upon said lots, for which he held my notes, at two years, at eight per cent interest. My contract with Mr. Childs was for $400 cash and he to take up my notes due to Mr. Ulrici; these notes were taken up and handed to me.

James H. Lucas. Am acquainted with defendant, and have had dealings with him in the sale of real estate. Sold a lot on Pine street to one Deggs, of which, after a lapse of time, Mr. Childs became purchaser from Deggs—probably before the conveyance had been made; by this Childs became the purchaser of me in lieu of Deggs. The lot is between Fourteenth and Fifteenth streets, on the north side of Pine, is forty feet front and one hundred deep. The consideration to be paid by Childs was $1,400, for which he gave me his notes. The interest on these notes for the last eight years has been paid and portion of the principal; $1,260 of the principal and last year's interest yet remains unpaid.

Joshua W. Owens. Am acquainted with defendant eight or nine years. At present am engaged in collecting rents and selling property. From the seventeenth of April, 1848, to ninth of April, 1849, I have collected and paid over to Mr. Childs, on account of the property situated on Franklin avenue, the sum of $762.35, which sum is exclusive of my commission and small amounts paid for repairs, etc. At the date of the final settlement, (ninth of April, 1849,) I ceased to make collections on that property. Have collected and paid over to Mr. Childs, on account of the Pine street property, from February to October, 1849, the sum of $304.76, and on account of the Orphan Home property the sum of $93.99. Have collected for Mr. Childs, on account of Mrs. Corbin, and for a piece of property situated on the north side of Morgan street. I have also collected for Mr. Childs on account of Mrs. Hayden, the sum of $162.75.

H. Miller. Am sexton of the Centenary church, and superintend the sale of lots and grave sites in the Wesleyan cemetery; act under the direction of Mr. Childs, and make reports to him. The first person buried in said yard was on the twenty-ninth of August, 1847, and since that time the yard has been in use. The proceeds from said yard, since April last, have been $7,224.

Money collected on account of lots and graves was paid over to Mr. Childs. On the single

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grave sites a portion is yet outstanding, but the amount collected is over $1,300.

H. W. Schemmer. Purchased a lot from Childs, situated on Franklin avenue; the lot was fifty-one feet by two hundred and twelve, and the improvements were four small brick houses and one frame house. Gave him $6,500 for the property—$3,500 of which was paid on the first of April, and the remainder in two instalments of $1,500 each. One of said instalments has been paid, the other is yet due. The four small houses on said lot rent now for $7.00 a month, and I should suppose when Mr. Childs owned them they rented for $8.00 each.

Mr. Bates read from the minutes of the Board of Directors in regard to sending the specie to the East: as to the amount of gold in the vaults; the resignation of Mr. Childs and the appointment of Mr. Hurshburg; the resolution ordering the arrest of Childs and a search-warrant and other proceedings.

Alton Long. Am a son of Mrs. Corbin. The property situated on Morgan street, now in the name of Mr. Childs, was sold to Mrs. Corbin in February last; and in consequence of an indebtedness of Mrs. Corbin to Mary McAllister, the same was detained by Childs, as the guardian of Miss McAllister, as security for the payment of said debt. The indebtedness was for money paid Mrs. Corbin by the administrator of the McAllister estate, for which she became indebted to Childs as the guardian of Miss McAllister.

Joshua Childs. Am brother to defendant, and in 1839 was in partnership with him in the saw-mill business; we did considerable business, and the mill was run night and day. There never was any capital credited to Nathaniel upon the books—his capital came through Dominick, another brother. At the close of the concern I settled the business; at which time many debts were outstanding and due. Having used considerable money during the year, I turned over to Nathaniel some four or five thousand dollars in unsettled bills, and upon consideration that he pay several small outstanding accounts against the concern, he might make from these accounts what he could. To my knowledge, but one of these debts was uncollected, and upon that I received a notice that $300 was due, and that the debtor had taken the bankrupt act. The persons from whom these accounts were due lived in the city; am unable to say what amount was received by Nathaniel upon them.

November 26.

Joshua Childs. When we gave up the saw-mill there was about $400 on the rent unpaid; my brother did not pay that, as he claimed it was not due; no suit was ever brought to recover it, so far as I know. Among the bills left with Nathaniel to collect, was one for $2,700 against A. W. Lockwood, a bill against a man named Barsh, and a bill against a Capt. Barrett—others I do not recollect. I think the house on Franklin avenue was built in 1837.

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Mr. Bates read in evidence a deed of trust for a lot of ground on Spruce street, executed by Elijah Hayden and Maria his wife, to Edward Bates, in trust for their adopted daughter, Margaret Whitlock, etc. This deed, he said, had never been acknowledged or recorded, but had been in his hands from the day it was made, August, 1845, to the present time.

Mrs. Corbin. Am acquainted with Mr. Childs and have known him ever since he came to this city. He lived in our family about seven months when he first came here. Have lived in this vicinity about twenty years; my husband, for about six years past, has been living in Washington City, at which place I have been in the habit of spending a part of my time. My property is located here. I own a lot of ground in what is called "West End," purchased for me by Childs, two years ago, and during my absence; before leaving, I gave him the money for that purpose and took his receipt, and when I returned, he handed me a deed for the property, which I gave back. I own a house and lot on the north side of Morgan street, between Ninth and Tenth, which I obtained from Childs in exchange for a farm I owned in the country. The paper shown me is held by Childs on said property as security for an amount of money I owe two of my children—James and Mary McAllister—the paper is held by Alton Long as attorney for James, and Mr. Childs as guardian for Mary. Mr. Childs handed me the paper with the deed. I looked over them, but knowing their purport, did not read them. I knew I was owing my children, and as I intended to return to Washington, I told him to take care of them. During my absence, Mr. Childs received the rent for the Morgan street property, and since my return I received it myself. Mr. Childs is guardian for one of my children—Miss Mary McAllister—and was guardian for Anna C. McAllister, who is now married.

Mr. Young. Am related by marriage to Mr. Whitlock; on the fifteenth of August last, was sent for by Mrs. W., and proceeded to her residence. As I entered the house saw a Deputy Marshal, named Williamson, come from her chamber, which officer kept strict watch upon persons visiting the house and its inmates; so much so as to prevent private conversation.

Mr. Polk read in evidence two printed statements published by order of the Board of Directors of the Bank; purporting to give the condition of the Bank of Missouri on the thirtieth of June and fifteenth of August last.

Mr. Polk proposed reading in evidence the reports made to the General Assembly by committees appointed for the purpose of examining into the affairs of the bank; he proposed to read these reports as published in the journal of the House of Representatives, commencing with the session of 1840-41 to the session of 1848 and 1849.

Mr. Geyer said such evidence was objectionable. The parties who made the examination and reports were competent witnesses and within the jurisdiction of the Court; and even if they were not, he could see no bear-

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ing of these reports upon the subject of inquiry.

Mr. Polk contended the journals of the General Assembly could be read in evidence, unless the matter was objectionable upon the ground of irrelevancy to the subject of inquiry. The prosecution had alleged that it was competent for them to show this embezzlement took place prior to the February and March count, extending back perhaps to the commencement of the bank, and hence evidence had been admitted respecting defendant's private affairs since he had been in the State of Missouri, and even before. It was important, in connection therewith, to show that when counts were made by the committees of the Legislature—persons independent of the bank and its officers—and their results reported, that this hypothesis respecting the previous abstraction was unfounded.

The COURT said, it understood the object in reading these reports was to show that all money called for by the books was in the bank at these periods.

Mr. Polk said they were offered with that view.

Mr. Geyer said, if the committees of the Legislature came here to be examined, they would necessarily be called upon to state how they counted the money, when the thing would tell for itself, and they would be able to see whether the count was made in such a way as to secure the counting of all the money, or whether it was handed about, from time to time, so that it was possible for the same amounts to be counted at different times. This was the very important inquiry which the journals do not furnish the means of ascertaining. The defense talk of the journals of the House being evidence. They were evidence only of what took place in the House —their recorded proceedings— and could not be made evidence for or against persons who were never a party to such proceedings. And even further, the report of a committee was no part of the journal of the House. The journal simply notices that such a report was made, and for convenience it is appended to the same book, with a various mass of papers, and called an appendix. These reports prove nothing, except for legislation. The defense had been endeavoring to show the Cashier of the bank was responsible for its funds. Suppose, by mistake, these reports to the Legislature had made him responsilbe for a larger amount than was actually in the bank, no one would contend they should be made evidence against him, either in a civil or criminal suit. They were mere written communications, made by members of that body for purposes of legislation, and had nothing to do with controversies arising between individuals.

Mr. Bates said, in offering the journals in evidence to go before the jury, it was by no means their intention to submit to the Court the question of how much they proved. He then argued the objection at length, and read authorities to sustain his views.

The COURT said the journal could only be evidence of what was done in the Legislature, that a committee was appointed and a report made. The matter embraced in the report was not sworn to, had none of the

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solemnity of evidence attached to it, and could not be made evidence in a court of justice.

Mr. Wright contended it was competent evidence to preclude the idea that this abstraction was prior to a certain period. By the law of the land it was made the duty of a committee of the Legislature to inspect these funds from time to time; they had discharged that duty and reported the result without ever having reported this defalcation, which the prosecution allege was previously made. This fact, he contended, it was competent to show in this cause by these reports.

The COURT sustained the objection of the prosecution.

Mr. Polk read as evidence, from the journal of the House of Representatives, the proceedings had upon report from the several committees appointed to examine into the condition of the Bank of Misouri, commencing at the session of 1840-41, and ending at the session of 1848-49.

Mr. Wright produced a pamphlet copy of the report of the Legislative Committee, made in 1846, together with the testimony of Mr. James Ellison, one of that committee, detailing the manner of counting the funds in the bank. This was read in evidence.

Mr. Polk asked that the original copies of reports from the Cashier to the Legislature, if now in the bank, be produced in court as evidence. He then read from the minutes of the Board, April 22, 1837, the proceedings in regard to the election of Cashier, First Teller, and Second Teller; also, a resolution passed by the Board fixing the Cashier's salary at $2,500, First Teller's at $1,500, and Second Teller's at $1,200. This was read in connection with evidence heretofore adduced, to show that at that period no such officer as Specie Teller was known in the bank.

Mr. Polk said he had looked through the minutes, as in Volume No. 1, and had been unable to find the entry of any of the semi-annual reports prior to February, 1840; if there was any book in the bank containing these reports previous to that time, he would be glad to have it produced in court. He then read in evidence the semi-annual reports made to the Board, February 11 and July 7, 1840; January 26 and July 13, 1841; January 11 and July 8, 1842; January 6 and July 6, 1843; January 9 and August 22, 1844; January 11 and July 17, 1845; January 16 and July 6, 1846; January 8 and July 12, 1847; January 11 and July 13, 1848; and January 12 and July 7, 1849.

Geo. H. Loker. Am acquainted with defendant; was engaged in the house of E. W. Clark & Bro., from 1843 to 1845. Recognize the book shown me as the deposit book of N. Childs, Jr. The entry on this book, "cash, February twenty-one, 1845, $1,707.81," is in my handwriting. The check shown me is of same date and for the same amount ($1,707.81); the check I do not recognize.

John E. Brooks. Am engaged in a house on the Levee, to which papers and books for Mr. Childs have been consigned. —The papers were generally taken to Mr. Childs at the bank, and the books sent to the Centenary church. The papers were small Sabbath school papers.

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Mr. Joseph Boyle was a minister at the Centenary church about two years and I think left there in 1846. I know his signature. The check shown me, dated Febuary twenty-one, 1845, for $1,-707.81, is signed by J. Boyle, and in his own hand; never saw the books received for Childs. They were from the Methodist book concern in Cincinnati. I have seen the papers, the subscription price to which is twenty cents per annum, at wholesale.

November 2?.

Claiborne F. Jackson. Reside in Howard county; lived in the State about twenty-six years; was Cashier of the Branch Bank at Fayette, from the time it commenced operations in 1837, to the spring of 1840 or 1841. In 1846 I was appointed on a committee to examine the parent bank and branches, and in October of that year met Mr. Ellison, of Lewis and Ray, of Carroll, in this city, and proceeded to discharge that duty. The examination was not made in a manner satisfactory to myself, but as well as it could be done in the time we had to make it. We did not count all the coin, but counted all the paper. The coin was counted by weighing a portion, ascertaining the weight and amount, which was made a standard for counting the remainder of the same description of coin. We examined the balance books. The balances and the statement furnished by the Cashier to the committee corresponded; some of the gold was in boxes, and some in bags. We looked into the boxes to see if they contained what was represented upon them, and grappled up the contents of each box to the bottom, to ascertain that it was the same kind of coin throughout. We were engaged some two or three days in counting. The coin counted on one day would be locked up in the evening, and one of the committee would keep the key until morning—that duty devolved on me. This precaution was continued during the count. It was possible that we might have kept one of the keys to the vault, as I have a knowledge of carrying a large key during the intervals; but I am not certain where it belonged. The result of our examination of the money on hand corresponded with the statement furnished us by the Cashier. There might have been a few dollars more or less, but it was satisfactory.

Cross-examined. We had the key to the large iron chest in the vault. The counting was during and after banking hours. Mr. Childs was with us most of the time; he had a memorandum with him of the coin, and pointed out to us what was to be counted. When we commenced operations in the morning, generally found the vault closed—think perhaps Mr. Childs opened it. We would have an interval about noon for dinner, and commenced operations again about two o'clock; the vault would generally be locked when we returned. In counting the metal, don't think we had any other officer with us besides Mr. Childs and the porter. We kept a memorandum as we proceeded in the count, and when we concluded ascertained the aggregate. When we finished counting, we did not ascertain the number of bags

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and boxes and compare the number with our memorandum.

Wm. T. Anderson. Was at Mr. Childs' house on the night of eleventh of August last; about nine o'clock, as I left the house, and had not proceeded ten paces from the door, I was stopped by two men who said they were officers, and had been placed there to guard the house of Mr. Childs. They told me Mr. Childs had been arrested and placed under bonds, and they were placed there to arrest and search every person coming from the house. This was the first I heard of it, and told the officers I had no objection to being searched. The officer then accompanied me to my house and searched. I went to Mr. Childs to borrow a book, and this I had with me at the time; it was Clark's Commentaries. I had no papers about my person. The search was made by feeling my pockets. The officers apologized, and said they had been placed there by the Marshal; but one officer went with me; the other remained about the house.

John E. D. Cozzens. Am lieutenant of the night guard, and was on duty Saturday night, August eleventh, but never had anything to do with Mr. Childs or his affairs. Was informed by the Marshal on the evening of that day, that four members of the night guard had been detailed as a guard around Mr. Childs' house; had no intercourse with this guard while they were on duty, and think the guard was kept upon Saturday and Sunday nights, as the men detailed for that guard reported themselves for city duty on Monday night. On Monday following he accompanied the Marshal to Spruce street, in order to search the house of Mrs. Hayden. When I got to the house, and was going in, when some gentlemen came to the door and said, "never mind entering." The gentlemen there at the time were Messrs. Williams, Yeatman, Ryland and Dr. Forbes—can't say which of them forbid our entering the house, Mr. Felps was inside the door, but I was only on the door sill, and did not enter. After we left the house, it was said something had been found by the gentlemen in the house, and it was suggested that Williamson, one of the officers with us, return to the house to guard it. Williamson did return. Went to Lake county, Ohio, at the request of Messrs. Yeatman and Christy, to obtain the attendance of Jno. Bowlin, late porter of the bank. I received $100 from the bank for that purpose, and succeeded in finding Mr. Bowlin; he returned with me very readily.

Francis R. Williamson. Was a police officer on the thirteenth day of August last.—Went with the Marshal to the house of Mrs. Hayden, for the purpose of searching the house. Felps had a search warrant, and while he, with Mrs. Whitlock and Mrs. Hayden, were in a room, I searched a trunk. The search was for gold. Before we went in we stopped outside of the house about an hour; we remained outside by order of the gentlemen upon whom we were dependent for orders, Messrs. Williams, Ryland, Yeatman and Dr. Forbes. Was sent to the house for the purpose of preventing any, except the family from going in or going out. Told Mrs. Hayden I would rather that

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she would not go out of the house; the men that relieved me at night, remained until morning, when they were relieved. Don't know when the guard was abandoned. On the afternoon of Sunday, I relieved the guard around Mr. Childs' house, and while on duty occupied positions on Fifteenth street, Market street, and back part of the house; saw a Mr. Carter come out of the house of Mr. Childs, but had no orders to search him. Don't know that Mr. Childs was prevented from leaving his house.

John Bowlin. Was formerly porter in the Bank of Missouri; have been on visit to Michigan; my family reside in this city on Eighth street. Left the bank on fifteenth of May, 1849, and was engaged as porter for two years previous. Assisted Mr. Childs in taking specie to and from the vault; assisted in placing the boxes of gold in the vault after they were counted. The foreign gold was piled in tiers of ten boxes each, commencing number one at bottom, and running up to ten at the top on the first tier, number eleven at the bottom of the second tier, and running up to thirty on the top. Was present during the opening and sealing of the boxes during that count. The sealing of the boxes was done in the Cashier's room. At that time the seal stamped upon the boxes lay upon the mantel piece, in Cashier's room, for two or three nights in succession, along with some sealing wax; recollect one evening after, that it was given by Mr. Childs to Mr. Angelrodt, who took possession of it, and kept it until the next day, when he gave it to the Cashier, and told him to take care of it. When Mr. Childs gave the seal to Mr. Angelrodt, he picked it up from the carpet; there were other Directors in the room at the time. Had seen the seal there two or three evenings previous, as I was cleaning up the room, and picked it up and placed it on the mantel piece; can't say who kept the seal after the Directors finished counting. During the time of counting there were two or three boxes of different kinds of sealing wax on the mantel piece. As porter, had charge of the key to the back door, leading from the yard into the banking house. After the officers left the bank, this key would come into my possession, and if I got through with my work before the clerk who slept there would come to the bank, would leave the key with the watchman to give it to him. It is sometimes gas-light before I finish my work in the evening, when I would lock up the whole house. Never had occasion to let any one in the bank after night, except the Cashier, and him on one occasion only. Don't recollect of opening the door on any of the officers, after I had locked the door, I never admitted Mr. Childs into the bank at night; once as I was about locking the door, Mr. Childs returned to the bank, and said he wanted to go in—that he had left his pocket-book, and wanted to get it. I put my hand in my pocket, took out his pocket-book and gave it to him; having picked it up while cleaning about the bank. He did not go into the bank, but took the book and immediately walked off; have frequently gone into the bank with the Cashier. Never saw Mr. Childs there at an unseasonable

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time. After the robbery of Nesbit & Co., the Cashier generally went into the bank in the evening, and looked all over the House to see every thing secure. Went to Michigan about the middle of July, and returned the latter end of August; was sent for by direction of the Bank of Missouri, by their messenger, Mr. Cozzins, a police officer. Since my return I have had conversations with several of the Directors — Messrs. Christy, Yeatman, Sarpy and Walsh, about the matter; I have had conversations with the Cashier also, but not on this subject; kept the key to the back door on Sundays. The Clerk who slept in the bank would very seldom stay there during the day, except when he would be at work. The Cashier has gone into the bank on Sunday to work; he would get in by getting the key from me, and would sometimes send to my house for it. If I was not at home when he left the bank on these occasions, he would return the key to my wife in the house. Mrs. Shurlds, wife of the Cashier, has had the key to the back door on Sunday, during the present year. About the latter end of March she got it from me about ten o'clock in the morning; and returned it about three hours afterwards. About two Sundays after this she sent for the key again, and got it about ten o'clock in the morning and did not receive it again that day until about four o'clock in the afternoon. The Cashier was not engaged in the bank on either Sunday or about the house. On both occasions when she got the key, he was away to his farm in the country, near Vide Poche; he left home Saturday afternoon, and did not return until Sunday afternoon or Monday morning. A clerk of Mr. Finney on the levee, has frequently brought bundles of paper to the bank for Mr. Childs —they were Sunday school papers.

Cross-examined. During the count in February and March, I heard some of the Directors complaining about the sealing wax being too thin. Think Messrs. Christy and Walsh were present when Mr. Childs was directed to get more wax.

November 27.

John Bowlin. Don't know how long the Directors were engaged in counting the fifty-seven boxes foreign gold; they did not count every day in succession; sometimes would count three or four days successively. I felt very uneasy about giving Mrs. Shurlds the key, without Judge Shurlds' permission, especially as he was not about the house. After he came home on the first Sunday, I mentioned to him that Mrs. Shurlds was in his room; he made a reply, "What in the devil was she doing there?" I said, I'm sure I don't know, Judge. The Judge always gave me orders to stop about the house on Sundays in his absence, and would always tell me to remain about the house if he was going anywhere. Can't tell how often Mr. Shurlds has been in the bank on Sunday since his sickness. Before the Nesbit robbery, the bars across the door leading from the Banking House to the passage in Judge Shurlds' house, were generally left down, so that the Cashier could get in whenever

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he wanted, but since that robbery the door has been fastened all the time. Judge Shurlds went into the bank on Sunday, during the count of the foreign coin. It is his privilege to go in as often as he pleases; can't tell how often he got the key from me. He would send for the key whenever he wanted it; can't tell that he sent for the key at any time during the counting of the foreign coin. Mrs. Shurlds sent for the key more than once during the progress of that count. She sent for it twice during that count, and I think the Judge was not at home the second time either. Recollect of hearing the Directors complain of the wax they were using running too thin, and heard them say they would like to have a better quality that would not run so thin or enter the seams in the boxes, and I think gave orders to Mr. Childs to get better wax, and he got other wax at Fisher's and the wax they were using was passed over and left on the mantel piece in boxes. Was informed that the bank was to be robbed before it was done at all, and befor the Nisbet robbery took place; heard it a few weeks before the Nisbet robbery and got my information from Mr. Shurlds; he put me on my keeping, and told me to have my eyes about the place, and from that time I was very careful to be there all the time; he put such restrictions on me as to require it. There was an increase of the watch about that time, but it was not increased until after the Nisbet robbery; I think that robbery was some time in February. Judge Shurlds did not tell me who gave him the information; I asked him the question, when he told me it was none of my business; he made the remark, "if I knew about it, I would be surprised to hear it." After that we kept a closer watch them before. I saw about the missing gold in a Cleveland paper of the fifteenth of August, and before Cozzins came where I was. Did not see Mr. Childs on the first day I returned to St. Louis, on the day after I met him on Fourth street for the first time; had a conversation with him in the rotunda, but only half dozen words passed between us; he said that probably the State would not call me as a witness; I replied I did not care whether they did or not, and then he said if they did not, that probably the defense would.

Alfred M. Rucker. Have known Mr. Childs about fourteen years; he is a trustee in the Centenary church, and been connected with it since it organization, and before the present building was erected. I am a trustee, and also steward of the church, had paid over moneys to Mr. Childs at various times; had receipts of such moneys to the amount of about $2,000, and had paid him about $1,600, for which I have receipts. Childs objected on several occasions to the kinds of money paid him, remarking he had to deposit it. He mentioned Clark & Bro., and Loker & Renick as offices in which he deposited it. My firm had a bill against the church, which was paid by Childs, but whether by a check or not can't say; the bill was for furnaces in the church, etc., and amounted to several hundred dollars. Some of the moneys so paid over to Childs was the proceeds of

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the Ladies' Sewing Society attached to the church. Have received proceeds of lectures delivered for the benefit of the church, all of which was paid over to Childs. When Childs was absent from the city, moneys came into my hands, being the proceeds of the sale of lots in the Wesleyan Cemetery, which was paid over to Childs about two weeks after his return; the amounts so received and paid over was between three and five hundred dollars. The aggregate amount of funds paid over to Childs has been about $4,000. Childs returned to the city while the cholera was raging—during the prevalence of the cholera, the number of interments were greatly larger than previously.

EVIDENCE IN REBUTTAL.

James M. Hughes. I commenced counting with the first committee on the fifteenth of February, and was present every evening during the counting of the foreign gold, except part of one evening. Have no recollection of anything being said about the sealing wax being of bad quality—though it might have been said; gave no direction about the wax; I heard no order given for a better quality to be procured. On the first day of the count, I saw the wax laying on the mantel piece but can't say whether it was in boxes or a piece of paper. I recollect of no change in the kind of wax used during the count.

J. B. Brant. Was present four day during the counting and boxing of the foreign gold. My attention was not so particularly drawn to the wax as to notice the character, quantity and quality of it; can't say that nobody complained about it; I heard no such complaint.

Mr. Angelrodt. Do not distinctly recollect how many days I was counting; was at the bank on the fifteenth of February and on the second of March; the counting of the foreign gold was commenced and finished on these days. During the time I was there I heard no conversation about the quality of the sealing wax; never heard any of the Directors give an order for other wax to be obtained, and never gave such an order myself. I never saw the other wax brought in during the count—it was not so. I did not observe the quality of wax when I first went to counting—it was laying on the mantel piece, and when it was used was taken from boxes. I used some of this wax myself in sealing bags, and observed no difference in that which I used at different times; remember when the stamp used in sealing the boxes was handed to me. Bowlin was not there at the time, and there was nobody in the room but Mr. Childs and myself.

Cross-examined. Do not recollect who sealed up the box of mixed gold that I was counting at the time the seal was handed to me; don't recollect how many boxes were counted that afternoon. When I counted the boxes were filled on the table put upon the floor, the lid screwed on, and sealed. When Mr. Childs handed me the seal, he threw it upon the table and said, "Angelrodt, you had better take it home and take care of

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it"; took it and locked it up in my safe at the office, and on the next morning handed it to Judge Shurlds. Am certain that Bowlin was not in the room at the time.

Mrs. Shurlds. I got the key but once to go into the banking room, and that was in October or November, 1848; it was the only time I ever got the key of the bank; at that time I may have had the key ten or fifteen minutes but certainly not over fifteen minutes at the longest. Bowlin never gave me the key at all; I sent to his house and got it, and sent by my servant girl, a mulatto slave. I went into the bank for the purpose of getting a bill, which I had repeatedly, and on the evening before, asked Mr. Shurlds to bring up stairs, in order that I might settle it; think it was a bill from Mr. Sullivan; Mr. Shurlds failing to bring the bill up to me, I got the key and went into the bank myself and got it. In February and March, I was not out much, as my health was very bad at that time; I very seldom left my room at that time, and was not well enough to go into the bank. Am certain I did not get the key or send for it in the months of February or March; I never sent for it after the time I have mentioned.

Cross-examined. It was on a Sunday that I sent for the key. Was in the Cashier's room on a Sunday to write some letters; this was about November, a year ago; on this occasion I went through the old Cashier's room; the door from this room leads up stairs, and at that time my husband directed the bars to be left down so that he could get in; Mr. Shurlds often did writing in his room on Sunday; he kept no other office or study. Have frequently gone down on Sunday, about that period, and found the door leading from the Cashier's room upon my back entry open, and have gone in.

James E. Yeatman recalled. Remember no conversation about the quality of wax used while I was counting. I gave no order or direction to have other wax bought; none of the Directors gave such an order in my hearing; I don't know that there was any change in the wax we used. I sealed no boxes myself, and did not have the sealing wax in my hand. Mr. Childs generally sealed the bags when I was there, and sometimes members of the committee would seal them. As early as February last, there was some stir about the bank being attacked and robbed. This was during the commencement of the count. I received the information, and gave notice to the President and one of the Directors; an additional watchman was then employed about the bank; with some of the Directors, I examined the doors of the bank about that time, and found everything amply secure.

Robert Barnes. There was a difficulty in sealing one of the boxes in the February count, in consequence of the lid not being screwed down. I know nothing about an order being given for new wax to be bought, or whether any was bought; such an order was not given by me or in my hearing. I have taxed my memory, and am certain I never carried the keys of the vault home, that I am aware of.

Wm. F. Christy. Was engaged as a Director in counting the coin of the bank in February

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and March last. Never heard any complaint of the wax being too thin; never heard an order given for new wax to be obtained; certainly I never gave such an order.

Cross-examined. I recommended Bowlin to the service of the bank as porter. The object of the Directors in sending for Bowlin was to ascertain what he knew about the matter, he having been in the bank some time. Never heard that he was sent for in order to protect his reputation from a slur on him about town; conversed with him, and he gave me some information on the subject. The sending for him was by direction of the Board. Bowlin having lived with me before he went into the bank, I was requested to write for him to return. I never was in the bank at night, and don't know that it was used on Sunday. I counted on four different days during the counting of the coin. I heard of no difficulty in sealing any of the boxes. I saw wax there; paid very little attention to it; saw it used, and helped to use it.

Dr. Forbes. Was engaged in the count in February and March; never heard any complaint about the quality of wax; never heard any order given for a better quality to be procured; certainly never gave such order myself.

November 29.

Mr. Fisher. While I was engaged in counting and sealing the the coin in February and March last, I heard of no complaint in regard to the quality of wax used; know of no order being given for additional wax to be obtained, and certainly gave no such order myself. The wax I sold to Mr. Childs on the second occasion of his calling at my store, I did not see in the Cashier's room during the counting.

Cross-examined. There was one occasion that champagne was sent to the bank during that count, and it was sent by private Directors; there was nothing convivial on that occasion, but two bottles were drunk, and some six or seven persons were present. A basket was sent to the bank, and I am certain that I paid for it. The Committee, President, Cashier and Mr. Childs were present on that occasion; I did not see Bowlin drink any.

Mr. Helfenstein. While engaged upon the committee in counting in February and March last, I heard of no complaint in regard to the quality of wax used in sealing; know of no order being given for additional wax to be procured; heard no such order, and certainly gave none myself. I am not aware that additional wax was brought to the bank during that count.

Judge Shurlds. As stated in my previous examination, I was sick in December last; have no recollection of being in the banking house on Sunday since then, except on two occasions—one of these occasions was the Sunday after the large fire on the seventeenth of May, and the other occasion was on the Sunday after Mr. Childs was arrested, when I went into the Cashier's room to write some letters. Am satisfied that with these exceptions, I have not been in the bank on Sunday since my illness in December last. On the first occa-

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sion I was passing by the door, and observed Mr. Atherton, Mr. Barry and Mr. Way, standing inside the bank, when I went in for a few minutes, and left them there when I went out. Bowlin left the bank on the fifteenth of May, and if back at all, on any occasion, it was after his successor was appointed; have no recollection of getting the keys from Bowlin at any time since the first day of January last to the time he left. When I was advised of an attack on the bank, I, every evening, would go around the bank with Bowlin, previous to his leaving, in the evening, to observe that every thing was right.

Cross-examined. Between the time Bowlin left and his successor was appointed, the young man who slept in the bank carried the key to the back door. The young gentlemen in the bank, on the Sunday referred to, were all engaged in the bank; they may have been at work, and my impression is that Mr. Barry was at work. Never gave them orders to work on Sunday, but have ordered them to have their work up; I never told them that six days shalt thou labor and do all thy work; kept no private office or study; when about the house on Sunday, I was generally up stairs with my family. Previous to my sickness have been in the banking house sometimes on Sunday; my mode of access to the bank at that time was through a door from the foot of the stairs, in the residence, through the lumber room, the bars across the door being left down for that purpose; since the time mentioned by Bowlin, (early in February) these bars have been down on no occasion to my knowledge.

Mr. Walsh. Have no recollection of giving instructions to any body about getting additional sealing wax during the counting of the coin in February and March last. Bowlin was about the room while we were engaged in putting up the boxes; have no recollection of making any remark about the quality of the sealing wax.

Mr. Heiskill. I recollect no conversation among the committee with which I was engaged in regard to the quality of sealing wax used in sealing the boxes of foreign coin; I gave no direction for additional wax to be obtained, and heard no such order given by any of the committee. I know of no additional wax being brought to the committee during that counting.

Mr. Geyer announced that they had gotten through with all the witnesses they proposed to examine, except Mr. Sarpy, who as yet was unable to come out.

Mr. Bates announced that the defense had no other witnesses to examine, and that they were willing to let the jury take the case without argument.

Mr. Geyer said if such a proposition had been directly made, it would have been rejected for reasons that must be

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apparent. The cause, from the circumstances which had taken place during the investigation, required it as a duty, from which we dare not shrink, to examine the testimony before the case was given to the jury. Under the rules of the Criminal Court, and inasmuch as they had opened the case to the jury at the commencement of the cause, and inasmuch, further, as the defense had not as yet opened upon their side, it devolved upon them to commence the final argument in this cause.

Mr. Bates contended that after the evidence in a case was concluded under the twenty-sixth rule of the Court, it devolved upon the prosecution to state the facts proposed to be relied on in the argument, and the law proposed to be brought to bear upon it.

The COURT decided that the junior counsel for the defense would open the case to the jury.

THE SPEECHES OF COUNSEL

MR. BLENNERHASSETT FOR THE DEFENSE.

November 30.

Mr. Blannerhassett said he was not insensible to the fact that the jury must regard it as a great tax on their time and patience for counsel to address them on this matter, yet he thought they would all see the propriety of continuing the attention which had been bestowed throughout the examination until the cause was closed and submitted to them. They must not imagine that speeches were made to them because it was thought necessary in order to get a verdict of not guilty at their hands. Counsel were not here defending Childs from the penalty of the law simply, nor were they going to "invoke the clemency or humanity of the criminal law" of the jury, for the purpose of getting a verdict of acquittal—they had a higher and holier duty to perform than that—the duty of absolving him even from a suspicion of guilt. They wanted, by a calm and deliberate investigation of the facts, to send him abroad without a stain

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or blemish upon that reputation which was unassailed and unassailable until the blighting and contaminating touch of the Bank of Missouri and its officers was brought to bear against him. His occupying the time of the jury, and trespassing upon it, was cause of embarrassment, yet there were other embarrassments to him in this case. We had all heard the great mass of evidence which had been introduced—had heard it as impartially as our minds could be brought to bear upon it; and to take it from beginning to end, he would ask an impartial mind to point out one fact, or any number of facts, that had been proved, taken together, and upon which, as an honest man, he could say the defendant was guilty of the charge against him. It was embarrassing for counsel to argue, when there was nothing for the mind to grapple with; breaking ground, as it were; groping in the dark; contending against a shadow without a particle of substance upon which to predicate a conviction; and this was his situation.

The defendant had passed through a fearful ordeal. He remembered well the feelings with which he first heard of the charge against the party on trial; he thought of those who were making the charge; he thought of the ordeal through which he would have to pass to preserve his innocence. The peril in which he had been placed upon this trial, was a fearful one; around him had been concentrated the influence of a host of men who do not peril one dollar of money out of their own pockets, but who stand behind a powerful monied influence, which enabled them to bring upon his devoted head might and weight. There was not a Director, Cashier, or other officer of that institution, but what had combined all the power and influence which wealth enabled them to exercise, in order to shift the responsibility from themselves; the influence of money was powerful—it runs into every nook of society, pervades every place, the castle as well as the cottage, and sets minds to work in an extraordinary manner—when the holders of it go to work in order to crush their victim and do not accomplish it, he

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must be protected by a power greater than the power of man. That such influence and power had been displayed in this case, no one can deny; that it had been brought into requisition, the witnesses themselves prove. Every fact furnished additional evidence of the fearful ordeal through which he had passed; but, thanks to the law and the institutions of the land that throw a shield more powerful than gold around him—he is enabled to demand of the jury a fair trial, and to stand up against monied power, concentrated or scattered abroad.

He felt that this case had not been tried as cases ordinarily were in the Criminal Court; the peculiarity of the trial had been such as to oblige a departure from the ordinary course. No man who practiced under the criminal law, or who had read one page of it, but who had ascertained that great landmarks have been erected for courts, regulating the manner in which trials should be conducted, so as to produce just results; in this case, he was forced to the conclusion, that these landmarks, old as the law, had not only been defaced and obliterated, but completely stricken down. No one was to blame—not the counsel for the prosecution or the Court—but he felt that it was to be attributed to the inherent defect in the charge preferred against the defendant; a charge, from beginning to end without a shadow of proof; a charge preferred and sustained by proof that would not even justify a magistrate in committing the party for trial. For I assumed (I even took it as proven) that on the eleventh, twelfth and thirteenth of August, in which time dates the arrest of Childs, the officers of the bank and everybody connected with it knew as much as the facts can prove now, and I contend that the selection of Childs was just as reasonable and just as much warranted by the law and evidence, and the principles of justice, as would have been the selection of myself, or any other person in the court room, except from the fact that he happened at one time to be an officer in the bank.

When a man is to be tried in this court for murder, or

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other crime, the Court will not trouble itself about ascertaining who did the deed, unless it was first proven that it had been done. This was a plain principle, that must come home to every man's mind. A man is not to be tried for stealing, unless it is proven that a larceny has been committed—and here it is that the old landmarks of the law have been destroyed in this case—and why? Because the Bank of the State of Missouri required that it should be done; that is, it was said $120,921.62 had been taken from the bank, and it was necessary for the purposes of justice that the doors of the Criminal Court should be thrown wide open, that the machinery of the criminal law should be set at work, that an investigation should be had, and that Childs should be selected on whom to fix suspicion, just because he happened to be an officer in the bank at one time, and at the time the charge was preferred happened not to be in the bank. This was the only excuse that can be found for this extraordinary proceeding.

He asked the jury to go with him quietly and calmly into an examination of the cause. He would advance it as a settled principle (knowing that he would be followed by gentlemen of high legal ability, who would correct his proposition if incorrect) that the bank has been, as it should be, on trial in this court, and not Childs; and whether the conduct of its officers be attributed to mistake, ignorance, dishonesty, or what not, it would be his purpose, on evidence introduced by these bank men, to show that their action in the arrest of Childs was not only unauthorized, but that the officers have exhibited a course of proceeding in the management of the institution—that they had betrayed a course of conduct in reference to the party on trial— which should invoke the deep and eternal indignation of every man who regards personal rights as worth preserving. For one, he would not bow down to the bidding of any such institution as the officers of that bank had proved it to be; he would as little regard its vengeance as he would despise himself if, on this trial, he courted its favors, directly or indirectly,

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when the consequences may be so vital to the defendant, or to any man that they may see fit to select for the purpose of covering up their own blunders and mistakes, or if you please, their own dishonesty.

He held that on this trial it had not been proven according to law, that the bank had lost the money it says it has. Here was the first point in this case, and the first point in every case. What is ordinarily understood in technical phraseology as the body of the offense, has not here been proven. It is a legal principle, that testimony required to prove the body of the case—the loss of the money—is of a different character from that necessary to prove a party guilty; he meant by this, that the jury must have positive evidence that crime has been committed by somebody before they can go an inch further. When a man is on trial, charged with an offense, if positive evidence cannot be given and circumstances are resorted to, it must be positive and proved in point of fact that the offense had been committed. His legal proposition was, when there is no positive proof that any offense had been committed, and the prosecution resort to circumstantial evidence, the circumstances when proven must bring conviction to the mind, so that it can repose undisturbed by the least glimmer of doubt, and leave no room for argument. Thus, in the offense of murder, you cannot try a man until somebody is murdered, and to prove the murder it won't do to prove that somebody fell out of a third story window and was killed; it won't do to prove that a man left his home and was gone twenty years, then take a party up and introduce circumstances to show that the man lost his life by violence; the body must be found and the jury must be satisfied that the man is dead, and that he came to his death by violence. The principle was the same in regard to larceny. It was an absurdity to talk about convicting this or that man of stealing, as long as there was a doubt on the mind whether anything had been stolen or not. It was absurd, laying aside all principle of law, and cruel, that you are to jeopardize the character of a man, by accus-

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ing him of stealing money, when the very fact of the money being stolen depends on the recollection, and there is a possibility that the man claiming to have lost it may not have been robbed.

He had another cause of embarrassment in this argument: he did not know whether or not they were trying the fact that the bank had lost $110,000 in ten thaler pieces, and $10,921.62 in sovereigns—making the sum of $120,921.62—no one could tell; he had been four weeks at this table, and when not here was elsewhere trying to figure it out, and could not tell. He asked the gentlemen engaged in the prosecution what they were going to ask the jury to find? In this respect it was a remarkable case, and it was one of the reasons why he felt anxious that the prosecution should commence the argument, and state what they believed the bank had lost. This was the difficulty in which they were placed, and twenty-four hours' deliberation on the part of any juror could not explain what the bank had lost. You may have a suspicion, if you please, that so much money was lost, and that Childs, or Shurlds, or Hurschberg, or somebody else in the bank took it, but you can't tell more. We are talking about the starting point, in this connection—the proof of the fact, without suspicion and without doubt. What has the bank lost? No man in the Court House could tell—no Director dare swear to it. If my memorandum is right, there was just so much in the fifty-seven boxes, says the Director—that is it; they have no knowledge upon which to state the fact—not a bit. It was a strange, unaccountable fact, that a man's liberty should be put in jeopardy—his character impugned—and he placed in the criminal box, when no man can swear that he has lost anything. The veriest object in the shape of humanity that walks, can claim more consideration at the hands of the law than to be placed in such a position. The beggar, the man without character, who moves through the world a blank, in our country, where personal protection is guaranteed, can demand the consideration of law—but not so this de-

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fendant; he has gotten along too well in the world—he has lived, not for himself alone, but for the good of his fellow-men—quietly and unostentatiously, has wended his way over a thorny path—was too good and cut too pious a figure. This is the complaint. The finger of envy was pointed at him—the man of avarice had marked him as a victim—the old landmarks of the law were to be trodden under foot, and he is to be offered up as a sacrifice for the sins of the bank officers: fatal day for any man who values his reputation, to have anything to do with such an institution!

He said he would now make it a matter of grave argument, by facts and figures, to show that the bank had lost nothing —no money at all. The witnesses introduced by the prosecution do not swear that a single bag was taken out of those boxes, except so far as their memory is aided by a memorandum, from the time of the February and March count to the time this trial commenced. Take Heiskell, for instance: if he had not been furnished with a memorandum from Shurlds, he could not have come into court and told the boxes he counted, much less their contents and the days on which he counted. When the counsel on the other side come to argue this case, they will have to take the specie books and semi-annual statements, and without regard to the testimony, take the memorandum made in September in connection with the specie books, put down the round sum, tell you it is gone, and advise you to find it so. It might be, that counsel on the other side would be able to establish the fact that the money was missing, but whether stolen, or paid out, was another thing. They certainly will be able to show that the most extraordinary blunders in the world have been committed by the Directors of this bank.

Let us see how they really fixed on the amount of $120,-921.62 as being abstracted. Bear in mind, it was on the tenth of August that box No. 30 was taken from the vault and opened, and a bag found missing; this gave rise to the proceedings of the next day and the thirteenth of August. It was then, I believe, there were various opinions in regard

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to the amount—at one time it was $20,000, at another time more, and it finally crept up to the sum of $120,921.62, and there settled. The great inquiry, of how it got to that amount, has not been answered before the jury. After this bag was missing, the August count commenced; and at the same time the directors were busily engaged with Childs; sub-committees were appointed for various purposes—one to go to the grave-yard, and ascertain the cost of a railing around the graves of his children—another to get his tailor bill, etc.—another to go to Spruce street, to see a lady, and ascertain if the missing gold was not secreted upon her premises; and these duties engaged the Directors on Monday, the thirteenth. On the fourteenth, these thirteen distinguished gentlemen (Angelrodt absent) got into the Cashier's room and determined to open all the boxes and ascertain their contents; Mr. Walsh, the oldest Director, takes the count, and from that count he tells you that, in round figures, $1,577,734.53 is the sum total of coin on hand. We will stop there for a moment. The last absolute count of the coin previous to this was in March last, when $1,566,458.36 was the amount of coin then on hand: so that, if you take a broad-cast view, they have really not lost any coin, because on the fifteenth of August they have $11,186.17 more on hand than they had in February and March. Yes, says one, but we have made up our minds that some money has been taken out, and so it has been proclaimed, and now we have got to ascertain the amount. But, says another, how are you going to tell that? In order to get at the matter, you must know how much coin has been received since March and how much paid out; and according to the result know whether we have lost anything or not. Stop here. What does Mr. Walsh say? "The difference between the two counts was $11,180.27, and at the August count we had no data to show the amount of coin received and paid out in the interval." As they could not tell the cash or coin account in August, between the interval of March and that month, it was then really a matter of ob-

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scurity whether they had lost anything. Mr. Walsh was mistaken, if the specie book was made up every week as it has been stated, for that would furnish him the data. If, however, the specie book for the week ending August 11, had not been made up on the fifteenth, then Mr. Walsh testified correctly, and had no data, and the flurry about the bank, and among its officers, makes it probable, that the weekly specie balance was not furnished up to the fifteenth, and they really acted without data. However, Mr. Walsh fixed himself at $11,186.17 as the amount over the March count then found on hand. There was paid out of the bank during the week ending August 11 (remarkable circumstance, connected with this alleged abstraction), $198,571 in coin, and taken in for the same period, $93,936.93—leaving the amount of $104,634.07 as the sum paid out over the amount taken in; for the week ending August 4, there was paid out $134,770, and taken in $149,743.70—leaving the sum of $14,973.70 as the excess taken in over the amount paid out; for the week ending July 29, there was paid out $170,618, and taken in $134,881.07—leaving an excess paid out over the amount taken in of $35,736.93; and for the week ending July 22, there was paid out $125,907.27, and taken in $145,471.91—leaving an excess of $19,564.64 as the sum taken in over that paid out. Thus showing, in the period of four weeks previous to the discovery of this alleged loss, the sum of $105,832.66 as an excess of coin *paid out* of the bank over the amount taken in. Well might Mr. Walsh say they did not have the data when they settled upon the sum of $120,921.62 as the amount abstracted! This data, which Mr. Walsh did not have, he endeavored to make a calculation upon, and how does it work? Take the sum of $1,698,656.15 as the amount of coin on hand August 15, then deduct from the sum of $1,566,548.36, being the amount of coin on hand at the close of the March count, and you have left the sum of $132,107.69; deduct from this the sum of $11,186.27, the difference between the two counts, as reported by Mr. Walsh, and what have you left? The

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sum of $120,921.62. The Directors then adopt the idea that this amount was taken from the fifty-seven boxes of foreign gold, and go to work to calculate accordingly. One of the Directors comes into court with a memorandum, and states that in March the amount of ten thalers counted was $428,858.38, and at the invoice of coin in September the amount of thalers in these boxes was only $318,958.38, showing an abstraction of $109,900 in thalers; add to this the bag of sovereigns alleged to have been abstracted from box 11 ($6,171.72) and the bag from box 30 ($4,850), and that will bring out the sum of $120,921.62 as the amount abstracted; and this is the way the counsel for the State will argue that point.

All of these fifty-seven boxes, in which foreign gold was packed at the August count, have been put in evidence on this trial, and he had taken the trouble to take off the contents of every box, in regard to thalers—having thereby the same means the Directors had for that purpose, and, unless he had made a mistake, the amount of ten thalers in all of them was only $416,426.08, showing $12,432.30 difference between Mr. Christy's statement and what he found by the memorandum on the boxes. How did the Directors get at the number of thalers counted in March? From the endorsement on the boxes, or the memorandum taken at the time of the count? None have said an invoice of the various kinds of foreign coin was taken in August. The number of thalers then counted was all a matter of figures and calculation, and if in that they have made a mistake, they may be incorrect in every particular.

November 30.

Mr. Blennerhassett. The evidence had not proved the fact of the loss of the money. The data by which he was governed was within the reach of anybody who had access to these boxes, and by taking off their contents as marked upon them, it showed a total failure in establishing the main fact to be proved—that the bank had lost the money claimed in the indictment; and if they are mistaken in this, then the

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basis of the charge falls to the ground, and they have no foundation upon which to maintain their case. In point of fact, instead of $428,858.38 in ten thaler pieces being put in these boxes in March, there was but $416,426.08, and in this estimate he had calculated the contents of box 5 (which, upon being produced in court, did not purport to contain ten thaler pieces), and had also included a bag of Prussian thalers in box 57; take out the contents of box 5 and the bag of Prussian thalers in box 57, and this amount is considerably more reduced. How is the matter further proved? Witnesses are asked to testify to the value of the different kinds of thaler pieces, and they give them of different value, from $7.75 to $7.90, and they tell you they were put in these boxes at $7.85. At what rate were they all counted? Take a great many pieces of this kind of coin and deduct on each but five cents, and it will make a great difference in dollars. It has been testified as a fact, that when the bags were filled and placed in these boxes, the lids were screwed down and sealed, and the amount and character of coin marked on each, yet, when we go to box No. 5, we find them at fault there, and the amount of coin only put down!

In order to prove whether there was any mistake about his calculation of the amount of thalers the boxes contained, he (Mr. B.) went to the fifty-seven boxes, and took down the quantity of coin they contained, excepting thalers. Recollect, they assume when these boxes were counted in March, they contained in all $969,360.92. He found, then, the result of his calculation to be $552,934,91, to which add his calculation of the amount of thalers, $416,426.08, and the aggregate contents is obtained—thus proving his proposition correct, viz.: a difference of $12,432.30 in the amount of thalers which the bank claims they contained and the amount they actually did contain, according to the memorandum upon them. If he was correct in his calculation—and he thought he was—then the fact was before the jury, that the Directors had made a great mistake in reference to this matter. He would show mistakes in other matters.

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Mr. Shurlds was asked if he stated on the direct examination that fourteen of the sixteen boxes from which abstractions were made each contained two bags of ten thalers, and he said he knew nothing about it himself, except from the memorandum made by the Directors, and upon that he makes affidavit for the arrest of Childs and for a search warrant, in which he swears to a certain number of pieces of coin, of certain value, as having been abstracted. At that day and time, it was no difference to the bank officer as to the peculiar kind of coin sworn to; and he threw that as a strong circumstance to establish his proposition, that the dividing of thalers and ascertaining the amount in these boxes was a second consideration, and for the purpose of bringing about the amount said to be abstracted from the bank. On his examination, he swears that fourteen boxes, from which abstractions were made, contained each two bags of ten thalers. How is this? Box No. 5 contained three bags, two of Prussian coin and only one of ten thalers, and boxes 8 and 14 contained only one bag of thalers. Is there no mistake about this matter—this main subject? Is it not clearly proven and admitted by witnesses on the stand, that box 30, in point of fact, contained four bags when opened, and is so reported on the original memorandum made at the time of counting, and yet, it is alleged that one bag of sovereigns was abstracted from it? Mr. Christy says, "Oh, it was a mistake." That is what we are talking about; and from the number of mistakes, it becomes a subject of grave argument whether the whole matter was not a mistake.

Mr. Blennerhassett reviewed the manner in which the February and March count was conducted, in regard to which the testimony was not clear, and certainly not positive, but in which large and enormous mistakes might have occurred in marking on the outside of the boxes, or taking down on the memorandum, their contents. There was a mistake in regard to box 30, and the same might have occurred in regard to twenty other boxes. The Directors say it is not so; now test that, and can the jury be satisfied that it is not so?

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Can any Director tell, of his own memory, how many boxes, much less their contents, he counted? Not one. They had to depend on a memorandum. How was the memorandum made? Did each one keep a memorandum of his own? No; it was a general one, used first by one sub-committee and passed over to the next, until the counting was completed. It may be correct and it may be erroneous. That they were not confident of the correctness of their count in February, is manifest, and hence they had to make another count on the sixth of September. They were not satisfied with their count in August, when they went over those fifty-seven boxes to ascertain the amount lost, and upon which examination they fixed the amount abstracted; but they subsequently went over all the coin, gold and silver, to ascertain the actual loss upon correct data by the amount on hand in February and the action of the bank in the interval. If the paper memorandum of the contents of the fifty-seven boxes was correct in every particular, they would have saved any further examination; they would have said from $969,360.92—the stated contents of the boxes—there was missing $120,-921.62, and there they would have stopped; but they had no confidence in this count as is proven by the statement published at that time.

On the thirtieth of June, the bank made its semi-annual report of its condition; at which time, according to the statement, it had no knowledge of its loss. A month and eleven days intervene, and these Directors go to work and count the coin, and publish an *expose* of the bank and its branches. Why include the branches in the *expose* published on the fifteenth of August? Did either of the branch banks lose any money? There would have been no necessity for an *expose* at that time were it not for this loss, and yet the Directors thought it would look better to put out an *expose* of the condition of the mother bank and branches. And mark, this statement published on fifteenth of August was not true in point of fact, and is admitted not to be true. In it they publish, under the head of *resources*, "gold and silver

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coin on hand, as appeared by boxes that had been sealed and marked by the Board, and counted and weighed, $2,226,-915.52." Why put out that statement—was it so? In regard to the amount of coin, it included parent bank and branches; but what Director attended it, and what officer informed them that the coin of all the branch banks was counted, boxed up and sealed? Not one. But by whom does this *expose* say it was done? "By the Board." What Board? Any ordinary man, taking this statement, would say by the Board of Directors of the parent bank; that the Board really marked and sealed the $2,226,951.52. No one pretends that this is so. The fault and peculiarity of the statement is, that they did not know the condition of the bank, and wanted to make the best face they could to the public in the report of the thirtieth of June, they give the item of profits at $240,659.90, and in their statement on the fifteenth of August, they give this item as the same. Had the bank made no profits in the meantime? The bank had sustained a loss, and it was necessary to satisfy the stockholders and *assure* them. Ordinary men will not go into a calculation of figures, but take results—it was necessary to show a firm basis and restore public confidence, and hence the amount of coin is fixed at $2,226,915.52. The loss by the bank has gotten rumor, and they turn upon Childs; the cashier's room is turned into a court, and inquisitions established; our duty is now to bring the matter before the Criminal Court, show that Childs had possession of this money, perhaps keep the jury in doubt—throw suspicion on him, and the more strongly suspicion is upon him, the better we will get out of the matter ourselves; if it was only $21,000 we would not trouble ourselves about it, but as it is $121,000, we must see to it; so they go to work.

He was struck with surprise when the gentleman who opened the prosecution announced that perhaps that amount of money was not there in point of fact during the March count, but was covered up by a kind of *hocus pocus;* and that it was for the jury to say that Childs, ever since

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he went into the bank as Teller, had been taking $10, $20 and $50 bills, and perhaps a little gold and silver, until it got to the amount of $120,921.62; and then, when the February and March count came about, that he went into the vault, and when the Directors sent a box down to him he had a candle ready, to apply to the seal, then unscrewed the lid, took out a bag and sent it up again, when it was counted twice, and in this way covered up his prior defalcation?

He thought there was some mistake about the matter when the rumor was first given out that the bank had lost gold; then that they had lost no gold at all, but paper; and this is what we have endeavored to get the prosecution to allege. The defendant is a man occupying an interesting position in the community; you say he has embezzled $120,921.62 out of the bank; as a mere matter of humanity and mercy, say whether you mean to ask these twelve jurors, young and old as they are, for a verdict for stealing gold or paper. No, you won't do that. You are going to give the testimony to the jury, and when you get it cooked will serve it out to them, and they can do as they please with it. He thought they had been too long about the dish and spoilt it; and when the question was presented to the Court for the purpose of compelling the prosecution to tell what ground they intended to insist upon, the senior counsel, with all his sense of justice, could not be coaxed to announce to the jury what points or fact, they were trying. This satisfied me that the conclusions arrived at by the calculations, had compelled the officers of the bank to abandon the idea of gold being stolen, and as they had gotten their foot in the trap by insisting on the prosecution, they would shift their position—let the gold go overboard—and go for a paper abstraction; their figures and calculations would not bring them out satisfactorily in regard to gold—they couldn't back out—and now they wish to make it appear that he stole some *paper* money. Is there any proof that he stole paper? They introduce Clark, the Receiving Teller, and he says

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there has been no paper money taken at all; he says the paper money was kept in a safe in the vault, to which no one but himself had a key, and that which was in the chest he kept *it* in such parcels that no considerable amount could be taken without his knowing it, and he insisted that none had been taken. Bear in mind, that there was a count in December, '48, February and March, '49, a semi-annual count in June last, the special count on the fifteenth of August, and another on the sixth of September, and it has never been pretended, directly or indirectly, that a single $10 bill has been missed from the bank, and the only testimony in this cause squinting that way is the testimony of the young man at Clark & Bros., who did swear, that Childs at one time brought some paper money to that office which smelt of the vault. Is it not an extraordinary idea, that men—the business men having charge of the bank—laying aside the common dictates of humanity, and all those principles which should govern man, should permit so trifling a case to be fastened upon them, by presenting to a jury the magnificent idea, that gold was lost and not lost—that paper was lost and not lost—that silver was lost and not missing? It was extraordinary that the time of twelve men should be taxed, the public interest made to yield to the bank, and character and liberty and reputation put at the peril of a trial, by such testimony as this, when such circumstances are relied upon for a verdict? The proof authorized the assertion that truly this defendant had passed through a fearful ordeal. If Childs were really guilty, there had been means resorted to, and vigilance used and exercised in procuring testimony against him, that would prevent the bare possibility of escape, no matter how ingenious he might be in avoiding detection. The bank and its officers and agents had been to every broker's office in this town, every clerk's memory had been brightened by inquiries brought to bear upon it, everything had been brought to their aid, everything hunted up against him—even from the grave of the dead—and if there was the least lingering suspicion of guilt, they would have

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had it before this jury. After all this, what is the lingering suspicion—"that some paper money which did not look as if it had been handled by rough hands, was brought into Clark & Bros., by Childs," and this young gentleman paid great attention to it; it made a great impression on his mind; it was the great embodiment of larceny; he thought of, and about it, from that time to this, and may have dreamt on it, and afterwards being brought in here to testify to it! Strong circumstance! The ingenuity of counsel on the side may have a great deal to *say* about it, but nothing to *argue*. What's the last idea? That Childs did not take gold, but took paper. He held, therefore, that the starting point in this prosecution had not been established; he held that there was no proof, such as the law requires, and any man charged with crime has a right to demand that the money has been lost out of the bank. He took higher ground—that, under the constitution and the laws of the land, which regulates the trial of men, the prosecution had totally failed to satisfy the jury of the first great fact to be established. The defendant, according to the evidence introduced for twenty-one days past, stands before this community, and the world, as absolved from the crime—as free and clear from it as does any one single witness connected with the bank, who has sworn against him.

He doubted not but that opposite counsel, in reply, and by aid of memorandums made out since the prosecution commenced, would argue quite differently; but if they took the data furnished by the proof, there could be no material difference. The bank Directors come into court with a memorandum which, they say, was furnished by Mr. Shurlds; and knowing nothing about its correctness, they testify upon it what they did in February and March. Suppose this data not to be erroneous, and that the bank lost $121,921.62 in gold, or silver, or paper, the question arises, who took it? Assume, for the sake of argument, that the bank sealed up fifty-seven boxes of gold, of various denominations, and, during the boxing up, somebody, by some *hocus pocus,* got six-

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teen bags out, making $121,921.62; and suppose, as a mere matter of suspicion, that Childs, being Teller and cognizant of all that was going on, was the man, did it not occur to the jury that if he was ingenious enough to accomplish it, that he would be smart enough to conceal it? Occupying the position which he did in the bank, and knowing that sixteen boxes each were minus a bag, and might be discovered, and would be discovered at the semi-annual count in June, was it not an absurd idea that he should, against the wishes of the Cashier and a majority of the Directors of the Bank, resign his place, and give the possession of these very boxes to a man who would be the very one to detect him? Would he not have remained in the bank just as long as he could, so that when anybody called for 80 or $100,000 in gold, he could go down into the vault, and select any other than a box from which an abstraction was made? Could he not, and would he not, have done that? It was absurd to contend for such a proposition. Had Childs taken that money, or any part of it, believe me he would have stayed in the bank and watched the boxes, if taken in fact in gold, and made false counts, or procured false counts to be made, in order to cover up the abstraction. He must have known that, in forty-eight hours, one of these boxes might be required for use. He would have remained there, and prevented anybody from handling them; and as long as he stayed in the bank he could have prevented any detection so far as he was concerned.

He asked, taking the testimony adduced in this case, and putting the President, Tellers, Clerks, and Cashier on trial, whether Childs would not be the very first man for whom they would render a verdict of acquittal, except for the strong point developed—that he had the opportunity. Because he had the opportunity, therefore he did it! He did not say that either of those gentlemen stole the money, but, apply to them the rule applied to the defendant, and they were in just as bad a box. Their opportunities were just as good. When the bank commenced operations, according to

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the evidence of some of the witnesses, they did not know what seal they would use. They sent Angelrodt for a seal, and he brought a Prussian seal, which they declined using in consequence of its official character, and after this, for the first time suggested, they picked up an old seal and used it. Before that count, Childs did not know that they would use that seal. But counsel will say it was laying about the room several days after they commenced sealing, that he got an impression and had a new one made, and used the old seal until he gave it to Angelrodt.

It was not in evidence that the seal was out of the Cashier's room one day from the commencement of the counting up to the time it was given to Angelrodt and by him to Shurlds. Is it not absurd to contend, that Childs could have gone into the vault, abstracted this money and re-sealed these boxes, when somebody had access to the vault at every moment of the time, with not one chance that he would escape, and a hundred that he would be caught? He left the bank early in May, and the count was concluded the twenty-fourth of March—even if he had the disposition he must have taken the money between that period—and is it in evidence that even then he had the opportunity? They forget that his successor had double that period of time up to the discovery, and with the very same opportunities that Childs had—call that gentleman on the stand, and he will tell you that he can go into the vault at any moment, and no person who has not the keys can go in and steal that money. It was sophistry to contend that Childs had, from the twenty-fourth of March to the eighth of May, in which to steal that money; and he is guilty, while another man, with double that time, is innocent. It was no injustice to any of the officers of that bank to draw a comparison between them and this man on trial. Their integrity, honor and honesty is not going to lose by that comparison. Put the successor of Childs on trial; he had access to the vault; you find him when box 30 was paid to Page & Bacon, on the tenth of August, and although absent at the time it was opened, and while a por-

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tion of its contents were counted, he is the very first man to discover that a bag was lost. Take another circumstance (which, if proven against Childs, would be strongly urged), when the box was paid over to the young man of Page & Bacon, the Teller refused to let them take it from the bank to be counted, as was customary—mistakes either way to be rectified—and declared himself not responsible for its contents.

Take Cochran and try him. In point of position, he may be as respectable as anybody else. When you try Childs, try him too. Did he not have a better opportunity than anybody, if he desired, to steal the money? Suppose he obtained an impression of the keys to the vault, as they were thrown about the bank, and got a set made from the impression, what was to prevent him from going into the vault at night and taking as much time as he wanted to accomplish the abstraction? All he wanted was the seal, and his opportunity for getting an impression of it was just as good as Childs'. He slept in the bank all night—had an opportunity of getting the keys and seal—had his own time to accomplish it—and could as well have done it as anybody else.

Take Shurlds and put him on trial. He had keys to the vault and the seal, and access to the bank every Sunday from the twenty-fourth of March up to the eleventh of August, and what was in the way of his doing it? He lived in the banking house, and it had been proven that he directed the porter to leave the bars off the door in order that he might go into the bank on Sunday, to write letters. He being, by virtue of the charter, in possession of the coin, and with these facilities, had a better opportunity of doing it than Childs.

Suppose we take the Directors and these sub-committees (for they are just as much liable to suspicion as is Childs, whose moral character stands just as well as theirs), and pick up circumstances against them. They say the amount of ten thalers counted in February and March was $428,858.38, and they were placed in these fifty-seven boxes.

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He would show that one committee counted just that amount of the contents of these boxes. Mr. Yeatman says it is the amount his committee counted—"the aggregate of foreign gold counted and boxed by the committee with which I was engaged was $428,858.28"—only ten cents difference; it was a remarkable coincidence. Without thinking of this fact, the Directors, to suit this case, go to work and separate the thalers from other coin counted in March, and the difference between the count of one committee and the aggregate of that description of coin was only ten cents. To take the round figures as data, one would infer that that committee counted nothing but thalers. If there was any *hocus pocus* about the bank, any mystery, it seems to be an unaccountable circumstance that one committee should count within ten cents of the very amount of thalers, it was important to show was in these fifty-seven boxes.

Let us suppose that, of these fifty-seven boxes of foreign gold, sixteen were minus a bag each—could it not have been done in the counting room? If the three or four gentlemen, on any one of these counting committees, should have made up their minds to feather their nests out of the bank—and many extraordinary things had been done by men connected with banks, before the Bank of Missouri had *hocus pocus* practiced in it—suppose they made up their minds, and conspired to take an amount of money to pay for some purposes of the bank—did they not have an opportunity of slipping a bag from these boxes; a better opportunity than Childs had—infinitely better? Before the seal was put on the boxes, or the contents marked upon them, it might have been done; and if done at all,, could have been done by any man who had access to the Cashier's room during the count.

The jury has heard much evidence in regard to the private affairs of Childs—his style of living—from which the idea was taken by the Directors, that he was pilfering from the bank. They set themselves to work and attempted to show possession of no such property—extended the inquiry to a period long before he came to the State or the

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Bank of Missouri was in existence—and by this expected to leave an impression on the mind of some man in the jury box, that he was guilty. The prosecution introduced this testimony with double effect—to disprove a statement made by Childs to the bank last spring, and to show an excess in his manner of living and accumulations. After all the testimony introduced, every single fact in that statement was corroborated and not one single fact contradicted. Their search had been vigorously prosecuted—the widowhood of Mrs. Whitlock and the age of Mrs. Hayden furnished no protection against their monstrous and iniquitous proceedings. "Have you given up all, Mrs. Whitlock?"—"haven't you got a little tin box"—"we come as friends to you, in order to disabuse the public mind"—strange mode of proceeding! It was not enough to charge the defendant with robbing the bank, but something else had to be started—"his profession of religion was all hypocrisy and only a cloak to cover his misdeeds." Even the character of woman—"improper intimacy"—had to be sacrificed—to such an extent of madness were these reports concocted and circulated.

It was an extraordinary thing to charge a man with crime simply because he happened to get along too well in the world. A crime to be rich! A lesson was to be learnt from this trial, and if a man wants to get along well, he must keep a diary of his proceedings—how he made this or expended that—so that when they are brought up before a jury, they could show it. It is only extraordinary that the defendant had accounted for the little property he has, so satisfactorily; he was a business man, and had a method of attending to his affairs, or else he might have been troubled in the task. "He has gotten along too well." True, his tax list don't amount to as much as some, and is more than others. In reference to that point, we have seen that he has accounted, and satisfied you beyond controversy, for all his property, without ever having got one dollar from the bank except what he got honestly. In this city, we find men who came here seven or eight years ago, who had no profession

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or salary, as far as we observed them, and now see them putting up extensive buildings.

If the fact be established that the bank has lost this money, the responsibility was on its Directors; they are responsible if they permitted others to steal it; they are responsible for neglect and an ignorance of the duty which they assumed; and they are responsible to the people of the State if they cannot account for the manner in which it was taken away—hence their anxiety in order to get a conviction against this defendant.

In conclusion, in going over the mass of testimony, he had left a good many things unsaid that ought to have been said. He left the case of Childs in the hands of the jury, confident that every man he saw before him understood his duty as a juror; that no matter what efforts may be made, even to raise a suspicion from the circumstances of the case, their sense of duty would enable them to stand up and say: Away with suspicion and your vague presumption, when you ask us to mark with a brand the citizen whose life is a model in itself—away with them; we will send him forth with such a verdict as to free him from all suspicion.

MR. WILLIAMS FOR THE STATE.

Mr. Williams commenced by commending the extreme patience, and attention, and gentlemanly conduct of the jury, during a number of weeks not often occupied in the trial of a single case. In this particular he coincided entirely with the gentleman who had just taken his seat. That gentleman, he feared, however, had complimented the jury for their patience, because he well knew he was about to tax it greatly more—for, although he declared it in his opinion, entirely unnecessary to make a speech to acquit his client, or to dissipate even the suspicion of guilt; yet five long hours had passed by, during all which time he had labored most assiduously to convince them of defendant's innocence. He would not make any promises as to the time he should occupy. The conduct of the jury up to this period was a full guar-

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antee that he would be heard. He thought Mr. Blennerhassett might well be charged with insincerity—and such charge he hoped himself to escape. Whatever he might say —in what mode soever, without reference to time—he trusted he would be all the while sincere. He did not think with Mr. Blennerhassett, that the innocence of defendant was quite so apparent—much less was he above suspicion in this transaction. He thought it unfortunate that Mr. Blennerhassett should declare him so pure and spotless, and especially was it unfortunate to contend, that if acquitted by the jury, he would go unsuspected and unharmed, save by the contaminating touch of the Bank Directors. But most of all, was it unfeeling in his counsel to urge upon those who were to try him, that he should be acquitted, because he was too religious, too pious a man—lived too much for the good of others—not enough for himself to please the Directors. Too religious indeed! Many of those gentlemen were professors of religion, and loved a good man as did the jury. Many of them had knelt with the accused around the same altar of prayer—partaken of the communion at the same table—and often, with pleasure, heard him dispense to them and others the bread of life. Lived too much for the world, and not enough for himself! And with this, the Directors were displeased, and so persecuted him in a most lawless and high-handed way!

Mr. Williams named several of the Directors as men who admired just such a character as Mr. Blennerhassett accused them now of persecuting, and being heretofore the warm friends of defendant, had once admired him. But Mr. Blennerhassett had also appealed to the prejudices of the jury, and called upon them to remember that it was a large monied power on the one side and a humble individual on the other; and asked them to aid him in resisting such influences and in putting down the bank. He commented with severity on Mr. Blennerhassett's expression, that "the bank deserved the deep, everlasting and eternal indignation of every man who loved liberty," and dwelt at some length upon the im-

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propriety of such appeals to persons selected as jurors and sworn to try issues of fact according to the law and testimony, without fear, favor or affection, in this land of freedom; talk like this might do well enough among the bogs of Ireland, but it would find no favor in American breasts. Such appeals he thought on a par with most of the conduct of the defense throughout the twenty odd days they had been together. All the while, whenever opportunity presented itself, appeals of every sort and character were made by all the gentlemen engaged by the prisoner; they had permitted no one to escape—even unoffending and delicate female reputation had been hawked about by them with rude and ungovernable hands. They had lugged into the case "the handsome widow," (as she had been called by Mr. Bates) and her aged adopted mother, over whom they hoped to shed a few tears; and they had, by their own witness, attempted to inculpate Mrs. Shurlds, the respectable and delicate wife of the Cashier; and they had made a cut-and-thrust business, when they could, sparing no one—the counsel opposed to them, the witnesses for the prosecution—the Court, whose ermine was white and unspotted—had all been pierced: indeed, every one seemed to catch it, except the gentlemen of the jury, of whom they only seemed to stand in fear—with them and for them all were smiles and compliments. He himself had come in for no small share of their animadversions. It was apparent to the jury that he had been treated with extreme professional courtesy, social kindness, christian and gentlemanly deportment, by at least one of the defendant's counsel; such was the bitterness of the pelting storm raised upon him, that at one time he almost felt disposed to bow his head in silence; but, as he was conscious of having done nothing wrong—although, for reasons that must be appreciated, he had been quiet during the examination of the witnesses—he had concluded to present himself before the jury and discharge fearlessly and faithfully, as he could, the duty devolved upon him. Why his name had been so often rung in their ears, coupled along with the

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visit to Mrs. Whitlock, he was totally unable to opine; if done only to victimize him, he felt assured the effort would prove abortive with many of the jury, who had known him long and well, and he hoped it would fall powerless upon the community with which he had lived so many years. Whatever the intention of the gentlemen or the effect it might have, he treated both with deserved contempt.

It was not necessary to insure conviction that the State should identify the sort of money taken by prisoner, if indeed he took any. He was charged with embezzling the funds of the bank of the State of Missouri; and if it should appear from the circumstances that surround him, that he had taken gold or silver, thalers or doubloons, or paper money, he was alike guilty. A count in the indictment charged him with having taken gold; another, with having taken silver; another with having taken both; another, with having taken paper money; and another still, with having taken the funds of the bank. He might be found guilty under our criminal code, or under the forty-seventh section of the charter of the bank, no matter what the funds taken were, so they were funds, and no matter whether one hundred and twenty thousand or one hundred dollars. He agreed with Mr. Blennerhassett in the position, "that if no positive proof of loss of funds existed, the circumstances must be such as to leave no glimmer of doubt on that point," but expressed his amazement at the assumption by the counsel that nothing had been lost. He said he was not sitting where he could see Mr. Blennerhassett, or he presumed he should have observed a peculiarity in the expression of his mouth, or his eye, that unfailing index of the mind, such as the good Swedenborg said was sometimes observable in those members, when certain persons were saying what they did not believe. He could not believe the gentleman in earnest, until he was forced to the conclusion by his labored speech of five hours; and then he thought it argued but little for the innocence of the accused, that a lawyer of such experience and ingenuity should base his hopes of acquittal—not acquittal only,

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but of all suspicion of crime, on such untenable grounds. If Childs was innocent, why not meet the question fairly, frankly, and claim his acquittal on some sensible, reasonable presentation of the case? It is hardly worth while to notice such a suggestion, but as it has been urged with zeal and apparent sincerity, let us examine it, and if it turn out that the jury have any shade of doubt whether the gold has been removed from the boxes in which it was placed by or in view of the Directors, and indeed that the amount claimed to be lost, is not missing from the bank, then acquit the prisoner instantly. He contended beyond a doubt by the testimony of every gentleman who had been examined, that there were fourteen bags of ten thalers and two bags of sovereigns removed from the boxes in which they had placed them, or seen them placed, during the count in February and March last. He said there was no foundation in truth, for the insinuation that such count and sealing had been induced by suspicions of Childs; that such insinuation had been refuted by the evidence of Mr. Barnes and Col Campbell, who stated that as chairman of a semi-annual committee, two years ago, Mr. Barnes had recommended that the foreign gold (then quite a large amount being on hand) should be thus dealt with; that it had again and again been talked of before the Board, but never gone into until the second day of February last; that it was done with reference to the convenience of the thing; that it was counted by tare, and sealed and certified, that it might be more readily gone over at semi-annual or special counts—that it might be known as the amount of specie deposit of the bank—or, at a proper time, be ready counted for transportation east to be recoined, as was done with all the foreign gold of the bank in 1845—that it was done with a view to have it remain untouched as a circulating medium for years perhaps, or it may be till the charter was wound up; all of which was well known to defendant, who had been informed all about it time and again. All that is heard of suspicions against Childs, before the count, seems to have been what was said by Col. Campbell to Mr. Barnes, just before last

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Christmas. When those two gentlemen were talking about this very contemplated count, Mr. Barnes remarked that it would be well to have the count, whilst there was a Specie Teller in office in whom they all had confidence. Col. Campbell said, "perhaps you are not aware that Mr. Childs is not above suspicion in the estimation of some." On being answered in the negative, he said, he had heard suspicions of him—but this conversation had scarcely any influence on Barnes, who was then, and continued up to the hour of his resignation, his warm and devoted friend, and in the hour of need, stood by him with a helping hand, by offering the amendment of confidence of the Board to Sarpy's resolution to receive his resignation. And now, forsooth, when Barnes presumes to think and believe him guilty, his touch becomes contaminating and deadly! When are any other suspicions heard of? Not until the February and March count was completed. Then Colonel Brant, Mr. Walsh, and perhaps Mr. Sarpy, expressed that some things had been whispered about him, not calculated to do him good—particularly had it been said that he lived too high, and spent money too lavishly for one receiving a salary of twelve hundred dollars—and the twenty thousand dollars of gold lost two years ago was spoken of—and at the suggestion of some one of the Directors, Mr. Bay was required to examine into the amount of property held by him, which was attended to and reported —which appearing pretty large in amount, it was suggested, doubtless by some friend of his, perhaps Shurlds himself, who was devoted to him, that he be called upon for an explanation, which being done, he complied with the request, and made a statement (since destroyed by him) and that statement proved satisfactory. At the time he furnished the schedule of his property and effects, with explanatory notes, he tendered his resignation, which was not only accepted, but on motion, as before observed, a unanimous vote of confidence was passed.

Col. Brant told you about the suspicion, and was about to point out some one, in your presence, who started them

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or had something to do with starting them in his mind, but was stopped by defendant's counsel. After all this, the touch of Brant, Walsh, and Sarpy, because they dared to believe him guilty of the offense charged, is contaminating! Not only so, but you are told that everything is made to yield to the bank influence—that old landmarks of the law are broken down, and you are warned lest the very liberty we enjoy, and for which some of you, and most of your fathers fought, be crushed beneath the iron hoof of the monied institution. A general broadcast onslaught is made at all the Directors, not only as burglars, but as dishonest men, and men having no business capacity or talent; and you have been told, that if on trial, any one of them would be convicted sooner than Childs, and so with every clerk and messenger of the bank; and if Bowlin could be believed, even female purity and innocence would be engulphed and whelmed in ruin, while this pure and immaculate man would be pronounced innocent by acclamation.

Mr. Williams defended strongly the Directors individually —both as to their honesty and business qualifications—also the Cashier and other officers of the bank, protesting against the desire of the defense to make false issues and turn off the minds of the jury from the matters which they were called upon to decide. Again did he allude to the eternal harping upon his own name, and Mrs. Whitlock's house, and said that it was not true, as Mr. Blennerhassett had intimated, that the State had brought into this trial injured and unoffending females—widows and aged mothers—that the State had said not one word about them—that whatever had been said about them, was forced upon the prosecution by the counsel for the defense, who had, at the very commencement, brought Mrs. Whitlock before the public gaze, and finding that they were not likely to be successful in their efforts with her and her pretended mother—who is not of kin at all—they introduce a witness whose testimony, thank Heaven, is not and cannot be believed by any of you, to insinuate that Mrs. Shurlds stole the gold. Injured inno-

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cence! Ruined virtue! How dare they use such terms, after their course of conduct here? They deserve rather to be lashed with a scorpion whip naked around the world. Mrs. Whitlock, Mrs. Hayden, Mr. Williams, the Bank Directors, Brant, Christy, Walsh, the devil—anything to call your minds away from the question at issue. Permit them to cut and thrust everybody, and then acquit Childs amid shouts of acclamation, and they will be satisfied. He again referred to his own position in regard to the visit paid Mrs. Whitlock, and the note addressed to the defendant by him, and said that all these things might have been ruled out, but he did not desire it; he wanted no insinuations as to his conduct about anything; that in this whole affair he had not said, or thought, or done a thing, for which he felt any misgivings. He had no repentings to make; that no man had a right to call on him for satisfaction, for he had required none; that he believed in God as a pardoner of sin, and a punisher of offenders against His law, and that He knew that about this whole transaction, he had not been asked, and never would be asked, to forgive him, for he had done nothing of which to make such request. He then alluded to the charge made by Mr. Blennerhassett, that the Directors were not to be believed, because they were all interested in clearing themselves, and repudiated the thought of their perjuring themselves to convict any one. He also noticed the argument that they might have paid out the gold by mistake, and ridiculed it. He then denied that the amount of the thalers was arrived at by calculation, for the purpose of finding out how much had been taken, and contended that the amount missing was discovered on the eleventh of August, when the boxes were first opened in presence of the Directors, and referred to one of them, who had taken down, at the time, the amount of ten thalers in the February and March count, and paid a just compliment to Mr. Angelrodt, not only for his integrity and business capacity, but his sharp sightedness in seeing that a very large amount of that peculiar coin seemed to be on hand.

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He called the attention of the jury to the fact that, whilst the proof showed that the gold in the chests had been counted first, then the shelf gold, and last of all, that which had been received from the Sub-Treasury, which according to Childs' own statement, consisted of sovereigns, yet there were ten thaler pieces found all along the count—among the last boxes a double bag, and even in the very last, No. 57, a whole bag of such coin. He said it was a strong circumstance, as he would show presently. The count in December last did not exhibit more than one-half the amount of thalers, as was found on hand in February and March, about two months afterwards, and he called upon defendant's counsel to explain whence they came, and especially did he ask them to account for their running all along this count and down to the very last box. Well might Angelrodt note their immense number. Four hundred and twenty-five thousand dollars and more, a very enormous amount to have been acquired in four years, when, in 1845, after the bank had existed eight years, there was not one-third of that amount sent East to be recoined. Whence did such an amount come? He would show after awhile. He referred to the argument of Mr. Blennerhassett that the same mistake that occurred in No. 37, might have occurred in twenty boxes, and asked how it could possibly be, and still the amounts agree with what Childs represented to be on hand, as it did when the count was finally wound up, there being an overplus of only about five dollars. It was true he said, that defendant professed extraordinary powers in making his accounts always balance, but that would have been difficult, had such a mistake been made in counting, as the leaving off, or adding on to them, of twenty bags of thalers. He asked the jury if they had not been astonished at the wonderful facility with which Childs always brought out his balances correct? At one time, during this very count, the proof shows that Angelrodt made some mixed gold to overrun his say so, about four hundred dollars, and it was taken down accordingly, and yet at the end, all was straight: and when Walsh reported

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to him on the twenty-fourth of March, there was a difference of one hundred dollars, it was immediately set right by him.

He seemed indeed to wield the spear of Ithuriel, to possess necromantic powers, in producing even balances. He (Mr. W.) commented upon the use attempted to be made by Mr. Blennerhassett of the statement of Mr. Walsh in regard to the count in August, and replied at length to the argument deducted, that it was for the purpose, by calculation only, of coming at the amount lost. He contended that the loss of $120,921.62 was fully discovered on the opening of the boxes on eleventh of August, and so it was proved by every Director examined. He said that Mr. Brant was absent, as he had stated, when he first heard of the deficit, and might now be mistaken in supposing it was rumored twenty, then thirty, then 40, and at last $120,000, he being, as he assured us, in great distress of mind at the thought of the fearful odds there was against his injured present client, and weeping day and night at the fiery ordeal through which poor Childs had to pass in his unequal contest with this monster monied power. Had Mr. Brant been here, he would have seen the first statement of the affair to represent the loss correctly. It could not be otherwise, for the gentlemen who had a month before counted and sealed it, now opened it and found what was not where they had placed it. The gold had been put in the different boxes now deficient, with their own hands, or under their own immediate supervision and inspection, and when these boxes were opened a month or two afterwards, $120,921.62 were gone, or were not found where they had placed them. The first inquiry very naturally arose, who had done the deed? And is it not a powerful circumstance, not to prove his guilt, but against the prisoner, that without one dissenting voice, all the Directors cried out "it is he, thou Childs, art the man?" They had been his friends; they had been associated with him, some of them for a dozen years; had counted and weighed the coin twice every year in his presence; had lent him a helping hand, when he was ready to sink; had con-

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gratulated him when sunshine lit up his pathway; had talked with him, prayed with him, and heard him preach, and had loved him, and now not one was found to hesitate about his guilt. Like the sunflower, that turns to her God, as he courses the heavens, so did they all turn and point at him, and it is certainly nothing in his favor. But why should they have suspected him with such unanimity?

Mr. Williams alluded to the position Childs had occupied in regard to the coin of the bank. He was the first Specie Teller the bank had, appointed in 1837, when the amount of coin was small and easily counted through the fingers, and doubtless when he received it into his charge, like a prudent, cautious, business man, as his counsel represent him to be, he did count it. It was then he opened his specie book, which, nine in number have been produced in evidence and are before you. The first entry was on the twenty-ninth of August, 1837, at which time, according to book No. 1, there was on hand $239,022.47 in silver, and $46,061 in gold, an amount easily counted in a few hours, and which it is assumed he did count, for he has not attempted to prove that any one handed it over to him as he did to Hurschburg. There was no predecessor of his to hand it over. Ever since that period, these books kept by him, represent the daily and weekly amounts of coin on hand, up to the period of his resignation, and during all that while, it is a fact that he has been present at every semi-annual count, and always there at special counts and biennial counts, and there has never been any discrepancy in the amount stated by him to be on hand, and what was found to the satisfaction of those counting. Always did matters balance, till he resigned, and then at the very first actual count, a deficit appears of $120,-921.62. It is a little remarkable, that during the twelve years' existence of these specie books, more than three-fourths of the amount of foreign coin represented to be on hand by Childs, are even sums, and yet they always balanced. He thought it would be very difficult, complicated and various as was the amounts of the different sorts of foreign coin, to

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have the aggregate sums so often of even amounts, hardly ever were they odd, except when there was a count; and yet a balance was readily struck—the amounts found to be in the vault, at least satisfactorily, never disagreed with what he represented to be on hand by his specie book—and if any discrepancy was spoken of, it was soon set to rights by his wizard pen.

He dwelt at some length upon the different counts, the mode in which they had been conducted, vindicated the conduct of the Directors and their method of counting, and stated that he would, before he left off, tell the jury how he thought the whole thing had been done, and recite the circumstances that pointed to the guilty party. He then spoke of the mode of discovery—thought it was Providential in shielding both Shurlds and Hurschburg from the suspicion of guilt.

It occurred when defendant was in the city, when there had been no change of Directors, allowing opportunity of saying his friends were away—before any sensible man would dream that Hurschburg had become familiar enough with the office to attempt it—before the boxes had been moved, and under such a state of case as to make the matter notoriously plain. No deaths had occurred—no change of officers—no time allowed for change of circumstances in any one's condition that might cast suspicion where it ought not rightly to rest. How was it? Clark & Brothers had been paid a draft of $50,000 in gold, which consumed all of the loose coin of the bank, save about $19,000, and what was in a chest, the key of which was in possession of Barnes, it containing some mutilated notes, which the directors did not wish put again in circulation, but which they were deliberating about burning. Page & Bacon called for $40,000, and Hurschburg agreed to pay them in sovereigns, but not finding Mr. Barnes, so as to get the key of the chest, he went to the Cashier and asked what he should do? The Cashier told him to go and get one of the sealed boxes of sovereigns, which he did. No. 30 having the amount nearest

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what he wanted, according to the certificate of Mr. Walsh on the outside, this he brought up, and, handing it to Page & Bacon's clerks, said, if they were willing to take it by the certificate, well and good; if not, to open it there and count it—that it was sealed and certified by the Director whose name was on it; but he himself would not be responsible for its correctness, as he had nothing to do with it, and knew not that the count was correct. The clerks opened it, and Hurschburg discovered that there were but four bags in it, whereas five were marked outside. He told the Cashier of it, and Mr. Walsh was sent for; and when he came, like a prudent man, he supposed it possible that the bag might have got into another box counted on that day, and asked that the Directors who counted with him might be summoned next morning, which was done, and the deficit fully discovered. There were good reasons for believing, if the gold was taken and carried away from the bank during or since the count in February and March, that Childs took it; but he nevertheless did not think it was thus abstracted, but that it was taken before this count, and the deficit made good in the foreign gold, which, being true, he could demonstrate it was chargeable alone to defendant.

He had now reached a very important point in this case. He had attempted to show from testimony, beyond contradiction, that the gold was removed from the boxes in which it had been packed, and it had been also testified that on the count of August and September, there was found a deficiency in the money of the institution, corresponding precisely with the amount of gold abstracted or removed in the boxes; and he had asked who took it? He could now attempt to answer that question, by making it manifest, that if it were taken or removed from the bank during or since the count in February and March, it was chargeable upon the defendant, but if it were not taken and carried away then, as he believed it was not, but prior to the count, as he believed it was, and the defalcation made good then, he would demonstrate that it was done by Childs.

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First, then, was it taken during or since the count, and if so, who did it? He assumed that it was most palpable that there had been no violence done to the vault or banking-house in any way, no disturbance of the boxes known to any one who had deposed upon the subject, no suspicions resting upon or attaching to any person outside for having taken it, hence, he thought, it might well be assumed that it was the act of some one inside, and if inside, then it was some one who had time, opportunity, and all the means necessary to the accomplishment of the deed, without detection.

He asked the jury to look at the state of the case as proved, and judge of whether any one of the officers of the bank could have done it. Could Clark be guilty? Take his statement, and the statement of all who were about there, and what is it? In ordinary times, he had about as much to do as he could well attend to, in attending to the duties of Receiving Teller. He did not usually keep the keys of the vault, and had access only in the morning to get out his paper, and in the afternoon, to place it again in his iron safe. The vault used to be left open during the day, but of late date, before and since Childs left the bank, it was closed during the day, except when something was needed that it contained. But a portion of the time since the count of February and March, whilst Hurschburg was sick, Mr. Way acted as Specie Teller, and Mr. Clark kept the keys of the vault. But when he deposed before you, he stated that he only was in the vault in the morning and afternoon, to bring up and carry down the paper needed for his daily transactions; that the Porter would open the vault and bring out the coin for the day, while he brought out the paper, and then the door was shut, and remained closed till something was wanted—and so in the afternoon, the same thing would be done, and he seeing the doors all fast, would sometimes leave the key of the outer door in his drawer, where he always found it undisturbed; that he very seldom had occasion to go into the vault during the day, and never except for a minute, and never was there after bank hours.

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There is no sort of suspicion that Clark has, since the count, opened sixteen boxes of this gold, taken from each a bag of thalers or sovereigns, containing one thousand each, and brought it off from the bank. He could not have done so without being detected, and besides, where is the proof that he had access to the seal? Who for a moment believes such a thing of this gentleman? It may be with certainty answered, that no one thinks of such a thing.

Did Mr. Robinson take it? That gentleman, too, was a witness, and scarcely any one failed to observe his manner and appearance as altogether favorable to his truthfulness. He stated that he was General Ledger Bookkeeper; and as such, although he had something to do with Childs, in receiving from him statements of amounts of coin on hand from week to week, yet he had but little to do with the vault, and nothing whatever with its contents, except occasionally to hunt up an old book—that sometimes he would be in the vault more than once during the day, and then he would not visit it for several days. That he never observed what was there; remained but a short time, and always brought up into the banking-room what he went for. Now and then he would send the porter down for a book, who would find it, and bring it up to him. Is there anything about his visits and business connections with the vault that suggests the thought that he took this gold? Could he or the Porter have concealed a thousand thalers or sovereigns about his person, and walked among the clerks and other officers there without detection? If once they, or either of them, had succeeded in doing so, could they likely have done it sixteen times?

Take Corcoran, and how seems his case? He has occasionally gone into the vault, too, for the purpose of hunting up some books or papers which, when found, he brought up, and used at his desk during bank hours. No more opportunity had he of doing so than Robinson, and would as certainly have been detected in the effort to conceal the money, for none of them were ever known to go into the

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vault, and on coming up to absent himself long enough to go home or elsewhere, and hide his gains. Indeed, Corcoran's home was at the bank; it was there he lived, both day and night; and so regular was he that he swears he was seldom out of evenings till later than eight, and never after ten o'clock. Not one of the jury could have the slightest suspicion of Corcoran.

Did Barry take it? He was never in the vault at all, but when Corcoran was sick last summer, he slept in the bank for a week or so. But how could he get at the gold? The keys, if in Hurschburg's possession, were down at his house, and if Clark had them, the one of the interior door, was at his house—while those in the Cashier's keeping were locked up in his chamber, so it may well be said that Mr. Barry stood no chance whatever, unless he had forced the vault, and that has never yet been done during the administration of any one. Perhaps Mr. Way, who acted for Hurschburg a short time, feathered his nest with these sixteen bags. He has been examined, and states that he very seldom went into the vault at all; that Clark and the Porter were there in the morning, and his coin was brought up to him, and then carried down again at two o'clock. Never did he stay long enough among the boxes, to open one of them, screw it up and re-seal it, if he had been in full possession of the means to do so, which he was not. Then it can hardly be contended that Way did it. May be Christy, the Porter, took it. His testimony, and he is truthful as any one, Mr. Clark's statement, Way's, Corcoran's, Robinson's, all go to exculpate him from the crime. All he ever did with the vault was to go down on an errand, and return with his report immediately—or else he was there in company with some one else. And it would scarcely be urged upon the credulity of the jury, that either of the gentlemen named had taken sixteen bags of gold, amounting to $120,000, and brought them out of the bank since March last. Their opportunities for doing so were not ample—they had only daytime in which to work, and could not have accomplished such

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a task without detection. It would have been discovered by those who were acquainted with the arrangement of the furniture of the vault. Who then did take it?

As was remarked by Childs to Dr. Forbes, the abstracted money lay between Shurlds, Hurschburg and the defendant. Were any circumstances pointing to either of them as the guilty man? How was it with the Cashier? If he took it, then it was in gold itself, for, as would appear presently, no one else did extract it if done prior to the count but Childs. When did Shurlds go into the vault and remain there long enough to take out and carry away sixteen bags of gold? He swears he never was in that dark place five minutes at one time in his life, and that he was never there alone. But he is so deeply interested that you can't believe him; he is a perjured villain; he is bent on convicting Childs to screen himself, say the gentlemen. It is not probable that the jury will agree to brand a man who has so long lived in their midst; who has children and grandchildren associating with theirs; who has always, hitherto, borne a high character for honesty, integrity and truthfulness; around whom not the slightest circumstances cluster calculated to raise a doubt of his innocence, unless it be the bare fact of his having keys of the vault, merely to gratify the hungering and thirsting of the counsel of the prisoner. They are hardly ready to acquit Childs, if this act is to convict Shurlds. The Cashier, moreover, states that he has not been in the Cashier's room on Sunday, or alone at night, or during the day, since January last, when he was sick. The doors have all been so secured that he could not get in without going to some one for the key, and no one who kept that *open sesame* recollects ever to have handed it to him, except the worthless fellow, Bowlin, who himself scarcely dared to place him there alone, but rather left you to infer it from such expressions as these: "I did not watch him to see where he went—he went where he pleased," etc. Shurlds told you the truth, no doubt, and you must feel satisfied that he did not get it, when you reflect

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that on a salary of $2,500, and house found, he is poor, and generally a little behind.

Let us now turn our attention to Hurschburg. Did he take it? It makes me indignant, and the jury should also feel a contempt for the thought suggested against this man by the defense. An honest German, scarcely speaking our language, imposed upon by the same confidence in Childs that imposed upon others, gladly accepting a most responsible post for the small difference in salary, who has testified before you in such wise as to fasten conviction of his truthfulness on your minds, is to be made the victim. It came a little too soon, but it shall at any rate be tried. He tells you that he has never been at the bank since he succeeded Childs, except during the hours of day, and when some one was there; that he was not in the vault, unless in the way of business, and then only long enough to attend to that business, and very seldom alone; that he had never touched these boxes till he went for the sovereigns with which to pay Page & Bacon, since he received them from Childs; and that he had, when well enough, been fully occupied in banking hours at his counter. He did not doubt that every honest minded man would acquit Hurschburg and Shurlds both, when they looked at the mode of the discovery. If Hurschburgh had robbed box 30, would he have brought that to Page & Bacon, and asked them to open and count it before his face? Much rather would he have acted as Mr. Blennerhassett thought Childs, had he remained in the bank and been guilty, would have acted: he would have kept out of view the boxes till they were forced upon him. When he discovered there was a bag missing, did he act as a guilty man? Why tell the Cashier something was wrong? Why go over to Page & Bacon's to see if Haight had not taken the bag away by mistake? Would he not have kept silent, knowing there were fifteen other bags out of place, which would soon be brought to light? Most assuredly. And if Shurlds had taken the gold, would he not rather have gone and pointed out the box he desired Hurschburg to pay out, than say "go and

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take a box of that sealed gold," leaving him to select indiscriminately? And when discovered, and Walsh had been sent for, and mentioned the possibility of its having got into some other box counted on the same day, would not Shurlds, had he been guilty, gone into the vault that night, and taken a bag from some other and placed it in box 37, so as to have prevented, if possible, further examination?

The person who removed the bags, whoever he was, did not desire a disclosure—or else, why did he not leave the boxes open, or take all the bags out of every box opened? But on examination of the boxes counted on the same day with 30, it was discovered that 37 was rifled of a bag—and then it was at the solicitation of the Cashier that a full inspection was had of all the boxes, and the whole deficit discovered. The acts of Shurlds and Hurschburg, and their conduct fully exonerated them of all suspicion in the minds of any intelligent, honest man. We now come to the prisoner, and ask how he stands? The gold was brought up by him and the Porter, and when counted and compared with his own memorandums and representation of amounts, it was taken by him and the Porter and carried into the vault. How long the Porter remained in the vault, it is not known—but we may well suppose, a short time. There he is left in the vault, at twilight, when all about the bank were gone—and how easy for him, if he desired it, to open a box, take out a bag, screw on the top and reseal it. He had all the materials at hand, and had plenty of time and no company to watch or detect him, either in the vault or as he came out. He could have taken the bag and brought it out and borne it off, and no one have ever seen it, unless, indeed, Bowlin had discovered it; and if so, he might have easily bribed him with a handful of the shining dust—for a man who will deliberately swear a falsehood, would readily accept such a bribe. He told Dr. Forbes, not that he took it, but that it was carried off a bag at a time. Besides, he has been known to visit the bank at night, so bleak and so cold as to be remarked from that circumstance—and last winter, more than once did he

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do so. Another circumstance, though small in itself, a very weighty one in determining this case, existed against defendant, and that was the purchase of wax in such quantities as would be required to reseal sixteen boxes—which on close inspection would be found to correspond precisely in color and quality with the wax on the upper seal of each rifled box, and different entirely from that on the lower seal, and untouched. But, I shall say more of this circumstance presently. The jury will agree that Childs had a better opportunity to take the money during or since the count than any other one in or about the bank, but he did not hesitate to say that in his opinion it was taken prior to the count, and then the defalcation made good. He did not expect the jury to believe for a moment that it was taken bag by bag and brought out of the vault by any one since it was put into the boxes by the Directors. Certainly, no one took it, or wanted it for circulation, or else why not take doubloons, or sovereigns in large amounts, or in preference to all other American coin? Thalers were too unusual to be circulated in such amounts without suspicion; even sovereigns would scarcely be plenty enough, but American gold might have been used with very much less suspicion than any other; and yet that was passed over, and fourteen bags of thalers taken, and two of sovereigns. If it were wanted for use, why not remove all from a box? No, gentlemen, the manner in which the thing was done, is enough to convince any one, why it was done at all. The money had been used before, and the defalcation was made good in this foreign coin. It will be recollected that Childs was Specie Teller, and as such might readily take paper money, and place it to account of specie, and no one find it out, without actually counting the coin. This was testified to by Mr. Clark, who, while he swore that no paper money, in large amounts, could be taken from his bulk of paper in the safe, without his knowing instantly, yet he also stated that defendant might very readily pocket paper during the day, and charge it up to specie without detection. Mr. Clark never stated, as Mr. Blennerhassett

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had said, that no paper money had been taken. As long as Childs retained the confidence of the Board, and especially of those who were placed upon the semi-annual counting committees, how easy was it for him to deceive them, as he has deceived the whole Board. Mr. Barnes, who has been for ten years a Director, has served on almost every semi-annual committee, and the warmest and greatest friend of the prisoner all the while, helping him out of all difficulties, till this trial came—then he could not aid him in his escape from the Siberian bog that was ready to engulf him, lest he too might be carried down, down to its deepest bottom—then, and not till then, did he lose confidence in the man, and for relinquishing his hold upon him, he is now denounced and traduced as a dishonest man, whose touch is contaminating, is death almost. The defendant had the confidence of others—Christy, Yeatman, Walsh—indeed, of all—for Brant himself has been his friend heretofore; and it was only necessary and very easy to abuse that confidence, and thus succeed in covering up his defalcations from time to time, as he had doubtless done for years before.

Mr. Williams here referred to the December count and to other semi-annual counts of the coin of the bank. Generally the gold was weighed in the course of two days—usually one chest to-day, the other to-morrow—never was it all counted or weighed in one single day. How easy could Childs, when part was weighed to-day, take from it what he wanted, with which to make up any deficit existing, and place it with that which was to be weighed to-morrow, and if he did not thus change the position of as much as he wanted to-day, could he not take out of the morrow's count and put it on the shelf? In December last, it happened that both chests were weighed on the same day, and then look at the amount found on the shelf—$230,000! Fifty or seventy bags more than even Bowlin had ever seen there for any purpose. Why so, unless it was to swell the amount as he wished? The jury can see how easy it was in February and March, on going into the vault with the sealed boxes, to take with him the screw driver and

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seal (the wax he had in his pocket) and open a box, take out a bag, and place it where it would be recounted; open another and do likewise, till he had got the amount wished for, and then all was snug.

Now, Childs knew all about the reasons for this count—he knew the coin was not soon to be disturbed in any way, and he knew that thalers were very seldom paid out by the bank—hardly ever; so that he would be very anxious to place his deficit just where it has been found. Here it is worth while to recur again to this wax bought a second time at Fisher's; and the jury would not fail to see how important a circumstance it was, particularly as in color, texture and quality, it agreed precisely with what was used in resealing the rifled boxes.

It did not prove of itself that Childs took the money, but it was a strong circumstance, and this was a case depending entirely on circumstantial testimony. If such a state of things did not exist, and stand around defendant, as prevented his escape without tearing them down, they should acquit him. If the proof so surrounded him with little and big things as unerringly to point to him as the guilty man, he would be found guilty. Now the jury see how it is that thalers are found scattered all along the line of these fifty-seven boxes; a circumstance, under the proof, accounted for in no other way. He was taking them out of the boxes where they had been already placed, and sending them up to be re-counted. Here, too, will be seen the necessity for borrowing bags of Clark, as it was proved he did. The bank had never borrowed bags before; they were to be had anywhere, and had always before been purchased, but he wanted old ones, lest the sight of new ones coming before the eyes of the Directors too often, might excite their curiosity and produce inquiry. Moreover, it is in proof that the gold was already in bags, it being thus kept always in bank. The seal was where he could get it, and it is proved he did have it on the last or among the last days of the count. He threw it on the table and asked Mr. Angelrodt to take charge of it;

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but that was after the defalcation was all fixed; and on that very day, after the boxes counted had been carried below, and after candle-lighting, while Mr. Angelrodt was counting some old mixed gold.

The pecuniary condition of the defendant was a powerful circumstance against him, and in favor of the theory he advocated. In larceny it was well considered a bad sign to find the person charged growing suddenly flush of the article stolen. In embezzlment it might as legitimately be urged against a man accused, that he had been growing rich much too fast for his means; and if such charge were not met and explained satisfactorily, at least, it should have its effect upon the minds of a jury. The accused here, it had been fully shown, went into the bank poor; and the evidence most conclusively proves that he left it a rich man, wielding his thousands. But before going into that, let's see what he represented on that subject. Just after the count in February and March, at the instance of some of the Board, he was asked to furnish, and did furnish, a statement of his property and effects, in which he said that he held most of the property appearing his of record in trust for others; that he had when he came into the bank $1,200 in cash and had saved of his salary $30 per month; that he had built some little houses in Franklin avenue, and collected the rents; that he had sold a lot on Morgan street by which he realized a profit of $600; that he was only worth about $8,000—an amount accumulated, as he stated, from his rents, sale of Morgan street lot, and salary saved, except $500 or $600, which he had made by occasionally shaving a note, or lending money. This paper he borrowed from the Cashier under promise to return it, but which he destroyed, and when called on refused to exhibit.

The circumstance of his stating an untruth about his property, when called on to speak, if he did do so, is greatly against him. He need not have answered at all, but he should have told the truth when he did speak, and the circumstance of his now withholding the paper is not a favor-

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able sign. Well, what is the proof in regard to his present pecuniary condition? He (Mr. W.) here exhibited an account current, in which he stated all the items proved as having been bought and paid for by him since 1837, and gave him credit for all the money he proved had passed into his hands, whether his own or that of others, including $4,000 of saw-mill accounts handed him by his brother Joshua, and $5,000 received from the Cemetery, and $3,600 paid him for the Church, by Rucker, and $5,000 paid him by Scheumer, and there was still left a balance in his favor of $27,561, now absolutely owned and possessed by him, putting down his real estate at first cost. He said that his property in that account, now held and owned by him, and his notes and cash, were well worth $40,000. In this estimate, nothing had been said about his family expenses, gifts and other extravagances —all these he had left out, and balanced by his salary, which every one knew was not more than half-sufficient to meet them.

The account current made out from the proof, showed that he had received and spent since '37, $51,665, and that he had paid out to others, supposing he had paid over the church and trust funds received, $4,635, putting down saw-mill accounts in full at $4,000. But what he now owned was his home place and improvements, proved to have cost, putting the land at fourteen dollars per foot, $9,048.82—his Pine street property, the improvements costing $2,500, his personal property, estimated by himself, $1,800, and his cash and notes $14,212.69, making the aggregate of $27,561.51. He stated he was worth about $8,000, and the jury could judge of the truthfulness of such statements, and his reasons for underrating his property, and it was for them to judge whether his large property had been honestly acquired. This calculation had nothing to do with his deposit account at Clark's, which was more than $10,000 per annum for the last five years.

The jury had a very painful duty to perform, if they should conclude to find against the defendant—that very few juries

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were firm enough to march right up to the verdict against one who had enjoyed the reputation of Childs, who had for ten years been known as a minister of a numerous and influential church, yet, painful as it might be, they should not shrink from the discharge of the high duty placed upon them by the State and the accused. It was not the first instance, in which the ministers of the gospel had been accused of high crime; nor was it entirely new that those wearing the livery of heaven, could fall. Lucifer was an angel in heaven, enjoying the very presence of God, and he fell, and to that fact, we owed the existence of a hell, for the punishment of sin. Other striking instances of error in men, called good, were enumerated; and he concluded by saying that it was more than probable that he should never as advocate address this same jury, or they as a body occupy their present position; that it was not for him to know what they thought about the guilt or innocence of the prisoner; but they would certainly meet on a day that had been appointed for all to be judged, when they would find out, as he had no doubt, in the blaze of eternity, they would anxiously crowd around, when the defendant was called upon to give his account of the deeds done in the body, to hear the truth in regard to this astounding defalcation.

MR. WRIGHT FOR THE DEFENSE.

December 1.

Mr. Wright. Gentlemen of the Jury: With the permission of the Court, I may say, at the suggestion of the Court, I rise to take part in this debate. The argument is pressed upon us by the bank; I say *bank,* because I prefer substance to form. The representative of the State has long since disappeared from the cause, with a becoming propriety; he has treated the State as a nominal party, and thrown the responsibility of this prosecution upon the attorneys of the bank. In numbers they are a regiment, and in quality, veterans, or if not all veterans, juniors who make up in zeal what they lack in discretion. If the gentleman were present who last

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addressed you, in full view, and under the searching gaze of that eye of his, which "reads the souls of men," I would repeat what my colleague (Mr. Blennerhassett) uttered, and that is, we do not deem argument necessary, to a verdict of acquittal. Mr. Williams is charitable enough to doubt our sincerity. The best proof of that is the proposition made by Mr. Bates, on our behalf, to submit the case. If it had been acceded to, the jury would have been possessed of the cause, and might at once have disposed of it. But the bank is hostile to such *haste* and *precipitancy*. Twenty-two days of grave and solemn deliberation, by the "most attentive jury ever empanelled in a civil or criminal cause," were not enough for decision and judgment! A calendar month must be devoted to a bank case. In the spirit of monopoly it demands a term of the court. Perhaps some deference is due to it, as a legislative creation. The law-making power gave it being, endued it with passions, but breathed into it no soul. Eyes it hath, and there is "speculation" in them; hands it hath, and enough of them to touch at once every interest of society; but there is no heart in its anatomy. Of the natural agents who surround this artificial being I may have to speak. I shall of course approach such dignitaries with appropriate awe; against them I shall utter no insinuation. What I *mean,* I shall *charge,* but never save upon "compulsion," and then only to return the poisoned chalice back to their own lips, which they prepared for Childs. I repeat it, we are forced into this argument.

Upon full consultation, we did not deem argument necessary for the vindication of our client. I take it we are safe guardians of his interest and honor; here, safe at least, as he may find. At all events, he asks none other. But Mr. Geyer says, "argument is indispensable." Indispensable; why? Indispensable for what? To vindicate the bank? To postpone the hour of honorable acquittal? To disgrace, by epithets, the man whose liberty they cannot destroy? Was not every lawful interest of the bank or State, safe in the hands of "the most patient and attentive jury that ever

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tried a cause?" Or, were you, gentlemen, to be made competent dispensers of criminal justice, and faithful administrators of the law, only by the electrical eloquence of a Wiliams, the impassioned logic and high philosophy of a Leslie, and the wit, sarcasm and analytic power of a Geyer? The Court, also, has deemed argument necessary, in consequence of that "peculiar nature of the cause." Gentlemen, I grant that this is a peculiar cause—got up in a peculiar way—and sought to be maintained in a peculiar manner; but while I do not see how these peculiarities should beget debate, rest assured we do not shrink from the argument. No! not even from such an argument as 'tis decided we must have. An argument which violates the universal logic of debate, by keeping those who hold the negative ignorant of the ground to be occupied by those who hold the affirmative; an argument, taken not from the schools of philosophy, not from the accustomed and sanctioned forms of debate, when truth is the object and fairness the rule of investigation; but which comes borrowed from military tactics, and the strategies of war, wherein the policy is to deceive the adversary by feints and manœuvres, and to win a victory by opening upon a surprised and unguarded column the artillery of a battery held in mask. An argument which reverses the true and lawful position of the accuser and the accused; which puts the accuser in possession of all that may or can be said by the accused in his defense, and withholds from the accused what is to be said against him! An argument allowable only in such tribunals as put upon the State but the easy task of accusation, and on the accused, the weighty burden of proving his innocence! From such debate as this, against which, as you know, we have in vain protested, we do not recoil. We are not frightened by such formidable odds, and with a proper respect for the power of the champions of the bank, as well those who have gone before, as those who are to follow, we fear not the issue of this contest, for we are clad in the triple armor, which all may wear "who have their quarrel just."

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What has the bank lost? I do not narrow the question down to embezzlement or larceny—for a bank may lose by mistake, by indiscretion, by bad management—by negligence, without either embezzlement or larceny—but my inquiry is a broad one: in all the modes in which a bank *may* lose, what has the bank lost? It is one of the peculiarities of this peculiar cause, that the investigation of twenty days cannot furnish an answer to this plain question! On the eleventh of August last, the President of the bank, the head of the corporation, backed by the nominal Cashier, Judge Shurlds—(I say *nominal* Cashier, for his part is the beau ideal of a sinecure—keeper of the cash, as the word imports, charged exclusively with the funds of the bank, by the express provisions of the charter and by-laws, put under large bonds, as he is, for the faithful performance of this duty, he has managed to shuffle off the entire responsibility; he is considered by universal consent of the Directory to have nothing to do with the money, has never handled a dollar of its funds, in paper or in coin, and has ever avoided all visitation of the vault, as forbidden ground to him)—backed by this nominal Cashier, the nominal President goes to Justice Butler on the eleventh of August last, to swear a loss, embezzlement and larceny of moneys of the bank. By joint affidavit they commit their consciences to the fact, that between the first days of January and April, 1849, one hundred and twenty-one thousand dollars in gold were embezzled and stolen from the bank; they swear the gold thus taken consisted of ten-thaler pieces, money of the Kingdom of Germany, and sovereigns of the coinage of England; they swear that they have good reason to believe that defendant stole and embezzled said coin, and that a part thereof is hid and secreted at his residence on Fifteenth street, in this city. In virtue of this swearing in duplicate, they obtain from the Justice one warrant to arrest defendant, and another to search his house for the lost thalers and sovereigns. They also swear that this enormous loss in thalers and sovereigns was discovered and ascertained on that day.

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The next step is to present their affidavit to the assembled Board of Directors for verification and approval; and forthwith, the Board approves the swearing; approves not merely the proceedings taken on the swearing, but the swearing itself! The consciences of the nominals, and the conscience of the bank—if it have a conscience—are thus pawned for embezzled ten thalers and sovereigns, amounting to $120,000. Gentlemen, this looks like an answer to my question; but what have you just heard? The gentleman who has just taken his seat—one of the authorized agents of the bank—placed here to speak not only for the Cashier and President, but for the entire corporation—after performing elsewhere for it important service, this representative of the bank, and guardian of its interest, pronounced this swearing an egregious blunder, a capital mistake, a total error! He pronounces, gravely, that the consciences of these gentlemen were committed to a false fact; that not one thaler piece, nor sovereign of gold, was taken from the bank. He gives forty reasons to prove the thing impossible, and dismisses the idea as an unmitigated blunder. In his own emphatic rhetoric, "this is all fudge." We have, therefore, bank authority for saying the corporation stumbled at the start, and, we shall see, it has never gained an erect position in the entire race of this prosecution.

If not ten thalers nor sovereigns, the question recurs, What has the bank lost? Light broke in upon the bank from some quarter soon after the swearing. They did not search the house of Childs for secreted gold; and when they searched another house, the search was for anything but gold. They abandoned altogether the idea of lost gold; it could not be maintained, though it started in plausibility.

In February and March fifty-seven boxes are filled with gold, and sealed up. On the eleventh of August following they are opened, and $120,000 are gone—gone in the shape of ten thalers and sovereigns. "Divine Providence" opens the boxes, and the same power, perhaps, keeps the gold within the bank. The gold was not taken from the bank,

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says the counsel; "not from the bank" echoes the whole Directory. The "abstraction" which we have heard repeated so often is the most abstract of ideas. It never goes into the concrete. The "abstraction" is not from the bank, 'tis only from the boxes! Gentlemen, let me explain to you this twist in the corporation. They found themselves caught by the first swearing.

They found it impossible to make Childs guilty, if the gold was taken from the bank, and out of the sealed boxes. They knew they could not show against him the *sine qua non* of all crime—opportunity to do the deed. They knew he had been three months absent from the bank without keys to the vault. They knew he never, at any time, slept in the bank, as did the nominal Cashier and others, and that daylight could afford him no means to pack off their gold. Stern necessity drove them from the ground they occupied, and forced them to take a new position. They backed out from their affidavits—from affidavits verified by the Board, and gave a new phase to the prosecution. If justice or magnanimity were bank qualities, they would have abandoned the charge and sued for peace; but a corporation has no soul! They hated the man because they had injured him. Besides, they felt the instincts of self-preservation, and yielding to their double impulse, they resolved to carry on the war. They changed their front, and mortifying as it must have been, they said, "The bank has lost no gold!" Magic is invoked, and they proclaim that necromancy deceived them. They counted $120,000 in gold more than they had. Childs fooled a subdivided Directory in the only accurate count they ever made—fooled them in broad daylight, and before their faces, and made them recount ten thaler pieces and sovereigns! He cheated them by magic to cover up a prior defalcation. A prior defalcation, where?—a prior defalcation in what? If you lost before, when was it and what was it? The question comes back, what has the bank lost? Who proves any prior defalcation? We have heard as witnesses the entire corporation, save Mr. Sarpy, a sick Director, and the super-

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numerary watchman, who reinforced the bank about the time of the Nesbit robbery. Twenty-three of the twenty-five guardians of the bank have been on the stand, and not one of them gives the least modicum of intelligence of any prior loss, any aforetime defalcation. Gentlemen, perhaps the most remarkable aspect of this remarkable cause is that what was lost by the bank is so little a matter of fact, and so much a matter of opinion, that it was solemnly objected by the bank, and as solemnly decided by the Court, that a Director should not be questioned on the subject! The evidence was gravely ruled out, on the ground that the witness would be testifying only to a matter of opinion.

That is a fact, and it is one without parallel in the history of judicial trials for crime. A bank robbed of $120,000, and the lost matter, a mere matter of opinion! The loss is to be proved not by the evidence of those who lost it, not by the guardians and keepers of the treasure, but by Cocker's Arithmetic! It was not coin, says Christy, one of the Directors, neither gold nor silver, that is impossible; it may perhaps have been paper. That is impossible, says Clark, the Paper Teller: I know the paper is all safe. Was it Shawneetown notes? No! Cupidity has never been aroused to touch them. Was it Illinois Bank certificates of stock? No! Was it "suspense account," that mysterious generic symbol of assets? No! not that. Then in the name of all values, I ask what was it? And the echo comes back, in reverberations from the bank room, from the Cashier's room, from the lumber room, and from the vault, "what was it?"

As the blind boy said of light—"Can any one tell me—what was it?" No mortal man in the shape of a witness can tell. If one could have been found in America, he would be here. The pains taken by the bank to bring Bowlin here is proof of this; and in the absence of all human testimony Mr. Geyer invokes the shades of Cocker and Dilworth! Like Warren Hastings on the trial of the unfortunate Princesses of Oude, the bank seeks to establish crime, not by any known code of laws, nor by the mouths of witnesses, but by the

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Multiplication Table and the Rule of Three. I suggest to Mr. Geyer an error in his policy—Algebra would have been a higher authority in the case, for it is said to be the science of computing by symbols, and treats of unknown quantities.

Gentlemen, are we to surrender our common sense because it is a bank that prosecutes? Must we give up our reason and our laws because a bank demands a victim? Let me suppose a case. One of *your* neighbors (you gentlemen of the jury from the country I speak to) is a grower of stock, consisting of horses, mules, oxen, sheep and hogs. You meet him on a beautiful morning, say the tenth of August, 1849. You find him in a "phrenzy"—the victim of "intense excitement." He tells you he has been robbed of his stock—has suffered immensely in that way. From the "generosity of your nature," you "deeply sympathize with him in his distress." You tell him that if you "can in any way serve him, he has only to "command" you; and you express the hope "that a kind Providence" or remunerating justice may restore the loss. With a view to give him practical aid in his misfortune, you inquire "what's gone—was your loss in horses?" "No, I miss no horse." "Mules?" "No, the mules are all safe." "Then the blow has fallen on your oxen—how many were taken?" "I can't say that I have lost a single ox." "You were fleeced then—your loss has been in sheep?" "No, thank Providence, the sheep are all secure—not a lamb even missing." "Well, then, it is quite clear that your entire loss is hogs." "No: fortunately there was no asportation of my hogs, but my loss in stock has been immense." Gentlemen, you would feel that your neighbor had sustained *one* heavy calamity—not the loss of stock—but the loss of his senses, and you would be inclined to breath a prayer, that medical skill, or a "kind Providence," might speedily restore him.

It is the bank, and their advocates here, that give us pause upon the question of loss. They open fifty-seven boxes containing gold; they discover $120,000 of gold missing, and instead of standing on this ground—the ground upon which

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the defendant stood at the time when he was asked for his opinion; they abandon it wholly; they adopt a new hypothesis; they declare no gold was lost. The lost gold ceases to be the *corpus delecti*—the body of the crime—it sinks into a motive, an argument merely, of a prior defalcation—of something not gold. That something, whatever it may be (if it be anything), becomes the body of the crime, and that something this bank has not been able to show. If Shakespeare, or common sense (and they are one and the same, for the immortality of the bard rests upon the solid basis of his common sense), be authority, the loss which the loser can't define, and does not know, is no loss at all. Mr. Geyer undertakes, however, in the absence of all testimony, to prove it by arithmetic. Now, gentlemen, with a proper basis, arithmetic may prove much. I do not object to scientific deductions, from certain and sufficient data: for such results are evidence, and amount to knowledge. But what is Mr. Geyer's basis? What does he begin to figure on? It must be some book of the bank—some count of some committee, either legislative, or semi-annual, or some one of the various sworn statements made by the nominal Cashier to the Legislature or the public. It can be nothing else. If a book of the bank —what book? Is it the Specie Teller's book?

That Mr. Geyer has already repudiated as utterly uncertain and deceptive. Is it the daily balance struck at the closing of the bank at two o'clock, evidenced by the balance sheet? He repudiates that also, as no test of truth. Is it the weekly statement? That he condemns likewise. Is it the general ledger? You have heard him denounce that. Is it the individual ledger as it is called? You know that book has been at war with the general ledger, from the beginning till now, and the utmost skill of accountants has not been able to make peace between them. Remember, gentlemen, my client does not make nor keep these books. Is it the count of any semi-annual committee of the bank? Mr. Geyer tells you, none of these can be relied on. Is it the report of the Legislative committees, made every two years, upon exami-

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nation of the affairs of the bank? He tells you, these are worse still. All that is left, is the Cashier's sworn reports, and Mr. Geyer acquits him, and he purges himself of all knowledge on the subject! What, then, is to be the basis of the arithmetic? Is it to be the specie book of the Teller! Now, gentlemen, what has been the affirmative testimony brought by the bank itself, to disprove any defalcation by Childs? They have verified his specie book, by every mode in which that bank can verify anything—first, by the daily balance sheet not made by him; then by the weekly statement; next by the general ledger; next by the actual examination of a committee twice a year, who report that by count and by weight, the money called for by his specie book was found and ascertained to be on hand in the vault; then, by the Legislative committees sent down by the Governor, who inform the General Assembly, in written reports, sanctioned by their oaths, that they, too, have, upon actual inspection, count and weight, found the same thing. And, lastly, by the Cashier, who, as exclusive keeper of the cash, in virtue of the solemn express provisions of the charter and the by-laws—under the sanction of an oath, too—has verified the accuracy and truthfulness of the Specie Teller's book. In the face of all this array of confirmation and approval, Mr. Geyer denounced the specie book as false, by denouncing all the corroborations furnished by the bank. He declared that unless he could get rid of these various countings, weighings and reports, the prosecution must stop at once. He therefore repudiated the entire mass, as false and unreliable—and yet to this repudiated mass he must resort to get the data of his arithmetical testimony.

If there be one count, in all the numerous countings of the bank, in which a single truth can be picked out of the surrounding mass of error, which is it? Is it the December count of 1848? That count has been severely condemned by the advocates of the bank here, and mark you, these countings are not the work of Mr. Childs. He made no count—it is the work of the bank that is repudiated, and

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repudiated because it sustains Mr. Childs. Of that count in December, 1848, it was said by Mr. Haight, who opened the case, before the introduction of a witness, that it would show the important fact of a presence at that time of $100,000 in ten thaler pieces less than there appeared to be present in the February and March count, and that emigration and other causes, between December and March, would not account for the decrease. Mr. Williams further said in argument, after the evidence was closed, that this turned out to be a fact from the testimony in the case. Now, gentlemen, you know that there has not been one word of evidence, documentary or oral, in figures of speech, or figures of arithmetic, as to how many ten thaler pieces were in the bank at the December count. You know that the only proof attempted to be introduced on that point, was the calculation of Mr. Christy, a Director, which calculation was never heard by any one of you, and was not given by the witness, because the Court excluded the evidence as illegal, it being confessedly a calculation made by the use of arithmetic, with no foundation to start upon! You know that the witness was told to say, if he knew, how many thalers were there in the December count—whether he learned the fact by figures or other wise, and that the witness told you he did not know, and he did not even attempt to guess. There was no other evidence offered on the point. The written report of the committee who counted did not specify the kind of coin counted. It stated that they counted so much in foreign and so much in American gold, and what is quite fatal to the assertion made and urged in argument without proof is, that at the count in December, there was more foreign gold by about $100,000 than in the count of February and March.

I demand, then, to know what count Mr. Geyer will make as his basis? (*Mr. Geyer* said, I will show you in my speech.) Yes! show me in his speech when there is none to reply. But I defy the gentleman to show it in any way but by speech. He has repudiated every other basis.

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Will the count in February and March be relied on? That the most accurate of all the counts made by the bank—the only count by tale, is particularly deceptive. That was the count by magic and conjuration! Will the June count do? No, it is only another specimen of error, furnished by the semi-annual committee of the bank. How of the August count? That was after Childs left the bank—after the discovery—after the entire corporation had rashly and specifically plunged into this prosecution, and were deeply interested in shaping appearances, to support a cruel charge. It was a count, too, loosely made—made for public opinion, to sustain the credit of the bank. Count the rents and holes of which they tried to patch up by a September count.

Gentlemen, Mr. Geyer finds himself in this awkward dilemma. If he does not repudiate the books of the bank and its various countings and reports, he cannot establish a defalcation against the defendant. If he repudiates the books and the countings, he destroys the basis of his arithmetic. It is a painful quandary for the bank advocate; his discretion is confined to the question, which horn of the dilemma shall he mount? He will only follow the footsteps of the bank. They have been at arithmetic to prove a loss; they set Christy to work at it, as far back as September, and brought him here, to prove this sum; but the count said the figures would not work, and Mr. Geyer must now try to prove by a closing speech what Christy could not swear to. My colleague (Mr. Blennerhassett), in his very able speech, attacked the figuring of the Directors, in the argumentative loss. He showed how they had forced this sum. Mr. Williams in reply admits the fact, but exclaims repeatedly "what difference is it—they prove something." A friend of mine, at the moment, gave me an anecdote in point, which I furnish to Mr. Williams as authority for his view of the case. A plaintiff in Kentucky brought a suit for damages against a neighbor for the loss of his nose, bitten off, as he alleged, by defendant in a fight. He proved the loss of the nose by three respectable witnesses. The defense re-

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lied on was a trial by inspection—inspection of the plaintiff, who was in court with a face bandaged to the eyes. He asked the Court if it was lawful for him to insist that the bandage be taken off. The Court decided it to be every way proper, as the jury might more clearly see the ravages committed upon the plaintiff. The Sheriff, in obedience to the order of the Court, delicately and tenderly performed this office, and exposed a proboscis duly elongate, of fine development and entire integrity. It seemed to Court and jury a full defense, but the counsel for the plaintiff asked the Court, "What difference is it? We have satisfactorily proved by three respectable gentlemen, under oath, the loss of the nose."

Gentlemen, the first thing to be established in any prosecution for crime is the crime itself. Until this be made certain, it is useless, it is unlawful, to inquire who did it. The law does not warrant an investigation to find out who perpetrated a doubtful crime. Under our criminal code, the magistrate must first ascertain certainly that the crime charged has been committed, and then, but not till then, may he hunt for the offender. It is cruel, as well as a lawless proceeding to act otherwise. I ask you, then, are you satisfied that the body of the crime has been established upon all the showing of the bank? Has not the bank, by its course, taken altogether, involved this question in reasonable doubt? The law demands that this matter must be made sure. It will not put to hazard the meanest man's life or liberty by violating this rule. The caution of jurors and Court is invoked by Hale on this point. Men have suffered on the gallows for supposed murders. The dead body must appear in evidence. Life must be proved to have been taken before you have a right to ask who did the homicide. 'Tis not enough to show (as Mr. Williams supposes) Cæsar's robe to prove he was murdered. The rent made by the dagger of the "envious Casca" is not enough to prove him dead. Nor would it be enough to show that he fell pierced with wounds at the base

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of Pompey's statue. The heart of the great Cæsar must have been stilled forever.

If I am forced into the other inquiry, "who did it?" I shall have an unpleasant task to perform. It is quite possible that I may not use the softest epithets—the tenderest adjectives, furnished by our language. Indeed, I think it probable that I may have to use the knife. If I cut deeper than the skin, I will avoid an artery if I can, but if unhappily I touch a vital part, and death ensue, put down the consequences to those who make the operation necessary.

You were told by the gentleman, (Mr. Williams,) and often, too, that we claim a verdict of acquittal, because the defendant "is a preacher." At this point of his argument, my client handed me a hastily penned note—penned in your presence, and while the speaker's words were ringing in his ears. I read it as the best and only reply which I shall offer. (Reads,) "I discard all claim to clemency from the fact that I am 'a preacher.' If I am not innocent from the testimony and from the showing from the bank itself, then let me suffer."

Gentlemen, the cause you are trying is one brought by a mighty monied power, against a single man. I leave out the State—for the State of Missouri is as much a nominal here, as the Cashier is a nominal in the Bank of Missouri. In this contest of the many against one, what is the spectacle exhibited? The accusers are agitated, the accused is calm. Phrenzy, trepidation, and terror seize the bank, a universal horror pervades the corporation; but their intended victim is self possessed and serene. Surrounded by the conclave of Directors on the eleventh of August—shut up under lock and key—and listening to the proclamation of war sounded by the Board, who of them saw dismay upon his brow, or pallor on his cheek? The accusers paint to you the scene of agitation, but they have not dared to speak of any tumult in his breast, of any tremor of his eye, of any quiver of his lip. It was the bank alone that trembled. Without reproach, with a mild bearing but erect mien, he tells them he is innocent,

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and will defend his innocence to the last. And what was the secret of this agitation? They knew public suspicion would rest upon themselves. All of them had access to the funds—opportunity favored them with facilities to rob the bank. To screen themselves they resolved upon Childs—long absent from the bank—as a victim. That resolve was sudden, and if simultaneous as Mr. Williams has declared, they knew it to be a step of hazard and full of difficulty. The common bond of interest united his accusers; they determined to sink or swim together, and you behold them signing together the first manifesto, and the last—though each manifesto is flatly at war with the other. You have witnessed here, gentlemen, the mild, calm, quiet bearing of my client, in every stage of this remarkable trial, looking his combined accusers full in the face, and wearing in his aspect, the resignation and composure which the Christian faith teaches to be a duty and an attainment. I have seen him elsewhere, by his own fireside, with his household gods around him, and there as here, I have beheld only the quietude and calmness of a soul unruffled by persecution. Is there nothing in all this? Does not this mere surface aspect of the case help you to decide it aright? For many years it has been my fortune to defend men accused of crime, and I have found it ever a hard task to reconcile confusion, trepidation, alarm, flight or falsehood, with conscious innocence. And it is a yet harder task for any guilty mind to counterfeit a soul at ease. "The way of the transgressor is hard."

You are told by Mr. Williams, that one strong circumstance against the accused is the fact, that twelve of his warm devoted friends, the Directors of the bank, turned against him suddenly—"in a minute"—to use his own words. He represents these twelve gentlemen as men, who would be the first to fly to the succor of my client, "if the lightning and the cloud beset his pathway;" and this, in virtue of the religious faith and common worship which bound their hearts together! It is lamentable to witness the sudden extinction of that ardor which perished from its own intensity, and

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could not endure a moment's trial. Such friendship is doubtless honorable to our nature, and would be very valuable, if it could last; but strong emotions soon exhaust themselves. A colder sentiment—exhibiting itself in a far less torrid enthusiasm—might have perhaps availed my client more. Be this as it may, these kind and loving Directors have high authority for the quick transition of their feelings. One of the disciples of Christ sold him to his enemies for a moneyed consideration, while his lips were yet warm with the kiss of love; and another of them, of a "generous nature," denied his master, under the instinct of self preservation.

These examples strongly support the directory, but they break the force of the argument; for if the Saviour of mankind was betrayed by his disciples, without the commission of an error, the friends of Childs might turn from him and he be innocent.

Other examples, if need be, might perhaps be found of men who drop their friends, as trees their "leaves in wintry weather;" but is it law, that when a man's friends desert him, to save themselves, he shall go to the penitentiary for it?

Gentlemen, there must be a mysterious influence in the atmosphere of a bank. It makes of men in their corporate character, what they would be ashamed to own as individuals. How else can you account for the enormities perpetrated by this corporation against our laws—against enlightened public opinion—against the most sacred sentiments of civilized man!

The bank arrests Childs, and drags him before Justice Butler—he gives bail in enormous bonds—he is free—he goes to his own home—shielded by the laws and constitution of his country—but the bank demands a higher security than constitution or laws can furnish. It throws around his home a chain of sentinels—night and day, the myrmidons of the bank guard his residence—stop all egress—and subject to search and imprisonment every citizen who passed the threshhold of his dwelling. The defendant himself, on the next

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morning (it being Sunday,) starts to the Sabbath School, of which he was the useful and honored head. He is stopped at his own door by the bank and driven back. The same lawless monster, seized a pious and unoffending young gentleman, put him to the search, and found him in guilty possession of a volume of Clark's Commentary on the Bible!

Appealing to law for redress, the bank starts with a violation of law. It outraged what is more valuable even than gold—it trampled under foot the Bill of Rights and Constitution of the State.

Gentlemen, you have been cautioned by Mr. Williams, not to be hasty. He tells you to come to your conclusions slowly —carefully—cautiously. He more than intimates that a spontaneous verdict would be criminal. He conjures you, as a bank advocate, not to acquit from the box—and he begs you to retire and read over a bundle of specie books in the jury room. After his active service performed on Spruce street, and his eloquence here, it would be unkind not to accomodate him. I have never asked a jury to acquit from the box. In a long practice, I have left the mode and manner of acquittal to the sound sense and sound discretion of the jurors; but if any case could make me change my course, it would be the cause in which you are now sitting.

Mr. Williams has laid down for your guidance a safe rule. You are not to jump to conclusions; you are to be slow, and cautious, and weigh all matters well. But how was it with the twelve friends of the defendant—those tender gentlemen, whose hearts ran over with the milk of human kindness? They changed in the twinkling of an eye! How was it with the gentleman himself? O! if he had followed the rule prescribed for others, his agonies had been spared, and I the pain of commentary.

There is, gentlemen, a deep mystery in sudden conversions, baffling the reasoning powers of man. Take two illustrations of this, which I borrow from my own profession—both lawyers—one on the road to Damascus, and the other on his way to the bank. Saul of Tarsus, the bitter enemy of Christians

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in the mountains of Syria, falls to the earth and rises on the instant their fast friend. The fostered animosity of his heart is turned to love. We pause before this prodigy, and ask its cause; and the light which fell upon his pathway, and the voice he heard, are the answer. On the morning of the thirteenth of August Mr. Williams learns the unhappy destiny of his friend, the defendant. His soul is moved by sympathy—his generous nature is touched to the quick—the friendship, which starting in kindly intercourse, and social endearments, had ripened into brotherly love at the altar, and the communion table, burned with ardor, and panted for expression; and it found it, in these memorable words:

Monday Morning, thirteenth August, 1849.

DEAR BROTHER CHILDS: I sincerely sympathize with you in your distress—if I can in any way serve you—command me; and may a kind Providence shield and protect you.

Yours truly,

W. L. Williams.

Gentlemen, in the same hour, the writer of that note was at the bank, in full consultation with its Directors, planning the foray upon the widows of Spruce street! What light burst upon his pathway; what voice he heard, is not given us to know; but the bank breathed its spell upon him and straightway the currents of his soul were changed forever!

In the light which the evidence has furnished we can better understand the object of the prayer put up in the concluding line of that missive of friendship. Executioners have been known to mutter prayers, for the victim lying under the uplifted axe—over beasts, ornamented for sacrifice, prayers have been said—and it may be, the touching appeal to Providence, in behalf of my client, was made to shield him from the effects of the meditated outrage, about to be perpetrated upon a defenseless and unprotected woman. I acquit the

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bank and its emissaries of any hostility to that lady. She had by no act aroused its animosity—nor would she have been stricken but that, through her breast, the javelin of the bank would better reach the heart of Childs.

The atrocities of that expedition have no parallel in history, unless they be found in the plunder of the Begums by Warren Hastings. That Governor of British India, aided by confederates, gratified his rapacity for gold, by robbing of their treasure two old women, the unfortunate Princesses of Oude. The deed itself was flagitious enough, but the manner of its execution has consigned him and his instruments to infamy forever. One of these old women had a son, who was Nabob of Arcot. Hastings tried to seduce that son in virtue of an obscure passage in the Koran, to claim that treasure as his right. He failed; but emboldened by defeat, he awed that son into the robbery and plunder of the mother that bore him! A letter written by one of the unhappy victims, set the outrage in so clear a light, that he feared its effect upon the British Parliament: he trembled at the anticipated indignation of the English nation, finding a voice in such statesmen as Fox and Burke, and Sheridan, and Pitt. He framed a pretext for his violence, and gave out that these old women were engaged in open rebellion against British power in India, and that the treasure seized by robbery was a justifiable confiscation for treason. He bribed a British judge to get up evidence of the rebellion. To the eternal shame of England's judiciary, this judge, in the person of Elijah Impey, traveled through Hindostan to find a rebellion, and returned with a bundle of affidavits about as numerous as the street rumors borne to Mrs. Whitlock by the emissaries of the bank. These affidavits consisted not of proof of hostile armaments—of forces organized—of expeditions planned—of battles fought—not of forts erected—not of collected munitions of war—but of paltry hearsays, unfit to be produced in any court of justice upon earth. The plunder of the Begums soiled the character of a nation—it stained the ermine of the English Bench; but those were not all, nor the

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greatest of sacrifices. Hastings outraged the human heart—he violated the "sacraments of nature," by seducing, awing the son to plunder his mother; and thus breaking the "primal bond" of society, he was condemned to deathless infamy by the moral power and avenging genius of Sheridan and Burke.

What was the crime imputed to the unfortunate and unprotected widows of Spruce street? Accessories, after the fact, to the embezzlement of the bank! to be proved by "street rumors" issuing from the lips of insolvent slanderers, not one of whom could pay a dollar in damages for their insolvent defamation!

The confiscation of a widow's property, by fraud or violence, was the smallest part of the outrages of this marauding expedition of the bank. The natural bearing of man to woman was forgotten. The appeal which her condition makes to the heart of civilized or savage man was silenced or unheard. What civilization teaches to be her due from our sex, under all circumstances, was indecently disregarded. All delicacy, all sympathy, all sentiments common to the rudest specimens of male nature was violated, and to give a climax to these atrocities, they were perpetrated in the sacred name of friendship! Gentlemen, man, though fallen, is not all evil. A ray of divinity, a portion of the glory of his lost estate, still lingers about his heart and warms it up to noble action. The sentiment of friendship is born of this principle. It elevates the man above the suggestions of mere selfishness; it inspires the martyrdom of sacrifice; it prompts him to brave disease, danger, death for another; and this noble sentiment, which dignifies while it adorns its possessor, was degraded into a vile expedient for plunder, to gratify the rapacity of a bank

If its officers were ever thus exhibited, it would, indeed, be what one of England's sweetest poets ironically called it,

> ——— "a name,
> A charm that lulls to sleep;
> A shade, that follows wealth and fame,
> And leaves the wretch to weep."

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My colleague, (Mr. Bates,) asked of these kind, gentle friends, why, in the presence of strangers, they told the lady her character was blurred upon the streets? He asked what benign object moved their hearts to this affectionate disclosure? Was it gratuitous insult? insult to one who, as a visitor and associate in their own domestic circle, was hailed by the endearing title of friend? Oh! no, not that; the object was not so base as that; it was only to "disabuse the public mind." Disabuse the public mind of what? disabuse it how? Disabuse the public mind by seducing her, through the wiles of a pretended friendship, to own her guilt? Disabuse the public mind by enticing her to the surrender of embezzled and secreted gold, in order to proclaim her doubly criminal? Surely, phrenzy and fatuity never before mustered up sorrier logic than this. The truth is, gentlemen, this absurd mockery, in the nature of things, could not last long. The friends of the lady grew weary of the part they were playing, and suddenly throwing off masks and dominos, they stood before her, the fully revealed inquisitors of the bank! Soft words gave place to intimidation. They surrounded their victim with images of terror, and appealing to the innate sense of delicacy, which never wholly abandons woman, in her lowest degradation, they threatened to expose her body to the vulgar embrace of police inspection.

I cannot believe that even the phrenzy of the bank, which spread like an epidemic among all of its agents and instruments, could have driven these gentlemen to an extremity so lawless and unpardonable. Far as they did go, they would have stopped short of this enormity. It was only their design to subject her to a moral torture. They only meant to put modesty and delicacy upon the rack. They did not intend to inflict corporal pain—their milder purpose was to lacerate emotions and tear to pieces only the finer fibres of sensibility!

But if their real design had been what their words imported, they must have sunk lower than a bailiff's part, to witness its execution—they must themselves have executed it. Cozzens and Felps, hardened as they are by daily con-

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tact with the degraded and the vile—lawless as they have become by hunting down desperate criminals—rude, as they must be, by reason of the rough customers with whom they have to deal, and callous, too, to delicacy, as a policeman's life may well have made them—Cozzens and Felps would have recoiled from an act involving both an atrocity in law and a desecration in manners. Gentlemen, they did not intend to go so far—in very truth, they were delicate inquisitors, as Mr. Forbes informs you—and when they spoke the language of intimidation, their honied accents and sweet manner, and gentle looks, acted like an anodyne upon the victim's agitated nerves, and took from the scene all idea of a duress! The genius displayed in this delicate and difficult operation, by bank inquisitors, forcibly reminded me of a scene in the Midsummer Night Dream of Shakespeare. I take it, that Nick Bottom, the weaver, furnished the model for bank action on the subject of duress, *per minas*. You remember, gentlemen, how the honest, but unsophisticated villagers, represented in that play, were bothered by the lion's part in that most lamentable comedy and most cruel death of Pyramus and Thisby. The difficulty was to play the lion's part and not frighten the ladies. But the genius of Bottom, fruitful in resources, suggested two expedients—first, a prologue, to be spoken by Snug, the joiner, (cast for the lion's part,) his face half visible through the lion's neck, in words like these: "Ladies, or fair ladies, I would wish you, or I would request you, or I would entreat you, not to fear, not to tremble: my life for yours. If you think I come hither as a lion, it were pity, of my life;" and in case the soft words of this soothing prelude failed to quiet all apprehension, Bottom himself would seize the part, and by an "aggravation" of his part, "roar gently as a sucking dove—nay, roar an' 'twere a nightingale." I repeat it—the delicacy of the Spruce street players was borrowed from Nick Bottom, the weaver.

It has been said of Shakespeare, that he has described with matchless fidelity, not only every animal now known to naturalists, but man, in his whole nature, however modified

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by climate, by education, by habit or vocation. The poet did not live in an age of banks—there was nothing in the past to teach him how a monied incorporation might modify the character of man, and yet, his universal genius has shadowed forth the image of a bank director, without a memory, and with a memorandum—in the person of Snug, the joiner—who, lacking memory, wanted the lion's part put down in writing.

In full view of all the outrages on female character committed by the bank, Mr. Williams vindicates the forbearance of the prosecution. He tells you that female reputation is too sacred to be brought into Court! Yes, gentlemen, the bank is fastidious on that subject. It does not drag women into Court—it contents itself with plundering them of their property, and blasting their characters—out of court. The gentleman tells you of his own agony and bloody sweat, during the examination of a witness. Why did he sweat? It was an examination of his own witness—not only a bank director, but a volunteer and busy agent in those scenes, in which the gentleman himself was chief actor. It is Dr. Forbes who paints them; has he exaggerated the picture? It is a false position which brings the agony. The gentleman put himself beyond defense; he voluntarily placed himself in that bog of which he speaks, in which every struggle only sinks him deeper, and which endangers all who come to his relief. Why, he asks us, did we parade his note to Childs, "written," as he tells us, "in the generosity of his nature?" I answer, to show that while he writes from the generosity of his nature, he acts from the generosity of the bank; and that in this competition of generosities, the bank generosity always triumphed. This contest of antagonistic powers, reminded me of the struggles to which the man was subjected, who united in himself the characters of the epicure and the philosopher. He said, in all the conflicts between his philosophy and his stomach, the stomach got the advantage.

But the entire corporation "is honest"—all within the bank "are honest men"—incapable of uncharitable thoughts,

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or wicked deeds—some of them are honest, because they come from Ireland and Germany—and some because they did not. Mr. Williams is the universal bank endorser, and gives us specimens of his skill in biography. Perhaps hereafter he may write the lives of officers and Directors, and then he will, doubtless, favor us with the history of their accumulations. The book may be valuable, as teaching enterprise a lesson—perhaps it may point the way to riches, and form a valuable appendix to Smith's Wealth of Nations. Among other useful hints, it may peradventure show, how fortunes may be made by grazing mules upon the barrens of our country at five bits a head. The book, gentlemen, may furnish information which we tried in vain to procure in this trial. The first director we questioned on the subject, took shelter under the broad folds of the Constitution, which saved him from self incrimination. When this city of refuge was pointed out, we deemed it useless to push the inquiry—for it was roomy enough to take in the body corporate.

Again, gentlemen, Mr. Williams has deemed it politic to tell you that the officers and Directors of the bank are not prosecutors of Mr. Childs. They are his friends, who come here reluctantly—with deep sympathies in his behalf, under the process of this Court, and in the capacity of State's evidence! I know not how to reply to this; for there is something in it which stifles a reply. Why is the gentleman here? Why are his colleagues here? Whose money brings them here? Whom do they represent? A friend gave me an anecdote when this remarkable argument was uttered. I do not apply it; I leave to others the application, and I offer it as an illustration of the general character of State's evidence. A preacher, rating the sins of his congregation, threatened his hearers with the terrors of that judgment day to which Mr. Williams has adjourned this cause. Selecting from the mass a sinner taller than the rest, who gave no tokens of contrition, he said to him, "Sir, in the day of judgment I will testify against you—in that day, I will be a swift witness against you!" "Very likely," replied the

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wicked one, "for I have always heard that the damndest rascals turn State's evidence."

Gentlemen, if indeed these be friends of my client, God save him! They come to crush him, to save themselves—to save themselves from suspicion, from prosecution, from damages—from damages for false imprisonment, from damages for a malicious prosecution, from damages on the attachment bonds they have signed in the other wing of this building, and from the retribution of public opinion! They know that if they fail here, a day will come, not distant from the hour in which I speak, when a new phrenzy may seize the bank and shatter every nerve of cupidity in its complex organization. That day, for aught I know, may, like the eleventh and thirteenth day of August, be the era of sudden conversions, and loose friends shall be fast once more.

The choicest subject for eulogy is found by Mr. Williams in the person of Mr. Hurschburg, the Specie Teller and keeper of the keys of the vault. He calls him "honest Hurschburg." And why so "honest?" Because "he was born in Germany, and breathed the pure air of her mountains!" This beats the baptism of Achilles in the fabled Styx! one unhappy heel of the Grecian warrior was left unwashed by the charmed waters, and became subject to mortal touch; but German sunshine bathed the infant Hurschburg in every part, and rendered him impervious to ill forever. I had not known that German air was the moral elixir of mankind. I take it, gentlemen, there is no statute against embezzlement in that country, and the hangman's office, like a cashiership in bank, must be a sinecure. If it had pleased Providence to place the Garden of Eden, not as is supposed, on the banks of the Euphrates, but on the Rhine, how changed perhaps had been the destiny of man!

My client, gentlemen, was not so happy as to see the light in Germany. It was his misfortune to be cradled in the land of Washington and Madison, of Franklin and Jefferson, and the sunshine of his native hills—the hills of freedom—brought him no exemption from the errors of the fall. There

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is a German on this jury, and, it may be, a son of Erin also; and this may give the key to what has fallen from Mr. Williams. I respect the man who loves his native land; it is a natural sentiment in man; but I could not respect the intellect of him who did not regard this fulsome appeal to his pride of country, as an insult to his understanding. What does Mr. Williams know of Hurschburg, or Germany? He is a stranger to both. Of Hurschburg, he knows only that he speaks good German and bad English, and is Specie Teller of the bank.

The advocate of the bank never grows weary of one theme —the friendship of the prosecutors for the man they prosecute. His last ornamental proof of this false fact is borrowed from the sunflower. Gentlemen, in my youth's summer, amid the sunshine of my native hills, I tested to my satisfaction the truth of Moore's beautiful lines. I found the poetry, but not the fact. I could never find the faithful flower following the sun below his meridian, and when he set, their faces were turned the other way. The Directors, I grant, are fair specimens of sunflower friendship.

He asks why these sunflower directors and officers did not turn against Judge Shurlds? and why was not he arrested? The gentleman thinks there is something in this, and so do I. I repeat his question—why was not Shurlds arrested the man of all others, having greatest opportunities, to rob the bank. I go further, and ask why all were not arrested, who had the greatest access to the vault? Common fairness, private and public justice, demanded this step. Or if the directory had not evidence sufficient to warrant an arrest, why not start an investigation to this end? Gentlemen, the bank started wrong! Childs had been absent from the bank on the tenth of August, three months—Hurschburg, his successor had carried the keys of the vault (one set of them) in all that period. The Cashier always kept another set of keys; was keeper of the seal; lived with his family in the bank; had absolute power over all subordinates, and could as Mr. Williams has fatally admitted, go to the vault alone,

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on any night of the year, and leave it unmolested! And yet the directors turn from these gentlemen, to say nothing about others, and take the affidavit of Judge Shurlds for the arrest of the defendant.

I know little of this bank, or its councils, but that I voted for its charter, upon one express precedent condition. I bargained with the democracy, and they obtained my vote upon the bargain, and that was that they put Col. O'Fallon in its directory. I trusted to their promises, and they fulfilled them and put him in, but I believe since then, they have put him out! I know but little of the councils of the bank, but I can well imagine the confusion of the board on the eleventh of August. There were not enough of them, free from suspicion, to make common cause against the rest! They were all involved, some because they kept the keys, some because they slept in the bank, other because they had access to the vault or had their hands in the gold. They cut the Gordian knot, which entangled them, by making common cause against a man who had been in the bank! They determined to give Childs a chance to defend himself, with sealed lips, while they would swear themselves clear, on the witness stand. The first step of the bank was a blunder; and it has "tottered on in blunders to the last."

I am not the accuser of Judge Shurlds, nor of his lady; nor do I charge embezzlement on "honest" Hurschburg—not because he was born in Germany—but because I am not sure that a single dollar was taken—because they back out from lost gold, and rely upon an argumentative, inferential, arithmetical loss of something not defined. But if I were sure that the crime was committed, still I would not accuse him of it—nor any bank agent or officer, for the evidence does not warrant the charge. But when Shurlds and Hurschburg come here to damn my client, by the force of circumstances, I point then to stronger circumstances against themselves, furnished by their own testimony. This is not unjust, nor unlawful. I have another reason, and it is a weighty one. It is from the evidence, more probable, that the bank

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if robbed, was robbed by outsiders. An important fact leaked out on this trial—I say leaked out, because it lay snugly concealed among Cashier and Directors—till after fifteen days swearing it dropped out of Cochran—perhaps because he was an Irishman, and could not hold back what was in him. The bank was notified of a meditated robbery—credibly notified—notified so as to awaken the vigilance of its guardians. Cochran is confirmed by Bowlin, and Shurlds, brought to destroy Bowlin, confirms the whole matter. The bank was to be robbed. And now, under what facilities, is the question? Gentlemen, it is put beyond controversy by the evidence, that the only step necessary to rob the bank from the outside, was to bribe a mulatto girl, the slave and servant of the Cashier, and she in all probability, a street strumpet. It is put beyond dispute that whenever this slave would go to the Porter of the bank, and ask for the key in the name of Mrs. Shurlds, the key could be had. This was enough; all that any skillful burglar would ask! But if he wanted more, it could be had. The seal and the Cashier's set of keys to the vault were accessible to the servant, in the room in which, daily, nightly, she performed her menial service. Gentlemen, why were these important facts kept back? They tend to exonerate all the officers of the bank from everything but negligence—but unfortunately they tend also to acquit my client.

Mr. Williams denies that any suspicion of Childs caused the February and March count. He labors to establish a thorough confidence in the man, to strengthen an argument founded on that confidence. How can he get rid of the positive evidence on this point—the evidence of Walsh—of Barnes—of Brant, and perhaps others of the Directors? What does he do with the emphatic testimony of Col. Brant, who says that he and Walsh dissented from the vote of confidence, and who also swore, that suspicion of Mr. Childs was one among other causes moving to that count? True, Brant is contradicted by the record—but which is false, the record or the witness? True, also, that Brant involves himself in

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inconsistency—for, when pushed to know if he had not tried to induce the bail of my client to give him up, and send him to prison, he said that he had not, but had only said to one of his securities, "up to Saturday, the tenth of August, I would have gone bail for Mr. Childs myself." Why then, did he refuse a vote of confidence? a question hard (I take it) to answer. But Brant has as much right to be inconsistent as any other witness for the prosecution. Besides, it was only the coin in the "charge" of Childs that was counted—the Paper Teller passed untouched—his paper was not counted. It is manifest that the object was to ascertain whether the coin for which they held the defendant exclusively responsible was in the vault, in the quantity specified by the books of the bank.

What ground will be ultimately taken by the bank in this prosecution, the defense cannot possibly know. For ten days we were all engaged in a hunt for lost gold. On a sudden, the cause took a new phase, and since the case is to last the period of a moon, we are to have all the phases of that satelite in its orbit round the earth. We get the grounds of the bank in driblets. My colleague, Mr. Blennerhassett, started in the dark. He was forced to make a speech for the bank, in his own mind, and then answer it himself. I have heard Mr. Williams, and I try to answer what it is deemed safe for him to disclose in the way of argument. Mr. Bates will listen to whatever shall be considered politic for Mr. Leslie to give out, and when all our voices are hushed, a power above us all will present the actual strength of the bank! The skirmishing of the fight will have ended, and the corps held in reserve—the "old guards" of the prosecution, will, by an unexpected but decisive charge, end the day! Of my friend, Mr. Geyer, gentlemen, I heard before it was my pleasure to know him. I was told that his intellect grasped all subjects with vigor, but exhibited a creative power in the field of circumstantial evidence. What I have heard I have witnessed, and this advocate, almost bending under the laurels won in a long professional career, is held back to present the cause

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of the bank, when every other voice is stilled. There was a time when the accused could know what was to be said against him, but that day is past. I trust there is a power in the land to bring it back again.

It is a great point with Mr. Williams to show that the object of the February and March count, was to prepare the gold for shipment to the East. Now, on this point the directory were divided; some favored that policy, and others opposed it. Among the latter was the Director Walsh; but I am willing to give the bank advocate his position, as far as he claims that the foreign gold was not to be used, and that Childs knew it. Does he not perceive that this argument destroys another great argument for the bank; that the foreign gold was sheltered and screened by the American gold, so as to prevent access to the former? On this hypothesis there was no motive to render it difficult of access. It was capital not to be resorted to—and the fact excluded a guilty desire to put it behind entrenchments. This is not the only instance in which the gentleman has answered himself. He told you that one remarkable circumstance against defendant was the fact that he was present at every count of the coin in his "charge;" and yet before he concluded, he gave you many excellent reasons why it was proper he should be there. Absence or presence at the countings or both, are made the evidence of crime, by this ingenious advocate of a shifting prosecution. If absent, the defendant would be guilty of neglect to the bank and of injustice to himself; if present, he is there to practice a fraud upon the counting committee. I know not how to answer these arguments, but by saying they amount to a suicide in logic.

But there is another circumstance which in the opinion of that gentleman bears heavily against my client: "Mr. Childs' counts were always found to be accurate." It is said to be wonderful that this should be true. I see in it nothing remarkable, unless it be a remarkable fact that the bank contained one officer who was at the same time accurate and honest. Ability as an officer, and integrity as a man, are

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generally considered adequate causes to bring about correct accounts. Indeed I know of no other safe guide to such results. He tells us that Hurschburg blunders in his countings, and 'tis proof of his honesty. To be accurate, is to be criminal! then God help the painstaking and the careful, for they will need his aid. This overturns law and custom, and introduces a new rule of evidence. If a man walk the slack rope, 'tis proof of his intoxication; if he staggers on the streets, 'tis evidence of his sobriety. The argument furnishes an admirable shield to cover scoundrels.

A legislative committee go to the bank to examine its condition; they go to the Cashier and to the minutes of the Board to ascertain how much coin ought to be in the bank; they descend to the vault and count and weigh it, and find what ought to be there—this is proof of the guilt of Childs! Suppose they did not find it—suppose they found it missing? that would establish his innocence!

Gentlemen, before our adjournment I noticed some of the circumstances pressed upon your consideration by the advocate of the bank (Mr. Williams). I did not notice them for any intrinsic force in them, but because they were magnified by the gentleman's mode of treatment, as the liver of a goose is said to swell under the operation of a French cook. Let me pay some attention to a portion of his bitter invective before I pass on to the remaining links of his chain of circumstantial evidence. He complains loudly, not only that the scenes of Spruce street are brought before you, but that we did not introduce the unfortunate victim of those scenes as a witness on the stand. Gentlemen, I appeal to your hearts for approval of our conduct in both respects. My client could not fail to see that the outrages she endured were suffered on his account—that her character was blighted by the bank to crush him, and that being the innocent and unconscious cause of her wrongs, it was his duty to vindicate her. We, as his poor advocates here, feel it to be ours to expose, if we can, the orgin and the authors of her wrongs, and to restore, as far as may be, a reputation foully, cruelly,

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and unjustly tarnished. We do not bring her here—we would save her the agony of this unseemly ordeal; but we will defend her here, though that defense should rouse the vengeance of the bank and all its advocates. Why was she not dragged here by the bank? what sentiment of delicacy would restrain it? Her name was on the list of bank witnesses and she was summoned by the bank: why was she not introduced? The bank had a motive for its action, but that motive was not delicacy. It would immolate her here without remorse, as it crushed her elsewhere without compunction. Why was not the gentleman himself put upon the stand? Why did he shrink from a cross-examination? He was chief actor in most of these scenes, and sole actor in one of them, and that the most secret of them all. Why did he not take the stand? He found fault with the picture drawn by the volunteer director, who accompanied him on the expedition, and "was part of what he saw," why did he not come to retouch it, to soften shades, or bring out into clear relief, the parts left too obscure? Perhaps, gentlemen, if he had taken the stand, we might have learned, what we in vain inquired of others, who it was that gave information to the bank of improper intimacy between the lady and my client, and when; and who suggested the plunder, and the search. The gentleman found it more prudent to speak than swear, to asseverate than give evidence.

The counsel argues, that it is a remarkable circumstance, that "the loss was ascertained at the first count after defendant left the bank." The argument is remarkable, but the circumstance is a fiction. The entire statement is untrue in point of fact. Childs resigned in April, left the bank on the 5th of May, and the semi-annual count, by committee, was made in June, and the alleged loss was not ascertained till the tenth of August, and when discovered, there was no count! The discovery was made by "act of Providence" not by count. It was the finger of God, that moved the heart of an honest German, to put his hand on box No. 30, which wrought the discovery. Mr. Williams has breathed the at-

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mosphere of the bank, and his memory fails him; he has forgotten the revelations he made of the councils of the deity concerning box 30.

He asks me, gentlemen, how ten thaler pieces got into box 57? I answer him—the counting committee of the bank put them there. They got into box 57, just as they got into box 5. There is no mystery in it, nor crime. They got there as guilders, sovereigns, francs and doubloons got into those and other boxes. The committees counted the foreign gold before the American coin, but they did not exhaust any denomination of foreign coin, before proceeding to another denomination of foreign coin, and that is the conclusive answer I give to his question, put to me, with an air and manner, which implied difficulty to answer.

In connection with this question, he told you there were only $220,000 of ten thaler pieces in the bank at the December count. How does he know this? There is not a syllable of evidence in the cause on that subject, as I before explained to you. Christy's arithmetic (not Cocker's, Mr. Geyer) was all the evidence offered on that point, and the Court decided it was not a good text book here of law or evidence. It was ruled out, and got into the hands of Mr. Williams, and he makes his speech upon its authority, or he has confounded in his memory a "rumor" heard in the bank, with what he did not hear in testimony. But if it had been read in evidence, what would it amount to? Have they shown what was the increase in the bank of that kind of money, between December and the last of March? They tell you such coin would be received by the bank with alacrity, but not paid out. This would account for its accumulation, and the merchants tell you in their testimony, that such coin finds its way into the bank, and does not enter their counting-houses. As to the emigrants who bring it here, they come at all seasons, when the river is open, in great numbers, and deposit their wealth with the bank or brokers, on arrival.

Mr. Williams has thought proper to burden the case with his personal griefs. He is hurt when auditors smile. I should

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not notice his remarks but for the imputation which they convey. He told you "men were hired to come here and laugh"—at him—if I may supply the elipsis. Hired by whom? Does he mean by my client? As one of his advocates, I say, that in my opinion, it would have been exorbitant in bystanders to take pay for such service, if tendered; they might, as reasonable men, consider themselves amply compensated by the amusements offered. Men spontaneously and naturally laugh at the ridiculous; and if the gentleman has voluntarily placed himself in a false position, he should use philosophy, and bear the consequences.

But he insists that the money could not have been taken by any one but the defendant. He exempts Shurlds, because, he says, that though he had at all times a set of keys to the vault, he never used them, except on a few occasions when the Specie Teller forgot to bring his. He discharges Hurschburg from all imputation because he was born in Germany. Gentlemen, while I am not satisfied that foreign birth is a conclusive test of honesty, I do not hold it to be any proof of crime. I bear Ireland and Germany no ill will. I have felt a deep and true sympathy for them in all their wrongs. I have watched their struggles for liberty with the lively interest that springs up spontaneously in the heart of an American; and my hope has been, and is, that Germans, Irishmen everywhere, may rise to the native dignity of manhood, and throw off the incumbent weight of despotism that oppresses them. If I do differ from others, as to some of the means of making steadfast the structure of liberty in my native land, I have not lost one touch of sympathy for my kind elsewhere.

Gentlemen, I find it difficult to answer arguments drawn not from the light of reason, but from knowledge of the councils of the Almighty. Mr. Williams has monopolized the part of vindicating the ways of Providence to man. He tells you when the Deity stoops from his high estate, to regulate the affairs of the bank—Hurschburg descends to the vault as an instrument of Providence, to pay off the check of Bacon & Page for $40.000.00. To me this matter seems as mere "busi-

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ness transaction." He went down not for box 30, but for any box containing an aggregate of sovereigns suited to the payment to be made; and he saw a box better suited to the payment than box 30, but it was more inaccessible and he took the other. The box not taken—the box most adapted to his payment, was more entrenched, more difficult of access than the one he did take, and yet it exhibited no deficit! What becomes of the argument about entrenchment—the great argument of violated boxes being hid and sheltered, and so obstructed by a criminal design as to conceal the violation? But again, and I wish you to mark it—Hurschburg went down not to count or ascertain the number of bags of gold in any box, but merely to find an aggregate suited to his purpose. He carried with him the memorandum of the loose gold he had counted, and he looked for a box, the aggregate of which would make up the sum of $40,000.00. It is unreasonable to suppose, especially in the absence of all testimony on the point, that he went down to study or memorize the endorsations on the boxes, as to what committee counted, and what each man counted, or the number of bags they counted and put into a box. He went for an aggregate sum in sovereigns, and for nothing else. If even he had read the entire memorandum on the box in the vault, its contents would have slipped his memory before he reached the top of the stairs. Recollect what passed in your presence. Helfenstein, a Director, testifies on the stand, with a box before him. He reads from the endorsation on it. He is questioned about the endorsation—recurs to it with his eyes again and again—and speaks from the vision. I took the box from him, and asked him to tell the jury, if he could, whether the endorsation was on the side or top of the box. You know that if his life had hung on the answer, he could not give it! Well, Hurschburg carries the box No. 30 upstairs and tenders it in payment—informing the young men who brought the check, that he would not correct any errors found in that box! This was the first introduction of a new rule. Before that time, in all the monied transactions between the bank and the house of

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Bacon & Page, boxed coin was taken without being counted, under a rule, which was reciprocal, that errors should be corrected: if of excess, to be refunded—if of deficiency, to be made good. This rule had, from the beginning, been universal; but Hurschburg says: "I will not correct errors in that box." Hurschburg retires to the vault, or behind the counter, and the box is opened by the young men in his absence. Before one bag is counted, Hurschburg returns and says, "Where is the other bag?"

Mr. Williams, feeling the force of this testimony, says, there was the top of the box before Hurschburg's eyes, and he read the call for five bags and saw only four. But there is no evidence of this. Hurschburg does not say so in all his testimony. He utterly fails to account for his intuitive knowledge of the missing bag. And Reed, who opened the box and began the count, represents Hurschburg as inquiring for the fifth, on his approach to the spot. Suppose these circumstances had appeared in evidence against Childs, how damning would have been their force! How soon the lightning of Mr. Williams' eloquence would have flashed upon such dark and guilty indications!

But this is not all. Who prepared and brought here a fraudulent map of the vault—a map made to convey and impress a false idea? Mr. Hurschburg is on the stand as a witness. After he has been examined on various subjects, Mr. Haight takes from his papers a map and has it sent by the Marshal to the witness. The counsel tells him there is a map of the vault, and he wishes to know of the witness if it is correct. The witness answers in the affirmative. In the meantime, I obtained a sight of the map, and before the witness was turned over for cross-examination, I denounced the map as fraudulent, in your presence. The fraud was evident on the face of it. It did not give the contents of the vault. It was confined to the relative situation of the foreign and American gold, and shut out from view every relative position of the silver and gold to the large chests which were in the vault on either side as you enter it. It

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presented the vault as empty, save the boxed gold, and omitted every thing calculated to show there was no design to render the boxes containing the foreign gold inaccessible. And to give force to the idea of the alleged entrenchment of the foreign gold behind the American coin, this map gave not only a horizontal projection of the boxes, but a perspective view of them. The map was prepared, carefully prepared, to show a guilty design in placing the boxes in the vault after the count of February and March. I ask again who prepared the map for evidence against Childs? The answer is Hurschburg. By cross-examination we learned what he had no right to suspect from the manner of its introduction here, or from the examination in chief, a close connection between the witness and the map. Gradually, and step by step, we ascertained that it was all his work, done at his instance, without the instruction of the Board, or of any authority in the bank—executed under his dictation, the artist, Hutawa, (who drew it) being utterly ignorant of what he was drawing. It was a drawing, not of what the artist saw, but only of what he heard—heard from Hurschburg. Gentlemen, why was this thing done? Why did this man, during the progress of this trial, put himself to the trouble of preparing a map in perspective of the foreign and American gold. It was not a map of the vault, it was a map of the gold. Why did he do this thing? If he had made or procured a fair map of the vault and its contents, from whatever motive, we could not complain; but it is a circumstance worthy of comment, that a false and fraudulent map should be prepared by him and brought into court to impress a false idea. It was not only a map made by hearsay, but the hearsay was in November, and purported to give the position of boxes in May last, and this from the memory of a bank officer. You know how testimony coming in the character of a map is likely to impress us. It presents the idea of accuracy. It smacks of care and attention, and excludes the notion of a guess. In all sincerity, did not your minds recoil from the imposition when you learned the history of the drawing? A

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map of perspective, made upon a hearsay! Well, all this is done by the man who has carried the keys of the vault since the fifth of May last; who would not correct the errors in box 30; who by a kind of intuition discovered there was a bag missing out of it; who could see from a distance, a memorandum calling for five bags on the top of the box, when the young gentlemen who opened the box and saw nothing to suggest a deficit, and who was the first to break a long established custom of the bank, without a suggestion of change by the Cashier or the Board.

But this is not all. I am not yet done with Mr. Hurschburg. His next step is to call attention of the several inmates of the bank to the peculiar arrangement of the boxes—in inverted order, as to numbers. He is busy on this point after the tenth of August, but never before. In the whole period of his Tellership in the bank, from the fifth of May to the tenth of August he never suggested to any one that arrangement of boxes, and mark it, no one but Mr. Hurschburg ever saw them in that position until after the bank was in phrenzy about a loss. And it does so happen that upon this important point—the arrangement of the boxes—Mr. Hurschburg is directly contradicted by the man who placed them in the vault. The contradiction cannot be reconciled; the conflict is direct and positive; no charity can harmonize the evidence; one witness must be rejected. These are some of the circumstances which I said I would refer to against Hurschburg, brought here to condemn by circumstances, my client; and the reference is just and lawful. They may in some small degree account for the "chill of death" which came over Mr. Williams at the thought of Mr. Hurschburg's guilt.

At the period of the February and March count, when these boxes of gold were placed in the vault, Mr. Bowlin was the porter of the bank. He served in that capacity for about two years; was recommended to the board as a man of trust and fidelity and honesty by one of the Directors—Mr. Christy; filled this post of great responsibility and trust to

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the entire satisfaction of the bank and retired from it on the fifteenth of May last; the owner of real estate in this city; and called on business to Michigan, he leaves to prosecute it, making Mr. Christy his agent, touching the tenancy of his property and collection of his rents. Contingently his business might carry him to Ohio, before his return home. On the tenth of August, he had returned to the city, and the directory had no certain knowledge of his whereabouts, for he might be in Ohio or Michigan. In this condition of things, the Board resolve to send for him for the purpose of testifying against Mr. Childs; and they appoint Mr. Christy the agent to bring him back, at any expense, to be used as a witness in the prosecution. Cozzens is employed to go after him; but as it was impossible to foresee the trouble and expense of reaching the witness, the compensation of the agent was not fixed. Prior, however, to his actual departure, a letter was received by Christy, from Bowlin, apprizing him that Bowlin was at Cleveland in Ohio. Cozzens was sent immediately, by the bank, was furnished with $100 to pay expenses, and bore an open letter from Christy to Bowlin, in behalf of the bank, requesting his immediate return to sustain by his evidence the prosecution against Childs. On his arrival, he was closeted with the bank, and consulted by Directors at their houses. In this way, he ran the gauntlet of the entire directory; so that, at great expense and after a circuit of travel embracing two or more states, this witness was brought here to swear away what is dearer than the life of the accused.

If then Bowlin be paid for the actual service done the bank, his compensation should be small; but if he be paid for service rendered to truth and law and justice, if he be paid for service rendered to innocence oppressed, if he be paid for rescuing a man, deeply wronged, from the powerful vindictive and relentless prosecution, I know no sum that can fill the measure of his just reward. The witness came, but could not testify as the bank desired. The bank declined to use him. We summoned him for the defense, and ran the

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hazard of his testimony, without knowing what it would be. We knew only this: the bank did not believe his evidence would sustain the prosecution, or it would have introduced him. And now to the important facts developed by him. He placed the boxes in the vault—placed them in their natural, not inverted, order, and left them in that order when he left the bank on the fifteenth day of May, ten days after Hurschburg became Specie Teller. If this be the truth, the boxes were changed. Changed by whom, and for what? Not by Childs, for he was not in the bank. There is no escape for the bank unless Bowlin be destroyed; he must be proved a liar, or the prosecution dies. When these facts appeared in evidence, you witnessed the tremor of the bank. Mr. Geyer invoked the highest powers to meet this exigency of the corporation, but in vain. The last desperate chance was to muster up the whole force of the bank and bring it in a body to slaughter the witness. They are driven to the sad necessity of attempting to show that the witness is unworthy of belief under oath. O! if he had sworn for them —sworn against Childs—they would have found in him "a marvelous proper" witness. They would have defied us to impeach him. Christy would have backed his unsullied integrity, and every director, every officer and subordinate of the bank would have testified to his unimpeachable honesty. A bank, gentlemen, stops at nothing. It is willing to put itself in the shameful position of insinuating that it placed in a post of great trust and high responsibility, and kept in it for years, a scoundrel unworthy of belief in a court of justice. Mr. Williams insinuates that Bowlin has been suborned. I repel the insinuation by saying that, if capable of subornation he would not have been our witness. If he had not been as Scott said of Taylor, "perversely and obstinately honest," the bank would have put him on that stand to send Childs to the penitentiary. The witness comes certified by the seal of the bank. He is brought five hundred miles to be a witness against the accused, and at great expense. Mr. Williams tells you he is "not worth a pinch of snuff;" he

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forgets, the witness cost the bank much more than that, and his evidence is priceless to truth and justice. It was easy to foresee that Bowlin would be slain, if the bank could kill him; for it spares no sex or condition; and knowing this, I called upon the prosecution to impeach him by bringing in the Directors and guardians of the institution, to say nothing of his neighbors, to swear that he was unworthy of belief.

Gentlemen, the sentiment of delicacy and self-respect was not so extinguished even in a bank, as to take a hazard so desperate. They felt that to strike Bowlin, that wise, was to strike themselves, and they fell upon the policy of undermining a fortress, which they dare not storm.

Gentlemen, I have been attempting in my remarks to teach the bank a lesson in justice and charity. I have pointed out to some of its officers and witnesses the cruelty of jumping in the dark to fix crime, infamous crime, upon my client; and without accusing any man, I have shown to them that if the object was to gather up circumstances of suspicion, they need not have wandered out of the bank to find a man on whom to cast them.

An effort has been made to fix in Childs the possession of the seal used for closing up the fifty-seven boxes of foreign gold, but it ends in a total failure. The only proof on the subject, is that at the termination of a count, in the last of March, immediately after the seal had been used by the committee, and before all of them had retired, the defendant handed the seal to Mr. Angelrodt, a Director, and one of that committee—saying to him, "you had better take the seal with you, as the Cashier is absent." Mr. Angelrodt took the seal and carried it home with him. Now, it is manifest that, but for this act of the accused, the seal would have remained exposed to the inmates of the bank during the evening and night, and the next day, to all persons who had access to the Cashier's room, so that his prudence and care, supplying while rebuking the negligence of the committee and the Cashier, were brought to sustain his guilt. Two circum-

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stances are conclusive to show that the momentary possession of the seal by Childs, could not have enabled him to use it to violate a box. First, there was no time, and second it was too late in the general counting. It was late in March—box No. 37 had been passed, and it is not pretended that any box beyond that was violated by anyone. Bowlin testified to the same fact, and says that, at the conclusion of the business of the day's count—after securing and sealing the boxes counted on that day—Mr. Childs picked up from the carpet the seal and handed it to Mr. Angelrodt. You will recollect that the boxes were sealed upon the floor, which accounts for the seal's being on the carpet. I pass from this subject at present, but shall probably recur to it before I close, when I touch upon the manner in which Bowlin is sought to be contradicted.

I approach now the great theme of the wax, and I intend to seal up the bank with its own wax. Mr. Williams tells you that every box from which a bag was missing shows palpably on its upper seal the violation of the box. (Marshal, bring me box No. 30.) You are told by him that any man can see it, upon a close inspection. The nominal Cashier told you when on the stand, that some of the Directors thought they could see a difference in the seals, but he grants that it required better eyes than his to see it. Among the Directors who were clearest upon this subject, was Mr. Heiskell, who thought that no man could be mistaken on the subject. While he was on the stand I resolved to try him, and concealing the number of the box, I submitted to his careful inspection the "providential" box No. 30. You witnessed, gentlemen, his minute inspection of that seal—you saw how, with microscopic glasses, he viewed with long and anxious speculation the seals upon that box, and then declined to hazard an opinion whether the seal had been violated or not. He could not determine the question, and would not risk a guess. I tried the witness, not because I deemed the matter material, but because I wished to illustrate the effects of bank atmosphere. In the bank, surrounded by the men who make war

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on the defendant, the witness would have seen a difference, or thought he saw, for there an opinion might be safely advanced; but here there was peril in it, and the witness determined not to be caught. Mr. Heiskell, perhaps, suspected that I was putting his opinions to a decisive test; he may have feared that I presented for his inspection a box not violated, and lest he might be caught, he took the only seeming path of safety, and that was to have no opinion at all. What was quite palpable in the bank, became invisible here.

If I understand that argument made upon the wax, it is this—involving four propositions: First—That all the boxes were sealed with the same wax. Second—That the seals of sixteen boxes were violated, and resealed with different wax. Third—That this latter wax was of a darker scarlet than the wax of the original seals. And Fourth—That the wax obtained by the accused, from Fisher, on his second call for wax, answered in color the wax used to reseal the sixteen boxes. The conclusive answer to this argument is given in the fact established by Fisher himself, that the last wax got of him by Childs was of a brighter scarlet than the original wax. This answer is decisive, but the whole argument is an assumption. There is no proof in the cause that the fifty-seven boxes were all sealed with the same wax. The reasonable presumption is the other way. Had the bank no wax on hand before and at the time they began the count in February? Was the wax used ordinarily in the bank just out? This was not so, or Mr. Williams would have had the fact in evidence, to furnish another act of Providence in behalf of the corporation. Bowlin's testimony confirms this; he swears to two parcels or boxes of wax, and he testifies to the surplus left after the counting and sealing were over, and tells where he placed it in the bank, and where, moreover, he adds, it may in all probability now be found. The Directors made no arrangement or provision for the wax, they used such as was handed to them by the Porter, when a box was ready for sealing, and not one of them ever thought of taking care that the wax used in the sealing should be of the same

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kind. They knew and cared as little about this as they did concerning the kind of candle that melted it. Indifferent on the subject in the beginning, they were wholly inattentive to it, when each day's counting was over, and they left their materials to be put away by the Porter, ready for the operations of the next counting committee. If the bank had wax on hand and the amount was replenished by another parcel, not one of them discriminated between the parcels, but used the wax as handed, nor if any wax was on hand, when they begun, did any one of them look to see whether all of it was of the same shade? It is thus manifest that the basis of the whole argument is a bald assumption.

But, gentlemen, let me tell you a secret. Do you know that the bank has resealed the top seal of forty-one of the fifty-seven boxes, and thus obliterated every comparative test between the upper and lower seals of those boxes? Do you know that it has wiped out every trace by which we could compare the boxes alleged to have been opened with those confessed to be untouched?—This is true, and it is a remarkable step. I asked one of the Directors why it was taken? He admitted it was very indiscreet. Gentlemen, why is it that the indiscretions of the bank are always against my client? They never blunder in his favor. They carefully preserve sixteen seals, and as carefully destroy forty-one. Well the bank resealed forty-one boxes—where did they get the wax? No Director tells. Was it in the bank? Then there was a large surplus of wax left after sealing the fifty-seven boxes, and this is a fact of much importance. How much? Now, Mr. Geyer, you have a chance for arithmetic. Mr. Williams argues from what he calls "a little act of Providence," namely, that it just takes fifty cents of wax or five sticks to seal sixteen boxes, and if this be so, how many sticks are required to seal forty-one boxes? Work this sum and you have the surplus left of wax after the original sealing. With this result the product of science, let us see how the wax argument of the bank stands. You observe the fact to be

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established is, that Childs broke the upper seal of sixteen boxes, and took out a bag from each box and resealed the boxes. What wax did he use in the resealing process? The five pieces bought of Fisher, is the argument and reply.

Recollect gentlemen what is said by the bank and its advocates, of my client. He is represented as a man of uncommon shrewdness, always cool, self-possessed, circumspect, wary and clear-sighted. A magician of unparalleled powers, who has fooled every counting committee of the bank, and every legislative committee sent to examine its condition and count its coin—a man so astute, as to baffle and deceive everything but Divine Providence. Now this argument requires that my client should go to the mantel piece in the Cashier's room, take the seal, lying by the surplus wax, leave the wax untouched, ready provided to his hands, the very wax used in the original sealing, and start out upon an expedition to procure wax suited to his end by purchase; purchase from a Bank Director, who counted perhaps the very coin he is about to purloin. Fatuity—brainless folly could not commit an act more senseless. Gentlemen, my client is not a fool, and the argument is not only an insult to his understanding, but to yours also. I know that prosecutors take great liberties with the human mind; the accused becomes as suits their policy, a wise man or a fool; at one moment he is endued with the highest powers of discrimination, and in the next he is brainless; indications of innocence, are ascribed to guilty foresight, and acts which sane intelligence can't commit, are put down to the mind's eclipse. I know all this, but I know also, how difficult, and how unnecessary it is to answer such suggestions.

Mr. Williams thinks it is quite impossible that a gentleman could innocently buy for his own use, five sticks of wax. Fifty cents is certainly a large expenditure for so useless a commodity, but as a small palliation for so great offense, I suggest to him, that my client was then not only a gentleman, but a member of several societies, requiring the transmission

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frequently of large packages, which might demand the use of wax.

It is difficult to doubt, that the bank had wax on hand before they begun the count in February and March, and that they have it now. The wish to destroy Bowlin, is the universal sentiment of the corporation, and it is natural, for he has destroyed their prosecution, and he told them here, in open court, where he put the wax in the bank, and where they might find it now. Do you suppose, gentlemen, they have not looked for it? If they found it, we of course would never hear of it, but if they could not find it, we should have been apprised of the failure. They would beat down his testimony at every point were it in their power, and we learn by what they do not attempt, where Bowlin is invulnerable. The omission to assail him is evidence that they cannot.

His testimony bears internal evidence of its truth. The duties he performed make him an able witness. He speaks of what he had a right to know, and of what he may well recollect. It was his business to prepare the room of the Cashier with the materials to be used by the Committees; and when they were gone, it was his business to gather up and place away what they left; and thus it is he is enabled to speak distinctly of facts which were dimly retained in the memory of the directors or altogether forgotten by them. If Bowlin were disposed to lie for the benefit of the accused, it would have been easy for him to say that the two parcels were of different wax; but he does not say that; all the wax was red, and he did not examine it to find different shades; but he is clear and distinct, and positive that there were two parcels lying on the mantel piece, day after day, during the count, and they were handled by him and put away.

It is said by Mr. Williams that if Childs had asked Fisher for a better wax, he would have answered, "I have not got it." Then he would have answered a falsehood, or else what he swore here is false; for he said, as a witness, that the wax

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Childs got the second time, was "a better wax, and of a brighter scarlet." Gentlemen, remember the phases of this director's evidence. In the first place, he told you that the second wax might have been the same as the first, or might not—he could not tell. But this would not do, as the seals were different, the wax should be also—the doubt gradually ripens into certainty; but, unfortunately for the bank, it is of the wrong color.

A remark made by Mr. Childs at the opening of the boxes, entirely correct in itself, and concurred in by others present, is presented by Mr. Williams as a circumstance against the accused. When some one of the Directors thought he saw a difference in the shade of the seals, my client observed that more or less smoke in the burning of the wax might make some difference in the color. Mr. Clark, the Paper Teller, says that others concurred in the observation; and he says also, that the next box examined gave more decisive indications of being smoked. As an argument it is smoke, and I notice it only to show the gangreened vision of the bank, which sees in everything, however natural and just, indications of guilt. Among those who concurred in the truth of the observation was Judge Shurlds.

Perverting as he advances, Mr. Williams says that Mr. Childs "besought Hurschburg to become his successor." Who said that? What witness gave color, even, for such an idea? Hurschburg knew that Childs was about to retire from the bank; he wished his place, and he found in Mr. Childs a friend. But my client cannot perform an act of friendship to an honest German, flying from the moral atmosphere of his native land to the corrupting air of our own unhappy clime, without being indicted for it. Mr. Williams can act from the impulses of a generous nature, but he denies to my client all such noble promptings. My client is made alien in heart to the foreigner—while the cosmopolitan yearnings of the bosom of Mr. Williams impel him to kiss every German he may meet. "Evil to him who evil thinks;" and the man most apt to distrust the friendship of others, is

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not aptest to be sincere in his own. Hurschburg wanted the place of Childs, and Childs gave him some good advice to attain his object. "His offense hath this extent—no more." How was it with the platoon of strangers, admitted to offices in the bank, since the retirement of my client? Were they recommended—had they friends, political or otherwise? And does the gentleman find in their introduction to the bank, by whomsoever made, a guilty design?

Gentlemen, if no other good shall result from this investigation, (and out of so much evil some good should arise,) it will open to the public mind—and I trust to the public authorities—the injudicious, irregular and unsafe manner in which the affairs of this bank have been and are managed. The Cashier of the institution, the lawful and exclusive keeper of its capital, has been by the unwritten prescription of its Directory, absolved from all knowledge of, or responsibility for, its funds. The directory have not condescended to consider it a part of their duty to see to the safety of either coin or paper; and by a simplifying process, which loses sight of all proper checks and balances, the practical responsibility for the whole capital of the bank is thrown upon two men, called Tellers—one of whom is responsible for all the paper, the other for all the coin. To conduct the daily business of the bank—embracing the payment or reception of fifty thousand dollars, the Tellers have access to, and are held responsible for, all the money on hand; and not they alone have access, but almost every subordinate agent in the bank.

The vault in which the money is placed is open to all but the Cashier, who is said to avoid it, as having no business there, and the Directors are careful not to be seen near it as a Board, and never approach it except by a committee of two or three, twice a year, when a compulsive visit is imposed upon them by the charter. The Board, or at least several of the Directors, have been informed on this trial for the first time that the Cashier had a set of keys to the vault, and others who knew the fact, by some loose information, could not account for it, except by the supposition that it was to

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remedy the possible forgetfulness of the Specie Teller in not bringing down his keys from his residence at the opening of the bank. The capital is placed within the reach of those, many of them strangers, too, who ought never to see it, while those who are trusted and held responsible by law, are said to be strangers to the sight of it. The books of the bank are likewise in confusion, and cannot be made to agree by its accountants.

It is said by Mr. Williams, that there was an improper design couched in the remark of Childs to Hurschburg, that half an hour would be sufficient time for turning over to him as his successor, the gold in the vault. There is no ground for the suspicion of an improper motive. You will remember that all the loose coin had been counted by Hurschburg, and unless the boxes were to be opened and the gold counted, half an hour was ample time for what they had to do. It is not even pretended, that this was expected or desired by either party, for it would have occupied them a month, and was contrary to the design involved in sealing the boxes by the Board, whether that design was to ship the coin east, or keep it in the bank unused. Mr. Hurschburg stated that he did not consider himself responsible for any but the loose gold, from the fact that the committee had counted, boxed and sealed up, and packed away the rest, and doubtless Childs took the same view.

One argument touched by Mr. Williams will be pressed by Mr. Geyer. It is the main ground upon which he will place the prosecution. He will insist that the semi-annual and legislative committees, and the entire board in February and March, were deceived—deceived by being entrapped into a re-count of money already counted by them, and that Childs was the only man who could have deceived them.

Thus when Jackson and Ellison counted and weighed the gold in the vault, or a portion of it, placed that portion in the gold chests, locked them, and took away the key with them, and resumed the count and weigh next day of the remainder of the coin—it will be said that in the interval

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Childs, by a false key, opened the chests, took out enough to cover his defalcation, relocked the chests, and made them recount the money abstracted; and that no one but Childs would know how much to take out.

The vice of this argument is that it begs the whole question; it assumes everything that is to be proved. It assumes the defalcation, and it assumes the deception. It is nothing but a series of guilty guesses, without a shadow of proof. The guesses are cruel, unlawful, wicked, suppositions. Prove the false key—prove that Childs had it—prove that he opened the chest—prove that he took out the money—prove that he deceived the committee by making them recount it, and then you will find it unnecessary to use your other proposition, that he was the only man that could have done these guilty things. Shall any man be damned upon a surmise? It is monstrous. Who made the false key? Was there a false key to the chest? Who ever saw it? Was it ever in the hands of Childs? If so, when and where? Was the chest opened in the interval? If so, bring the witness. Have you such a witness in the bank, or can you bring one in all the states you traversed to get Bowlin?

Mr. Williams insists that the Paper Teller, Mr. Clark, is the most honest man in the world—and the friend of Childs. I do not impeach his honesty, and he may be a friend of my client, if so it is something in his favor, that despite this prosecution and against the esprit-de-corps of a bank, he yet enjoys the friendship of the most honest of men. I have some reason to know what Mr. Clark thought about the haste, precipitancy and cruelty of this bank war against the defendant; but waiving that as not being in evidence, I rely on the testimony of Mr. Clark, to destroy all idea of a paper defalcation. He says he would have found it out, if paper had been taken by another, and that the first semi-annual committee would have found him out if he had taken the paper himself. He says the paper of the bank is safe, and with a candor worthy of imitation, he says, that of all the officers of the bank, he is the one least checked. The books

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of the bank, the reports of the committee, the sworn statements of the Cashier, the records of the Board, all prove no defalcation in Childs, and we might fill a bushel basket with the affidavits of bank functionaries to this point, but Mr. Williams sweeps away the entire mass by a dash of rhetoric, and says it is all deception.

The counsel, in the ardor of his friendship for my client, says that "Mr. Childs and Mr. Bates are the husbands of all the widows in the land." Gentlemen, it seems to be a hard thing, for this bank, or its advocate, to be just. Elijah Hayden made some years ago a conveyance of his property, consisting of real estate in this city, for the benefit of his wife, and Mrs. Whitlock, her adopted daughter—adopted twenty-five years ago. He constituted my friend, Mr. Bates, trustee, to enforce the trust. By the provisions of that conveyance, the beneficiaries were secured the enjoyment of the property, were entitled to collect the rents and profits, and in all respects to enjoy the estate free from the molestation of the granter, and at last the estate descended to the only child of Mrs. Whitlock. This estate as you have learned by the evidence, produced from rents, exclusive of the house occupied by the ladies, fifteen hundred dollars per annum, and for several years these rents have been collected by the defendant, as the agent of the beneficiaries. You have heard from Mrs. Corbin, the circumstances under which her money was invested in real estate by the defendant, and upon these facts, the counsel declares "Bates and Childs are the husbands of all the widows in the land." Under the advice of Mr. Bates, the original title deeds to this estate, and documents connected with them, such as tax receipts, etc., were sealed up and placed for safe keeping in the bank, as a special deposit, endorsed as such, and required by the endorsement to be delivered to either of the beneficiaries or to Mr. Childs. That is the violated packet, plundered from the vault, and carried to the Grand Jury, at a period of time, when, perhaps, the fate of the prosecution hung upon a balance. Gentlemen, if the bank did trample under foot, the bill of rights

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—the Constitution of the State, and the general laws of the land, they ought, at least, to have respected the laws of the bank and their own contract—but in the general phrenzy, they ceased to be a law unto themselves. The packet was violated.

You are told by Mr. Williams that he penetrates without difficulty a bank statement of its affairs; that even "suspense account" is no mystery to him, and that he readily perceives how the clear profits of the institution may exceed by one hundred thousand dollars its gross profits. He is modest enough to inform us, however, that he attributes this not to any particular acuteness original with him, but to the result of education. In this light, with which common men are not furnished, he has made and presented to you an account of the property, liabilities and resources of my client, which beats even "suspense account."—There is nothing like it; it eclipses all bank arithmetic, and I asked a copy of it when he concluded his speech, not only to study the abstruse, but to preserve the curious.

I have not time to study the document now; I hand it over to my colleague, Mr. Bates, for his grave consideration, as a paper tasking all the talents or taste which he may have for the difficult and abstruse. My colleague will perceive that the first step in the account is a blunder of $1,500. By that document, Mr. Williams has made my client rich. I submit as a practical argument in answer to his figures, that from the sum of wealth there put down, the bank may deduct $25,000, and the corporation may have the property by paying the balance left. Here is a fine chance for a fortune—who will take it?

When the counsel came to the foot of his account, showing the imaginary opulence of my client, he exclaimed, "Gentlemen, we have not found out half of the wealth of Childs." Where, I ask, is the other half? Where can the bank yet look and search? What place so dark, concealed or sacred that the bank has not already penetrated? Its Argus eyes, its Briarien hands, have looked and felt everywhere.

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Every bank, every Broker's shop, every stock jobbing establishment, has been ransacked—the West, the South, the East, has been explored, the dens of the police have been entered by the bank, spies without number, all the Union over, have been peering for lost gold—peering in every haunt of vice, every avenue of exchange, and here at home, in the city, around us everywhere, the bank and its instruments have been night and day practicing a sleepless and lawless vigilance—they have haunted the tombs, they have gone to the grave of a sleeping sister, they have raked the ashes of his dead children, to find their embezzled gold—where?—where, shall the bank go next to find what it has not yet discovered?—what other unprotected widow shall be plundered for the benefit of the bank? No, gentlemen, you have performed your task, you have discharged your whole duty, you have been faithful servitors. If you have not found what you sought, it is because the thing sought was not lost, or because you have not looked to the guilty party. It is a fact, almost beyond belief that this bank has never directed a single energy of its mighty powers, elsewhere than at Childs; with a desperate hardihood, it has fixed its gaze on him, on him alone, and has sprung upon him as the catamount springs upon its prey.

I have abused your patience, gentlemen of the jury, and exhausted my strength, and passing other matters of interest, I will hasten to a conclusion. I come now to the testimony of Bowlin, and to the mode in which the bank seeks to destroy the witness it took such pains to procure.

The important facts sworn to by this witness, are

First—Access to the bank by leaving down the bar, under the orders of the Cashier. Second—By procuring the key, under an actual or pretended message from the lady of the Cashier, sent by a mulatto servant who lived at the bank. Third—The situation of the boxes of foreign gold, ranged in their natural, not inverted order, in numbers from one to fifty-seven. Fourth—That he was directed by the counting committee and by the defendant, not to place the American gold on the foreign, but to put it in front, in separate

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piles, and that in doing this, he separated the foreign and American coin, as far as the space would allow, by placing the latter against the chest. Fifth—That when he retired from the bank on the fifteenth of May last, the fifty-seven boxes of gold were in the same situation in which he placed them. These, gentlemen, are the most important matters in the cause for they prove a change of the boxes after he left the bank. The less important facts detailed by him are: First—That two parcels of wax were in the Cashier's room during the February and March count. Second—That while the count was going on, some members of one of the committees complained that the wax was thin and ran into the box, making it difficult to seal the box, and requested other wax, and that accordingly Childs did procure another parcel. Third—That he saw Mr. Childs pick up the seal from the floor and hand it to Angelrodt, requesting him to take care of it, as the Cashier was absent. Fourth—That he informed the Cashier that during his absence his wife had sent for the key and entered the bank, and the Cashier inquired of him "what she wanted in the bank," also the reply he made to the question. Fifth—That after all the boxes were sealed he placed the wax remaining at a certain place in the bank, where he supposes it can now be found.

You will bear in mind, gentlemen, that in the important facts, developed by this witness, the bank has made no effort to contradict him. It exhausts itself in endeavoring to show error in mere trifles that cannot effect the case, if found either way. The direction he received from the counting committee, stands unimpeached—the position in which he left the boxes ten days after Hurschburg took charge of the vault, is not contravened—even Hurschburg is not called to disprove this pregnant fact—no attempt has been made to dispute what he says he did with the wax left after the count was over, nor has Judge Shurlds been able to deny the conversation he held with the witness, touching the entry of his lady into the bank during his absence. The witness is therefore confirmed in these points of his testimony. The

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silence of the bank fortifies the witness. And now in what does the bank seek to negative his statements; and how? Mr. Angelrodt is brought to prove that Bowlin was not in the Cashier's room when Childs handed him the seal and bid him take care of it; and the directors in a body come to show that they do not recollect any occasion for more wax. It is in these matters and by this mode, that they seek to impeach the witness. It is not lawful to impeach a witness who recollects an incident, by another who says he does not recollect it. But the effort to destroy a witness by the forgetfulness of a Bank Director, a Director of the Bank of Missouri, is enough to start a smile on the face of a marble statue. Gentlemen, these directors have secured to themselves the immortality of a proverb; they have robbed the fly of one of its distinctions. Heretofore, men have said, "no more memory than a fly," but in coming time, they will say "no more memory than a Bank Director." Without a memorandum or a box, a bank director is a fish out of water. The mode, too, in which they reach the oblivious, commands our special wonder. Take an illustration: Dr. Forbes, a director, hears a paper read at a sitting of the Board, among other things that paper states my client was worth $2000 when he left Maryland to come hither. That gentleman remembers the sum; he goes before the Grand Jury—the Grand Jury that found this indictment against Childs—and swears that the sum was $2,000. He is put upon the stand here, and he says he is of the opinion that the paper read, stated my client to be worth $1,200 when he left Maryland. I asked him if he did not swear differently before the Grand Jury. Yes. Did you not then say it was $2,000? "Yes." Was not your memory distinct as to that sum? Yes. Why have you changed it? "I conversed with Mr. Austin." Did Mr. Austin ever see the paper or hear it read? "No, sir." And your recollection changed after talking with Mr. Austin? "Yes, sir." And settled down on $1,200? "Yes, sir." Now, gentlemen, the most amusing part of the whole affair is that this Mr. Austin swore in your presence, in this cause, that

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he had no knowledge of what my client was worth when he left Maryland. The Director's memory retains the sum of $2,000, he prints it deeper by an oath, he talks with a man who never saw the paper nor heard it read, and is wholly ignorant of the subject matter, and straightway the Director deducts $800 from the amount. If he had met another man, as ignorant of the whole affair, and talked with him, the whole $2,000 might have slipped from his memory forever. It is remarkable, gentlemen, that the metempsychoses of the recollection of the witnesses, so frequently displayed in the progress of this trial, never work a change for the benefit of Childs—the chapter of accidents is always against him. I have heard of a speculative philosopher who ventured an ingenious theory to illustrate the phenomena of memory. His suggestion was that the memory in its structure, was a sieve of unequal apertures, one-half fine, and the other coarse, so that on one side, the smallest incidents would be retained, while on the other the largest facts would fall through and be lost. I recommend the evidence furnished by the bank on this trial, as a striking illustration of the truth of this theory.

The attempt to discredit Bowlin by the evidence of the cashier and his lady, is a total failure. Bowlin swore that the lady sent for the key on two Sundays, in the absence of her husband. She admits she was in the bank on two Sundays, in the absence of her husband. She recollects of sending for the key on the first occasion by her mulatto servant; but is of opinion that she entered the bank on the other without the key, the bar having been left down by the order of the Cashier. She thinks these visits were about twelve months since, and Bowlin thinks they were about nine or ten months ago; and either of them may be mistaken as to time; but the important fact of access to the bank by sending for the key in her name is established. She confirms, too, the habit of her husband in going into the bank on the Sabbath, and his mode of access. The Cashier's evidence in rebuttal only makes the matter worse. He recollects only two occa-

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sions on which he went into the bank since January; even these he did not recollect when he was examined in chief; and since he came on the stand the last time his memory has been refreshed as to another occasion when he was in the vault, previously forgotten. Questioned moreover by Mr. Bates, as to still another visit to the vault, he does not remember, but he does not deny.

He fortifies Bowlin also, by confessing the knowledge of the threatened robbery of the bank—a subject upon which he and the Directory preserved a dead silence, till the fact leaked out of Cochran. He proves also, access to the bank by others, for he found three young men in the bank on a Sabbath of this year.

If Bowlin had forgotten, or confused in his memory, any of the events which transpired while he was porter in the bank, they are the last men on earth who should attempt to discredit him on that account. You have seen them day after day in this trial, come back to count, to correct blunders, made in their own swearing.

But it is said that Bowlin read the newspapers containing the published evidence of this cause. If that discredits him, then all the witnesses of the bank are unworthy of belief, for they all read the papers. Did they not read them notwithstanding the order of separation, by which it was designed to keep each ignorant of the others' swearing? Did they not confer and consult together, and muster up in the bank, and out of it, all the evidence gathered from every quarter and did not Col. Brant move and carry in full board the proposition that they had now sufficient evidence to issue an attachment agaianst the property of Childs? Yet Bowlin is to be discredited because he read the newspapers.

But he conversed with Childs. I had supposed the prosecution would take special care to avoid such inquiry. Suppose it were true? Could the bank complain? Do they, in virtue of its corporate character, claim a monopoly of conversation with a witness? Did not they send five hundred miles for Bowlin, to converse with him? Were they not

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closeted with him in the bank again and again, and did not every director converse with him—converse with him on the subject of this trial—converse with him to know how much and what he would swear against Childs? In the face of all this, in the face of Christy's letter, and the verbal message borne by Cozzens, they have the hardihood—I say hardihood —to object that Childs should converse with him. But Childs did not converse with him as to what he knew or would swear. He observed a delicacy and propriety on this subject, which the bank has not followed.

An effort was made to show that Childs had written to him, before he received Christy's letter, but it was a total failure: he knew not where to write, had he desired to write him. Christy only learned through the letter he had received from Bowlin. The next manœuver was to insinuate that some man—a man of straw—created by the mind of Dr. Geyer —had beaten police and bank vigilance, and reached Bowlin as an emissary of Childs, before the arrival of Cozzens at Cleveland. The last exhibition of Mr. Geyer's ingenuity was to make it appear that on the arrival of Bowlin in this city he fell into the hands of the defendant before he reached the bank; but the proof was positive against the suggestion. Gentlemen, I dismiss this part of the case—I leave the witness, strengthened by attack; the effort to destroy him, made with the entire forces of the bank, recoils upon the prosecution, and establishes both the importance and the truth of his evidence.

I deem the testimony of Mrs. Shurlds important, but not to show crime in her. I am quite sure her visits to the bank were not to embezzle its gold. Her testimony is important to us to show how easy it was to rob the bank through the instrumentality of a negro servant. It will be said, perhaps, that no outsider robbed the bank, and the argument will be, no outsider would have taken a single bag from a box of gold, and he would have left behind him some mark of violence. These plausibilities are met by others quite as plausible. As to external violence, that never is made, but from necessity. In

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this case, the easy access did not require it. As to the mode of asportation, that is more plausible, but it is not conclusive. A box of gold is a difficult load to hide. There was a watchman at the bank, he would have to be entertained by an accomplice, and the city police and strollers, at all hours guarded against. It is not every thief who is so unwise as to cut open the golden goose; and besides, it was of the last importance to gain time to secrete the treasure. This is the great labor in a stupendous robbery. Want of time led to the detection of the Nesbit robbery. The case of the robbery of the City or Canal Bank of New York illustrates what I have just said. In that case there were no marks of external violence. Boxes were violated, and re-sealed; the inmates of the bank were implicated because of this, but the robbery was accomplished from without.

Gentlemen, we might rest the case upon the absence of proof against our client; but there is evidence, affirmative evidence, of his innocence. The bank has chosen to give the life of Childs in evidence, and that life from boyhood's apprenticeship up to the present hour, is proof against the deed imputed to him. It brings his life up to the present hour; for, though brought to this criminal bar, and put on trial; standing amidst the mighty throng which fills this temple of justice, and before you, a man accused of crime, he is yet, in your judgment, as in mine, in all the qualities that may make a man, the equal of the loftiest among his accusers! He has not forfeited in an hour the rich treasure of a name, won by a life of honest toil. He is now surrounded by "troops of friends," and has the sympathy of the just. His laurels were not won in a day, and shall not perish in an hour. Thank God! accusation is not crime, nor malice proof of it. The Court will tell you this is a cause in which character is a shield. If in a case like this a man could not fly to his character, as to a plank in shipwreck—a good name would cease to be the valuable thing it is. Besides, he has never been too proud to work; he is a man of toil, and the man who works is not the man to steal. There is something in toil,

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daily toil, which exempts man from the tendency to steal. The thief is born of idleness and cupidity. Hard, honest, daily toil begets no such offspring.

Again, the bank, with all its vigilance and inquisitions, its search and lawless confiscations, has never found a dollar of its "funds." This is decisive. There is no instance of a loss so stupendous, without a discovery of some portion of what was lost.

The efforts to go into business on a limited capital; the uniformity of his statements touching his means and resources, is proof of his innocence. The contracts he made with his workmen, and the mode of payment is proof to the same end. And his bearing before you and amidst every stage of the storm of persecution, which beat around him, is the bearing of a man deeply, foully wronged.

I cannot close my remarks without calling your attention to one of the many means resorted to by his accusers to manufacture public opinion, against the accused. Public opinion, a powerful tribunal in all countries, is omnipotent in ours. To turn the tide of public opinion against my client, Col. Brant cut loose the tongues of the directory, tied up by a string of the charter. The bank cries, "havoc!" and lets slip the dogs of war, and at once in full cry, "Tray, Blanche, and Sweetheart," open on the track of Childs. Was the resolution dissolving the injunction of secrecy necessary to obtain information? No! but it was deemed necessary to impart it. You see, too, the facilities of the bank to get up a prosecution. One of the directors was a member of the grand jury that found this bill. He could sit for one hour, amidst a bank conclave, and in the next, appear as one of the lawful inquisitors of the country, while the forces of the corporation, divided into detachments, were marching through the streets imparting knowledge, gendering suspicion, by significant inuendoes, and fanning into flame every element of excitement in the popular mind. Why was not the defendant tried before Justice Butler, under the provisions of our statutes? I will guess. There is an action known to our laws by the name of

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false imprisonment. If he had been tried and discharged by the Justice, a heavy responsibility rested on his accusers. If, however, the grand jury could be coaxed to find a bill of indictment, some shallow lawyers think it a defense to the action of false imprisonment. It was, therefore, deemed a salutary step, to transfer the jurisdiction from the Justice, and to ply the grand jury for a bill. That tribunal catches the very whispers of society, and amidst an excited community, the bank determined it should hear enough to inspire action. It cannot be denied that the bank was at this work, and it did make public opinion. Hogan and Gay were not the only persons who heard that a large amount of the gold of the bank was found by search, at Mrs. Hayden's residence. The rumor was rife upon the streets; it could be heard at every corner and at every spot of the city, where men do congregate. Who published the falsehood? The directors and officers and agents of the bank, or their instruments, the police? In either case, 'tis the same, for the police were the hired agents of the bank. Slanders, connecting the name of Childs in guilty association with one of the ladies, were blended with the discovered gold, and the packet—the violated packet—taken from the vault of the bank to the room of the grand jury, was exhibited to show the guilt of the triumvirate, Mrs. Hayden, Mrs. Whitlock and Nathaniel Childs.

Mr. Geyer, seeking to paliate, when he could not justify the confiscation and plunder committed by the bank, will tell you the trust deed made by Elijah Hayden, was not put upon record. What of that? A record is only constructive notice —the bank had notice in fact. There was possession by the ladies, open and notorious possession, for years, which is notice to all the world, and there was Owings, the Collector, collecting and paying rents. The bank is without excuse; it made the confiscation, to give color to the slander of criminal intercourse. The packet in the bank was notice.

A gross perversion of the paper read to the Board has been attempted. It was not the design, nor the effect of that

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paper to show what Childs was worth—its intention and purport were to show what his real estate, unimproved, had cost him, and this cost was put down at about the sum of $8,000. Every Director knew that the residence he occupied at the time on Fifteenth street, was worth nearly double that sum, to say nothing of his property on Franklin avenue, worth six or seven thousand dollars. So that the paper could not have been satisfactory to the Board, if it was considered as showing the worth of defendant's estate.

It purported further to explain a fact, quite well established by the evidence here, that he held for Mrs. Corbin the legal title of several parcels of real estate in which he had no interest; and the bank was not then so unjust as to make him a criminal because his property had risen in value. The attempt to falsify his statement (as the Court said) must recoil upon his accusers, and I trust it has in the breast of every juror. In England and America, before a man can be called upon to account for the possession of stolen property, the possession must be recent after the larceny; but Mr. Childs has been called on here to go back to the period of his youth, when he was a 'prentice boy, and account for property not stolen. Through that ordeal, hard as it was, he has passed unhurt; while the first Director of the bank, whom we questioned on the subject of his acquisitions, flinched from the inquiry as if stung by a wasp! He sought a balsam for the sting in the medicine chest of the constitution, provided for unquiet consciences, and we trust he found it.

I have just seen a book brought in and dogleaved at the head of circumstantial evidence. I know the object. It is to form the subject of eulogy. Circumstantial evidence is to be made the theme of panegyric. It is to be held up before you as the severest test of truth known to the law. Experience and reflection teach me, with all the guards and restrictions thrown around it by the law, it is of all evidence the most treacherous and unsafe. Examine its nature, and you find it is at last only a process of reasoning. It is nothing more than reasoning upon the supposed dependency of one

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fact upon another fact. Because it is reasoning, human reasoning, therefore is it treacherous. Unfortunately, what renders this kind of evidence treacherous is exactly what makes it captivating. It panders to the native pride of intellect. We are delighted with our own progress. We spin, like the spider, the intellectual thread on which we move; and we are charmed that we make, as we advance, the cue that leads us through the labrynth. Jurors in the box, judges on the bench, men everywhere, feel, if they do not own, this fascination. And it has led men astray all the world over. Just as beacon lights are put up on the ocean, to warn the mariner of the rock on which some gallant vessel has been wrecked, so these melancholy records are placed in the law books to warn courts and jurors of the innocent blood shed by circumstantial evidence. If man, finite man, could take in the infinite combination of circumstances; if he could always see when facts, seemingly dependent, are really independent, the danger would be lessened —but this is impossible.

If circumstantial evidence were personified, it should assume the form of a beautiful woman. Her brow should be the brow of Minerva; her smile the smile of Venus; her voice the voice of the syren. She should be clad in the white robes of Innocence, but on her garments should be seen "gouts of blood." Her step should be the conqueror's tread, but behind her should be the conqueror's desolation; and in the background, haunting her footsteps, should appear the shades of unquiet, perturbed spirits, ranged in groups of twelve, representing the juries who have been led astray by her knowing brow, her treacherous smile, and her yet more seductive voice.

For the consolation of Shurlds and Hurschburg, and all others implicated, be it spoken, that good men, innocent men, may be, and have often been, surrounded by circumstantial indications of guilt, stronger, far stronger, than can be found in all the evidence brought to sustain this cruel prosecution.

Gentlemen, in the prosecution of the war against my client, the bank has achieved many triumphs. It has gained a victory

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over the constitution and the laws. It has trampled under foot, the holiest, most sacred sentiments of the human heart. It has assailed my client, as a minister, as a husband, as a father, as a citizen, as a man, and in every way it has touched him nearly. It has hurled him from the sacred desk, it has shivered the household gods around his home, it has pierced with agony the breast of his aged father, it has brought travail to the bosom of his mother and children of the same womb and loins—his brothers and sisters, they too have been stricken; it has sent by the lightning, the story of his shame, and what the lightnings bore, the press has blazoned in all the pomp of topography throughout his native land and abroad, he has been held up to the gaze of his fellow men, as a criminal. Yes! I own it, the bank has had its triumphs, but there is one more fortress yet to storm before its victory can be complete, and that is the bulwark furnished to innocence by the constitution of the State, in the breasts of twelve honest jurors. If this last stronghold be not carried, justice, truth, innocence, will have triumphed, and not the bank, and then the hour of retributiton will have come! Gentlemen, when my client shall sleep the sleep of death, when his dust shall go back to the earth that gave it, when he is laid by the side of his sleeping sister, and his dead children, shall his remains mingle with theirs in honor or dishonor? That is the question.

MR. LESLIE FOR THE STATE.

Mr. Leslie. The time has now come for me to discharge the remaining part of my duty as one of the counsel for the State, which was to comment upon the law and the evidence, and aid the jury as far as my limited talent would go, in arriving at such a conclusion as the evidence, when applied to the law of the case, demanded at your hands. But, gentlemen of the jury, I regret, as you do, and as this large audience of ladies and gentlemen will, that we have come to that part of the case, when from necessity the scene is changed from silvery words, impassioned eloquence, poetic fancy and im-

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agery that stirs the soul, to the cold, dull argument upon the law and the evidence which my position as counsel for the State makes most proper, and which for the want of oratorical powers, I am forced to, if my duty did not require it. The learned gentleman who last addressed you has not the physical power to meet his intellectual even handed, and the physical has given way, because of the unexampled and unreasonable calls which the intellectual has made upon it, and the entertainment is therefore over, and all who were here to listen —myself and colleagues included—are disappointed that the curtain has fallen. I wish that it had not so happened, for I am always charmed and instructed by the speeches of the learned gentleman, Mr. Wright.

Gentlemen of the jury, although it is not my fortune to be touchingly eloquent, and in the discharge of my professional duty enabled to embellish my work with fancy and the pathos of poetry like the counsel for the defense who have preceded me, I am not the only one of my profession thus wanting; and this gives me some consolation.

From my acquaintance with the learned gentlemen, I had hoped that in conducting the defense they would have occasionally referred to the law and the evidence, and not have all the time struggled to divert the attention of the jury from the issue they are solemnly bound to try, and to carry off their minds into a region of fancy choicely selected from their own extensive travels. Gentlemen, in no instance yet, to my knowledge or belief, have the counsel for the defense alluded to a fact worthy of the serious consideration of the jury, or advanced an argument that weakens the prosecution or strengthens the defense. Day after day, gentlemen have been occupying the time of the Court in the consideration of extraneous matter, and calling to their aid forensic display of a high order to carry you, gentlemen of the jury, from the real question as stated in the indictment. Such displays were laudable enough, pleasant to the audience and creditable to those by whom they were made, and ought to have just their true worth and no more; and by the jury to whom they were

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directed, made to take a miscellaneous position, to be disposed of in some leisure time.

Gentlemen of the jury, you and not the counsel for the State, have the responsibility of this case; and in your deliberations upon it, the manifestations of friends or, if it suits better, of public opinion, as witnessed in the crowd attending, while the defendant's counsel were addressing you, should have no influence.

You are responsible to public opinion of a different character and manufacture—a public opinion as to the manner you discharge the high duties of jurors upon the law and evidence; and the correctness of the conclusions you come to as part of the judiciary of the land—which public opinion, and its salutary influence upon the legal tribunals of the country, is an ornament and a safeguard, and peculiar, I am proud to say, to our institutions.

Again, I say, gentlemen of the jury, the responsibility of the case rests upon you alone; it does not rest upon counsel engaged in it, either for the prosecution or defense; it does not rest upon public opinion—I mean that floating, careless, undefined public opinion, manufactured by feelings which are derived from outward influences—and it is a fit and apt question for the jury to ask themselves what such public opinion as this is has to do with the merits of the case; it does not rest upon the laugh or the sneers of counsel, or the cheering of friends, such as that which was so extraordinarily exhibited in this court; but that serious, weighty public judgment to which all causes, whether civil or criminal, are justly subject, and to which you, the jury, the triers of this case, are amenable, and from which you cannot escape. The counsel for the State are not responsible for your verdict. You are the triers, and we the machines to help the jury to such a verdict as the law and evidence demands. I say this, because I desire to know if appeals to human passion, such as you have heard, in your judgment, outweigh the facts as proved by the State. It is not for me to know whether it is so or not; but I know there is a responsibility which cannot

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be dodged in dealing lightly with evidence of the serious nature here adduced.

The novelty of the mode of trial adopted by the defense—the extraordinary and strange arguments used by counsel during the course of examination—and the kind of evidence introduced by them, leave a speaker for the prosecution in an awkward situation. If the case had been conducted differently—if extraordinary efforts had not been used, and strange arguments resorted to—I could have hoped to finish what I had to say in one hour; but these things have imposed upon me a more arduous task than I had anticipated. The deserved reputation, also, of the counsel who have preceded me for the defense, would leave me derelict in courtesy to them, if I did not pass upon some of the numerous and extraordinary positions which they have thought fit to assume to effect the discharge of their client.

Gentlemen, the question to be decided was (not as the counsel had labored hard to show) whether a search warrant was issued for gold and no gold found—not that certain gentlemen, by an inquisitorial proceeding, procured certain papers from a widow on Spruce street—not that Hogan, or Gray, or Anderson, or any other person were restrained of their liberty by the procurement of this hideous monster, the bank; but whether the accused is guilty of embezzling the funds of the Bank of Missouri—a question in which the State of Missouri is plaintiff and Nathaniel Childs, Jr., is defendant, and these other matters lugged in during the examination, being foreign to that question, should be entirely disregarded.

After stating what constituted embezzlement, in order to enable the jury to be the better prepared to apply the evidence given on the trial to the law, and pass upon the question they were empanneled to try, Mr. L. proceeded to notice the question so triumphantly put by the defense "what did the loss consist of?" In answer, he referred them to the indictment and evidence. "No gold, no paper gone," say they, and triumphantly declare that nothing is gone so far

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as the evidence in this case had given them the least information. He regarded this as a ruse on the part of counsel to call the attention of the jury from the offense charged in the indictment. In following out this plan of defense, the counsel say that Clark, the Receiving Teller, had, in answer to their questions, stated that not a dollar of paper money had been taken from the bank (an unjustifiable perversion of his testimony) and hence it was ridiculous to prosecute their client on the paper branch of the subject. Farther on, yet true to the policy first adopted, to keep away from the case and produce as much confusion as possible; under the pretense of having a legal question for the court, they had availed themselves of every opportunity to address the jury piece-meal upon all the matters that they thought belonged to the case on their side, and then generously propose to submit the case without argument after the examination is closed; and because the State insisted on argument, with the same generosity, they accuse them of some after-trap to be sprung upon their client in the argument of the distinguished counsel who is to close the case. Mr. L. hoped that from this time the case would be tried without regard to extraneous matters, and by such rules of law and evidence as will lead to a satisfactory verdict to the State, the accused and the jury themselves. He hoped the time had come in this inquiry when everyone would march up to his duty manfully and professionally; when everyone would forget that they were trying anything but a case of embezzlement, under the laws of the land, and upon the strength of evidence which was before the jury under the sanction and permission of the court.

Mr. Leslie proceeded to notice the complaint made against the use of a memorandum by the witnesses, in order to refresh their memories in a matter of figures and fact, and dilated at length on that point, and said it was a fault from which the counsel themselves were not free, as had been demonstrated by the frequent occasions they have had to refer to their own memoranda of what witnesses said on the

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stand, and he thought the charge of "loss of memory" against these directors, who were witnesses, came with very ill grace from those who displayed so great a want of that faculty.

But this is not a tithe of the complaints which have appeared from the beginning to the end of their arguments. They complain, loud and long, that they are compelled to grope in the dark: they spring a debate themselves, and complain of oppression, unfairness, and iniquity. They say they fear that a trap will be sprung upon them, and thus they speak untiringly to an intelligent jury and before this unusual audience. But has the defense less material to go upon, less evidence for information than the counsel for the State? No, this is all out of the way stuff, paraded for the chances of its effect upon the jury. In this their straightened position cast ridicule upon the indictment, and this, too, while assuming that they are arguing the merits of the case. Such of course, mark it, gentlemen of the jury, is indicative of weakness in the defense. Everything but the merits of the case is brought into requisition; the sympathy of the jury is appealed to, and the character of men not within the bounds of this inquiry, wantonly assailed for want of something better to address you upon. Tears have been shed upon the occasion, whether by "collusion" or not, I am unable to say. And I do not say that such things as tears, are censurable in this case; they are a part of the glowing picture which counsel have drawn for the jury—(and perhaps, for a part of the audience)—may be because it was felt they were needed.

The offense charged against the accused, committed by whomsoever it was, (except the "outsiders" spoken of,) must of necessity rest upon circumstances. Hence it was, that he again asserted that the jury had a responsible duty to perform, and to aid them in discharging it, he should endeavor to bring before their minds the evidence relating to the case. He contended that the State had proven by testimony unimpeached and unimpeachable, just what the counsel for

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the State said would be proven, before the witnesses were brought to the stand, to-wit: that the sum of $120,921.62 had been taken from the bank. It had been testified to, day after day, for nearly a month, and not one single thing to invalidate the testimony, as far as this fact goes, had been attempted by the counsel for the defendant.

Then there were two important things established, upon which rested this whole case, and to which belongs all this circumstantial evidence. He desired the jury to see how they had been met and what use had been made of them. These Directors state, they saw the money go into the boxes, in the February and March count, and when those identical boxes were afterwards examined in August, it was found not to be there. The question then arises, how was it taken, and who took it? And here the law of embezzlement will be easily seen as differing from the law as to other crimes; here, also, comes in play circumstantial evidence, for you to give its true value and applicability.

I ask what became of the triumphant declaration, that there was no such sum of money there, as these witnesses testified to, and that it was a cruel persecution on the part of the bank and its Directors and persons employed in this case. How fickle was the memory of the counsel who last addressed the jury, when he asked the acquittal of his client upon the ground that nothing was gone. Who was it that brought the money out to be counted? Who marked the amount on each box? Who carefully ticketed each bag? Who made a memorandum and compared it with the number of bags and aggregate amount counted each day, and the aggregate amount counted and placed in these boxes? Who carried it to the books of the bank, and who settled with his successor for that amount, but the defendant? Were these things so trifling that we should not give them fair examination? Can the counsel be so reckless as to argue in a manner which makes their client guilty of practicing legerdemain, and telling a wilful lie, as to the amount of coin on hand? These were circumstances to be considered by the

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jury. When gentlemen can do nothing to turn the current of circumstances from the point of guilt, but indulge in fancy pictures of the imagination, it weakens their case. To bolster up which, they resort to a hue and cry against the bank, to the proceedings on Spruce street, and by these means endeavor to turn the jury from the main facts in issue.

Mr. Leslie proceeded to comment on the forensic displays made by defendant's counsel, which, he contended, was not for the want of facts in the case upon which to argue, but an inability to meet such as had been presented by the State. If the defense had met any of these facts by evidence, he did not know it, but supposed he would be informed of it by the learned counsel who was to follow; if any had been given it was of so mysterious a character as to escape his observation. He made the proposition for sake of argument, and would assert it, that there was no evidence on which to found a defense; that the case stood without testimony on their part; and there was nothing to lead the minds of the jurors to an acquittal.

It had been said by counsel, and met with hearty response from by-standers, that blunders, mistakes or dishonesty on the part of all in the bank except the accused was the cause of this trial. Blunders, etc., on the part of all of them, from the commencement of the institution, and these called pointedly to your minds by way of accusation. How is it they were not found out sooner, by inspection from day to day and time to time and while the party on trial was connected with the institution. They are to be accused because they have not looked about right and left, and acted as if every man would steal and run away, and because they have not so conducted, the defense cry out that the Almighty power of the bank in this case is corrupting the streams of justice, bribing the jury and the bench. Such had been the course of proceeding by the defense. But he and his associates had conducted the examination with a view to ascertain the facts; they had asked no questions of a frivolous character,

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and laughed at them for effect; they could not be charged with doing anything more than was necessary in order that the jury should be put in possession of the case, and then of lending a helping hand to apply the facts to the law. They had heard no counsel on the part of the State talk about hanging the jury. But they say we want to hang the jury, and will be satisfied with this—and at this point they cry for an acquittal from the box. These things had been stated so often and argued upon so long that some of the counsel begin to believe that there is some truth and sense in them. They appeared as counsel for the State, not to win a case, (and he hoped no one would seriously think otherwise, or be foolish enough to charge otherwise) but to aid in the administration of justice, and that without extraneous influences. If Burt Mackay, or some less notorious characters were here on trial upon this charge, none of these extraneous influences would have been brought to bear upon it, but with united voice the jury would be called upon to rise up and praise such an institution, as this bank, for bringing, by her agents, so confirmed a thief to justice. He hoped they would make no difference as to men. The institutions of our country when calling for the punishment of those who violated the law, did not say "Burt Mackay" nor the man who preaches from the house top, makes long prayers, or smites his breast. The jury was sitting there to maintain the laws of the land, and to give all the testimony in the case its proper weight and application without respect of persons.

November 28.

Mr. Leslie resumed his argument and said, when the Court adjourned, he was proceeding to call the attention of the jury to the body of the offense, and would try to follow it out; and in connection therewith he would comment upon the arguments of Mr. Blennerhassett and Mr. Wright, as often as he could find them or either of them in the vicinity of this most important part of the controversy. He deemed it a proper course to take, on his part, in order to make him-

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self fully understood by the jury, for the whole strength of the defense was undoubtedly shadowed forth by them in their respective speeches; and when their view of it was taken and compared with the arguments in behalf of the prosecution, it was presumable that the merits of the case would be developed. The body of the offense, in plain English, is, the embezzlement of $120,941.62, of such funds of the Bank of Missouri as were intrusted to the defendant in his official capacity as Specie Teller: in other words, and without reference to the defendant personally, (for he would avoid personalities when he could,) it may be defined interrogatively, as embracing the following: Was there any money of the bank taken? This is the same, gentlemen of the jury, that the very classical advocates for the defense have called *corpus delicti;* which term, together with the name of Williams, (my learned colleague,) and the bank ordeal and combination, has been piped so often, that it tires, if it does not sicken. My position, as counsel, renders it unnecessary, when addressing you upon the body of the offense, to name to you each witness and the particular evidence he gave upon the stand; because it is allotted to me (being midway from the arguments for the defense to the close for the State, by Mr. Geyer,) to test, as well as I can, the body of the defense, upon principles of law, and the body of the offense, by the same rule, which I can as well do by referring you to the evidence *in solido* as by careful detail; by this course your time will be shortened, and my duty performed to the extent of my ability.

Gentlemen of the jury, does not the testimony of the counting committee satisfy you that $120,941.62 in gold was brought forward by defendant, in the February and March count, and thereby made to be, for all purposes of the body of this offense, actually in the bank? Are you not also satisfied that in August afterward, this identical amount of gold coin was not in the bank, and had not gone out of the bank in the legitimate and ordinary course of business. I think that I can confidently assert that such is the state of things from the evidence; it is testified

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to by all the Directory and the President, and thrice vouched for by the defendant himself, and if this is not full proof of the fact it cannot be obtained by human testimony. I say thrice vouched for by the defendant: first, by asserting at the end of each day from 1845 up to the last February and March count, that there was a given amount of coin on hand, and this statement of his became an entry on the books, for the truth of which he was, and now is responsible—yes, responsible criminally, and under the indictment we are trying him upon. Through the defendant, as Specie Teller, you learn (from the practical operations of this institution) that all persons whose right it is to know, get their information of the monied condition of the bank, I mean unless they actually count the coin from time to time and from day to day, an act altogether impracticable physically, and therefore morally excusable. It is, however, argued by the counsel that omitting this on the part of any officer of the bank who had a right to do so if he could and would, is a material matter of defense (I suppose upon that high legal philosophy spoken of by way of compliment by Mr. Wright,) as much as to say that if one man is careless of his duty another has a right to steal or embezzle at pleasure in time or extent.

A leading and favorite theme of the advocates for the respondent from the beginning of this trial, as manifested by questions put to witnesses, by driblet arguments to the jury while pretending to address the Court, and by the main effort of Mr. Blennerhassett and Wright, whose eloquent appeals I am now making a feeble attempt to meet and answer. May some controlling power of law, or sense in the Court and jury save the criminal and civil administration of the rights of persons and things from such specious stuff having any effect.

But, gentlemen of the jury, I must make good my position that the defendant has vouched for and proved the "body of the offense" by his own acts. Secondly, the defendant has vouched for this money by bringing forward every part and parcel of it in bags counted by him, ticketed in parcels by

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him, noted and marked in his own book—which was just like the bank ledger before spoken of—which ledger he was the author of to all intents and purposes, as far as the coin of the bank is concerned.

The defendant again, in the final close of the count of February and March, by recapitulation and testing the actual count of the committee by his own count and his books, settled with the counting committee and balanced the account in accordance with his own statements of the amount of coin in kind and value. Thirdly, he took a receipt for it from his successor, and upon that occasion pointed out to him exactly the amount in specific kinds of gold coin—that he counted and ticketed, and after again being counted by the committee whom you have heard testimony from, and put in boxes and marked by himself, were placed by him, or under his direction, in the vault, and so remained until Hurschburg took charge of the same. Thus has the defendant thrice proved that part of the body of the offense which relates to the said sum of money being in the bank up to the time that Hurschburg became the Specie Teller.

A denial that the alleged abstracted sum has been proved ever to have been in the bank, comes with an ill grace from the defendant and requires an extraordinary amount of professional courage and impudence to make it a point of argument. It is a direct charge of wilful falsehood upon the respondent at the bar, and if taken and acted upon as desired, and urged by the counsel, it will make damning proof of the guilt of the defendant, and show that the manner which has been suggested to you as to how the thing was done, is sound and reasonable. But Mr. Blennerhassett and Mr. Wright stated in the commencement that so extraordinary was this case, they should throw off all restraint, cast aside their elegantly wrought veils of modesty, and abuse everybody in and out of the bank except their sweet and pious client; and most faithfully have they performed their engagement in this particular at least.

The first advocate, Mr. Blennerhassett, seemed impetuously

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to rush to a part of his argument where he could sneeringly pronounce the name of Col. Brant; ignorant of who he was talking about, (but taking his cue from his senior associate, who during the examination seemed to see the travail of his soul in asking every witness on the stand if they knew Col. Brant, and then flourished by knowing looks, after the manner of the school master who whipped his pupil with a peacock's tail, and rolled up his sleeves for effect,) and having come up to the point, cried Brant, bank, combination, inquisition, and then slid off in solemn accents, upon the fiery ordeal his "rigidly righteous" client had just passed through. When men make bold and gallant strides in debate, it is good that they know well the point they are aiming at, and then they will save the mortification of defeat. Do you know Colonel Brant? is the significant question. I will tell the gentleman, that before he was born, Col. Brant was fighting the battles of his country, on the northwestern frontier, and resisting the oppression and revenging insults of the learned gentleman's own country on duty as the forlorn hope, and by his brave action promoted to a high and honorable rank in the army of his native country. And let me tell the gentleman that the same man was on the stand as a witness in this case a few days ago, and on the very day when the audience was nearly doubled, to see his immolation, as promised and threatened for several days before, and there, as he had been on the field of battle, (with the change only that time had made upon his brow,) ready to meet the assaults of his enemies—and at the first dash, you, gentlemen of the jury, saw them wither like green weeds before a sirrocco.

It would have been wisdom to have left the matter where it was put by Col. Brant while on the witness stand, but as it had been designed to make a display of it in speaking, the counsel could not drop it without re-composing their speeches.

The learned counsel (Mr. Blennerhassett) next takes a reckless flight into classic history, and compares the inquisitorial action of the Directors of the Bank and their unholy persecution of Mr. Childs, to the action and pro-

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ceedings and character of the Areopagus, a court held on Mars Hill. Whereupon the sympathizing friends of the accused started their usual noise of approbation, and one and all by this mode exclaimed, "there's another capital hit;" the Directors of the bank have got the money, or at least they are no better than the Judges of Areopagus. How mortifying it ought to be to make such comparisons, and see such signs of acquiescence in this audience.

Gentlemen, this Areopagus was the oldest of the Athenian Courts of Justice, and at the same time the most famous for its respectability, purity and love of justice, and it obtained its name from its place and meeting on the Hill of Mars, near the Citadel. It was established by Solon, and Aristides called it the most sacred tribunal of Greece. And Demosthenes says they never passed a sentence in which both parties did not concur. The jurisdiction of this court was murder, poison, robbery, arson, dissoluteness of morals, etc., the charge and care of helpless orphans.

Gentlemen of the Jury, you must pardon me for these digressions, made in running after counsel who have preceded me in debate. My only reason for so doing is to meet and expose everything that has been said or done with any show of seriousness on the other side.

The next inquiry in the natural order of debate is, how the abstraction of this amount of gold coin was effected? In law it makes no difference, so it was done by any agent, clerk or servant of the bank, who had charge of the same in fact, or in a fiduciary character. But it is highly important to examine carefully into the manner it was done, and to make the examination by the evidence in the case. This examination, if thoroughly made, will point also to the person who did it, with reasonable certainty.

In the first place it is incontestibly proved that the opening and re-sealing of the sixteen boxes, out of the fifty-seven which contained foreign gold, was in some manner connected with and part of the *modus operandi* of the abstraction. The only reasonable inference to be drawn from this is, that some

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one who had access at pleasure to the vault did this work, and that it became a necessary part, and probably the finishing stroke of the embezzlement which you are trying. If you will lay out of the question for the time being every idea that this money was taken by a forced entry from the outside of the bank, you will be able the more clearly to see the character of the operations inside, and upon the hypothesis so frequently stated to you by the counsel for the prosecution.

The counsel for the State contend that there is ample testimony to support the proposition that this large amount of money has been taken from time to time for a series of years, in smaller sums and in such amounts as were best suited to effect the embezzlement, and cover up the artful method resorted to for that purpose, and that the leading or first step was by forced balances, to bring black and foul lies upon the books, and then to work out the scheme according to the exigencies of the case—relying upon the manifest confidence which one officer of the bank had in another to help in the consummation of this strange and startling crime.

Let us see how the thing could be done. You learn from the evidence of Mr. Clark that at the commencement of each day's business, Mr. Childs received a certain amount of the notes of the bank from him, and with which he stood charged by Mr. Clark, until the close of the business of the day; when Mr. Childs would hand back the paper not used, and report an amount of coin in the place of the notes not returned to balance the account between the two Tellers, which when done, an entry showing their transactions went upon the books. The testimony is also positive, that in no instance did Mr. Clark, the Cashier, or any one else, test the truth of the Specie Teller's statement, by counting the coin reported by him as on hand, and the witnesses go further, and testify that it would be physically impossible to do so. You will readily see, I apprehend, that under such a practice, any amount of paper could be taken for the private use of the Teller without detection.

The fact that the defendant, as Specie Teller, had the

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custody of the coin, puts the whole matter in his own hands and without danger of discovery unless by actual counting in his absence, or unless the bank should be called upon to pay out as much coin as would call for the whole or part of the $120,941.62. Neither of these things were likely to occur, as they never had from the commencement of the corporation; and therefore that chance might be confidently taken.

The manner in which the several countings had been conducted year after year, allowed the Specie Teller to have just as much counted twice as would meet the abstraction, he having a full and perfect minute of the whole amount embezzled.

I ask you, gentlemen of the jury, if any person other than the defendant, could from time to time have taken the paper of the bank to his own use, and ostensibly by forced balances of coin, make it appear to be in the bank.

Clark, the Receiving Teller, had nothing to do with coin. The bookkeepers had nothing to do with either paper or coin, but were the mere recorders of what these Tellers furnished them for entry. Shurlds, the Cashier, could never have meddled with it, for if he had, Childs could not make up his account. The Directors are as far removed from it as if they had no right in the bank at all, and nobody but Childs could have touched it up to the time of the February and March count, because, he said, as a man in whom there was confidence—he said, as a citizen who has no right to lie—he said, as Specie Teller, under oath—that the money was there, and in some way or other made it so appear to the satisfaction of the Counting Committee.

Then I ask, gentlemen of the jury, if it was untrue, that the gold coin was there in the February and March count; because of the piecemeal abstraction made previously, or for any other cause whatever. Did not Childs, the Defendant, tell the lie, practice the deception, and embezzle the money? This conclusion is inevitable, or legal logic and human reason is weaker than the bubble that breaks from

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its own inherent feebleness. Mark, gentlemen, that you have the high public responsibility of adopting or rejecting this conclusion, while the counsel for the State cease to have any responsibility after they have presented it for your consideration.

Thus far I have endeavored to show how the money might have been embezzled by forced balances of coin, and upon the proposition that it was out of the power of anyone to do it but the respondent, by himself or by combination with others, and that in either case he was equally guilty under the indictment. The argument upon the last proposition stops at the February and March count, or at the time his successor took charge of the funds.

The trial of this last question is simple and short, if we commence in 1845, and end at the time the coin was turned over to Hurschburg, his successor. You will notice, gentlemen, that Mr. Childs has vouched for the amount of money up to that time as much as he has ever vouched for a single cent of the funds of the bank during the time he has been employed in it; and if it suited his notion to take it in specie, he had the same power to force balances by false statements under this course of action as by any other; and it is equally true that no other person, unknown to Childs, could have done it; and the deceptive double counting was as easily done in one case as the other.

Now, gentlemen of the jury, if you drop the outsiders (so called) and find that the money was so abstracted before the February and March count, the testimony points to defendant with unerring certainty, and not one substantial thing exists to turn the current of the evidence from the point which all the circumstances (which are facts of themselves) rationally and legally tend, to-wit: to the defendant as the guilty party.

He asked the jury to go with him in the inquiry into the vault of the bank at the time Childs turned over the coin to Hurschburg, and stay there until they can from the evidence see whether an abstraction of the money occurred

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after said Hurschburg took possession of the contents of the vault. If the embezzlement took place between that time and the day Page & Bacon presented their draft for payment, then Childs is excused, and the offense must be fathered by outsiders, Shurlds or Hurschburg. But as all idea of violence to the vault or entrance into the building is negatived by positive testimony, we may as well drop the outsiders here as anywhere, and in doing so, we shall not be unkind to the defendant, as that was also his view, as expressed to Dr. Forbes, when he said there was no mistake about the money being gone, and that himself, Shurlds or Hurschburg must be guilty.

If Hurschburg took the money it was by opening, abstracting and resealing the sixteen boxes so often mentioned, and then arranging them in the extraordinary position, as proven they were put up in; a proceeding wholly unnecessary, as he could gain nothing by it, in the line of concealment. But what is most absurd in any scale of reasoning is, that he, Hurschburg, should be the very man who first disclosed the abstraction, and that, too, when there was no necessity of it either before box thirty was brought up to be counted out to Page & Bacon, or after he noticed that it was minus a bag of sovereigns. In the first place, he would have been the last man to have selected that box, and if he had done so by mistake, it required nothing more than silence to correct the mistake, for the clerks of Page & Bacon neither knew nor cared how many bags were in the box. Mark his conduct on this occasion, how diligent he was in pressing the matter to the point that opened up this stupendous fraud and exposed it in all its dark and criminal deformity. In view of the evidence, gentlemen of the jury, and the unassailed and unassailable character of Mr. Hurschburg, his manifest concern and dissembling conduct throughout, whoever suspects him for a single moment, is unfit to sit in judgment upon his fellow man, either civilly or criminally.

And now I will leave the vault of the bank; the place that

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the counsel for the defense dread more than all places in this case; they have a preference for the graveyard—to this cold, stony, mildewed, gold-holding cavern; and it is with the utmost difficulty that you can keep them there long enough to count the sixteen boxes that ought to have contained $120,941.62 more than they did contain.

Yes, I will go to the ornamented grave yard, and there seek for, and perchance find, evidence of the crime we are inquiring into, and feel as happy in the excursion as he who caused the journey.

Let me say to the gentleman (Mr. Wright) who has made so many "tremblingly alive all over" remarks upon the sanctuary of the dead, that we do not visit the sepulchre with cruel and unhallowed designs, but we visit it upon what we claim the purest principles of propriety and Christianity; and we visit it with the declaration, that money criminally obtained from the living is not needed to ornament the resting place of the innocent and virtuous dead.

It was incumbent upon the State to inquire without stint into the pecuniary affairs of the defendant, and to make such use of the discoveries as law and justice permits.

The written statement given by Mr. Childs as to the extent of his property, and the fact of burning it, and that, too, by advice of counsel, is an indication of guilt. It certainly could not take the direction of innocence, for the innocent are not alarmed at their own mistake, while the guilty often times over act. This is in the line of circumstantial evidence, and like everything else in this trial in the shape of evidence, tends, according to the legal rule, to support the hypothesis upon which we started.

I however desire, as I am about to submit the case, as far as I am concerned, to remark, that the technicalities of the learned counsel, which have been their whole defense from the start, are of strange manufacture and difficult to describe. In the early part of the trial they seized a web that was left by a swarm of dancing flies, and to make a cord of defense out of it they divided their strength, and applying

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it to each end, they pulled and twisted till the thread became so attenuated as to part in the middle, and the operators passed out of sight in the technical fog they raised around their own heads, and have never made their appearance since upon the solid platform of law and evidence. This need not have happened if this defendant, who has drawn around him the solemn vestments of religion, had been content with Christian love and herbs for dinner, instead of "stalled oxen," obtained by sordid wealth.

Gentlemen of the Jury—I have striven to the utmost of my ability to present this case before you according to truth and professional propriety and duty, and if, in the humble discharge of this duty, I have said or done anything unkind to the prisoner at the bar, or have been in any manner uncourteous to you, the Court, or my respected opponents, I humbly ask pardon; and now, in view of this whole case, as it stands in law and upon evidence, I leave the responsibility of a verdict, upon those high principles of truth and justice which ought to govern you in this trial, and upon the solemn oath you have taken, to do justice to the State and the prisoner. Give, also, in kindness give, the defendant the benefit of sympathy. I admire, as you do, the eloquent appeals of counsel to the sympathies of the soul. I am happy, because it shows they possess it themselves in a high degree. It ought to find welcome in the heart of man. It is an Heavenly essence, distilled in Paradise near the Throne of God, and trickles down to earth on effulgent rays of light to make a blessing here; but cold and sordid crime must damn its general flow.

Gentlemen of the Jury—Take this case and all its responsibilities.

Mr. Geyer said he would place the senior counsel for defendant (Mr. Bates) in possession of the general course or line of argument he would introduce. After disposing of the question relating to other persons suspected, he claimed to show it was impossible, consistent with the facts, that

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either of the persons in the bank could have taken the money at any time after Childs ceased to be Teller.

He would show by the facts of the case, and then maintain, that when the money was taken, it could have been taken by nobody but the accused or some person in collusion with him.

He intended to point to the facility which existed for the accused to make abstractions from time to time, and so managing the counts at different periods, as to conceal the amount missing; and in connection with this, he intended to refer to the specie books and ledger balances, made up by testimony furnished by Childs himself, as showing the amount of coin on hand, which he cannot gainsay—whether these accounts corresponded with the general accounts of the bank, or not, is a question with him.

He would then refer to the specie book and show what appears to be a system of forced balances, commencing in 1847; and by reference, would show that in a large majority of his weekly accounts, this foreign coin is in even thousands, notwithstanding its great mixture and amount; with two or three exceptions, (besides those of the semi-annual counts and counts by the Legislative committees, at which times it was in odd sums, but would immediately fall down to even sums,) this was the case up to defendant's leaving the bank, from which period it began to be odd and so continued to the eleventh of August.

He would then advert, (connected with that change in the account of foreign gold in 1847,) to the operations of defendant out of doors, and would show that the statement he gave of his affairs was reasonable; but that, in the years 1847 and '48, he spent upwards of ten thousand dollars in the way of building which he paid in cash.

He would then come to the December count, in 1848, show how it was conducted, and that the two chests in the vault, purchased by defendant himself, had afforded him at all these counts the opportunity of changing the gold from the chests to the shelves so as to cover up any deficiency. Down

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to the December count the committee appear to have contented themselves by ascertaining the aggregate of coins. At that time the American coin is entered on the specie book at $350,000, and the actual amount reported by the committee at $300,000—showing a discrepancy, unless the bags on the shelves contained American coin. He would show by the specie books, however, that the American coin ran down for some period before, so that it could not have well been American coin on the shelves. The shelf gold in December was $287,000, being one hundred and two bags, almost as much and as many bags as was in both the chests. How it got there would be a subject of remark. In connection with this he expected to show that a number of bags appear not to have been assorted, and that the receipts were not so large as to require any time to assort them.

The next circumstance he would show was, that the number of bags in the vault at the December count exceeded by eighty-two the number of bags that were put in the boxes at the February count, and he alluded to that for the purpose of calling on the defense to explain why more bags were wanted during the February count.

The next thing he would call the attention of the jury to was, that defendant was called upon before the February anad March count to arrange the coin, and if he did it before the count, then his absence can be accounted for, and if he did not do it that matter can be explained by his counsel. If he did arrange the coin before the count, then why afterwards require more time, during the operation of the count, for that purpose?

He would then allude to the conversation defendant had with Mr. Fisher. He would show the order of counting was thus: the committee counted the first three days successively, ending Saturday; then again on Monday and every alternate day thereafter, until the count was completed. That the arranging and placing of the boxes in the vault, the American coin in front of the foreign, was not by order of the Directors, but by order of Childs. That fourteen

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of the sixteen bags abstracted appear to have been abstracted from the boxes immediately behind the boxes of American coin. That these fourteen boxes contained twenty-nine full bags of thaler pieces, and during the Monday and Wednesday countings no ten thalers appear to be counted. At this interval the defendant plead for more time to arrange the coin, and it was granted; and on the week after the counting commenced (about the same period that more time was asked) defendant purchased an additional quantity of sealing wax. That no full bags of thalers appear in the boxes again until the count on the following Friday, being the sixth day of the counting, when the first box counted on that day showed an abstraction of sovereigns, and the seventh box counted on the same day showed an abstraction of thalers. That the Sub Treasury gold, which according to Childs' statement, was sovereigns, was taken up to be counted during the last two or three days of the count. That in all the counting there are but fifty-eight bags of sovereigns found and a great variety of other coins, among them a large amount of thalers, which run through the fifty-seven boxes at intervals to the last box.

He would then rely on sundry circumstances which gentlemen have mentioned; the fact that a statement of his affairs was made by Childs to the bank, which was subsequently obtained by him from Shurlds and taken away, under a promise to return it; that he did not return said paper, but destroyed it, without taking a copy, and thereby deprived us of the means of giving its contents from the paper itself.

He would call Mr. Bates' attention to his running commentary, as published in a paper of this city, on reading in testimony from the minutes of the board the report of June and July; on that day Mr. G. was absent from the Court. It appears from the newspaper, that Mr. Bates took the aggregate on the thirtieth June from the specie books and makes a difference between that and the report of the committee of $2,815.40. Although that difference appeared,

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he would call attention to the testimony of Mr. Barnes, who stated that in consequence of the sickness of Mr. Hurschburg the semi-annual count was continued until the fifth of July, at which time, by looking at the ledger balances, it would be found that the report of the committee corresponded.

MR. BATES FOR THE DEFENSE.

Mr. Bates. Gentlemen of the Jury: It may not be necessary for me, like all who have gone before, to compliment you on your attention during the progress of this cause; your patience up to this hour indulges me to hope the same may be bestowed upon me during the remarks I may submit. None who have preceded me have abstained from telling you this was an uncommon, an extraordinary and novel case, yet one half of its mysteries have not been told. Mr. Geyer had just stated some, which you had not heard until the final ground was to be taken, and then you heard them but imperfectly; there were others, hid in the deep arcana of that gentleman's astute mind, which we will not hear while we have the right to reply. And so, the real beginning of the prosecution will only be seen in its end.

It was an extraordinary case, and a wonderful circumstance connected with it is, that up to this moment, the indictment had not been read, and not one of you in your conscience, can say what you are going to decide on. There might be neglect in this, but it was not so; you have heard us implore often and over again, that the case be conducted as other criminal cases are, but to no avail. Mr. Haight, when he opened the case, told you he "held the indictment in his hand, but it was not worth his while to read it—that it was an indictment for embezzlement." He told you a little then and would tell you more thereafter. This case is imaginary—no particular charge had been preferred, and it claimed an origin in no particular quarter. It is not the State's case but it is emphatically and alone the case of the bank; the representative of the State has long since yielded the field to a strong array of bank counsel. He would not

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have drawn such a "fishing" indictment as this, much less prosecute under it, containing as it does, six vague and scattering counts, not one of which is good. Defective as it is, we were afraid to move to quash; standing on the ground of innocence, and determined to stand proudly on the ground of self-defense, we waived such a motion for fear of delay, believing this to be but a branch to a civil suit pending against the defendant. We know how this case was gotten up; and it did not need Mr. Shurlds, the Cashier, to come here and tell us that the bank was "phrenzied" at the moment the bags were missing from the boxes. Every act of the bank in regard to this prosecution has been marked by precipitate injustice and headlong madness. Yet the power of the bank is fearfully great.—It pervades the community. When it speaks society trembles. Now, it moves along like our majestic river sweeping away all obstacles; anon it creeps, in insinuating rills, through the little glens of social life, silently undermining the fortunes and characters of men.

The loss was discovered, and you heard by the testimony with what desperate haste the host of Bank Directors jumped to their conclusions. Walsh was sent for, runners started to summon other members of the Board, and a meeting was held. Childs was sent for and he was there. The boxes were opened and diligently examined, and a number of bags found missing, as was then supposed. The President and Cashier slipped out of the bank, the doors were locked after them, they proceeded to Justice Butler's and made the affidavit for arrest—leaping, evidently in the dark. With frenzied haste and little attention to truth and consistency, they swear to the actual larceny, the amount stolen and the time when. Childs was then locked in the bank; he was arrested without receiving any notice of suspicion against him, until he was told that an officer was at the door with a warrant. What more was done? A few days afterwards, the Board of Directors thought fit not only to endorse these proceedings, but took up the affidavit and

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approved the swearing of the President and Cashier. What evidence had the Board then as to the character and quantity of the coin said to be lost? At that time Mr. Geyer had not been retained, nor his genius exercised in calculations to inform his clients whether or not they had lost anything, what they had lost, and when. What further? On the same day they ordered that steps be taken for issuing a search warrant against Childs house, which is issued immediately. A day or so afterwards, Mr. Shurlds reports to the Board, that in addition to the search warrant against Childs, he had caused a search warrant to be issued against Mrs. Whitlock's house, and forthwith the Board approved that proceeding also.

These proceedings can neither be got over or around; they fix the bank in one position respecting this abstraction —that the gold was actually carried off—and to this they should be held strictly. Now, they say that this is all a mistake, notwithstanding the swearing of the President and Cashier and the repeated resolutions of the Board. The gold was never taken from the bank, but only transferred from box to box by some jugglery in the counting.

Seeing their mode and manner of proceeding against the defendant—their disregard of the rights of woman and society —their running in violence against the statute laws—he felt his indignation rise, and as he remarked on a previous occasion, did not intend to waste any delicacy in exposing the false, unjust and cruel grounds assumed by this prosecution.

And the prosecution were arguing the case as if the defendant had something to prove. Mr. Williams had stated, and Mr. Leslie had repeated the idea, and then asked "wasn't the money stolen, and if Mr. Childs did not get it, who did?" Childs had nothing to prove, nothing to show—his accusers had. How could any man prove that he did not go into the vault of the bank and steal the money? It is not our duty to show this, and if we made the attempt it would have been a failure. He would show by the charter and

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by-laws the relative and positive duties of the President and Cashier; and if they had come anything near the gauge of their own duty, it would have been impossible for Childs to have purloined a dollar from the bank. He meant to prove that, and he defied contradiction. So far from the Specie Teller being the only man unchecked, the only man free to steal, he would show that there was one man freer; that the Cashier was the only man who had power by law to steal the money of the bank. In such an institution, defective as it is, somebody has to be trusted; and thus the charter and by-laws have made that man the Cashier; and when he came to that portion of his argument, he would read the clause, in order to revive the failing memories of the Directors. He would make it plain that it should not be denied, that it was the Cashier's duty not only to keep the money, but every day to count and see that the accounts balanced; and if he found any error, to report it to the Board without delay. That was the law, and if never practiced it was a crime; and if it had been practiced an embezzlement could not have taken place, because the balances would have been made every day. The Cashier was keeper of the cash, and if in the discharge of his duty he had gone to Childs every morning and given him a certain amount of cash, and at the close of business settled with him according to his operations during the day, he would have been checked on the instant and checked every day, and there could not have been any default on his part without an association with him who is specially charged with the cash. In consequence of the late hour at which Mr. Leslie closed, he intended to throw out a few suggestions to the jury this afternoon, in order that they might retire and chew the cud of reflection during the night.

December 6.

Mr. Bates asked whether, up to the moment, any of the jury knew what was to be prosecuted? Not a man could answer. There has been broadcast insinuations made, then

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embodied in the form of a charge—and then brought into a bill of six counts. What it is his client was to be found guilty of, no man had told the jury. And so it became his duty, at this late hour of the investigation, to be the very first to read the indictment to the jury. It contained six counts, many of which, in his judgment, were bad in point of law for various reasons. Embezzlement in one form or another was stated in all six counts, and he contended that embezzlement and larceny were substantially the same; the one being the felonious taking of goods already in possession of the thief, and the other, the felonious taking of the goods from the possession of the owner.

After reading and explaining at some length the six counts of the indictment, he said it would be seen that this indictment was drawn with minute particularity. It is so drawn because it was known to be necessary that every charge should have certainty and specialty, and because they knew it was necessary for this jury to decide the defendant guilty of some particular thing, and not guilty of the general charge of embezzlement. This is not the State's prosecution. Here is the indictment in the handwriting of Mr. Ryland, Bank Attorney; here it is, drawn by the bank and prosecuted by the bank.

It was indispensably necessary, that the time, place, and circumstances should be stated.

Mr. Leslie in his argument, attempted to state the difference between embezzlement and larceny, and my ear was startled when he made the declaration that embezzlement was no offense under the common law. He differed with Mr. Leslie and contended that it was always a crime in England. Before made felony by statute, it was like perjury, a high misdemeanor, for which the offender might have been imprisoned, whipped, cropped, branded, or deported to the plantations.

The indictment, as the jury had been told, was defective in point of law, yet the defense did not choose to argue its

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legality before the Court, in order to have it quashed. They did not choose to give such aid to the ulterior objects of the bank, by delaying this investigation. A civil action was brought against the defendant at the same time this suit was instituted, and he thought the present a very good time to launch their bark. He did not want them to have an opportunity of trying that civil action, before this investigation was had. He wanted prompt action, knowing as he did, that his client was prepared to meet all assailants, come from whence they would, or as powerful as they might appear. He wanted prompt action for another reason—all defendant's means and funds were locked up; such as had escaped the inquisitorial vigilance of the directors and attorneys of the bank, were seized by the Sheriff on attachment, and it was necessary that they should be restored in order to put him in the way of earning his daily bread and retrieving the losses inflicted upon him by the wanton prosecution.

Such an indictment as this could never have been gotten through the Grand Jury but for two reasons. The Directory of the bank were represented on that jury. Barnes was there, (and he would not impeach him or say he was unworthy to be there,) and he was capable of making any explanation. The charge was preferred by the bank and this indictment was in the Bank Attorney's hand writing, and he felt assured, that had not a representative of the bank been on that jury, such a paper would never have gotten through—no foreman would have endorsed on its back "a true bill." The counts in the indictment were conjectural, like the general charge, only capable of being sustained by circumstantial evidence, and before he got through, would show their motives for bringing the charge. No man could wink so hard as not to see that the State has nothing to do with this case. The State has other and different motives in its prosecutions than that which influenced this. The State has a motive in shielding injured innocence and to bring the offender, however high in life he may be, and arraign him at the bar of justice; it has a

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motive to do that, in order that the law may be upheld. The law has a high duty to perform in bringing the guilty to justice, and not a less duty in protecting innocence from persecution.

This indictment was wholly defective. He would say he felt confident, had his friend Lackland, the State's Attorney, managed this case, he would have entered a *nolle prosequi* in the first week. But the bank has its motives in this prosecution. It may be asked what motive has the bank? Can it in this way get back its money? No, not directly—but they may learn how to prosecute the civil suit with better effect by the coercive means of a criminal prosecution; they may feel their way in this proceeding, and learn how to build up a state of circumstances, step by step, which may promise them a better hope of success on the civil than on the criminal side of this cause. Besides, if they can fix suspicion on Childs, they acquit themselves. They may lose their money indeed, but they save their reputation.

He then alluded to the discovery of the loss of bags on the tenth of August; the surprise, phrenzy and vast confusion which seem to reign about the bank on that and succeeding days, and the sudden manner in which they jumped to a conclusion of the amount gone and the guilty party. He did not deny some of the men about the bank honestly believed at that time that Childs was guilty. Mr. Geyer has only at this late period informed us how he is going to calculate our guilt and cipher us into the penitentiary; but these calculations were not made at that time—they leapt in the dark, and were ignorant of their loss, and all attendant facts. The brightest intellect among the Directors comes here ignorant of the charter and by-laws of the bank, and proclaimed the fact from the witness stand.

The bank was a corporation—a political corporation—a State bank—governed by the Legislature. The character of the bank had to be maintained. Here was a loss discovered all of a sudden, and however they might reason, the public mind must be satisfied, and although the mass

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might be induced to fix on Childs as the guilty man, still all the rest in or about the bank were equally liable to suspicion. There was nothing so high or holy about them as to prevent it—our reverence for Bank Directors is not an impervious shield against suspicion. We know how the Legislature sometimes makes them. They pick up some little fellow who, by hook or crook, has got $500 worth of type, and prints a party paper, and manufactures him into a Director, to give him some importance; and happy for us is it, if, after serving a little while, he turns patriot, and "leaves his country for his country's good."

It was well known how the State manufactured Directors, and it was necessary for private stockholders, in consulting their interests on their part to put in men of the best business capacity. Mr. Barnes used to be elected by the Legislature, and he is a business man, but becoming too soft in his politics, was left out, and then he was put in by the private stockholders, in place of George Collier, because private stockholders had some money at risk, and had some wish to support the reputation of the institution.

There was a high motive operating upon the institution to bring this charge. This court sits every two months, and the Circuit Court every six months. Cases in this court can be tried at the first term; in the other court they cannot, and the prosecution brought against Childs in that court would be pending six months, and perhaps a year; if this case could be continued from time to time, and every valve kept open, they expect new light, and by this means not only afford time to Mr. Geyer to cipher out the guilt of the accused, but they hoped that somebody in Missouri, or somewhere else, would start up and tell them something to lead to the knowledge of what they lost, and how they lost it. It is in proof that the bank lost $20,000 some years ago, and which disappeared like the gifts of the witches.

Some men of wealth are proud of the reputation of being the rulers of the money market, and the only men allowed to deal in a bank in broad Missouri. Who is not proud of his

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professional ability and standing in society? These Directors had that reputation to sustain in regard to the management of this bank; they had to sustain themselves, and brought this charge against Childs, who left the bank early in May, and left it fully endorsed by the Directory. Although it was made to appear from the stand, that this endorsement was dissented from by some of the Board, yet when they produce the record in evidence, we find it was by unanimous vote.

Who conducted this prosecution? It was not the State. This was evident to all who had been present during the investigation. But to show the matter beyond all question, he read from the minutes of the Board, already in evidence. At a special meeting, August thirteen, the famous Monday on which the search warrant was issued, and the disgraceful proceedings thereon transacted, it was ordered by the Board "that the President be directed to retain Messrs. Gamble & Bates, Geyer & Dayton, Haight and partner and Williams & Kirtley, to act in connection with the Bank Attorney, in the prosecution of the matter of the abstraction of funds from the bank." Ryland was already Bank Attorney, and these gentlemen were to assist him. They take no notice of Lackland, the State's Attorney, and mark, these gentlemen were not to help him. He is in the condition of the young sparrow, in whose maternal nest the cuckoo laid its eggs.

He would now make some remarks as to how the case had been actually conducted, and in doing so, he would have to advert to the opening of Mr. Haight. What is the use of an opening statement? Rule twenty-six of the practice in this Court, says: On the trial of a case, the Circuit Attorney shall open by reading the indictment and commenting thereon, to the jury, and give the law expected to be involved and the facts to be proven. Was this done? And, further, it goes on to say, that after the evidence on the part of the State is given, defendant's counsel may be permitted to open the defense, commenting on the testimony already introduced and that expected to be introduced; and after

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the evidence is closed, the Circuit Attorney shall be required to tell the law, and facts, etc. This was the rule. Now, let us see what was done. When Mr. Haight opened the case, he said: "I hold the indictment in my hand, but it is not necessary to read it." The rule says he shall, and put on it the interpretation and views he intends to insist upon before the jury. "It is sufficient to say it charges him with embezzlement." Why, embezzlement is as broad as the universe or the conceivings of the imagination. "He was an officer of the bank, and trusted with its money, and took it for his own use." Larceny and embezzlement, says he, are different; we have this indictment, both under the general law and the charter of the bank. He then referred to both these and to the punishment to be inflicted under each, etc. After speaking of this matter, Mr. Haight said there could be no dispute about Childs being such an officer, or intrusted with the funds of the bank.

We admit that Childs was such an officer, but dispute his being the keeper of these funds. We admit he was Specie Teller from the first, but deny that he had charge of the specie of the bank.

Twenty-five days had been exhausted in hearing the testimony in this case, which was introduced to the jury by Mr. Haight in a very short time. He told you it was mostly circumstantial, and warned you it would be necessary to observe it closely in order to see its importance and applicability. He then told you it was due to yourselves and the accused that he should give a general outline of the evidence, and what did that outline consist of? Simply a detail, the manner in which the coin was counted, telling the amount then thought to be on hand, and the means by which the supposed abstraction was discovered; he also told you that Childs kept the count of the coin, and his count corresponded with that of the committee. From this, Mr. Geyer was to do his cipher-ing, in order to show such and such amounts in these boxes of foreign gold, and from that to draw his inference that there were forced balances upon the books.

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Mr. Haight said, "the counting in February was a count of all the money on hand." Was it? If it was, then bank notes are not money, for they were not counted. Clark made an aggregate statement and they took it as correct—they did not pretend to count the paper. Mr. Haight told you further, that the committee counted every day for several days, when upon application of defendant, who complained for want of time to prepare the coin in suitable quantities to the bag, they only counted on alternate days; that as the gold was counted, it was placed in bags and boxed, and the name of the Director counting it placed on each box; "that the ten thaler pieces were a coin which it was not intended to pay out from the bank, but to be sent east, as they were boxed;" "that the boxes in which this description of coin was placed were large boxes, numbering from one to fifty-seven, and that the money could not have been taken from them, after this count, on one, two, or three occasions without assistance." After going on and describing the manner of the counting and weighing in December, he says "that count might have been a test against all the world, except the defendant, who could easily remove from the chests to the shelves, gold once counted, and in such quantity as to make any amount he pleased on hand." No counting was a test against Childs!—The wand of that magician could remove any amount from chest to shelf at pleasure, and produce double counts? The legislative committees were no check against Childs, though a test against the whole world beside him. Where is the charity, not to say justice, in such an imputation? He continues farther, "by the count in February, the amount of gold exceeded by $100,000 the amount found on hand before or after." He passed this without remark; there was no evidence of external violence to the bank or vault, and there was only one person in the bank who had charge of the cash, and balancing the cash account." He denied it, and no man could say it without a fearful disregard of the law, and the obligation of the Cashier. "We shall establish beyond all doubt that this particular sort of money, thalers and sover-

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eigns, were boxed up with a view of being shipped east; and also show, that during the count, Childs was in the vault frequently during the day, and went down there several times during the night. He was sure that Mr. Haight did not weigh the words he used, when he said he went down into the vault at night. There was not one iota of proof or circumstance leading to establish that conclusion. Mr. Haight then dwelt on Mr. Childs' position in the bank, the temptation and the inducements for making false statements at the February count, in order to cover up previous deficiencies. Has any proof been introduced to show an abstraction from the bank previous to that count? Not a particle. That matter has been left to Mr. Geyer's arithmetic, and yet it was boldly assumed in the opening. Mr. Haight started with the proposition that the money was taken from the vault, but now, after a laying together of the heads of the Directors, above ground and underground, they falsify this airy superstructure erected as a tower of strength against this defendant. Some of them knew he was growing rich too fast, and that was mooted as early as December last; that his immense expenditures, gorgeous magnificence and oriental displays were such as to look too splendid in their minds for a poor, blind plebian; it surpassed their understanding that a poor Teller in the Bank, with a salary of $1,200, could live in this Rothschild style. They had forgotten when they made that jump in the dark, when they charged this magnificence to the stolen money, that he could not have spent it a year ago and stolen it since last January. During the examination, when a question was raised, the Court took occasion to say it was not pretended this money was taken before the February count; then Mr. Geyer arose and corrected the Court, and said that was the very thing they did contend—that it was not taken off at that time or since, but long before, and covered up at that count by what Mr. Haight called some hocus pocus, of the particulars of which he did not tell us.

The manner in which the case was opened, there were no

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points laid before the jury to help them to single out in their own minds the facts which were to mark the case, and he did not believe one of the jurors knew more about the case after that speech was concluded that they did before it was begun.

Mr. Bates then spoke of the manner in which the prosecution had been conducted and followed up by the counsel who had preceded him. He was not going to answer the propositions of Messrs. Williams and Leslie. They carried out the idea of Mr. Haight, "that we have arrested you, got a great bug bear of an accusation against you, and now prove your innocence." Both these gentlemen had asked, "What have you proved to show your innocence?" We are not forced to prove anything, and it is not our duty; no man in the room could prove that he did not steal that gold. Mr. Leslie said the argument was all blatherdash, trash and froth. If we advance any proposition in testimony it amounts to nothing whatever. Facts were stubborn things, and when advanced did not suit this prosecution.

We shall proceed to notice the means resorted by the bank to get testimony. First, when Messrs. Walsh, Brant and the President were upon the stand, they were asked if any gentleman had been procured to go east and make diligent searches for the hidden treasure of Childs? It seemed to strike them with surprise, and they looked as if cold water was trickling down their spines. No one could remember that the Board, as a Board, had ever retained any man to go eastward. At that time we had not got possession of the minutes of the Board and these gentlemen supposed we never would. This fact was held back; none could tell whether it was a recorded matter, and all agreed in saying it was done by consent of the Directors, had in an informal way; that a good many little things were done by the Directors, not considered material, which were not put upon record—they were asked pointedly if any man was retained for that purpose, and they answered there was a gentleman going eastward, and they did get him to say he would stop in the principal cities and look into the matter and would charge

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only for the time he was so detained. Look into the record; what does it say? "Tuesday, August fourteen, 1849, the Board met, ten Directors present, when, 'Mr. Brant moved a suitable person to be procured to proceed east, with a view of ferreting out evidence as regards the person or persons who may have abstracted funds from the bank. Mr. Barnes moved, as a substitute, that the agents of the bank in Baltimore, Philadelphia, New York and Boston be instructed to employ a police officer to inquire if N. Childs, Jr., has any money deposited to his credit in any of those cities, and ascertain if any stock or other evidences of debt has been bought or sold by the said Childs or any of his relations, or if any stock stands in the name of the said Childs on the transfer book in either of those cities.' The question being on the substitute, it was negatived, and the proposition of Mr. Brant adopted. The President and Mr. Brant were appointed a committee to procure a suitable person to proceed east."

You know how many gentlemen were examined on that point, and not a word could be gotten from them. "*Non me recordo*"—"I did not write it down"—we have got no memorandum, and they forgot all about this. They did send a man to the eastern cities to make inquiries—they sent letters to banks in all parts of the United States where they had agents, to hunt for its stolen property or its proceeds, not only in the name of Childs, but his relations and family. These letters were not all. We had proven by Barnes and several of the Directors, that they had searched the broad continent to see if they could find one vestige where Childs had invested a dime. They had found nothing, but since the fact has come out that an agent was procured to go east, they have insinuated the receipt of a telegraph dispatch and letter from Baltimore, the contents of which were not given. They found no money however.

The sending an agent east and letters to the banks were not all the means used to obtain evidence. It was an important matter, and Bowlin must be sent for. He came, and being disappointed in the man, they suddenly charge about

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and attempt to destroy him. Bowlin, it will be remembered, came upon invitation of a gentleman of wealth—a prosperous Bank Director. Several years before Bowlin went into the Bank as porter he was a trusty agent in the house of Mr. Christy, upon whose recommendation he got the situation in the Bank, and that gentleman, from his acquaintance was selected to give the invitation. Accordingly, on the fifteenth August he writes, directing his letter to "John Bowlin, Esq." —not Bowlin the plebian, or Bowlin merely, or John Bowlin, or even Mr.—but "John Bowlin, Esq." "sir," mark you, "your favor by mail was received this morning informing me about your land, etc., all of which is satisfactory." He took great interest in his affairs. "The bearer, John E. D. Cozzins," no Esq. or title there, "visits your place to get you to return to St. Louis as a witness in the case of the bank against N. Childs, Jr." Cozzins did not go merely to invite Bowlin to come; a letter would have done just as well. He went to get him to come, and if he did not come willingly, to bring him—not because there were whispers against his character, in connection with this loss, but because he was wanted by the bank as a witness. That was it, and it was expected he would be a swift and hoped to be a willing and powerful witness. "To be a witness against Childs," says the letter. No one would suppose the bank to pay $100 and take such trouble to get him here for any other purpose in the case. —"The circumstances will be explained by Cozzins if you have not previously heard them through the public prints. You had better return as soon as possible," Why? The letter was written on the sixteenth and he could not return in time to be a witness before the Grand Jury. Why return as soon as possible? It carries upon its face the answer—"as the Directors are anxious to converse with you about the matter." What did the Directors want to converse with him for, he being summoned as a witness in a case where the State was prosecuting?—After addressing Bowlin in this style, the note closed as follows: "I was at your house yesterday and

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found the ladies well you left in charge. Hoping to see you in St. Louis, I am respectfully,

W. T. Christy."

Well, Bowlin was brought to St. Louis and he was conversed with. He told you that when they were trying to drill him, he gave them to understand he would tell what he knew when he came upon the stand. He boldly appears before them and demands what they have against him. Bowlin, tell us how it is, say they. He answers as he properly should, and for this he was kicked overboard, and must now be sacrificed.

The prosecution had not given one-tenth part of the testimony they intended to give. They had witnesses summoned to prove nearly all of the defendant's dealings, but so unsatisfactory did they make out with such as were brought on the stand that they declined going through their host. They found, as far as they progressed, that every transaction was but an honor to the defendant—that he would come out white as the mountain snow—no man to say he ever wronged him or did other than justice in his dealings.

This being the manner in which they sought evidence against Childs, the next important work was to manufacture public opinion. Childs was arrested on the thirteenth of August, and on the sixteenth, in order to allow free scope for conversation about the matter, that it might have influence with all they met, the Board of Directors, on the motion of Mr. Brant, repealed the by-law imposing secrecy on the members of the Board, "so far as the same related to the resignation and abstraction of N. Childs, late Teller of the Bank." No reason or argument is given to show why this was done, and it is left for us to conjecture. Their object was not only to set their tongues at liberty regarding the abstraction, but to discuss something else. They talk the matter over freely among themselves, and scatter through society their suspicions as facts, and their crude opinions as the just conclusions of law and truth. And thus they hoped

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to forestal the public mind, to make sure of their victim, condemned before he was formally accused, and slain before the first weapon of law was drawn upon him.

Eaves-dropping guards were placed about the houses of individuals. Respectable citizens were seized and imprisoned.

Mr. Anderson was arrested, and his person searched for coming out of Childs' house from a friendly visit, and Messrs. Hogan and Gay for simply inquiring for Mrs. Hayden's, were threatened with a club and hurried to the calaboose. And all this was done, not by any pretense of lawful authority, but by the barefaced violence and insolent tyranny of the agents of the bank.

The affidavit for arrest was made on Saturday, the eleventh of August, at which time the Criminal Court was in session and the Grand Jury sitting. Application was made to the Justice and the warrant issued. The action of the Board on that matter is as follows, taken from their proceedings of Aug. 11, 1849:

"It appearing to the satisfaction of the Board that a large amount of funds have been abstracted from the bank, that affidavit be made by the President and Cashier for the arrest of Nathaniel Childs, Jr., late Teller in this bank." Which resolution was unanimously approved; and it was further ordered, unanimously, "that said officers proceed to take out a search warrant with a view to have the house and premises examined."

They first approve the affidavit and then approve the search warrant. The affidavit is in the hand-writing of the Bank Attorney, and is as follows:

The affiants, James M. Hughes and Henry Shurlds, both of lawful age, being first duly sworn, say: that the said James M. Hughes is the President, and the said Henry Shurlds is the Cashier of the Bank of the State of Missouri, the office of which bank is located in the city and county of St. Louis, in the State of Missouri. The affiants further state that the funds of the said Bank of the State of Missouri have been

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embezzled and stolen, and the amount so embezzled and stolen is one hundred and twenty thousand dollars, or thereabouts. And that the discovery of said embezzlement and theft of said amount of said funds was made on this day, the eleventh day of August, A. D. eighteen hundred and forty-nine, and that said embezzlement and theft was committed in the county of St. Louis, aforesaid.

The affiants further state, that they have good reason to believe and do believe that the said sum of one hundred and twenty thousand dollars, or thereabouts, has been embezzled by Nathaniel Childs, jr., who was lately the Specie Teller and one of the officers of said Bank of the State of Missouri.

And the affiants further state, that they verily believe that he, the said Nathaniel Childs, jr., did, while acting as the Specie Teller and officer of said bank of the State of Missouri, embezzle and appropriate to his own use the said sum of one hundred and twenty thousand dollars, or thereabouts, of the funds of said bank, and with intent to cheat and defraud the President, Directors and Company of the said Bank of the State of Missouri.

Then follows the writ of the Justice to the Marshal, commanding him to "arrest and deliver to the keeper of the county jail of St. Louis, the body of Nathaniel Childs, jr.," and the Marshal's return thereon, as follows:

In obedience to the within writ, I arrested the within named Nathaniel Childs, jr., by his body, and have brought him before Esquire Butler, in obedience to said writ, this eleventh day of August, A. D. 1849.

James A. Felps, City Marshal.

The marshal did not execute the writ to commit him to jail, because he had been bailed. There was some testimony to show that the bank, or some of the gentlemen connected with it, even went so far as to endeavor to deter Messrs. Wilgus and Alexander from going his bail, in order to prevent him from going to his family, and to raise the popular

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belief that his guilt was so apparent, that even his old friends could not venture to bail him. The Criminal Court and Grand Jury were in session, yet application was made secretly before a Justice for a warrant. This was done in order to make an impression upon the public mind, that he was the guilty man, and so guilty that it was necessary to take him, with all speed and secrecy, as they did, for fear he would flee from justice, and confine him at once to the four walls of the jail, as the only place of safety for so great a culprit. It would paralyze Childs' efforts, dishearten his friends, and enable them the better to carry out the program of their operations. At this minute, the record of this warrant and arrest is not complete. Up to this minute, there has been no man to the Justice to wind up the record and close the proceedings. He would tell the jury why it was convenient to have it in that shape. If the testimony had gone forward before the Justice, Childs would have had counsel there; the unkindness of the case would have been displayed; the witnesses would have been cross-examined before they had consulted, so as to remember facts alike, and before the memorandums were prepared, so as to harmonize their details of fact, and avoid the danger of mutual contradiction and mutual destruction of each other's testimony.

He (Mr. B.) was absent when Childs was arrested, but returned as soon as possible after receiving a letter requesting him to stand up for defendant in the hour of his calamity. The first thing he heard upon his return was, that there was a search warrant out, and he called at Justice Butler's to get a copy. It had not been returned. He hunted for Officer Felps and demanded its return or execution. It was held above the heads of these parties as *in terrorem*. It was returned in a few days, marked as follows: "not executed by request of the Bank Attorney. Jas. A. Felps—fee 50 cents" —date forgotten, but fee marked.

The Cashier reported that he had proceeded to take out a search warrant to search Mrs. Whitlock's house, in order to ascertain if anything could be discovered in regard to the

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abstraction of the funds of the bank; which was unanimously approved.

Thus the whole matter stood approved by the Board. The warrant is to search for stolen gold coin of the bank, and is directed to a public officer. When he heard of the proceeding under this warrant toward the poor young widow on Spruce street, his indignation was aroused, and he felt for the decency of justice in this land. It was not the hasty and precipitate action of any one individual. The plan was contrived at the bank—deliberately planned, and illegally, wantonly and cruelly executed.

If you note the report of the Cashier to the Board, it was not in the manner of law "to search for stolen property," but to "ascertain if anything could be discovered in regard to the abstraction of the funds of the bank"—a general inquisition after facts, not a legal search for stolen goods. The affidavit states in terms, and specifically, the kind of money lost—"ten thaler pieces of the Kingdom of Germany! and sovereigns." You have seen by the statute, that no search warrant can be taken out unless the property lost is described, and nobody can search under the warrant except a sworn officer of the Government. Private malice is shut out. In a country thought to be worse governed than this—in England —a man's house is his castle. No matter how poor the man nor how mean the house, still it is his castle; the fortress of his safety, which no rude hand should dare to violate, and the hallowed scene of all his domestic affections and social charities. It is indeed a sacred place, protected by the strongest ramparts of the law, and sanctified by all the endearing sympathies of life. The loftiest orator of Britain informs us that the lowly hovel of the peasant is a castle as impregnable, in the eye of English law, as the princely piles of Blenheim and Waterloo—"the tenant may be ignorant and poor, his hut may have walls of mouldering mud, and a roof of rotting thatch; rent and broken, and open to the inclemencies of the winter; the wind may enter there, the rain and snow may enter there, but the King of England dare not enter there."

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And do not we here in Missouri boast of a higher degree of legal liberty, and a larger measure of practical independence, and can our citizens be expected tamely to submit to the more than royal authority assumed by the bank, in seizing our persons, besetting our houses with spies and eavesdroppers, and placing guards and listeners in our very chambers?

This warrant was not a phrenzied paper. It was the deliberate writing of skillful men—written by Mr. Kirtley and reviewed by Mr. Ryland, the Bank Attorney. His opinion had been asked by one of the parties concerned, in regard to the proceedings on Spruce street under this warrant, that he gave it to the effect that these gentlemen were guilty of an indictable offense—that they obtained property there by false pretenses.

Mr. Bates then read from the minutes of the Board the proceeding in regard to the appointment of a committee "to superintend the prosecution of such person or persons supposed to be engaged in the abstraction of the funds of the bank," upon which committee Messrs. Yeatman, Sturgeon and Barnes were appointed, to act in connection with the President. Barnes escaped the work, by being on the Grand Jury; Hughes having no stomach for such a fight shirked out, and Yeatman would have been left alone, except for Dr. Forbes who gallantly volunteered and marched up to the assault like our high spirited youths to the storming of Chapultepec.

He considered an important point in this case—the proceedings on Spruce street. This branch of the matter, they had been told by Mr. Leslie, had nothing more to do with the case than Gulliver's travels. To me and all lovers of decency and the justice of the law it was important. He did not suppose that in their proceeding the Directors had any hostility against Mrs. Whitlock, but it was important to prostrate Childs, whoever else might be overwhelmed in his ruin—to blast his reputation—to make this community believe that instead of being a christian, a moralist and a gentleman, he was a hypocrite, a debauched libertine, a foul adulterer. If

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he could not be pulled down without attacking female character, let that even be made a sacrifice. They had jumped in the dark. They reasoned upon this matter not without some knowledge of the philosophy of the human mind. Once convince you that Mr. Childs, a professed christian and moralist, a preacher of the gospel, was a hypocrite and libertine, and you would believe, on far slighter testimony, that he was a swindler and a thief. Did not Mr. Forbes tell Mrs. Whitlock that rumor said there was improper intimacy between herself and Mr. Childs? And when asked what object he had in giving this gratuitous insult before two strangers, (Messrs. Yeatman and Ryland,) did he not say it was to make her give up whatever she had belonging to Mr. Childs? Upon application of the thumb-screw of cross-examination this was admitted. They had a twofold obect, to blacken character and force her by a cruel moral duress to confess and surrender the papers. Yet these kind gentlemen would not hurt a hair on Mrs. Whitlock's head! What was their conduct? Messrs. Williams and Forbes came as pretended friends, and demand papers and documents belonging to Mr. Childs, but nothing for which they have a warrant. They insult her with the assurance that her reputation is assailed by rumor, and threaten her with officers at the door ready to search the house, and, if need be, her very person. If this had been true, still their conduct would have been cruel; but it was false, and they knew it. She declines their demands at first, but reluctantly, when tortured and driven to the last extremity, she admitted the possession of some papers handed to her that morning by Mr. Childs, and said she would go upstairs and get them. Then it was that Mr. Williams proposed that an officer should accompany her. When she shrunk from the proposition and said, "Oh, no! you go with me, Mr. Williams." He did accompany the lady to her chamber; and when he returned, had possession of the papers, which at once were handed to Dr. Forbes. Entirely satisfied with their excursion, Messrs. Yeatman and Williams left the house in glorious triumph, and were soon followed by Ryland and

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Forbes; the police drawn off, and all came to the court house to meet in conclave. What their action in conclave amounted to we are not informed in evidence, but only know that soon afterwards, a policeman intruded into the very chamber and remained for hours, and officers were sent to guard her house during that night. While at the house, and the fact of a search warrant coming to the ear of Mrs. Hayden, who was upstairs and ignorant of the proceedings below, and hearing that the officers were about to leave without executing the search, she demanded of them to do their duty, to search, and not go away and say they had a warrant but were not satisfied. Felps came reluctantly in, ashamed of the job, did look about a little, but so slight was his search that he regarded it as nothing, and returned the warrant "not executed by request of the Bank Attorney." This search warrant was only a pretense—a scarecrow held over the head of unoffending and unprotected females, and the papers obtained by that means were not only obtained by falsehood, but the actors subject to an indictment for obtaining them under false pretenses. These proceedings have all been ratified by the bank, who assumed the responsibility. These gentlemen of the bank would not have dared attempt such proceedings against a man who knew his rights and would maintain them. They dared not go to Childs' house and attempt it, although his house was first mentioned in the warrant. If that poor woman had the presence of mind at that time to tell these persons it was a proceeding of which she was ignorant, to have patience and be seated until she sent for some one to counsel her—if she had sent for some one who knew her from childhood—if she had sent for Mr. Polk, Mr. Wright or myself, he ventured his right hand they would have gone away ashamed of the cruel and dishonest errand on which they had been sent.

Notwithstanding these transactions, Mr. Geyer says it has nothing to do with the case—and this is reiterated by Mr. Leslie—"No more to do with it than Gulliver's Travels." Why, gentlemen, this is a mockery, an insult to your under-

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standing. Is not this a case of circumstantial evidence? Has not Mr. Childs' life been ransacked to find incidents great and small, from which you may infer his guilt? And shall others, equally liable to suspicion, presume to say, that their misconduct, their very crimes, shall raise no implication against their innocence? They have the monopoly of banking, to be sure, but while I have the freedom of speech, they shall not, with impunity, violate the laws of the land and the decencies of life; they shall not, unresisted, put a helpless woman to moral torture. Yes, gentlemen, it has something to do with this trial. It is a case abounding with circumstances of peculiar aggravation—a case in which every generous sentiment, every impulse of gallantry, and of manhood, may be properly called forth into active co-operation with law and justice. If ever suffering virtue deserved a tear, if ever persecuted innocence cried aloud for sympathy and protection, now is the time; now, when lawless violence rushes upon its victim with headlong haste, reckless of the ruin it scatters in its track, and tramples, with thoughtless cruelty upon the downtrodden bosom of unprotected woman. Yes, gentlemen, it has much to do with the case—the law, the facts, the morality of the case.

But, say the gentlemen, "we got the papers;" and what are they? They are plundered papers—plundered from Mrs. Whitlock. She had a perfect right to have them, as a friend of Mr. Childs, and they had no right to take them. Had they been given to me, as they were to Mrs. Whitlock, think you, gentlemen, they would have gotten them? My life upon it, they would not have been so impertinent as to have asked me for them.

Here is a package of papers, (holding up a bundle,) endorsed "private papers of Mrs. Hayden, and to be delivered to Mrs. Hayden, Mrs. Whitlock or Mr. Childs," and dated "December 4, 1848." You remember what Mr. Hurschburg testified respecting this package. It was in the vault of the bank as a special deposit. Mr. Hurschburg testified he gave it to an unknown hand, he believed one of the Directors, but

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could not remember to whom; he gave it to them sealed and in proper order. It was returned to Hurschburg, to be again placed in the vault, by Mr. Walsh, but then it had been violated by cutting around the seals. This package was called for during the examination, but not produced by the bank, and was eventually obtained from the bank by an order from Mr. Childs endorsed by me, and it was brought into court mutilated as it is. He mentioned this to show how unscrupulous these bank officers are, and how little regard they paid to the rights of others. It seems nothing in their keeping is safe. He did not know what it originally contained, nor could the Teller of the bank say he had delivered what he had received on deposit. He did not know what paper was gone. Having blindly jumped to the conclusion that Childs had got their money, (or thinking it safer for their own reputation to have the world believe so,) they claim the right of reprisal on his property. They issue letters of marque to make the captures, and give to Mr. Williams a *del credere* commission, to guarantee his acts and contracts in the premises. They are very diligent in the search after his effects. They violate special deposits in their own vault. They threaten and terrify helpless women, and wring from them confidential trusts; but they very prudently abstain from touching his property open before their faces, if it happen to have a man to guard it, "who knows his rights, and knowing, dares maintain them."

Among the things delivered up by Mrs. Whitlock was a small deposit book, in which was an entry to her credit, with Clark & Bro., for $1,800. She was compelled to give to Mr. Williams, a check for that amount. Why was this money forced from her? What pretense of law or decency is there for extorting from her the check for that balance? It might have been her own, or Mr. Childs, but certainly it did not belong to Mr. Williams or to the bank. Obtained in this shameful manner, no wonder it was concealed by a variety of artifice privately shifted from hand to hand, so that no one Director could tell the whole story. From Williams to Forbes,

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from Forbes to some unknown person at the bank, from the unknown back to Williams and Yeatman, who cashed the check and delivered the proceeds to another unknown at the bank, who handed them to Mr. Sarpy. He vested it, in his own name, bearing interest, and delivered the certificate to the Cashier, who never made the mark of his pen about it, on any book of the bank. Thus they get possession of the money of other people and thus they hide it (I will not say embezzle it) with every mark of contrived secrecy, that betrays their consciousness of wrong.

But they have got the papers! and Mr. Leslie says in them they have gotten the avails of the stolen gold. How dare they say so, without one iota of testimony to prove the assertion?

Having now stated the nature of the indictment—the motives for instituting and the manner in which the prosecution has been conducted—the extraordinary means used to obtain testimony, sufficient to weigh down any man—the unusual and cruel means used to poison the minds of society, and its powerful reaction upon the bank—he would now ask what was the charge against defendant? Yesterday evening the jury was asked to chew the cud of reflection during the night and determine if they could what was charged against him. If they knew what the charge was they knew more than I do. Having been driven to the necessity of guessing, they could guess also.

You have seen by the sworn declaration of the Cashier, endorsed by the Board, that the money was taken away in January, February and March. Then you learn that the money was not taken, in point of fact, but used to cover up an old defalcation—cover up a previous defalcation! When and of what? Abstraction has been the word in the mouth of every witness and of the counsel. Now they go into an indefinite past—since 1837—and in that long career they are to figure us into the penitentiary. Mr. Geyer is now to show us that somewhere there are forced balances made and false accounts shown. You recollect with what frankness he made

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his statement of what he intended to rely on in his argument. To this indictment are six prongs—only one is to inflict the wound, and that is to be determined by figures. There is no pretense set up now that Childs stole this money after the February count. Mr. Haight and Mr. Williams deny it, though Mr. Shurlds swears to it in his affidavit. To this moment they don't know the charge, and now Mr. Geyer will go to calculating it. They say there has been an error in the books for years past, but don't know who made it or how it occured, and that it would take five years to find that out.

In coming to the body of the crime charged against defendant, he would show what was the duty of the officers of the bank, and that if that duty had been properly performed this alleged embezzlement could never have occurred. In doing so it would be necessary to trouble the jury by reading from the charter and by-laws of the bank. He called attention to the testimony of the Directors in regard to the powers and duty of the subordinate officers of the institution. They knew nothing of that duty or how these officers conducted themselves. "It was none of their business"—"they were Directors"—"this was a hard year upon them"—excepting this year they had nothing to do but meet at the Board and drink champagne furnished by the younger members in sponging their robes of office.

December 7.

Mr. Bates. The by-laws show that no clerk could carry on outdoor business so as to interfere with his duty in the bank. This rule did not apply to Tellers; in illustration of which he referred to Mr. Clark, Receiving Teller, who had knowingly carried on outdoor business, and as far as the rules were concerned, he contended the Teller could do business out of the bank as well as any Director.

He contended that if the President and Cashier of the bank had done their duty as laid down by the charter and by-laws, or if they had come near discharging their duty, Childs would not be here charged with this embezzlement—

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he could never have abstracted one dollar without it being known to them. True the Directors said it was not their business to see that the officers of the bank discharged their duties, yet they, by the charter, are charged with that duty; they were appointed for the purpose of governing the whole institution. No officer lower than the Cashier was mentioned by the charter, and he, as the exclusive keeper of the cash and by the twenty-first by-law required every day to verify the daily balance of the Tellers, and if a discrepancy occurs to report the same to the Board. This duty was plain, but all the evidence went to show he had not discharged it, and he himself was anxious to have it understood that he never pretended to do it, his bond and the rules to the contrary notwithstanding. The Teller was not the keeper of the cash.

Mr. Shurlds went into the bank inexperienced. Col. O'Fallon, who had been President of the Branch Bank of the United States, and Mr. Smith who was engaged in the agency of the Commercial Bank of Cincinnati, were the only men of experience he had around him at the commencement of the institution. Mr. Shurlds had no knowledge or experience—it was his duty to know and to do what the charter and by-laws required—and where knowledge is a duty ignorance is a crime. If he, as a lawyer, should take a case for any gentleman of the jury, and from ignorance lost it he held that he would be accountable. The duty of the Cashier was plain and simple. Suppose he had kept the treasure in the vault, and on every day furnished each of the Tellers with sufficient cash for the day's operations, and at the close of business struck the balance according to their transactions, could any abstraction of its funds ever have taken place? It was impossible. "Childs had access to the vault, and therefore, he had charge of everything in the vault." Absurd!—a trick to shuffle off the Cashier's duty upon the Teller. It was directly in the teeth of the by-laws of the bank. Why, by the by-laws, the Teller only gives bonds in $10,000, while the Cashier is required to give bonds for $50,000. If nothing else showed the responsible party, this in itself would. The Teller

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makes no report to the Board—has no communication with it —the Cashier, and he alone strikes the balances and verifies the statements furnished them. Is it just, we ask, for those Directors to come here, one after another, and strive to make the impression that Childs is responsible for the cash of the bank? He might be held responsible for that part of the funds which legitimately came into his hands, but none other. If I handed my servant $10 to purchase any necessary, I would expect him to come to me, and say, here is $7.50, I spent $2.50, and here is the proceeds of the basket. If he did not properly account for the money given him, I, as the keeper of my funds, would hold him responsible. So it should have been with the Cashier of the bank. He was the keeper of the cash, and should have watched his officers. The money in the vault was not, in point of fact, in Child's possession. The vault was merely a little cellar, with doors and apertures, and Shurlds had keys to it as well as Childs. Since this loss, however, the Directors are partitioning off the vault, and only giving out such amount of funds as are necessary for daily use, the Tellers ticketing for it just as the Specie Teller ticketed for the paper he received for daily use. As Clark took the ticket from the Specie Teller for the amount of paper furnished him every day and settled after the close of business, so it was the duty of the Cashier to do. Not a Director could tell how it happened these Tellers were trusted with the treasure of the only banking institution in Missouri—trusted with the highest and holiest fund in the State, set apart by Congress for the instruction of the rising generation of Missouri—they could not tell who had possession of that money. Even Col. Campbell, who had been eight years in the bank, never knew who kept the keys of the vault! Mr. Yeatman told you that until last August he never knew who kept the keys of the vault! No wonder Mr. Barnes could not recollect that he had the keys on one occasion down at his store, as no one seemed to know where they were kept. Suppose the claim of right had arisen as to who had possession of the bank—Shurlds or Childs—how would Shurlds lay his

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claim? Certainly by the charter and by-laws. Childs would say he had the keys and did have access. It has been decided over and over again that mere access to a thing does not put in possession of the party. For that matter, every officer of the institution had access to the vault.

Childs was not even in constructive possession, and not being in his possession, made the crime against him different. Without possession in himself, the taking of the money would be larceny not embezzlement.

Embezzlement is a breach of trust—the applying to one's own use, property already in possession, and is contradistinct from larceny, which implies a taking from the owner. The taking of the property of bank by any of the clerks there employed is not embezzlement, but larceny. Archbold, page 189 says: If an owner of goods deliver them to another to carry, and does not relinquish possession, and the person to whom they were delivered runs away with them, he is guilty of larceny.

Mr. Geyer will not say that embezzlement was no offense at common law. They did not hang men for it at common law: it was not a felony, but a high misdemeanor. The character and quality, of the crime is changed by statute in several instances both in England and America, so that what was but a misdemeanor formerly, is a felony now.

It is a truth, in point of law, that the Cashier was the keeper of the money of the bank, and in point of fact that he keeps it much more than anybody else. He makes all the reports to the Board and to the public, and swears to them; and yet, strange to say, he never counted the money, and knows nothing about it.

I called for the Specie Teller's account, for the purpose of showing the jury what it was—a mass of figures—and from which Mr. Geyer was to make his arithmetic. I did not intend to go to cyphering, that part of the case on our side belonged to Mr. Blennerhassett, and well the State knew it, yet we could not beg nor threaten, coax or provoke them to give him a prior statement of what they intended to rely on.

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He was not to be drawn from the main defense or line of argument laid down for himself, by the statement of Mr. Geyer just as he (Mr. B.) was rising to address the jury.

These specie books represented the gross amount supposed to be in the vault. This amount it took the Directors a month and nine days to count, by relays of committees, under comfortable circumstances, and having nothing else to do. Could they state what was in the vault by the knowledge of others? Shurlds was "general boss," as Mr. Christy says, and when Childs went into the bank was not particularly experienced in bank business. He ascertained from the beginning the amount in the vault, and afterwards, on every day, put in this book the amount he supposed to be there. Childs was not required to count the cash; the semi-annual committee were, and Shurlds swore to their statements. From these statements Mr. Geyer was going to cyphering; no matter how false the accounts may be, they are true, as to Childs! he is estopped; he cannot explain, he can't tell the truth, and if false balances are discovered there, no matter who made them, it is to be taken as proof that Childs stole the money.

These counts by the Legislative committees, shall we not take them as correct? Shall we not be bound by what they swear to? You see they cannot be true in point of fact. Suppose Mr. Geyer should succeed in his ciphering and show there was a balance of $100,000 wrong—is Childs to be estopped because he every day put that down as the amount he supposed to be in the vault? Suppose Shurlds, who has access to the vault, had removed $120,000—how does Childs know that fact? He would go to the vault each morning, bring up a few trays of gold and silver, and note the amount of them on his memorandum, but never pretend to count the shelf gold in bags or that in boxes. The seals of boxes can be opened, and money has great temptations for other men than Childs. Shurlds has all night and Sundays for that purpose, were he disposed. He was desirous by this to show the false basis on which Mr. Geyer was going to build his argument. When Childs reported, his reports were subject to the

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revision of another man, and in no instance has a witness been brought forward to disprove them.

It was the duty of Shurlds to examine the cash every day, and he must have examined it in order to make his reports. How could he make out his reports to the public and the Governor unless he knew the state of the bank? If he was ignorant of that he deserves expulsion from his office. He charged nothing more on Shurlds than he was forced to. He charged no man with the crime; he only defended Childs. Everything that could be had been said of Childs in connection with this loss, and nothing said of anybody else—no suspicion aroused. Mr. Yeatman, when on the stand, expressed surprise that any imputation should be placed on the Directors at the time Childs was arrested; he never heard it, and supposed if it had been made they would have protested against it. He was then asked if Childs did not express surprise that he should be suspected and protest against it? "Oh yes, to be sure he did." Childs was astonished at the charge, and he was not astonished that the Directors and all should so readily unite to charge him and thus exculpate themselves. Self-preservation was a natural instinct, and men will resort to it. Did any of these men who so readily charged Childs stand fairer in the community than he did, down to this disclosure and prosecution? If anybody in or about the bank was suspected, you were bound to suspect gentlemen, they had no rowdies there, none but men who were not ashamed to look as upon a level with the proudest citizen they meet

Mr. Bates then alluded to the imaginary blunders in the bank, for which the February and March count was to be panacea—the cure-all—yet even there they blundered grossly, as was manifest by their memorandums and record. This was illustrated by box No. 30, which was recorded to contain four bags, marked on the outside to contain five, and when opened did contain four bags; yet, from this box 30 it was contended a bag was abstracted, and it was the box in which the discovery was first made. Then again, box 34, which is

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marked to contain five bags of sovereigns, and so signed by the President, is recorded as only containing four bags. He did not intend to go into a calculation, but only called attention to these facts to show that the Directors themselves blundered.

They don't say that Childs did, in fact, take the money, only that he had an opportunity, because he had access to the vault. He was directed by the President, previous and during the count in February, to put the coin in bags, 1,000 pieces in each, for convenience in counting. Gentlemen of their leisure and wealth could not do this, although it was their duty. This arrangement was not completed when the count began, and hence his absence down in the vault during the count; and here is the time he was mysteriously engaged as they would have it in opening the boxes, removing a bag and resealing them again. He was down there by order, and this, too, during bank hours. You recollect that from the vault opening into the banking room where all the clerks are engaged, besides the door, there are two peep-holes. Childs could have gone into the vault at these times with his wax, but he must have a light in order to use it, and in using it must necessarily have produced a smell, from the character of the ingredients of which wax is made, which smell must have escaped through these apertures into the banking room under the very noses of Mr. Robinson and the Discount Clerk. They must have known that sealing was going on in the vault, had it been the case. It was next to impossible that so much wax could have been in the vault without discovery. He was liable every moment to interruption. It was in business hours; the clerks all at their posts; the vault door open: He might be seen through the sky-lights, or detected by the smell of the burning wax.

"Why, he bought some wax from Mr. Fisher, a Director," say they. Are you going to convict Childs of being a fool as well as a knave, by supposing he would go to Fisher to buy wax for that purpose, when there was plenty lying upon the mantelpiece in the bank!

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Well, Shurlds could have done it as well as Childs, and so could others. Shurlds' chances were better, ten to his one, and if he be the weak and gullible man some think him, somebody else could have done it in his absence. Shurlds had access to the bank from his dwelling and kept keys to the vault. When he passed into the bank in the evening to get his snuff box, Burke standing at the door, he could easily have removed the bar from the door, and have gone into the banking room at his leisure, without the knowledge of Bowlin or the watchman. Burke, Bowlin or Cochran could have done the same thing. A decrepid old man watched around the bank, and by leaving this bar off, and taking advantage of his absence at another part of the building, it would not take three minutes for an "outsider" to get in, and while he, the watchman, is walking his rounds and crying "all's well," there they could be in the vault sealing and unsealing at their comfortable leisure. The keys to the vault were accessible; they were kept upstairs in Mr. Shurld's residence in a drawer fastened with a common lock, and everybody about the house were likely to know where they were kept. An "outsider" could have got them by collusion with the servant and Shurlds never know the fact.

Bowlin was sent for by the bank, but after his arrival they found they could not use him, and so they resolved on destroying him. He testified that on two occasions Mrs. Shurlds went into the bank on Sunday, and testified something about the wax. To disprove his statement about the wax, all the Directors were recalled, and Mrs. Shurlds was dragged into Court to contradict the other statement, and thus impute to him perjury. Bowlin says he gave the key to the servant on two occasions, in her name; she says no; she got the key but once, and then for the purpose of seeing a jeweler's bill which she knew or believed to be in the Cashier's room. I have no thought that Mrs. Shurlds was accessory to the stealing of the money. From childhood, hitherto, she has been far above such an imputation. But, like all the ladies of ancient and modern times, from the Garden of Eden to St.

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Louis, she has a spice of curiosity. She longed to see that bill of jewelry, to note the items and conjecture their destination. But she little thought that to her womanly curiosity the public would be indebted for proof of the astounding fact, that a negro slave could get the keys of the bank, for the asking. Do you suppose this was the first or last time that the key was got by asking! If you do, you stultify Bowlin and Mr. Shurlds too. Do you suppose these things remain unknown—that there are no spies upon the bank as upon private houses? Do you suppose they did not know this servant girl could get the key of the bank, by simply asking for it, and that, by means almost as easy, she might have access to the keys of the vault? This was the state of careless insecurity in which the treasure of the bank was kept; and while this state of things continued, it is no less cruel than absurd to say that Childs took the money. But he "could have done it," say the learned counsel; and so could others, far easier than he. Mr. Shurlds had every Sunday wholly to himself, to be in the bank at his pleasure, with the vault keys in his pocket, and had opportunity to smuggle in all persons he chose to have with him. He had the seal—he had a knowledge of the localities of the money—he had the books and memorandums of the count, and he, as well as Childs, could have played a "hocus pocus" to cover up former deficits. Who, then, stole the money? We charge no man, but we say that it is less reasonable to charge the man who had a bare possibility, than the man who had every opportunity and means, and equal temptation to commit the crime.

Mr. Bates then proceeded to comment upon the conversation between Dr. Forbes and Mr. Childs, just previous to his arrest. He alluded to Childs' answer to Forbes' question at that time, that the money was taken by "Shurlds, Hurschburg or myself—but I am innocent." Childs, at that time, did not know how easy Shurlds' keys could be obtained, and in his remark, only included those who had keys to the vault. This, however, he considered of little or no importance.

Mr. Bates then noticed the accusation that Childs was

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"rising too fast and getting rich," and commented on the failure of the Directors to adduce one circumstance against him in that connection; they had traced his transactions for the fifteen years he has been living here, and even gone to his residence in Maryland, while an industrious orderly apprentice, yet had not found a man to say he was unjust in his dealings or unfair in any one transaction of his life.

He knew this goodly city when it was a little town and had but four brick houses in it, and about 2,500 inhabitants. He had seen it grow and rapidly increase in numbers and wealth; and many of its enterprising citizens, animated with the spirit that built up their city, "grew with its growth, and strengthened with its strength."

Is it any impeachment of Mr. Barnes, one of our great merchants, now so enterprising and prosperous, and apparently so wealthy, and still so rising, to say of him, that but a few years ago he was a very intelligent and faithful clerk, living on his salary, in a respectable mercantile house in this city? Is it any impeachment of Col. Brant, now one of our few millionaires, the owner of a princely fortune of his own making, to say of him that, twenty years ago, he was only a Deputy Quartermaster, with the rank, pay and emoluments of a Captain of Infantry? If these be reproaches, then all our leading men of wealth and influence, our great landholders, our eminent merchants, our far-seeing and nice-calculating brokers and financiers, instead of glorying in the achievements of their talents and industry, have cause to blush over the mushroom growth of their bloated fortunes.

Gentlemen, few of us are natives of this country: we are all adventurers, coming from a distance, to seek a fortune or make a name: we had very little to bring with us: if we had been rich and prosperous at home, we would have shown our wisdom by letting well enough alone, and staying there. But with most of us, migration was a necessary of life. I remember as if it were yesterday, the first time I ever crossed the Mississippi, the twenty-ninth of April, 1814, and I can give you, with entire precision, the inventory of my worldly

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wealth at that interesting epoch. Imprimis, a horse, saddle and bridle—the horse a first rate gelding, of the best Hunter blood on the shores of the Chesapeake; item, a pair of saddlebags, well packed with pretty good apparel; and lastly, in actual cash in my pocket, three dollars and a half! I came without fear or doubt of the future; buoyed up by the confident hopes, puffed up, it may be, by the silly vanity of youth, I never allowed myself to doubt of a reasonable measure of success. I knew then, as I know now, that, in the good providence of God, integrity, industry and perseverance never go wholly unrewarded; that in all civilized society, they entitle their possessor to personal independence and to the decent respect of the world. True, I have not made a fortune, as some of the Bank Directors have, and as Mr. Childs is charged to have done. That is my fault, for I have had ample opportunity. But if I were called upon to account for the little I have, surely I could not go as Mr. Childs has gone, triumphantly through the severe test to which he has been subjected.

He contended this charge was a contrived scheme against Childs, concocted in the dark recesses of the bank, and had utterly failed in its end and design. He then referred to Mr. Barnes' recollection of Childs' statement to the Board, (the original of which had been destroyed by Childs upon advice from Mr. Wright,) in which statement he alleged that he made it an invariable rule to save thirty dollars per month out of his salary. All the Directors had stated in evidence that Childs received a salary of $1,200. To show their recollection of facts, he read from the record of Jan. 13, 1839, in relation to the salaries of the officers of the bank. In regard to the salary of the Tellers, he read as follows:

"On salary of First Teller, Mr. Dobyns moved to strike out $1,400 and insert $1,200, which was negatived by a vote of nine to one, and the sum of $1,350 was agreed to.

"On salary of Second Teller, Mr. Dobyns moved to strike out and insert $1,200, which was negatived by the same vote

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—ayes, nine, nays one—and the sum of $1,350 was agreed to as the salary of the Second Teller."

This was in 1839, a year and a half after the bank went into operation, and its business was small, that Childs was allowed $1,350; yet all these Directors, in order to infer a fraud from his low salary were declaring he only received a salary of $1,200. He brought this fact forward and commented upon it at some length to show the character of this proceeding, and the unfair manner in which Mr. Childs had been treated from the beginning of this prosecution.

You have heard Mr. Geyer's brief announcement that he meant to prove by an examination of the specie books and weekly statement, that there were false and forced balances of the coin, and infer from that, that Mr. Childs had somehow acted very improperly. But he did not say, nor insinuate, that if he fully succeeded in that attempt, it would amount to proof of any one of the six counts of this indictment. He knew it would not. I am not going into an examination of those accounts; and, as far as concerns this indictment, while I suppose the amounts are right, I care not a straw whether errors are found in them or not. I have at hand, however, several answers to Mr. Geyer's hypothesis of false balances; and first, it is impossible to make it out without falsifying the whole course of the prosecution; for they have denied the correctness of all former countings of the money, and of the receipts therefor—all former statements of the amount counted. And how can they make out a false balance at any particular day, without establishing a true balance at some former day, to serve as a standard to measure by? Second, the cash balance, true or false, was not Child's balance, but the bank's. How the silly practice arose of stating in the specie book, in every day's entry of business at the counter, the total amount of coin in the vault, of course, I know not, but suppose the Cashier, the "general boss," as he has been called, directed it. But so it is the gross amount was carried forward every day. Now, does any man pretend that Childs so stated it upon his own knowl-

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edge, his own counting every morning? This fact is physically impossible. He could not do it, but must have made the statements on faith of the semi-annual counts of the Directors.

Third, if Mr. Geyer should have the ill fortune to cypher out false balances on the books of the bank, some dignitaries higher, I wot, than Childs, will begin to quiver in their shoes. Men will begin to read the charter and by-laws, and so find out that it is the bounden duty of the Cashier every day to settle the cash account, take charge of the cash, and report any impropriety without delay to the Board. They will discover also, that the Directors must, twice in every year, count the money and publish to the world a full and fair statement of the condition of the great interests committed to their wisdom and honesty. That they do, in fact, pretend to have such countings and make such publications, and that the Cashier swears to every one of them. Now if Mr. Geyer should succeed in proving that the books are false, the balances forged, and the money represented, in fact not there, charitable people will begin to wonder how such things can be, under the management of such vigilant and virtuous financiers. And the Legislature, when it meets, may take into its head to be displeased at being habitually imposed upon by the biennial blunders of its own committees, and the semi-annual falsehoods of the Directors and Cashiers.

But enough of these false balances. For aught I know, they may deeply concern the bank and the public; but as concerns Mr. Childs and this indictment, their existence or non-existence is the same to me.

And now, gentlemen, I am almost done. I thank you for the patient and strict attention with which you have listened to my remarks, too long continued. I would gladly have avoided the necessity of speaking to you at all, and in all good faith proposed to submit the cause without argument, for I knew, from the beginning, that my client was in no danger of conviction. The duty was to me a painful one, for it imposed upon me the necessity to turn upon the pursuers,

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and carry the war into Africa. I have discharged it to the best of my ability. My conscience is satisfied. The charge against the defendant is now proved to be flimsy and groundless. There is not one word of testimony tending to show the affirmative fact of his guilt. The whole air-built fabric is based on the simple fact that he had an opportunity, and it is therefore possible that he might have committed the crime. His own conduct and demeanor during the whole of this trying scene, is his best eulogium. Strong in conscious innocence, he has stood unmoved amidst the storm of accusation, and unterrified by the fearful odds of numbers, wealth and social influence arrayed against him. His calmness and self-possession have never for a moment forsaken him. He could not be provoked nor seduced from the even tenor of his way. Accused, he did not recriminate; reviled, he reviled not again. Defended by no armor but moral courage, with no tower of refuge but the simple dignity of conscious rectitude, he stood, serene and safe, in the tumultuous onset of his foes; while his friends looked on with honest pride and beheld all the arrows of his enemy, blunted by that impenetrable armor, fall harmless at his feet.

I have no fears about this indictment. I know that he must be acquitted of that. But that is not enough. I long to see him sent back to society, cleansed, purified, washed white from the social and moral contamination of so vile a charge. Restore him, gentlemen, restore him, for you alone can do it, to the position in society which he has so worthily won, and so long sustained as a man of business, a gentleman, a moralist, and a teacher of the Gospel of Christ.

I have done. He is in your hands, and God grant him, through your means, a safe deliverance.

MR. GEYER FOR THE STATE.

Mr. Geyer. The position of counsel who had the concluding argument was generally understood to be a post of honor, yet never a position of ease; and in this case, after thirty

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days of successive toil, with enfeebled constitution and intense application of mind to the subject matter of the trial, he should not in opening his remarks, spend the little time and strength left him in apologies. His purpose was to argue the case upon the facts—a course of argument not yet attempted by the gentlemen on the other side. Indeed, they set out by informing the jury that they did not understand what charge was against their client, and the gentleman who last addressed you, after occupying a whole day in preliminary observations, again reiterated that the nature of the charge was not understood by the jury, and in his opening remarks in the afternoon of Thursday, among other things, sent you home to chew the cud of reflection on this point, an idea, he supposed, suggested by Mr. Blennerhassett's prolific cow with five calves. From the first day of the cause to the present, their sole desire has been to cover up the facts in order that they might not be understood, and call on you to acquit without reflection. His purpose should be not only to make it understood what the charge is, but to dig up from the mass of evidence by which they had been covered, the facts which apply to the charge.

He had a memorandum summary of the points taken by the defense, and in the course of his remarks would advert to them; he did not intend to discuss them at the length bestowed upon them by the opposite counsel. They started with the proposition that their desire was not merely to get an acquittal, but a triumphant acquittal, so that the defendant be turned loose unscathed if not unsuspected; yet, when the senior counsel rises in his cause, he contends the indictment is defective and ought to be quashed, and throws before the jury a question of law for them to decide in order to avoid the trial upon facts in evidence. He asked how that tallied with the profession that they anticipated a triumphant acquittal! This was one of Mr. Bates' new points. Another was, to make charges upon the Directors and upon every witness, as if they were now here upon their trial and the jury not passing on the guilt or innocence of the accused,

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but sitting here to indulge their prejudices and passions or represent those entertained by others toward these Directors. There were some points made by other gentlemen in their argument, which he would pass over for the present; among them the extraordinary attempt to deny that the money was gone

Mr. Geyer said he had taken down a list of the penitentiary offenses insinuated against the Directors and officers of the bank during the argument by the defense—sometimes insinuated and sometimes almost directly charged in words. They were:

First. Of embezzling the money themselves, with an agreement to divide it.

Second. Having stolen the money, it was used in bribing the members of the Legislature at the last election for President. Mr. Bates tells you he don't charge it, yet he says there was an election last winter for President, and great sensation in the bank in consequence, and it was an occasion in which money might have been profitably used.

Third. Having stolen the money, by entering into a foul conspiracy, they caused it to be charged against Childs, and that, merely because he had left the bank. Thirteen Directors and the President, who will compare advantageously with any of the men concerned in this cause, either counsel or witnesses, they enter into a secret conclave, having robbed the bank, to charge the fact upon Childs, and having done that, they become suborn witnesses.

Fourth. They more than insinuate that Burke. the watchman, was drilled and had his consideration.

Fifth. That they sent for Bowlin and attempted to bribe him.

Sixth. With obtaining goods upon fraudulent pretenses. Threats were made that prosecutions are to be instituted in consequence. These gentlemen counsellors, who think the man ought to be damned who instituted this prosecution, upon good cause, and who made an effort to detect the guilty party are to be concerned in prosecuting, not only the gentle-

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man who made the much-harped-on expedition to Spruce street, but all others of the bank, because they ratified the proceeding.

Seventh. With false swearing and perjury.

Seven distinct charges of penitentiary offenses, to console which they are all brought into court to commit an eighth—the high crime of perjury—the most ignominous in the sight of God or man.

He was struck with surprise at hearing the epithets which had been employed in denouncing these gentlemen, especially the four gentlemen who went down on Spruce street—"savages," "cowardly," "hypocritical," etc., and had he time to go over his notes he could furnish a sheet of extracts of the kind. Who were these four gentlemen so denounced by Mr. Bates? Three of them are members of the same church and have partaken of the same communion—probably communed with the distinguished orator who used the language on the first of this month—and he could not help thinking at the time, behold how these brethren love one another. We too had come in for a share of the kind, brotherly sentiments of the counsel on the other side, but he was not going to defend himself from them; he would ask the jury, that when they go to "chewing the cud of reflection," they may say with how much forbearance it had been borne throughout the trial, and received with a proposition to argue the facts piece by piece, instead of indulging in vehement declamation. He asked, if they were to be tried, to contrast the conduct of the counsel for the State with that for the accused, and he was willing to abide by it.

Mr. Bates offered, and since has boasted of it, to submit the case to the jury without argument. He had practiced a long time with Mr. Bates, and they both knew what the game of brag was, but it was some time since either had anything to do with it as a game. This brag of submitting to the jury without argument was just as it was in that game—the man with the weakest hand brags the loudest, while the strongest hand says nothing, but coaxes on inch by inch. He scarcely

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knew a man who bragged very much to have much to brag on. What did they mean when they proposed to submit this case without argument? Have they not argued it inch by inch? Had they not time and again declared there was nothing before the jury to argue upon? and caused a stamping in the lobby in order to produce the impression that the case was going one way?

Was argument proper? Mr. Bates told the jury that even now, after hearing argument for a week, they did not understand the case. Was this not a case in which, of all others, argument was necessary for the administration of justice; whatever your verdict shall be, the public mind should be satisfied; yourselves satisfied that the whole case was before you, presented by counsel on each side, and then, by looking to the evidence, to see which presented it in its true light. A large mass of the testimony had been hastily read to the jury; they had not seen the documents, and much of the guilt or innocence are to be found on the face of papers produced, and in the handwriting of Childs; most of the testimony consists of figures which it is impossible to understand of a sudden, and he thought he would show that these figures told more than the gentlemen were willing to tell or find out. He did not wonder at Mr. Wright's horror for Cocker and Dilworth, when he would find by the writing and ciphering of defendant that he was responsible for something he has not produced.

The gentleman who opened the argument, complained loudly that the old land marks of the law had been beaten down—that he was oppressed by the rule of the court, by which he was compelled to open the case on their side, and in this he was followed up by Mr. Wright, who complains that rules were made to fit this case, so great was its importance, which would not suit any other. He did not deem this important; the rule by which they were governed had certainly existed in the Criminal Court ten years, and in the last two cases he had in that court, one in 1840 and the other a few years afterward, it was forced against him and his side of

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the question. The grievance was this, (not that the rule had been violated and a new one made for this case,) they wanted to send Mr. Williams ahead; they were not willing to take him one at a time, but wanted to hunt him down in couples, because he had in some way been concerned in producing developments exceedingly inconvenient for the counsel of the accused.

Mr. Wright commenced by saying he was forced to speak, but did not like to give reasons of compulsion. When started, however, it was harder to stop him than to get him to go. He traveled far distant from the regions of the case and the trial, and like a spirited courser in the sulks when the spur is put to him, jumped the track and bounded to the field; never touched it again except to cross it; spurs through the field and finally lets down when he happens to meet with Mr. Shurlds' servant girl. It happened just at the time when some of his numerous correspondents gave him information of scandal, he let down. He did not think they ought to complain of the argument, for he did not know what sort of case this would have been for entertainment, had it not been for the speeches of Mr. Wright and his successor.

He proposed, in the argument he would submit, to travel with more rapidity than the gentleman who preceded him, over that part of the case they introduced, and which in his judgment had nothing to do with the inquiry; he noticed it only for the purpose of removing so much of the rubbish thrown on the case as would enable them to try the facts they had sworn to try.

What has been the conduct of the Directors during the progress of this investigation that led to a conviction in their minds that $120,921.62 had been abstracted from the bank by somebody? They, be it remembered, are charged with despoiling these boxes themselves, and having entered into a conspiracy for the purpose of convicting Childs of an offense whereof they have been guilty. Is it not remarkable, that these corrupt savages, when the disclosure was made, should have sent for Childs the first thing, in order that he

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might see the boxes opened, that he might examine them for himself, and that he should be a witness of the evidences they were to furnish against him? Every box, excepting a few of the first, was opened in his presence, and when a remark was made about the seal, his attentiton was drawn to it and he attempted to account for the difference in its appearance. When it was ascertained that there had been abstractions from sixteen boxes, and when these Directors, astonished at the condition of things, were looking about to inquire how it was done, one of them, a personal friend to Childs, asked him about it; Childs then had no accusation against the Directors—no imputation against them. He thought he was safe in saying that this imputation of the Directors was an afterthought suggested by the investigation, and nothing but the desperation of the case induced them to resort to it. Dr. Forbes in that conversation asked if it could not be a mistake; "oh, no," replied Childs, and in answer to the question "who in the name of God could have done it?" replied "nobody but Shurlds, Hurschburg or myself—I am innocent." It never occured to him to charge the Directors with having despoiled these boxes or entering into a conspiracy to fix the charge upon him.

Judge Shurlds and the President made affidavit that afternoon and had Childs arrested, and that figures largely in the course of the defense: and Shurlds is charged with swearing to a falsehood because he took the word of Childs—it may be indiscreetly took it. He took Childs' official written reports, rendered to him as Cashier, under oath, that the money was there, when in fact it was discovered not to be in the vault. According to Childs' own representation it was coin; according to the memorandum book it was coin, gold coin, ten thaler pieces and sovereigns; and according to these reports, and his opinion that it was taken from the boxes bag at a time, he made affidavit to losing a given number of coin, for which he is charged with perjury, because it may afterwards appear not to be coin taken from the funds of the bank.

Mr. Geyer proceeded to notice that portion of Mr. Bates'

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argument which charged that Childs' examination before the Justice, at the time he was arrested, was dispensed with in order to allow the bank to manufacture public opinion. He thought an examination before the Justice would have been the surest and best mode to create public opinion against Childs, but such was not their desire or wish. Childs was arrested and entered into recognizance, and Mr. Wright says "to appear before the Justice for examination." What then? Was the Justice corrupted by the Directors? What is the reason it was not carried on? He would tell them, and it was a matter of surprise to him that gentlemen argue a case and charge criminal acts, and don't themselves look at the record to see what was done. The grand jury had been in session some eight or nine days previous to Childs' arrest, and he held in his hand an application from the Grand Jury for a bench warrant, which was issued August 15, 1849, and by which the matter was taken out of the Justice's hand. This charge of an attempt to manufacture public opinion is a specimen of the evidence of guilt on the part of these Directors.

Mr. Geyer then proceeded to notice the remarks of the defense respecting the search warrant—as it had so often been sung, "a search warrant for gold"—and he contended that the matter lugged into the case in regard to the affidavit upon which it was issued and the manner in which it was executed had nothing to do with the guilt or innocence of the accused. In passing upon this branch, he referred to the proceedings on Spruce street, and believed that house was visited by the gentlemen who went there, with the best of motives, for the purpose of ascertaining if there was any ground for the suspicion entertained against the house, and for the purpose of preventing the officers from executing the warrant if there was not. He then alluded to that which seemed to gall the opposite counsel more than anything else. It was hard to be obtained. Like drawing a tooth, it was a slow process, and several tugs had to be made before it did come. While the counsel had been so highly complimentary to this

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lady, (Mrs. Whitlock,) whom he did not know, he asked the jury to see what was her position, according to the evidence. She knew the charge against Childs, had offered her services to him, and received these papers from Childs to be hid for him, when he told her he expected his house would be searched. When these gentlemen went to her house and undertook to examine her, she denied everything. "Have you got anything belonging to Mr. Childs?"—No, she had nothing. "Haven't you got so and so—did he not present you with a silk dress?" "Oh, yes, he presented me with a silk dress—you know it, Dr. Forbes." "Haven't you got some papers?" No, nothing; and they put question after question, and could get no affirmative answer, until finally, when Mr. Williams spoke of a search warrant, her recollection suddenly came to her, and the papers were produced; painful as it was, as in the operation of tooth-drawing, spoken of by Mr. Bates, it had to come. The counsel now charge these papers were obtained under false pretences and threaten prosecution. He would like to see the figure Mr. Bates would make when he charged Williams, Ryland and gentlemen (all members of the same church with him) on an indictment for false pretenses, and charge that they obtained these papers fraudulently and with intent to convert to their own use! He would like to see—no, no, he would not like to see Mr. Bates standing up and prosecuting such a case; he would tremble for the purity of their professional faith to see him prosecuting an accusation of that sort.

They could not find these papers, is a complaint of Mr. Bates; Williams gave them to Forbes, and Forbes, as a Director in the bank, sent the check to Clark & Bros. and had it cashed; a part of this money, or the whole of it, Childs, as the agent of Mrs. Hayden, had deposited to Mrs. Whitlock's credit for the purpose of repairing her house on Spruce street, injured by the large fire in May. They forget that the deposit was made two days before the fire and that the damages to the house cost but $150. Mrs. Whitlock said it was Childs' property, and being his property she gave the

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check over; and these gentlemen, when they left the house, believed it to be his property, and to be the effects of a part of this missing gold. They took the check and had it converted into cash and deposited on interest, to abide the termination of this trial. The remainder of the papers have been held secure; when asked for they were produced in court and when we were charged with having had them in court all the time and trying to conceal them, when, in fact, they were in the custody of the Cashier. We were charged with perpetrating a contemptible trick in regard to them—and such were the charges made by the defense in this case. What further? When the papers were produced in court, because we were suspected of dishonesty, this court was called on to do what?—To exercise jurisdiction in a criminal case and pass these papers over to Childs. Was that check or certificate his money? Mrs. Whitlock said it was—here it has been denied—and then again asserted.

Obtaining papers under false pretenses. A plea set up by defense. The Cashier of the bank had in his possession a paper belonging to the bank—voluntarily furnished by Childs, and purporting to give a statement of his affairs. The defendant obtained this paper, as he said, to take a copy of it, and under promise to return it. What became of this paper, or was it ever returned? Mr. Bates has already told what disposition was made of it: that Mr. Wright being at Childs' house early on the Sunday morning after his arrest, had advised him to destroy it, and that Childs did so. Do you believe, gentlemen, that if the Court had so far forgotten its duty and jurisdiction as to allow these papers to pass over to Childs, that we would ever been permitted to see them again? Could we have examined witnesses to know who made the deposit and where it came from? He thought not. But he said, the defense, not content with charging criminal acts on the part of these gentlemen while down on Spruce street, or abiding by the evidence, set their imaginations to work, and imagine that when Mr. Williams went upstairs with Mrs. Whitlock, he, by threats of violence, or in some way, terrified

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her into giving up the check, which they claim as her property, but which she denies. He asked, if the defendant did not wish to base their attack upon Mr. Williams upon hearsay, and make these airy charges, why not summon the lady upon whom these outrages were perpetrated? They knew if she was brought upon the stand her testimony would have put an end to the gentlemen drafting upon their imagination—would have silenced that which has cut the largest paragraph in their speeches—the outrages on Spruce street.

December 8.

Mr. Geyer. He was asking why the defense did not examine Mrs. Whitlock touching what they supposed the outrageous conduct of these gentlemen towards her, when Mr. Wright interrupted him and said she had been summoned as our witness. He said he answered and so had Bowlin. He had since been informed that Bowlin was not summoned by the State, and his object was now to explain how he fell into the mistake. During the examination and discussion, when that witness (Bowlin), was alluded to for the defense, it was stated, that he was a bank witness, and endorsed by them; and he (Mr. Geyer), respecting Bowlin, was somewhat in the situation of a country cousin to a young lady, who when asked her age was never over nineteen! on one occasion, when the cousin was present, she made that reply, when some of the company appeared incredulous; the cousin was present, and applied to for verification, when he said it must be so as she had stuck to it for ten years. So it was in regard to Bowlin; they had talked so much about his being a witness for the State, that he had been partially persuaded it was true.

Mr. Geyer then proceeded to notice the enormities of the bank; the foul conspiracy of the Directors in sending East, and taking off the injunction of secrecy from the proceedings in the board, for the purpose of enabling them to talk over the matter and building up public sentiment against the accused; their dark and damning accusations against him—

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themes so extensively dwelt on by the defense. From the commencement of this trial the defense had been told to point out such books or papers in the bank as they might want, and at any moment they should be at their command. These secret conclaves, as they had been styled, were open to their inspection, and he thought his side had submitted to an act of doubtful propriety by producing these books in open court for inspection to those who might choose to look into them; it was true, the injunction of secrecy was removed from the proceedings of the Board so far as it related to the matter under inquiry, yet there were other matters in that record which were sacred. Copies could not have been asked, because they did not know what was in them, and we produced the record for them to select whatever matter might be useful to them on the trial.

He had not, at this time, ready access to the record of the Directors, and would read from a newspaper a resolution which he supposed to be correctly printed, which resolution had been read in evidence by Mr. Bates. It was offered to the Board by a friend of Mr. Childs, an amendment offered by Mr. Barnes and rejected, and the original passed. It was as follows:

"On Tuesday, August 11, 1849, the Board met, ten Directors present, when 'Mr. Brant moved a suitable person be procured to proceed East, with a view of ferreting out evidence as regards the person or persons who may have abstracted funds from the bank. Mr. Barnes moved as a substitute, that the agents of the bank in Baltimore, Philadelphia, New York and Boston be instructed to employ a police officer to enquire if N. Childs, jr., has any money deposited to his credit in any of these cities, and ascertain if any stock or other evidences of debt has been bought or sold by the said Childs or any of his relations, or if any stock stands in the name of the said Childs on the transfer book in either of those cities.'

"The question being on the substitute, it was negatived, and the proposition of Mr. Brant adopted.

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"The President and Mr. Brant were appointed a committee to procure a suitable person to proceed East."

He read this to show how the defense had tortured the plain meaning of language. The resolution as passed, it would be seen, was for a general inquiry, and if that inquiry had resulted in testimony tending to establish the guilt of anybody else, it would have been brought here as other testimony was.

Mr. Barnes' amendment, it would be observed, required the agents of the bank to employ police officers to inquire if N. Childs, jr., or any of his relatives had stock in the transfer books in any of those cities, etc., which amendment was rejected by the Board and the original resolution adopted; yet the defense exclaim, notwithstanding this action, "here was an inquisition, not only in the affairs of Childs, but into the affairs of his relatives—every man connected with him!" A shameful perversion of the meaning of language and an attempt to mislead the jury on this point.

The defense had been told these records were accessible to them, and subject to their order at any moment. They could have had them and looked into them at any stage of the trial; yet, notwithstanding this, when the Directors were brought to the stand, every one of them was examined for hours about the records; and because they did not recollect the contents of a book, they are denounced as witnesses, and a want of memory sufficient to testify upon. While so declaiming, the gentleman himself (Mr. Bates,) who read these resolutions, forgot there were two distinct propositions before the Board, and declaimed here for hours against the resolution of Mr. Barnes, which was negatived, and told you it was adopted.

He thought they pursued their examination a little too far, and Mr. Blennerhassett said the whole of it turned out to be a piece of folly; he did not find, in the eloquent language employed by him, even a mare's nest. The original of that phrase, as the story goes, was in Ireland; a countryman of the gentleman, in passing through a pumpkin patch, took

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it for a mare's nest, and as he walked along reflected on the delight it would be to little Teddy at home to have a colt, and he pulled one; in passing along, Patrick unfortunately dropped his pumpkin near by a rabbit, which started and ran when the pumpkin broke. Patrick started after, crying at the top of his voice stop that colt!! Were we in search of any such thing? If we were that gentleman would have been a capital man for the expedition, with one exception, if he had found the nest, he would have sucked the eggs. But when these witnesses were under examination, they "put them to the torture" and applied the "corkscrew of cross-examination," said Mr. Bates, a figure no doubt taken from early convivial recollection, and they were interrogated touching what had been the fruits of expeditions, etc. Every time the Directors answered we know nothing about it, what pliant expressions of countenances were manifested. Finally, Mr. Walsh got on the stand, they proceeded to interrogate him, and found the expeditions were not altogether fruitless. Here their countenances suddenly fell; "yes we did get a letter from Baltimore," said Mr. Walsh," and after that, not a man was asked about expeditions. They previously talked lavishly about the fruits of the expeditions, but this stopped them. They knew that in a criminal prosecution we could not take depositions and introduce them.

Well, "the bank employs counsel," says Mr. Bates, and here was an extraordinary proceeding! "They pass a resolution to employ counsel, and they had attempted to get all who were worth having," naming them. Who leads off in the names of counsel mentioned in that resolution? Gamble and Bates, and they were not here prosecuting this case, simply because Childs was too fast for the bank, and in their race to obtain counsel, got ahead of them. If the bank had been so lucky as to know the whereabouts of my friend, Mr. Bates, (he having told us he was absent from the city at the time,) we may have changed sides, and then, if I thought the case desperate, I might have resorted to the same expedients he has. In almost every instance in this country, where

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a prosecution was instituted, there must be a prosecutor, and scarcely a crime is detected where there is not. What harm was there in the employment of counsel, he asked. The very gentleman who complained about the bank employing counsel to prosecute, was fresh from a State's prosecution in the county of St. Charles, when this cause commenced.

During the trial, you will remember, when the box counted by Messrs. Pickering and Yeatman was brought forward as one of the boxes from which abstraction was made, and the name of Pickering found upon it, how quick these gentlemen, one or two of them fresh from the defense of Pickering as an injured individual, began to sneer at him as if he had escaped the power of the law through their ingenuity. Mr. Bates follows this up, and you heard some of his expressions in two instances. There was no mistaking the mark or object of these allusions. We were told that anybody who can raise a quire of paper and a few types will be placed by the public in the management and control of millions, and this is followed up by an expression which has reference to those coming here from abroad—that they leave their country for their country's good. He never saw Pickering but once, (on the night of the fire) and then, he was introduced to him by a gentleman of distinction, and he had that gentleman's endorsement. It was true, that not long afterwards this same gentleman entertained suspicions of this same Pickering and followed him up the country, but as he never brought him back, he must suppose he had not left his country for any criminal act. Although not a witness in this case, there appeared to be a determination whenever his name was mentioned that it should receive a blot. Even Mr. Barnes, who enjoys the confidence of Mr. Bates—the model Director and model gentleman—even he could not escape. He is detailed on the Grand Jury, and this indictment could not have been found if he had not been there. What does Mr. Bates know about their proceeding? Has he had eavesdroppers to know who voted and how the vote was? If he has been in communication with any of that body, he has tempted some man to the

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commission of crime, as no man can reveal the secrets of that body. Where did he receive his information that but for Mr. Barnes being on the jury this indictment would not have been found? Dr. Forbes was a dentist, and had the presumption to turn miller, and for that reason he is suspected of having robbed or taken his share in the plundered air they talk about. The boxes counted by Dr. Forbes and Mr. Fisher had not been interfered with. Mr. Wright had spoken of Mr. Heiskill in such a way as to produce the impression that he had been tried in the county of Marion for some criminal offense. Such an onslaught upon gentlemen, because they chanced to be witnesses, he strongly denounced. He had heard, in the latter part of the summer, after this abstraction was discovered, that there was to be one man immolated, and the gentleman who was to do it was named, and public opinion was being manufactured by digging from the grave the putrid remains of old scandal. When that witness was to be brought to the stand, public opinion-makers were on the *qui vive;* he did come, and what did they meet with? They were going to put to him the "cork screw" of cross-examination, and announced it in advance. He would never forget the noble bearing of that old soldier when upon the stand, knowing as he did that men were detailed for ruining his reputation. Col. Brant was a soldier in the ranks in the period of 1814; had fought in Scott's regiment, then on the frontier; was subsequently promoted because he was a soldier and merited it, and he did not expect him to flinch when these gentlemen attempted to inflict upon him torture. Did you see how soon they dropped him, and how the counsel who had been detailed for the ignominous duty left the field?

Mr. Geyer then proceeded to notice Childs' position in the bank, and he did not care a whit whether his books corresponded with the other books or not. He told the amount of coin that ought to be on hand, made that total amount daily and weekly, and it was no importance whether the private ledger corresponded or not. We were told all the reports lie and were one continuous series of lying from the beginning

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of the bank down to the present hour; and if they lie in regard to the specie balance he asked who was the father of it, and upon whose data and sworn reports was it founded? The reports of the Cashier were but a consolidation of all the reports of those employed by the bank, and he must rely upon them. If they report to him incorrectly, surely he should not be charged with the omission.

But the counsel spring another ground of defense, and tell us the indictment is bad and ought to be quashed. Mr. Bates did not move to quash it, because "delays are dangerous." Why dangerous to a man confident of innocence? Are delays dangerous to him or is it deliberation that is dangerous? They say this indictment was gotten up for the purpose of making capital to be used in a civil case. Then how can delays be dangerous? If this was to influence a civil suit, why did they not come to the civil suit first? He would not say that Childs authorized his counsel to talk in the way he did; if he did so authorize, his case was worse than he thought. In the judgment of counsel delays were dangerous; in the civil case, depositions might be taken; in a criminal case they cannot. The indictment being bad, Mr. Haight was guilty of an enormity for not reading it at the opening of this case. He mentioned it in the hearing of these gentlemen, and they did not think proper to call for the reading, as they might have done, and if called for he would have been bound to read it. It was not read, and the record of the court will show why. "Defendant comes into court and waives an arraignment and the reading of the indictment, and says he is not guilty in fact." Not one word was said to Mr. Haight about reading the indictment, and it was for the learned, powerful and ingenious counsel who made the concluding speech to make this ground of defense—this point which ensures his client's acquittal.

I (when Mr. Leslie concluded his argument) proposed to communicate to the senior counsel for defense the grounds upon which I would present certain views, and he accepted the proposition; yet when he concluded his speech these views

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were not touched by him, and we were told his client was to be cyphered into the penitentiary. I intended to produce the books, and if the defendant got into the penitentiary in consequence, it would be by his own cyphering and not mine. Mr. Blennerhassett was set to cyphering and he made certain discoveries. Mr. Bates did not touch them at all; he did not say one word as to the force of that defense, but contended himself with the vague generality, "it might have been somebody else." Nine-tenths of his speech was made on these extraneous matters, the rubbish of which he had endeavored to clear away and extricate the facts which belonged to the case.

There was one point dwelt upon at large by the two gentlemen who spoke first, not touched at all by Mr. Bates in his concluding speech, which was presented as one of the desperate expedients to avoid the true issue. You heard them talk about the body of the offense—that is, whether anything has been lost.—Could the jury go into their room and find that a fact, as they say it—that no money was lost—he would be one of the first to rejoice; it would acquit all men of the imputation thrown upon them. But dare the jury say so? He would be willing to rejoice if they could, upon their conscience, in the discharge of their duty, satisfactory to their own minds, stand up and proclaim to the world that no money was lost, and that no body was guilty of any offense. The only use of argument was to prove a proposition, not to assume it, and he would undertake to prove that the money was lost. Though the gentlemen on the other side may have reason for an aversion of all sorts of figures, except figures of fancy, it would be his duty to place this case where the books placed it, and in doing so might have to do some little cyphering.

The accounts of coin and paper were kept separately, and the general ledger must represent truly the balances of each, as well as the general aggregate.—The cash keeper was required to report the amount on hand, and every week did report that amount which corresponded with the cash balance,

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showing the amount that ought to be on hand. Independent of these reports, the cash keeper kept specie books, in which the daily and weekly operations in coin were entered, commencing from the beginning of the bank. These books had been put in evidence.

But to the body of the offense. The foreign coin was counted in February and March, and all done in the presence of Childs; he wrote upon most of the boxes the memorandum of their contents, stating the number of bags, kind of coin and amount each contained. He verified their count by his own memorandum of the count set up each day to be counted, and verified the whole when the count was closed. According to that count there was $969,360.95 in foreign gold placed in the fifty-seven boxes, sealed and marked, and $40,379.81 in loose foreign gold—making in foreign gold counted, $1,009,-740.76. The American gold counted, amounted to $364,265. These fifty-seven boxes, purporting to cointain $969,360.95 were placed in the keeping of Childs, and by him delivered over to Mr. Hurschburg, his successor, as containing that amount. This amount or supposed amount of coin was stowed away in the vault. Then came on the semi-annual June count, which was protracted to the seventh of July in consequence of the sickness of Mr. Hurschburg. At that time the contents of these boxes were not examined; the counting committee went down into the vault, examined the memorandums upon the outside, and from this derived the amount and character of the contents. We then pass on to the tenth of August, that memorable day in the history of this city, which seemed to throw this whole community into disorder and confusion—the discovery of this abstraction. The first thing the Directors do is to see whether there might not have been a mistake. They examined the boxes counted on the same day with box No. 30, (the box in which the loss was first discovered,) and instead of finding the missing bag of sovereigns in some other box, they discover a bag of ten thales missing from box 37, the last box counted on the same day that No. 30 was. Then it was they began to see that some fraud had

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been practiced—before, they thought it was a mistake. They immediately sent for Childs, and the entire Board of Directors, and in his presence—he looking on and seeing what they did—every box was opened. The found two bags missing on the previous day, and by this examination fourteen more, making sixteen bags in all. There was found missing fourteen bags of ten thalers, containing $109,900, and two bags of sovereigns containing $11,021.62—amounting in all to $121,921.62. This was no mistake; it was proven by the Directors and admitted by Childs. On the very evening the loss was ascertained, he said there was no mistake about it. Thus we have the *corpus delicti*—the body of the offense—proven, and Childs never thought of the contemptible expedient of denying the loss of the money, until his counsel found that something of that sort must be thrown out in his behalf.

Mr. Geyer then proceeded to notice the examination of the coin in August, and in connection therewith referred to the charge that the boxes of foreign gold from which abstractions were made, had been resealed by the Directors with intent to deprive the defense of examining and comparing the original seals upon them, and for the purpose of suppressing that evidence. Had these boxes been left open since that examination, then their tone would have been changed, the cry would have been loud and long that this money was open to the plunder of everybody. Several of these boxes were brought into court by the Marshal, and he would direct the attention of the jury to the seals upon those that were and those that were not violated boxes, and request they would make a careful examination in order to perceive the difference in the wax.

He thought it had established, according to the evidence and the accounts of the bank, that the bank should have had $120,921.62 more in August than they really did have; he thought they had also ascertained what descriptions of coin were missing. They had the opinion of Childs that it was taken away a bag at a time; and why raise the question, if

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confident of innocence, that nothing was gone, or ask what particular kind of coin was missing. This argument raised by Mr. Wright, was soon perceived by Mr. Bates not to hold good, and he raised the other expedient of quashing the indictment before the jury, and argued because the money was by resolution in the custody of Mr. Shurlds, and, in fact, in the keeping of Childs, that no matter how much was taken the defendant was an innocent man.

He would not treat upon that point, and he asked the jury, upon the whole of the testimony before them, who had possession of that coin? Mr. Bates had said access was not possession. That was a question of law; and if, from the facts in the case, the jury find that the abstraction was made by Childs, he was guilty as charged. He had the exclusive management of the coin, so that the counting directors were dependent upon him for each bag they counted. The defense had asked with an air of confidence, was it coin or paper money that was gone? Mr. Childs had reported it to be coin; he thought it was taken away in coin; and his counsel cannot deny but what it was coin without contradicting their client of fraud upon the bank. He said it was coin; he turned it over to his successor as coin; he reported it as coin, and as a given sum in these fifty-seven boxes.

If a clerk abstracts from your drawer from an amount which you knew to be there, so much in specie and so much in notes, according to your count, you have a right to charge him with the plunder of whatever is missing. He contended this was the position of Childs. These funds were in his charge as coin, but he readily saw how he could take paper and make it appear as coin. He illustrated it as follows: Suppose in the operations of a single day, he takes out from the vault, $40,000 in coin, receives from the Paper Teller $40,000 in paper, for which he gives a ticket; and receives during the operations of the day $40,000 more in coin—he then has an actual capital of $120,000, of which $40,000 is in paper. During the day he pays out $25,000 in specie and $20,000 in coin—leaving him $75,000 to account for at night,

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$20,000 in paper and $55,000 in coin. Suppose of that remaining $20,000 in paper he puts $10,000 in his pocket and gives the remaining $10,000 to Clark the Paper Teller and gets credit for it. Clark don't count the coin, but balances his account by the day's operations. You see $65,000 is shown as coin when in fact he has but $55,000. Nobody counts the coin, and he has the remaining $10,000 in his pocket. He represents the $55,000 coin, which he has upon his trays, as $65,000 against him; and so this embezzlement could have been effected.

It was not incumbent on the State to prove that the abstraction took place at any particular time, within three years unless the defense choose to avail themselves of the statute of limitation. And he contended, if taken before the twentieth March last, at any time, no matter by whom taken, the testimony pointed to the defendant as the guilty man; if taken since that period the question is opened—may it not have been taken by others? He contended that if it was taken before the end of the March count, Childs was responsible. If it was taken by anybody else, he became a party to it when that count was made. Childs knew it, and must have known the loss when he took the specie up to be counted, or else he could not have made the coin count $120,921.62 more than was really in the vault.

Various persons have been charged with being the possible offenders, (Messrs. Shurlds, Hurschburg and others,) and he thought he would be able to show it was inconsistent with the testimony that any one of them should be suspected. He proceeded to notice this argument of the defense, and first as to the "outsiders." Mr. Wright was very good in imagining a case, but in reference to these outsiders he had totally failed. The banking house had been described to the jury, and all the doors except the back door were barred on the inside; the door through which it was thought Shurlds had access to the banking room was effectually barred, and even Bowlin did not have the hardihood to say that after that bar was put up it was ever taken down. Bowlin, honest Bowlin, was

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in the possession of the key to the unbarred door. Now, the gentlemen tell us that somebody to get in must first get the key from Bowlin, and that was the easiest thing in the world, because it could be had at any time, day or night, by the servant girl being sent for it; and just at this particular point in the argument, one of Mr. Wright's correspondents communicates to him something he dare not read, and he insinuates something against character—against the girl—as great a horror as he has manifested for such insinuations.—Access to the banking room is not all—a man must have the keys to the vault before he could enter, and there was no evidence of external violence upon it. But in regard to the back door key: from the count in February to the fifteenth of May, that key was kept by Bowlin; from the fifteenth to eighteenth May it was kept by Cochran; and on the nineteenth of May J. R. Christy was sworn in as porter, when he took charge of it. Bowlin swears that down to the time of his leaving the bank these boxes of foreign gold had never been disturbed in the vault, and Christy swears that from the time he went into the bank up to the time of the discovery of the abstraction, they had not been disturbed. There was then, three or four days, and that between the fifteenth and nineteenth of May, that we have no evidence of what might have happened in the vault. He had fixed the date of his argument on this point to the second of March last. Then the perpetrator must have had both the keys to the vault and back door and known the contents of the boxes before he opened them. He contended the man who took the coin, did not want it for circulation, or he would not have taken thalers. There was American coin placed just in front of the boxes from which the abstractiton was made, and sovereigns at the other end, both more accessible and easier to circulate. The man who entered that vault, had some other purpose to answer than the mere amount of the money; he must have had some reason for not taking the two bags out of each box, and for taking thalers almost exclusively; he could have gotten his supply out of half the number of

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boxes despoiled.—But that was not the object. The argument of the defense was that outsiders might have taken the money, a position assumed by them for argument but certainly without the least foundation.

We have now come to a part of this case, in which he was called upon to perform a very disagreeable duty; to present to the jury such facts as would operate upon the character of a witness which had been introduced here under circumstances calculated to produce an unfavorable impression upon the public mind. He had been told, and triumphantly told, that we sent for Bowlin and endorsed him. He was sent for, having been an officer of the bank, under the supposition that he would know something about the matter. The instant he was sent for, by a polite invitation through Mr. Christy, his conscience smarts under the impression that he is to go to St. Louis in custody. He thinks a police officer is sent for him because it was possible there might be suspicions against him, and he would show, if Childs was the guilty man, he had some grounds for his uneasiness. He starts to come, and by the time he gets here, collects his courage, and a large amount of insolence. When he landed in the city, the officer left him, and he called on Mr. Christy. He struts into his office, and says to him—"Well, sir, you sent for me—what do you want?" When on the stand, Bowlin was interrogated about that. He was asked why he said so. "I thought I was brought here in custody and I was ready for them." Why screw his courage up and dare them to do anything? He told you "they thought I was simple enough to tell them all I knew." No, gentlemen, he was not simple enough to tell them all. What think you of a witness that introduces himself to a jury with such declarations? My opinion is, he has not yet become simple enough to tell all he knows. The counsel for defense say he is a witness of truth because we brought nobody here to say they would not believe him on oath. Why, gentlemen, did they bring anybody here who would not believe Angelrodt, Barnes, Brant, and the other Directors upon their oaths—did they attempt

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to disprove their testimony? No. Notwithstanding this, we design to slaughter Bowlin. They design to slaughter the Directors because they have not the memory to give dates and times. There were three modes to impeach a witness, and the meanest of these was to bring up witnesses to swear to character. When he wanted to know whether a man tells the truth he would rather look him in the eye, and if he could not detect him while looking at him, he would not give a straw for other evidence. He tested men by meeting them face to face, and he believed there never yet was a man so practiced in iniquity but his guilty soul would make him turn his eye when he was stared in the face. There is another mode of impeaching a witness, and that is by impeaching what he swears to.

Let us see what Bowlin did swear to. He swears he never let Childs into the bank and accompanied him. He says that he placed the boxes of foreign gold in the vault in their natural order—No. 1 at the bottom of the first tier, running up to No. 10; No. 11 at the bottom of the second tier, running up to No. 20, etc., and that so they remained when he left the bank; and this was a question of veracity between Mr. Hurschburg and Bowlin, and very easily determined.

Another thing he thought necessary to swear to, as he had heard much of it out of doors, was that Childs, very soon after the commencement of the count, had called the attention of some of the Directors to the fact that the seal or stamp was lying about the room, and they had better take care of it; he never would have done so unless he was an innocent man; and that he (Bowlin) never saw the seal afterwards unless they were using it. This was for a double purpose. One was to show this transaction took place at the early part of the putting up of the boxes, and the other, was that he nor Childs ever saw it afterwards. Then came his story about the sealing wax, and that Childs went to Fisher's and got more wax for the Directors. That Mr. Shurlds was in the bank several Sundays during the count. That Mrs. Shurlds

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was there twice in that period, and Mr. Shurlds said to him, "what in the devil was she doing there?"

He would show how this truthful witness stood condemned by every witness with whom he came in contact.

"He never let Childs in the bank, and never accompanied him." Is not that directly in the teeth of Burke's swearing? Burke says he never saw them go in together but once. He told you that during last winter Childs came to the bank at night, and was inside for upwards of an hour; that he came there a week after this, when he (Burke) went to Bowlin for the key, and he would not let him have it; that Bowlin himself went in with Childs, and they were there together about an hour. If these two witnesses were here, and stood before you unknown and uncontradicted, you could easily tell that Burke was the honest man, not Bowlin. Burke and Bowlin do not stand alone in contradiction. Move one step farther and you find Bowlin in conflict with Mr. Hurschburg, and I think in perfect conflict with the facts of this case. Bowlin swears the boxes were arranged in a certain position in the vault and so remained until he left the bank. Christy, his successor, swears they remained undisturbed down to the tenth of August. There were three days interval between these two porters—Tuesday, the fifteenth of May, to Thursday, the seventeenth inclusive, and on that night was the great fire. On the night of the fire most of the officers were about the bank endeavoring to secure the books and papers, and on the next day Christy went in the bank, and that no change was made after he came. If Hurschburg was the guilty man, he must have turned these boxes topsy turvy in the course of Wednesday and Thursday. If he had been in the vault at any time long enough in the daytime to do it, the noise of moving the boxes would have been heard. How is it possible that he could accomplish that laborious work without any man missing him from his desk, and without being in the bank at night? How accomplish it without being observed by anybody? Well, Hurschburg tells you that when he "received these boxes

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from Childs, he looked over the memorandums on the outside, taking the first tier from No. 1 to No. 10; that then he looked at the bottom of the second tier for No. 11, when Childs told him it was at the top, etc. It struck him as a singular arrangement. As said before, it was a mere question of veracity between Hurschburg and Bowlin, and made no sort of difference so far as the question of abstraction was concerned, as it had been indisputably proven that the two stacks of American gold completely covered the two first stacks of foreign coin, which were not accessible except by removing the American coin or four tiers of the foreign coin. And remember, the abstraction was principally from these two first tiers of the foreign coin.

Bowlin says the sub-Treasury gold was taken up on the three last days of the count. According to the statement of Childs it was carried up and commenced on the sixth day of the count. The first full bags of sovereigns counted on that day disappeared, and between boxes No. 11 and No. 30 they disappear entirely. Unfortunately for them, so far from the four last days of the count containing nothing but sub-treasury gold, which was in sovereigns, there was nearly as much of other coins counted, and on the eleven last days of the counting, eleven full bags of ten thalers appear. He would be able to show a fact before he closed, indicating how this occurred.

Bowlin says farther, that he saw Mr. Childs pick up the seal from the carpet, about the first of the count, and hand it to Mr. Angelrodt, and that he never saw it afterwards. Mr. Angelrodt testified on that subject, and testified that it was on the last day of the counting, and he strengthens his testimony by stating he was alone in the room assorting mixed coins, which were boxed that evening, and sent to the vault; that Childs entered the room and threw the seal upon the table. Mr. A. did not see where he got it from. Bowlin was not in the Cashier's room at the time, but was seen in the banking room by Mr. Angelrodt as he left the bank. From the position of Angel-

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rodt and Childs at the table when the seal was handed over, it was impossible for Bowlin to see the transaction, and he undertakes to swear he saw it through a wall, or was looking through a two inch plank. He does not stop here in his swearing but comes to the sealing wax. He stated that one evening he heard Mr. Walsh say the wax was very bad and ran through the cracks in the boxes, and that he or someone eles gave orders for Childs to procure more wax. The first witness we bring on the stand to contradict this statement, is Childs himself.—He went to Mr. Fisher's it is true, about a week after the count commenced, and bought sealing wax—not for the bank but for himself, and no mistake about it. Gentlemen talk loud and long about a man being entitled to use or buy as much wax as he wanted, but it effects nothing. Mr. Fisher was a Director, and had sold Childs the other wax to be used in sealing; he expressed surprise that more should already be called for, when Childs tells him, "I don't want it for the bank, but for myself." Bowlin says, "Childs bought the wax from Fisher"—he did not see him go there; he says "he saw the wax in the bank" —he may, but not in use by Directors. But, he follows this up by saying he is "pretty sure some of that wax is at the bank now." The fellow undertakes to swear in that way. He left here in May last and had been absent ever since; professing to be in Mansfield, Ohio, and actually found in Lake county, Michigan. Has he been to the bank for the purpose of seeing whether any of that wax was there, or putting a piece there to swear by? How could he know that some of it was there at this time—how could he be certain of it?—Mr. Wright asks triumphantly why we did not send and see if there was not some of the wax bought by Childs the second time, now in the bank? The reason we did not, we thought we had enough to settle the judgment of the jury about this man's swearing without taking that trouble.

We now come to his swearing about Mr. Shurlds and family. He began by telling you that Mr. Shurlds was often in the bank on Sunday since the first of January, and Mrs.

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Shurlds was in there twice. When we cross-examined him on this point, he cut short the answer: "I did not watch Mr. Shurlds; he had the privilege to go where he pleased." He (Mr. G.) knew then he had sworn in that respect untruly. Mark the period selected by the witness, to place Mr. and Mrs. Shurlds in the bank: four Sundays in succession during the counting. Now, there were but two Sundays intervened during that count—the counting commenced on the fifteenth February, and ended on the second of March—yet he put Mrs. Shurlds in the bank twice, six hours one day and two hours the next, on both which Sundays her husband was absent in the country; and Mr. Shurlds he put in the bank twice in the same period. Independent of any testimony, this was sufficient to condemn his statement. But what does Mrs. Shurlds say: "I have not been in the banking house since November last, and during the months of February and March was sick and did not go down. I was in the banking house twice, during October and November last, but never sent for the keys but once, and at that time was in the banking house but a very few minutes. I went in to get an account for jewelry, sent to Mr. Shurlds the day before, which I asked him for and he neglected to give to me." The second time, she went into the Cashier's room to write some letters, and passed in through the door leading from the Cashier's house—she had no occasion for the key. Bowlin says she was there two Sundays during the count—she says it was no such thing, and she got the key but once, and that was in November. After the alarm about robbing the bank, she could not have gotten in except by the back door, as Bowlin himself says the door leading from the house was effectually barred, and the bar was never removed. But he swears further.—"When the judge came home, I thought I had done wrong in letting Mrs. Shurlds have the key, and I told him about it; he said, what in the devil was she doing there?" Yet the very next time she sent for the key he let her have it? Was ever Catiff known to lie as this man has?

Once more, and he hoped for the last time, he would proceed

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to address the jury on the questions which remain undisposed of in this important trial, with misgivings on his part, in consequence of the state of his health, now growing weaker and weaker, of his ability so to discharge his duty as he had hoped when the court adjourned. The jury would pardon him, if in some instances, for the purpose of saving himself, he hastily passed over some facts, leaving it to their judgment to draw the conclusion.

We had been asked why Judge Shurlds was not interrogated as to the language Bowlin attributed to him. One reason was, we would have been ashamed to ask such a question, and another was, the lie had been effectually nailed to the counter by the testimony of Mrs. Shurlds. She was not in the bank at all in March, and consequently there was no occasion for such a question from Judge Shurlds as Bowlin had attributed to him.

We next come to his statement about Mr. Shurlds; and here it is that these things betray more than at first meets the eye. It was for the purpose of showing that during the operations of counting, some person else beside defendant had access to these boxes, and hence it is that Bowlin is brought up to place Mr. Shurlds as spending his time in the banking house, with the keys to the vault in his possession, for the purpose of throwing suspicion off to himself; and it would be seen in the sequel, if Childs was the guilty man, that Bowlin was an accomplice. Mr. Shurlds comes up and testifies that he was in the bank on Sunday only twice since January last—once on the Sunday succeeding the great fire, when the clerks were in the banking room arranging the books from the confusion they were thrown into on the night of the fire. Did he get the key from Bowlin then? No; in passing the door which was open, he stepped in for a moment. Bowlin was not about the bank at that time; he left on the fifteenth, and this was on the twentieth May; yet he comes here and swears that during the time he was porter and during the time of the count, Mr. Shurlds was twice in the banking room on Sunday: "what he did was none of my business; he had the

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privilege to go there." The second, and only other time he had been in the bank on Sunday, since January last, Judge Shurlds tells you was the Sunday after the twelfth of August, when he went in there to write letters. Contrast these two witnesses, and what becomes of Bowlin, whose contradictions of himself were so numerous that it is impossible for me to remember them without referring to my memorandum of his testimony.

With respect to the sealing wax, what is the testimony of Bowlin? I have said it was contradicted by Childs himself. But this witness says, "Mr. Walsh and Mr. Barnes were in the room, and that Mr. Walsh complained of the sealing wax; that some of the Directors ordered Childs to get more wax; that he got more from Mr. Fisher's." Childs says he got this additional wax for his own use; this man Bowlin says he brought it to the bank and it was used by the Directors. All the Directors, excepting Messrs. Sarpy and Pickering, (who were on the committee with Messrs. Yeatman and Walsh,) had been examined on this point, and eleven out of the thirteen Directors swear positively they gave no such order, and, as is clear, no such order was given.

Mr. Wright, in the course of his speech, asserted that Bowlin said he had arranged the boxes of foreign coin by direction of these Directors. He had referred to his own notes, and to the newspaper report of his evidence, and found he said no such thing. He remembered distinctly, when Bowlin was under examination, he was asked who directed him to arrange the American coin just in front of the violated boxes; he said something in a low voice, something I did not understand. I asked him, who when he pointed his finger and said Childs. He don't and never did say the Directors gave him such an order.

Now, what is Bowlin's position as a witness? He came here, declaring from the witness stand on oath, that he was not going to be so simple as to tell all he knew. He was only going to tell so much as to serve the purpose of him for whom he was called. He was to dispute the swearing of Burke, who

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says that during the count, Childs was twice within the banking house at night for more than an hour at a time; that the first time he applied for the key, Burke went to Bowlin's house and got it, and Bowlin was not at home; the second time he applied at Bowlin's for the key, Bowlin was there, and upon ascertaining who wanted it, did not give it to him: stop, sir, you can't have the key, I have business of my own to attend to in the bank, and that he accompanied Childs in and they were there together. Bowlin stood upon the stand and contradicted himself—was contradicted by Burke and Hurschburg, all the Directors, by the circumstances of the case and by Childs himself.

Why was he not simple enough to tell all he knew? Why was he beset with terror when the police officer approached him? He suspected something, for when the officer approached him he was reading the account in the paper, having got the intelligence with an unusual degree of rapidity. He felt that he was charged without testimony, and his situation with Childs placed him in a condition in which he must share his fate. He feared for himself, and truly was not simple enough to tell all he knew.

Mr. Geyer after briefly noticing the report of a contemplated attack upon the bank last winter, the result of which was a depredation upon the vault of Nesbit & Co., proceeded to notice the charge against the officers and Directors, and to inquire whether, under the circumstances of the case, the testimony pointed to anybody else but Childs. Leaving out the three gentlemen named by Childs, certainly no one of the others had any chance to effect this abstraction. He then alluded to the proposition upon which Childs placed the case: "that it was either Shurlds, Hurschburg or himself." There could be, and he was free to state it, there could be no suspicion resting upon Childs after the time he transferred the boxes to Hurschburg; he was then a mere outsider. In order to relieve him, it will be necessary for you to find that what he represented to Hurschburg was in the boxes at that time; for recollect, he handed them over as

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containing the amount of coin they did contain when put up by the Directors, and not until you are satisfied that amount was passed over to his successor, are we warranted in saying he is not responsible for the abstraction. We will see in the sequel that the passing over the coin was merely a formal matter, and that it proves nothing affirmatively. Now, down to the seventh of May, at which time Childs left the bank, Hurschburg stands in the same position as the other clerks. Shurlds is all the time, down to the discovery of the loss, in the same situation. Let us see whether the hypothesis that Shurlds could have taken it will bear testing; and if I am successful in showing that Shurlds or Hurschburg could not have been guilty of the abstraction, then the case is reduced to a point.

Mrs. Shurlds, with a great deal of liberality on the part of the gentlemen for the defense, has been excused. Well, Mr. Shurlds had a memorandum of the contents of these boxes, and so had Childs; one had a set of keys to the vault, and so had the other. Shurlds never was in the banking house at night, never was in the vault during banking hours, or the counting of the coin, and never in the banking house on Sundays during this year down to the period of the great fire. Here is an important distinction between the accused and Shurlds. If the witnesses are to be relied on Childs was in the banking house at night, and was in the vault for hours during the period of that count.

But, gentlemen, I have undertaken to show that the man who made that abstraction was not in want of money for circulation, but to cover up some deficiency. What had Mr. Shurlds to cover up? What account or responsibility was it necessary for him to conceal? Shurlds, since the commencement of the count in February, did not get the key to the back door, and that access to the banking room from his residence so much talked of by the gentlemen on the other side, was cut off. Shurlds could not get into the bank without collusion with Bowlin, and could not have got a dollar without Childs knowing it at the end of the count. After

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Childs left the bank, Shurlds had no more opportunity to abstract this money than any other man, except that he had a set of keys to the vault lying in his drawer upstairs. Not a single witness has testified that he was about the banking house at an unusual hour after that count was concluded; and if he had gone down into that vault during banking hours, it would have been so remarkable an occurence that all would have noticed it.

He passed from this, but would presently treat of another matter that would remove Shurlds from any suspicion; he would bring him in connection with Hurschburg when the discovery was made. Gentlemen had told us to throw around Childs the circumstances which surrounded Hurschburg, and then what would we say? He would say he was not only willing that he should be acquitted, but it would be the bounden duty of the jury to acquit him. Gentlemen excuse the defendant, from the fact that he resigned at the time he did. Every hour he remained in the bank supposing him to be the guilty man, brought him nearer to certain discovery and punishment. If he had been in the bank on the tenth of August, is there a single man that would not hold him accountable for all the money? He knew detection must come, earlier or later; that he must be detected when this coin was marketed and might be detected in shipping it, on account of the deficiency in the weight of the boxes; and if anything was needed to throw off suspicion from him, it was to interpose another man upon whom suspicion might be thrown in the event of a discovery.

What circumstances surrounded Hurschburg? The gentlemen ask didn't he arrange the boxes in the vault? I answer that by asking another question. When did he do it? The old porter swears they were never changed while he was there. Then there was an intermission of three days before his successor came into office. Then you must place Hurschburg in the vault these three days, sealing and unsealing and making a total change in the position of the boxes which could not be done without detection in twice that time. Who told

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you he was ever in the vault either morning or evening during that time? Not a single witness can say he was there either day or night, and yet they boldly assert he made the change in three days and not one of the clerks could smell the sealing wax.

But, Hurschburg introduced a new rule. What was it? He received these boxes from Childs without counting their contents, and when about to pay out, insisted that it be counted in the bank. There had, previous to his administration been more than one dispute about discrepancies in coin when counted out of the bank, and hard thoughts arisen in consequence. Like a prudent man, he not having counted this coin, and to obviate such feelings in case of discrepancy, he did not enforce a new rule, but the old one—and required all coin paid from the bank to be counted in the bank. Had he been the fraudulent depredator, and attempted to palm a despoiled box upon them, he would have let them take it home and then had a quarrel as to whether they had not stolen it themselves. But he would not have paid that box, knowing it to be short, had he been the guilty man; or, if he had paid it out through mistake it would have been the easiest thing in the world for him, when he saw five bags were called for and but four found in the box to replace it in the vault and get another box. Box 38 he told you contained $19,400 in even sovereigns, and he would have preferred to pay that box out, but being weak, in consequence of sickness, he was unable to lift off the two boxes which were piled upon it. The bag was missing from No. 30; and what did he do?—did he act like a guilty man? No. He goes for Mr. Shurlds, who comes into the bank very much concerned. Finding the box was counted by Mr. Walsh, what did he do? He sent for that director, who came to the bank, and putting his hand on the box, said, "I put five bags in there—there may be a mistake however." Then the act of Shurlds, and Hurschburg tended to show their guilt, or a knowledge of the abstraction, until this discovery. He thought he had shown, and the conclusion was irresistible, that the money was

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taken from these boxes before the second of March, the end of the count. There was not the slightest foundation for a suspicion that it was taken afterwards. If taken before that count, discovery could not have been avoided at the count; and the irresistible conclusion is, that it was taken during the count, or if taken before, that that count was so arranged and managed by Childs, who was in attendance upon the committees all the time, as to cover up the deficiency.

Mr. Geyer then proceeded to show that during the latter part of Mr. Childs' service in the bank (during 1847 and 1848) the specie books showed what appeared to be forced balances. He then read from the books to show that from August, 1847, down to the fifth of May, 1849, the period at which Childs left the bank, with the exception of special counts, it was very rarely that the foreign coin was entered in odd hundreds, while, invariably, at the times of the special counts, odd hundreds appeared. From the different values of that species of coins, he contended this could not reasonably occur, and from the fact that at special counts these sums were odd, he inferred these balances upon the specie books were forced and incorrect.

This system of forced balances commenced in 1847, and in that connection Mr. Geyer desired to present some facts which he thought of importance.

In referring to the property of Childs, we turn to his own statement. He said to the Directory he saved $30 per month from his salary; made $600 by the purchase and sale of a lot; and had $1,200 when he came here. In the beginning of 1847 he had just been in the bank ten years. To that time he had purchased the Franklin avenue property, which was paid for in one year at a cost, in round numbers, of upwards of $7,000; had purchased forty arpens of ground, for $578; loaned to Deggs $636; and presented to the church $750—making his expenditures in property and donations to the church up to that time $9,124. Now, take him on his own hypothesis: his savings at $30 per month, his rents at $24 per month, the $600 made on the lot, give him the $1,200 he brought with him, and ten per cent interest, and you make his whole accumulations

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$9,440. Recollect his expenditures and donations to the same period (1847) are $9,124—leaving $316 to commence on from that time. What were his expenditures in the latter part of 1847 up to 1849? The lots and improvements thereon, on Fifteenth street, which had been paid for since the period of the above estimate, cost $9,098.42; the Degg lot cost $1,551.52; advanced to purchase the graveyard lot, $3,000; loaned Mrs. Garnier $1,000; purchased of McAlister half his interest in a piece of ground for $575, making his aggregate expenditures, for the two past years, $15,224.94. These were facts for the jury to take into consideration, in connection with the fact that Childs had no other income but his salary.

Mr. Geyer then alluded to the December count in order to show the jury how the examining committee may have been deceived in reference to the amount of coin on hand. There were two chests in the vault, provided by Childs, the locks on which were furnished by himself. According to the result of the December count (at which time the foreign coin was not boxed) there was this remarkable state of things existing: in one chest $167,000 in foreign coin; in the other, $402,000, and upon the shelves the enormous sum of $287,000—I give round sums. This sum on the shelves struck the attention of Mr. Sarpy, and he called on Mr. Childs to account for it. Childs answered, it was recently taken in and he had not time to assort it. *Mr. Geyer* then proceeded to show that no such increase in foreign coins had taken place in November and December, as to justify that large amount upon the shelves He then called the attention of the jury to the facility which existed for Childs to remove from the chests to the shelves coin once counted, and cause the same to be counted a second time, and by that means to cover up any deficiency in his account which might have existed.

Mr. Geyer referred to the great increase of thalers in February over the amount on hand in December. He also called the attention of the jury to the fact, that for the first few days of the count thalers almost exclusively were counted, when they fell off about the time that Childs asked for more time to ar-

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range the coin, again appeared in a few days after and continued to be found in the boxes through to the end of the counting of the foreign coin; taken in connection with the fact that thalers almost exclusively were placed in the first boxes counted, from fourteen of which abstraction was made, the defendant asking for more time, their disappearance for a few days and their appearing again, shows a strong circumstance that in the interval these boxes were violated and the coin sent up to be counted a second time. This conclusion appeared more manifest from the fact that about that time more bags were wanted by defendant, while at the December count there were more bags in the bank than appeared to be there at the count in February; in connection with this he reminded the jury that bags once filled in February could not have been sent up to the Directors a second time, from the fact that the initials of the Director, who first counted its contents, were invariably placed upon them, and a second use of the bag would lead to detection.

Then this February count having been concluded and everything well arranged, it was a fortunate time for Childs to resign—it would have been dangerous for him to remain in the bank, lest another ordeal, more troublesome than that through which he passed on that occasion, might be presented.

Mr. Geyer then adverted to the wealth and transactions of Childs, in real estate and loans outstanding, and by giving the smallest estimate and allowing him every advantage, he estimated the aggregate at $28,512—excluding $1,800 paid to the parson and $750 donated to the church.

After adverting to the position which Childs sustained in society, and his influence and popularity, which should have no weight with the jury, if guilty of the crime alleged against him, he asked the jury to examine the facts which had been presented—to examine them carefully and cautiously, and if they found anything not worth their attention to reject it. He asked them to look at both sides, as the question of guilt or innocence had been presented before them, and from the facts to draw their conclusions; and if they should find it satisfac-

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tory to themselves, after this examination, that the accused was innocent, to acquit him. He commited the case to the jury, with the hope that they might be enabled to exercise such judgment in its decision, as would be satisfactory to the country, and in after years, be satisfactory to those who may have a review and examination of these facts.

The COURT congratulated the gentlemen of the jury, that the case was about to be submitted for their final action, and instructed them as to the law which was to govern them in their final decision.

The case was then (at half past five o'clock) given to the *Jury,* and the COURT took a recess for half an hour.

THE VERDICT.

At a quarter past six the court was again opened, when the *Jury* returned the following verdict:

"We, the jury, find the defendant *Not Guilty,* as charged in the indictment."

Great applause succeeded the reading of the verdict by the clerk, and a number of Childs' friends crowded around him to offer their congratulations.

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THE TRIAL OF JOHN JOHNSON FOR THE MURDER OF JAMES MURRAY, NEW YORK CITY, 1824

THE NARRATIVE

James Murray, a young man, a stranger in the city, landed in New York from the Boston boat in November, 1824. He had lately emigrated from Ireland and was intending to go to the Southern states, to make his home there. One of the first persons he met on the dock, was a fellow countryman, John Johnson, who invited Murray to make his home with him while he was in the city. Murray gladly accepted, and the two carried his trunk from the boat, when it was taken to Johnson's house. Johnson appeared to be a man in good circumstances; he was forty-five years of age, married and had four sons and a daughter. After supper, the two men went down to the dock again, as Johnson was expecting his wife to return that night by boat from a visit she was making. She did not arrive, so they returned to the house, when Murray requested that his trunk be brought up from the cellar where the drayman had put it, as all his money for his passage to the South was in it, and he did not feel that it was safe where it was. So the two carried it up to the bedroom in which they were to sleep. Murray undressed and went to bed. Johnson went downstairs, sat there for a while, then came up to the bedroom, when curiosity impelled him to take the key from the pocket of the sleeping guest and open the trunk. There he found a large bag of silver coins, and it immediately "came into his head," as he afterwards confessed, to commit murder. He went quickly downstairs, got a hatchet and killed Murray with two blows, as he lay. The latter never moved. The murderer carried the body to the cellar, returned upstairs, took the bloody axe and pillow and carried them down to the river, throwing them in the stream. Then he went to bed, but could not sleep, and in the morning,

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told his daughter what he had done. "She cried," said he in his confession, and said "it would not have happened if her mother had been at home." That night he carried the body out of the house, and left it in an alley near by, where it was discovered the next day.[1]

At the trial, the mate of the ship,[2] the steward[3] and a passenger[4] identified the body as that of Murray, and also the prisoner as the man who went away with him and his trunk. And it appeared that when he was taken before the Magistrate, he confessed to the murder. But evidence of his confession was objected to by his counsel on the ground that just before it was made, he had been taken by the High Constable to the dead body and asked to touch it, which made the confession one given under undue influence and inadmissible. But the Judge overruled this objection. The prisoner was convicted and subsequently hanged.

The trial shows an interesting incident in the selection of a jury. The case had been widely discussed in the city and in the newspapers and a large number of persons were challenged both peremptorily and for cause. On the first juror being asked if he had any bias against the prisoner, the court appointed two leading members of the bar, John Anthon and Charles King as triers, and left to them the decision as to the competency of the jurors, as was the common law practice at that day, and still remains so in England.

THE TRIAL[5]

In the Court of Oyer and Terminer, New York City, March 1824.

HON. OGDEN EDWARDS,[5a] *Judge.*
HON. RICHARD RIKER,[6] *Recorder.*

[1] Charles Miller, p. 522.
[2] Dennis Ripley, p. 523.
[3] Henry Young, p. 523.
[4] Samuel Morehouse, p. 523.
[5] *Bibliography.*—*Wheeler's Criminal Cases, see 2 Am. St. Tr. 1.
*"The Trial and Confession of John Johnson, who was executed at New York, on Friday, April second, 1824, for the horrid murder of

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March 15.

The Prisoner, John Johnson, had been indicted by the Grand Jury for the murder of one James Murray. There were no less than eight counts in the indictment, in each of which the kind of instrument used was varied (as the weapon was not exactly known) and the name of the deceased was given in different counts as Murray, Clark, and a "person unknown," for the deceased was a stranger who had been in the city but a few days, and some uncertainty existed as to his true name.[7]

James Murray, to which is added his farewell letter to his wife and children, collected with great labor from authentic sources. Philadelphia. Printed back of number 171 Market street, between Fourth and Fifth streets (north side); also in Race first door down Sixth street." There is an absurd picture on the cover which recalls Hogarth's print of a bad perspective. A man is hanging on a gallows; his coffin in the foreground, with his initials painted on it; behind are eighteen men in a row, all wearing stiff black hats, and all carrying large staves, and at the side a tree on which three individuals with similar headgear are perched. Below is the following verse:

In what a hopeless state, in this abode,
Is wretched man, bereft of fear of God;
To unknown lengths in sin, on earth, he'll go,
Ere he is lost in everlasting woe!

[5a] EDWARDS, Ogden. (1781-1862.) Born in Connecticut. Member New York Legislature and of Constitutional Convention 1821. Judge Supreme Court 1822-1841.

[6] See 1 Am. St. Tr. 361.

[7] The first count of the indictment was as follows: "City and County of New York, ss. The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present, that John Johnson, late of the first ward of the City of New York, in the County of New York, aforesaid labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-first day of November, in the year of our Lord, one thousand eight hundred and twenty-three, with force and arms, at the first ward of the City of New York, in the County of New York aforesaid, in and upon one James Murray, in the peace of God, and of the people, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Johnson, with a certain hatchet, made of iron and steel of the value of one dollar, which he, the said John Johnson, then and there had and held in

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Hugh Maxwell,[7a] District Attorney, for the People.

Dr. Graham,[7b] *Mr. Price* and *Mr. McEwan,* for the Prisoner.

The Clerk. How say you, John Johnson, are you guilty or not guilty?

Mr. Price, called upon the District Attorney to elect the counts upon which the prisoner was to plead. He contended that the election must be made before plea pleaded, or the prisoner would lose the benefit of his objection. It appeared, he observed, from the record, that the prisoner was indicted for the murder of more than one person, and that it was clearly illegal to charge distinct felonies in the same indictment.

Mr. Maxwell, District Attorney, replied that he was not bound to elect on which count of the indictment he intended to rely. He was aware of an authority in Chitty, vol. 1. page 252, which seemed to warrant the doctrine contended for by the counsel of the prisoner, but he could satisfy the Court by a reference to other books and cases, that the dictum in Chitty was unsupported by the very cases he referred to. *Mr. Maxwell* read from 1 Chitty's Criminal Law, p. 252; and from 3 T. Rep., p. 103, Young's case, and he read Lord Kenyon's, Justice Ashurst's, and Justice Buller's opinions,

both his hands, him the said James Murray, in and upon the left side of the head near the left temple of him, the said James Murray, then and there feloniously, wilfully, and of his malice aforethought, did hit and strike; and that the said Johnson did then and there give unto him, the said James Murray, by such striking of him with the hatchet aforesaid, one mortal wound of the length of four inches, and of the depth of one inch, in and upon the left side of the head, near the left temple of him, the said James Murray, of which said mortal wound, he the said James Murray, then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, say that the said John Johnson, him, the said James Murray, in the manner, and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, in contempt of the people of the State of New York, and their laws, to the evil example of all others in like case offending, and against the peace of the people of the State of New York, and their dignity."

[7a] See 1 Am. St. Tr. 62.

[7b] GRAHAM, John A. A leading practitioner in the Criminal Courts early in the first quarter of the Nineteenth Century. His son, John L. Graham, was also an eminent lawyer. See People v. Ward, 4 Am. St. Tr.

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to show that the Court would not quash an indictment even when distinct and separate felonies were laid in it. Also the case of King v. O'Coigly, St. Tr., vol. 26, p. 1203. There were others he might refer to, but he thought it unnecessary; they were all contrary to the dictum in Chitty, and they had no analogy to this case. He had indicted Johnson for one offense, to-wit, the murder of James Murray. Now it was well known to the Court, that it was often necessary to vary the name of the person supposed to be murdered, in order to meet the proof expected to be offered. There was but one charge, and that modified to meet the circumstances of the case. In this case it was indispensable; it arose from the uncertainty of the name of the deceased, and could not be avoided. Here is a man murdered in a foreign country. He was a perfect stranger in the city; some called him by one name, and some by another, and it was necessary to lay it so in the different counts. That there was nothing unreasonable in the rule must be apparent. Suppose a child murdered upon the wharf, and thrown into the river, and it was not known whether it was a male or a female; would it not be necessary to charge it as a male child, and also as a female child, in the indictment?

Mr. Price. The situation I stand in is none of my seeking. I am here to defend a man on a charge of murder. I should feel myself guilty of that crime if I neglected to make all legal objections that are calculated to serve the interest of my client. The application before the Court is to compel the District Attorney to specify the counts the prisoner is to plead to. The District Attorney contends that he cannot be compelled to elect upon which of the counts he intends to offer evidence, because it is apparent to the Court, that he intends to offer evidence against the prisoner, but for the murder of one person, and of course of but one offense. But how is the Court to know this? They know nothing of the case but what they have learned from the record, and by that instrument it appears the prisoner is charged in one count for the murder of *James Murray,* and in another for the

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murder of *Timothy Murray,* etc. How does it appear to the Court they are the *same person?* It is extremely important to the prisoner that he knows the charge against him, in order to frame his plea to meet it, and to have the benefit of challenges. I make this application to the Court; they are to dispose of it as the solemn nature of the case now before them requires.

The COURT. Without entering farther into the law, the opinion of the Court is, that they have discretion, and may compel the District Attorney to select the counts in the indictment he intends to rely upon. It is a discretion to be exercised upon a full view of the case. Where it appears to the Court that distinct and separate offenses are charged in one indictment, which confuses the prisoner in his pleas and challenges, they will give him relief by compelling the District Attorney to elect upon which count he intended to rely. Here it is obvious the indictment contains but one charge, although modified to meet the proof in the different counts. The Court can see no hardship upon the prisoner in this case. Their opinion therefore is, that the prisoner must plead to the indictment.

The Clerk. John Johnson, are you guilty, or not guilty? *The Prisoner.* Not guilty.

The Clerk. Are you ready for trial? *The Prisoner.* Yes. Will be ready tomorrow morning.

The Clerk. Have you counsel? *The Prisoner.* Yes.

The Clerk. Do you wish the Court to assign you more? *The Prisoner.* No.

March 16.

From the very great crowd in the room and in the avenues to the Hall, all the witnesses on the part of the People did not answer when called.

Mr. Maxwell said, that it would be impossible for him to proceed, until the witnesses came in. He had no doubt they were among the crowd, but could not get in.

The COURT directed the panel to be called, and by that time it was supposed the witnesses would come. It also

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directed the clerk to swear the gentlemen upon the panel who had belonged to the artillery, and who were suspended yesterday. It decided that artillery-men are not exempted by the statute to serve as jurors after they cease to be artillerists.

The petit jury were then called, and the challenges made. The prisoner made peremptory challenges, and challenges for favour.

Albert D. Spear being called as a juror, *Mr. Price* prayed for the following questions to be put (as in Selfridge's case[7a]) to each juror, as he came to the book to be sworn. First. Have you heard anything of this case? Second. Do you feel any bias for or against the prisoner in this case?

The COURT. The only object of interrogating jurors is to ascertain whether they are prejudiced for or against the prisoner. The Court or the counsel for the prosecution would not be concluded by the answer. The question of competency must be settled by the triers appointed according to law. We do not mean to sanction the particular mode now suggested. You may, however, ask the questions.

The RECORDER referred the counsel for the prisoner to Milligan and Welchman's case, 6 City Hall Rec. 71.

The COURT after consultation adopted the questions put in Milligan's case. The questions were: Have you at any time, formed or expressed an opinion, or ever entertained an impression which may influence your conduct as a juror? Have you any bias or prejudice on your mind for or against the prisoner? Do you in every respect, according to the best of your knowledge or belief, stand perfectly indifferent between the people and the prisoner?

Mr. Price requested the Court to so frame the interrogatories that the answer in the affirmative or the negative would embrace the case, and preclude farther questions.

The COURT. The prisoner must be tried according to law. We cannot frame any question to preclude explanatory ones being put by either party. The Court cannot decide upon

[7a] 2 Am. St. Tr. 544, 551.

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the competency of the juror. If challenged for favor, triers must be appointed.

The juror *Spear* was challenged for favor by *Mr. Price.*

The COURT appointed John Anthon and Charles King, Esqs., to decide upon the competency of the challenged juror, and they were sworn well and truly to try the juror, to answer the questions put to him.

Mr. Price. Have you formed and expressed an opinion or ever entertained an impression which may influence your conduct as a juror, etc.? as in Milligan's case.

Mr. Spear. I have unfavorable impressions against the prisoner. I have read his confession.

Mr. Maxwell. Notwithstanding your impressions, and what you have heard, is your mind free to make up a verdict upon the evidence that will be offered, exclusive of what you have read and heard?

Mr. Price. In a case involving the life of a person, the juror should be free—his mind should be as a blank piece of paper. The juror himself can hardly know his own bias. Mr. Spear has read the confession of Johnson in a handbill, circulated through the town by some persons. A great many persons have been summoned as jurors—is it not possible to obtain an impartial jury? I do not mean a jury who have never heard of this case, but a jury who are impartial. We can certainly find such a jury notwithstanding the excitement.

Mr. Maxwell. If the doctrine contended for by the counsel for the prisoner were adopted, every culprit would go unpunished. Jurors feel as men. That they feel a prejudice against the enormity of a great crime is natural. It is not a prejudice or bias against the man, but against the offense. What would be the consequence of such a doctrine if sustained by the Court? The party himself might excite and keep alive these prejudices. In that case he never could be tried at all. The juror says he has heard the reports of the murder, and has read the handbill detailing the confession; but he nevertheless says he is competent to render a verdict upon the evi-

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dence. With the greatest respect I think Mr. Spear is a competent juror.

The COURT. A juror must approach the box with impartiality. The opinion that the juror has made up his mind may be predicated upon a hypothesis that if the report is true or not true, the prisoner is guilty or not guilty. The mere circumstance of a juror having formed an opinion upon reports and newspaper publications is not an objection against him. If the juror is able to make up a verdict upon the testimony offered on the trial, independent of the reports he has read and heard, he is certainly a good juror.

The Clerk (to the triers). How say you do you find the challenge true or not true? *The Triers.* Not true.

Eighteen jurors were challenged peremptorily, and twenty-two for cause shown. The following jurors were sworn: Robert Stoddard, Joseph Middlemast, Timothy Kellog, Richard Harding, Barnet Audariese, William Hitchcock, Dennis Ward, John Degez, James L. Bleecker, Alexander Robertson, Isaac L. Jaques, and Michael Immanuel.

Mr. Maxwell. Gentlemen of the Jury. The prisoner is now to put up on trial for the crime of murder, a crime against the laws of God and man. In a crime of such a deep die, it is necessary that satisfactory evidence should be offered —that the prisoner should have a fair trial. But however anxious the counsel for the prisoner may be to find some difficulty, some doubt in the case, it is my duty, gentlemen, to say to you that the proof will be of so satisfactory a nature, that you will find little or no difficulty in the investigation of it. The witnesses against the prisoner are all people of good character; they are strangers to him; have no malice or ill-will to gratify. They will develop such a chain of facts and circumstances, that nothing but the hand of a superintending and all-wise Providence could have brought to light, as if for the detection and punishment of this foul murder. It would appear that the deceased was a young man of good character. He was not a native of this country, but had just come from Boston, where, by honest industry, he

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accumulated upwards of $300. He arrived here in the sloop, Fulton, on Tuesday the eighteenth of November and slept on board the sloop until Thursday. It would appear by the testimony of Young, the steward on board the sloop, that he saw Johnson on the wharf on Wednesday, speaking to the deceased, and that he came again on Thursday, and assisted the deceased to carry away the trunk. The deceased told Captain Morehouse, the captain of the sloop, that he was going to board in the lower part of the city. It would appear by the testimony, that the deceased left the vessel on Thursday, and the people on board neither saw nor heard of him until Sunday, when a dead body was immediately recognized by them as the body of Murray. Under the direction of an all-wise Providence, I shall be able to fix the guilt of this murder upon the prisoner, beyond all doubt —not only by the testimony of the people on board, but by the officers of the police who arrested Johnson and searched his premises—from the circumstances of the case, and from the confession of the prisoner himself.

On Sunday, the officers took Johnson as he was coming from church, where he had been, I hope, to worship! He was arrested by Mr. Hays, and while under arrest, as the steward of the sloop Fulton was approaching in order to identify him, the prisoner exclaimed, "this scares me." The prisoner was brought to the police office and was examined. He denied all knowledge of the deceased, had never been at his house, and knew nothing of his chest. While Johnson was under examination, the officers of the police searched his house, found a bloody sheet, truss and clothing, all in places not usual for those articles. On Monday Mr. Kip recognized the deceased as the same person who was in company with Johnson with a chest, which they employed him to carry to Johnson's house.

Mr. Maxwell detailed the circumstances of finding the chest of the deceased under Johnson's bed, a bloody shirt and bloody handkerchief, the clothes of the deceased; also the circumstances of finding the money in the sand bank at

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Brooklyn; the blood traced from Johnson's bed room to the cellar; the particulars and manner of the death of the deceased; the finding of the body in Cuyler's Alley—the exhibition of the body at the hospital, and its recognition, and concluded, by observing he was not willing, by any address to the jury, to inflame their minds against the prisoner—there could be no necessity for it, for he apprehended the jury would be under the necessity of exerting themselves to resist their feelings and indignation of such a public outrage.

THE EVIDENCE.

Charles Miller. Am a city watchman. On Saturday, the twenty-second of November, at half past two, I was doing duty in the neighborhood of Cuyler's alley, and found a dead body. It had nothing on but a red flannel shirt tied around the body, an old bolster case tied around the head, and a white pair of drawers wrapped around them. It had a wound upon the left temple of the head. A rope was tied around the body, and another around the head. The rope around the body was slack, is if to carry it. I remained with the body until the coroner came and took it away.

Doctor Stevens. Saw the dead body on Monday. The wound upon the left side of the head appeared to have been produced by some blunt instrument. The body had longitudinal scratches upon the chest, such as might have been produced by dragging him upon the sand or gravel. Think he died in good health. There were marks of a rupture on the right side, which the truss now produced would fit. The body might have been dead four or five days. The scalp of the deceased was not cut—the wound must therefore have been inflicted by a blunt instrument. The wound was about three inches and a half long, and two and a half wide, and it was about two inches deep—it must have produced instantaneous death.

Dr. Rogers. Concur in the statement of Dr. Stevens, in all he has said. Was present at the examination. The truss now produced would be proper for the rupture on the person of the deceased.

Elizabeth Day. Live at 16 Barclay street. Saw the body on Monday, twenty-fourth November, at the hospital. His name was James Murray, the same person that called at my house to inquire for the Rev. Mr. Powers. He told me his name was James Murray, and that if the Rev. Mr. Powers called, he would know his name. Deceased was dressed in a gray coat, dark vest with spots, black silk handkerchief, and dark pantaloons. The coat and waistcoat now produced, James Murray had on when he was at my house. Have no doubt at all the body at the hospital was the deceased Murray, nor that the clothes now

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before the Court were worn by Murray when at my house.

John Powers. Saw the body of deceased on Sunday morning. His name was James Murray. Saw James Murray alive the Thursday before the Sunday he was exhibited at the alms-house. Saw him at the Rev. Mr. Powers'. He had on a gray coat, dark spotted vest, and darkish pantaloons, the same now produced before the Court.

Doctor Powers. Am a physician. Saw the body of Murray on Sunday. It was the body of same person I saw at my brother's on Thursday. He had on a gray coatee and dark vest; did not know him by any name, but others called him Murray. Am certain it is the same person who called at my brother's.

Samuel Morehouse, Jr. Arrived in New York, from Boston, in the sloop Fulton, in November last—the Tuesday preceding the Sunday on which the body was exhibited. Saw a body in the rear of the hall on Sunday. It was the body of the person who came in the sloop with me from Boston. Murray staid on board until Thursday. Had a chest on board—the chest now before the Court. He wore on board the sloop, a gray coatee, and red shirt and grayish pantaloons, the same now produced. Do not recollect who came on board with him, he was not intimate with any person on board.

Dennis Ripley. Was mate on board the Fulton—saw the dead body of a man in the rear of the hall on Sunday. It was the body of the same person who came from Boston in the sloop Fulton with me—saw his chest—it is the same chest now before the Court. Deceased wore on board the vessel a gray coatee, grayish pantaloons, black silk handkerchief, dark waistcoat. The clothes now shown to me are the same clothes the deceased wore on board the sloop.

Henry Young, (a black). Am steward on board the Fulton—saw a dead body in the rear of the hall. It was the body of the person who came from Boston on board the sloop Fulton. Deceased left the vessel on Thursday in the afternoon. Am certain the deceased is the person who came in the sloop. The prisoner and the deceased came on board and took away a chest Thursday afternoon. Had seen Johnson speaking with Murray on Wednesday before. Murray came on board and lifted the chest on the quarter-rails, and Johnson took hold of it. Cannot tell which way they went. Murray had on a gray coat, dark pantaloons, and dark vest, with spots in it—the same clothes now before the Court. Saw the body at the alms-house and immediately recognized it. I described Johnson to the officers of the police before he was taken.

Cross-examined. Johnson and deceased took away the trunk one hour and a half before sundown on Thursday. Johnson had been there the preceding Wednesday, and had conversed with Murray. Johnson was dressed the same on Sunday as he was when he and Murray went away. He had on a green surtout on Sunday. The chest now before the Court is the same that belonged to Murray on board the sloop.

Thomas Kip. Am a cartman. On Thursday, in the afternoon, between one and two, was at the

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head of Burling slip—Thursday preceding the exhibition of the dead body on Sunday. Was sitting on Griswold's stoop—saw two men carrying a chest—one was Johnson, and the other the man whom I saw dead at the hospital. They agreed with me to drive his trunk to Johnson's house. On arriving at the house, Murray pulled out his pocketbook to pay witness, but had no change. Johnson said he would pay him, and borrowed the money of a boarder, and paid him. Cannot be mistaken—it was Johnson—have known him five years. Deceased was dressed in a gray coatee, and black waistcoat, the same now before the Court. Took particular notice of him—am sure he is the same man I saw with Johnson—recognized him immediately when he lay dead in the hospital.

Mary McGlochlin. Live at No. 64 Front street, directly opposite Johnson's house—remember the Thursday evening preceding the exhibition of the dead body on Monday in the hospital—there was a light on Thursday evening in Johnson's room at half past twelve o'clock—it is an unusual thing in that house—they are in the habit of retiring to bed at nine or ten o'clock. One of the window shutters was open—could see into the room, but not where the bed stood. Might see a person walk across the room.

Jacob Hays. Am High Constable; arrested Johnson on Sunday as he was returning from church. Told him I wished to speak to him, and as Young, the steward of the sloop Fulton, was coming up to us in company with Mr. Maxwell, Johnson exclaimed, "this scares me." I had him by the hand—told him not to be frightened, and took him to the police office. Never said to Johnson it would be better for him to confess. Took him to see the dead body, and requested him to touch it. He was very much agitated. Brought him to the police office, where he confessed to the Magistrate.

George A. Raymond. Went to Johnson's house with Mr. Homan, traced the blood from the room to the store, and down the stairs into the cellar—there were spots of blood on the ladder which leads into the cellar.

Mr. Homan. Examined Johnson's house, crawled into a hole in the cellar, not more than three feet wide, but ten or twelve feet long, just large enough to admit the body of a man; in the extreme end of this hole found a bloody sheet and a truss. On Monday found a bundle of clothes behind the woodpile in the yard; they were very filthy, apparently just taken from the sink of the necessary—found the chest upstairs under Johnson's bed—traced the blood, out of the room down the stairs into the store—turned down the bed clothes and found the bed wet with water and blood, and fresh spots of blood appeared on the head-board.

Azel Concklin. Examined the room in which the supposed murder was committed—there was blood upon the carpet and upon the stairs. Found in the bar below, a chest which contained dirty clothes, a shirt covered with clots of blood, and a cravat also very bloody.

Justice Hopson, sworn.

Mr. Maxwell. Have you any money in your possession found

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in Brooklyn? I have $380 in specie.

Mr. Maxwell. How did you become possessed of that money?

Mr. Price. I object to the inquiry—it may lead to improper testimony.

Mr. Maxwell. I shall offer nothing in evidence against the prisoner, but what came from third persons in his presence, and was assented to by him. I wish to show the Court, that after the confession was made, Johnson was asked what he had done with the money; that he said he gave it to his daughter; and she, upon being sent for, said she gave it to her brother; and on his being sent for, said he had secreted it in the sandhills back of Brooklyn; and this being said in Johnson's presence, he requested his son to go with the officers for it, where it was found.

Mr. Price. It must appear by the examination.

The COURT. Was it at the time of the examination?

Mr. Maxwell. It was connected with it—it was subsequent.

Mr. Price. I contend that it was part of the examination, and can not be separated from it.

The COURT. We are not sufficiently certain whether the proof now proposed to be offered is connected with the examination or not. If it was made at the time of the examination, it should have been inserted. The rule of law is well settled, that the examination must be taken together. It is the right of the prisoner to demand that the whole of his confession be taken together. The evidence is excluded.

Dr. Graham objected to reading the examination of the prisoner, on the ground that it did not state that the Magistrate had apprized him that he was entitled to counsel.

The COURT ruled, that no law in this country required the presence of counsel at the examination of a prisoner.

Mr. Price. The confession was not *free* and *voluntary*. The prisoner was taken out of his cell to the hospital by Mr. Hays, the High Constable, and was required to touch the dead body; a circumstance calculated to agitate and distract him. It was a species of mental torture more powerful than promises of favor or threats and menaces. The law was well settled that the least undue influence exercised upon the mind of the prisoner by threats or promises would vitiate any confession made by him. Should not then a confession made under circumstances so well calculated to agitate and confound the prisoner be rejected?

The COURT. The prisoner was taken to see the dead body, and was required to touch it. He did so, and was brought by the police officer to the police office in great perturbation

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of mind, and confessed the murder. It does not appear that any threats or promises were made to him by the officer, or by any other person. On the contrary, it was stated to him by Mr. Hopson, the examining magistrate, that he was not bound to confess, and that his confession might be used against him upon this trial. He did confess, and that confession in our opinion, was free and voluntary. His being taken to the dead body, and being required to touch it, does not affect the examination. What influence would such a circumstance have upon an innocent person? None. The guilty might be intimidated, and tremble; conscious innocence would disregard it.

Mr. Maxwell then read the examination of the prisoner.

"John Johnson again brought out and examined in relation to the murder of James Murray. Johnson was first told that he was to be examined, and that what he might say would be made use of against him, and in all probability it might cause his life; that he need not answer any question without he pleased. Question. Do you know James Murray whose corpse you have just been to see? Answer. Yes, yes, I do know him, and I will tell you all about it. Question. Where did you first meet with him? Answer. On Thursday last, I met with him at the coffee-house-slip, and he asked me whether I was an Irishman, and I told him that I was born there; and he mentioned about his going to New Orleans or Savannah; and I asked him to my house, as there were a couple of men at my house who were going there, and he came and talked to Jackson and Jerry about the southward; and he stated he would stay there a few days, and wanted me to go with him and get his chest, and went and got the chest—which chest is now here shown to me—from the vessel at Burling-slip; and at the head of the slip, had it put on a cart and taken to the house, and Jackson and Jerry were there when they came with it. I paid the cartage, as I got a shilling from Jerry to make the change. The chest was put into the back room. They all remained at home, and eat supper, viz. Jackson, Jerry, Mary, my daughter, Murray, the dead man, and myself. After supper, Murray and myself went over to the north river to look for the vessel that I expected my wife to come down in from Newburgh, at Washington market. We parted—Murray having stopped with a man, and I went home, and got home a little before Murray did. Jackson and Jerry were sitting there when I returned, and they saw Murray return; after which they sat and talked together till ten or eleven o'clock, when Jackson and Jerry went up to bed in the back room, leaving the man, Murray, myself and daughter, in the room: my three boys being put to bed some time previous. Murray said that he did not like to go upstairs with the men without

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his chest being taken up, as he had money in the chest. He did not mention the sum, but said he had enough to take him to the southward. I then proposed to him to go to bed with myself and take the chest up in the room; Mary by this time had gone up to bed in the bed room. Murray and myself then took up his chest into my bed room, the front room, and set it near the fire-place by the bed-side, and Murray undressed himself and went to bed, and I remained up, went down stairs, and set by the stove for near an hour as I judge, and found Murray was asleep, and took a key out of his vest pocket, opened his chest, and took out a little bag of money about as big is my two fists. It was dollars, as I judged, as I did not open it, and Murray told me that he had silver dollars. It then came into my head to murder him, and I threw the bag and money into the corner of the closet where there were carpenter's tools. I then went down stairs and got a hatchet, and came up and struck Murray two blows, as I think, on the head, and he never moved as I know of: I then put something about his head, so as to prevent the blood running on the floor, and carried him downstairs into the cellar through the trap door. I then returned upstairs, took the bloody pillow and the hatchet, and went and threw them into the river. When I returned I looked about the floor for the blood, and not seeing any, went and lay down on the bed with Mary, being afraid to go into my own bed. In the morning I felt very uneasy, and my daughter Mary asked me what the matter was, and I finally took her and told her how that I had killed the man, and showed her where I had put him, and he remained there till ten o'clock the next night: when they were all quiet, then I put a rope about the man, and carried him out and left him in the lane. I can't say what has become of the money, the clothing, or anything else of the man. Mary cried and went on when I told her, and she said it would not have happened if her mother had been at home. I put the bloody sheet and things all into the river."

Dr. Graham (to the jury). This was a case depending entirely upon circumstantial evidence: the examination must be thrown aside. It was taken under circumstances of extreme perturbation in the prisoner. He had not the benefit of counsel—had just been to see the dead body—had just touched it. In this situation he is brought to the police office —ready to confess anything, and willing to confess everything to save his family. The examination therefore can not be depended upon. *Dr. Graham* read the celebrated Vermont case where the party had confessed himself guilty of murder, and the man was discovered to be alive, just before the day appointed for the execution. And to show the dangerous

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tendency of presumptive evidence, he read a number of cases in the appendix to Phillips.

Mr. Price. Gentlemen, we have a great responsibility upon us; we are to pass upon the life and death of a fellow being; we are called to take away the life of a fellow being. Need I remind you with what care and caution you ought to proceed. I advert to it to admonish you, that unless you have the most satisfactory evidence of the prisoner's guilt, for your own peace here, and for your security hereafter, you will not take away this man's life without the most satisfactory evidence. It has been doubted by many great men whether it could in any case be taken by the creature, it being the gift of the Creator.

Mr. Price adverted to the fact of Johnson's former good character, and contended it was against the nature of things for a man to plunge into the depth of wickedness at once—he proceeds by degrees and argued the improbability of the guilt of the prisoner, from the enormity of the crime. He contended, independent of the examination, there was not sufficient evidence to convict. Little reliance could be placed on the examination—it was no doubt made under the most excruciating agony of feeling—made to save his family—made after his return from laying his hand upon the dead body of the man charged to have been murdered. He referred to the Vermont case—it was no bug bear, no man ever doubted it.

He went on to show a discrepancy between the testimony of Young, the steward, and Mr. Kip. He also remarked upon the favorable circumstances of the window shutters being open, and concluded no man in his senses would commit so foul a crime with the window open. He also commented on the expression used by Johnson, while in the custody of Mr. Hays, at the approach of the steward—"It scares me."

The word guilty is easily pronounced, but its effects are irrevocable; for let it not be whispered to you that if you pronounce him guilty, there is aught can save him from

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execution. No, gentlemen; I say, if he has been guilty of the murder imputed, he has committed a deed of deep, bloody, and unprovoked malice, meriting all punishment. If he be guilty, gentlemen, he has by this one act contradicted a life of excellence. You have heard from witnesses you cannot discredit, that his past life has been without reproach. It is not in the course of nature thus suddenly to plunge into guilt; it is the work of time, and no man ever was at the outset an accomplished villian. This man had every inducement to be otherwise—a good character, acquired through a long life; in possession of large means, with a wife and children around him. Would he have thrown from him all these blessings, his peace here and his hopes hereafter, for the indulgence, at such hazard, of the passion of avarice? It is almost incredible. The two men, Jackson and Jerry, said to have been in Johnson's house at the same time with the deceased, have not been called; no account is given of them; no assurance that, reckless villians as they may be, they have not fled with the consciousness of guilt from the possibility of punishment. If the proof were irresistible, which it is not, that the deceased was murdered in the prisoner's house, it would by no means follow that the prisoner was the murderer. Then as to identity, it is one of the most difficult cases in the world to establish, as in the famous case from Haverstraw, tried in our old city hall, was demonstrated. Yet, to the identity of Johnson as being alongside the sloop on Wednesday, we have no positive evidence but that of the steward, though the captain, mate and working people around them, had no recollectiton of seeing him. He had never seen the prisoner before, never spoken to him, yet he identifies him, and not only identifies his person, but his clothes, and not only his clothes when without, but when covered with a surtout. The witness, I hope, believed what he stated, but if he did, it only shows you, gentlemen, that a witness may state as a fact, what the jury would find it difficult to receive as such.

But the prisoner has confessed, it is said. Confessions

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freely made are the highest evidence, but under threat or hope, or under any undue excitement, ought never to be received. But what was his condition? Torn from his family on a Sabbath day, thrust into a loathsome prison, his wife cast into the same prison—his daughter, just entering into life, incarcerated there too—his little boys scattered, God only knows where. After passing two nights, thus harrowed in heart and spirit, he is taken to the hospital, to gratify some absurd theory, to see if by his touch the dead body will not bleed afresh. Thus harrowed, thus tortured, he is carried to the police office, and there falling on his knees, says he will confess all, confess everything. And this is called free and voluntary confession. A promise of reward, however trifling, will vitiate any confession, and yet this mighty working on the mind is to be held as not affecting this case. I do not refer to the Vermont case as a bug-bear, but put it solemnly before you as an instance in which a man confessed himself guilty of murder, when none had been committed. Here murder has been committed, but the confession is probably not less false. Here I commit this cause, gentlemen, to you. I ask no perjured verdict at your hands, but, as you are accountable beings, if you entertain a doubt, I invoke the benefit of it on the side of mercy and human life.

Mr. Maxwell said that if there was a case where the evidence was of that conclusive nature that left no doubt in favor of the accused, this was one. He had never known a case where all the circumstances so harmonized. It might be true that innocent men had suffered; but because it is possible, and may at some time or other have occured, is John Johnson to embrue his hand in the blood of a stranger with impunity? Is Johnson to be thought innocent, because an innocent man may have suffered?

The jury were bound to judge the case according to law—for the throne of mercy was not in this hall. Here we are bound by the principles of law, and in accordance to them we must decide. The executive may pardon, if the object is thought worthy the exercise of this power. There was a

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singular consistency in the testimony of all the witnesses. The testimony of Young, the steward of the sloop, must be satisfactory as to the identity of the prisoner—his calling at the sloop on Wednesday and Thursday, and what took place on Sunday, when Johnson was arrested.

Replying to *Mr. Price's* remarks upon Young's testimony, and upon the fact that the window shutter of Johnson's bedroom was open the night of the murder, he observed that Mrs. Johnson had gone to Newburgh, and might have left it open, or that perhaps the deceased, being a stranger, and wanting to rise early in the morning, had opened it himself. He saw the confession was perfectly free and voluntary. The magistrate testified that he had given him all and more than the necessary caution. The magistrate indeed had to restrain him; to such an extent had a guilty mind been operated upon, by a consciousness of its own crimes. The fact of the prisoner being taken to, and touching the dead body, could not be used as an argument against the validity of the examination. If he was an innocent man what had he to fear. He made the confession just read without any advantage being taken of his situation; he did not even know his wife and daughter were in gaol. You gentlemen, are called here under the solemnity of your oaths, to do justice according to law and evidence; and if those laws and evidence with your oaths, require that for a particular crime life shall be forfeited, you must go straight on. You are not here to legislate—not to exercise the prerogative of mercy, but to find a verdict on the facts detailed before you. It is a fact that could not be explained, but to the disadvantage of the prisoner, that his counsel had not called to exculpate him, if he could be exculpated, his daughter, the witness, of all others, that could best establish his innocence. For the prosecution this witness could not have been introduced, without violating the feelings which belong to us all; but in *defense* of a father, her filial affection, her highest obligation would have prompted her, at once to appear as her father's vindicator. It is happy this daughter

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was not introduced; it would have led to a scene which we should never have forgotten.

Mr. Maxwell went into a particular detail of the evidence, and concluded by remarking, that if the jurors of our country were to disregard testimony of such character as that now before the Court, there was no safety for the lives of individuals. If strangers coming into our city are to be inveigled into houses apparently for their accommodation; and when in the house where they suppose themselves entitled to protection to be robbed and murdered there could be no security for life or property.

EDWARDS, J. Gentlemen of the Jury—The high and responsible duty now to be exercised by you, is the most sacred and awful that a fellow citizen can be compelled to perform. It is a duty of the greatest importance to society, and which is necessary to be exercised for their protection and safety. You must be so impressed with this feeling as to make it unnecessary for me to remark any farther upon it. You are called to pass upon the life of a fellow beieng. You must decide between the people of the State of New York and John Johnson, the prisoner at the bar. You are called upon to pass according to the evidence before you, divested of anything you may have heard out of doors.

On Saturday, the twenty-third of November, a man was found in Cuyler's Alley, by Mr. Miller, the watchman; the situation and circumstances of the body was such as to induce a well-grounded belief the man had been murdered. The state of the body and circumstances of it (here the JUDGE stated the particulars of the evidence). The body was watched by Mr. Miller until the Coroner was sent for, when it was removed to the hospital, where it was seen by Mrs. Day, Young the Steward and others—they recognized the body to be James Murray, who had just arrived in the sloop Fulton, from Boston, and was at the sloop on Thursday in good health. It is certain he was murdered: the next inquiry is, who is the murderer? It appears by the testimony of Young, the steward,

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that Johnson came to the sloop Wednesday and talked to Murray, and came again on Thursday, and he and Murray took away the trunk of the latter. It also appears that Mr. Kip carried the trunk to Johnson's house, which was the last place the deceased was seen alive. (Here His Honor stated the testimony in relation to the bloody clothes found in the house, the clothing found behind the woodpile, and the testimony of Mr. Homan and others, police officers.)

It is your duty, gentlemen, in a case of this kind, to make every reasonable allowance, and put upon the transactions, as they have been disclosed, the most favorable constructions that can in any way benefit the prisoner. It is your duty in considering the case, to test the witnesses, to test their accuracy, to give every circumstance in favor of the prisoner as much weight as in your judgment it ought to receive. In order to the clear understanding of this case, I will read to you the first examination at the police office. (Here the JUDGE read the first examination of the prisoner, commenting upon, and explaining it to the jury.) With respect to the last examination, the law is, that if it was made under any threats or promises whatever, it can not be received in evidence. In this connection it does not appear that any threat or hopes were held out to the prisoner. But, however, should you think that he made this confession under any frenzy of mind, from the effects of guilt, and anguish, and sufferings, which he could no longer endure, then it is admissible in evidence against the prisoner, and is entitled to full credit.

I do not know that it is my duty, or that it is necessary for me to enter more fully into the testimony.

In the close of my remarks, I shall observe, that on the one hand you have the life of a fellow being in your hands, and on the other you have a community to protect. Your course must necessarily be straightforward. You cannot turn either to the right or to the left, without doing great injustice to the prisoner, on the one hand, and to the community, on the other. You will, when you retire from these benches, take the subject

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into your consideration, and report the matters as you find them, under all the circumstances of the case.

With respect to mercy, gentlemen, this is not the mercy-seat. That attribute is in the hands of the executive. If he is a proper subject for mercy, it rests with the executive to extend it. *Your* duty, gentlemen, is to say whether the prisoner at the bar is or is not guilty of the murder laid to his charge. With these remarks, gentlemen, I submit the case to your consideration.

THE VERDICT AND SENTENCE

The *Jury* then retired, and in about ten minutes, viz., at a quarter after two o'clock in the morning, returned with a verdict of GUILTY.

The *Prisoner* was asked the usual question by the *Clerk*.

Johnson. I want to speak, just to say, I am not the man that killed the murdered.

EDWARDS, J. John Johnson, you have been convicted by a jury of your country, of the murder of James Murray. The circumstances attending the murder are of an extraordinary, and in this country, unprecedented character. The deceased was a young man, a countryman of your own, who having accumulated some property was desirous of joining friends at the South. You invited him to your house, under the pretext of ability to serve him, and after he had committed his person to your house, his property to your protection while sleeping in your room, in your bed, deprived him first of his property, and then of his life. Your case has been calmly investigated, and a jury whose verdict is approved by every member of the court pronounced you guilty; and that verdict it is not too much to say, is approved by an almost unanimous community. You stand before the audience and country as an instance of moral depravity almost unexampled. I mention this circumstance not to harrow up your feelings, but to satisfy the community, if any yet remain to be satisfied, of the justice of the sentence to be passed. I cannot flatter you with any hope of

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mercy; your situation is an awful one; on the scenes around you your eyes must soon close forever. You are about to pass from the presence of your fellow-beings to that of your God. You will be sent there by the voice of your injured fellow-beings, you will appear before him with hands stained with blood, which his mercy alone can wash out. Having made these observations in the hope of awakening you to a realizing sense of your condition, I now proceed to pass the sentence of the court, that is, that you be taken to the prison from whence you came, and thence on Friday, the second of April next, to the place of execution, there, between the hours of ten and three o'clock, to be hung by the neck until you are dead, and your body to be then delivered to the surgeons for dissection,—and may the God of heaven have mercy on your soul!

During the sentence, not a muscle of the prisoner's face moved; except as he occasionally muttered something; and at its close, he looked around on the audience with a hardened unconcern. The awful stillness of the court formed a striking contrast with the demeanor of the prisoner.

THE EXECUTION

After he was taken back to prison, Johnson made another confession, in which he placed the responsibility for the killing on one Jerry, one of his boarders, and the man he borrowed the money from to pay the carter for carrying the trunk from the boat to his house.[8] On the night Murray came, said Johnson, he (Johnson) and Jerry were talking about him, when Jerry said Murray had been very foolish in telling about the money in the trunk. We must have that money, said Jerry. Johnson expressed a fear that if they committed a robbery, they would be discovered and sent to the State Prison; Jerry replied that they could avoid this by killing Murray, and it was then agreed that they should kill him for his money. Jerry wanted to do it at once while he slept, but Johnson ob-

[8] See ante, p. 526.

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jected that the watchman might be near, and hear his cries. So Johnson went into the street to see if any one was about, and when he came back, he found that Jerry had killed Murray. The two then carried the corpse to the cellar, and in the morning Jerry decamped with part of the money. The next night Johnson carried the body into the street, where it was found. The prisoner held to this story to the end, repeating it to the clergyman at the foot of the gallows, though he acknowledged he was guilty, but not of the actual murder. Asked by the clergyman why he had confessed to the Magistrate that he had killed Murray,[9] he replied, "To save my wife and children from being put to death. They were there in Bridewell, and a police officer told me that they would all be hanged, as well as myself, if I did not take the murder on myself. So to save them, I confessed more than was really true, but I have been accessory to, and deserve to die for it."

The sentence of the law was executed upon Johnson on Friday, April 2. Curiosity to see the execution brought an immense concourse of people together from the several parts of the city of New York, and the adjacent counties. The military, in considerable strength were ordered out. Johnson, who throughout had been in good health and sound memory rose early and ate a hearty breakfast, and several clergymen attended to pray and converse with him. The sheriff, Mr. Wendover, and the under-sheriff, Mr. Loudes, who were unremitting in their humane attentions to this unfortunate man, had his irons taken off, and the usual dress consisting of a white cap, shirt, and pantaloons trimmed with black put on him—a ceremony which seemed to move him more than any other preceding event; and he was conducted to a platform in the rear of the Bridwell gaol and seated on a chair. Rev. Mr. Stanford then made an address or sermon in which he recapitulated the heinousness of the crime for which Johnson was about to suffer, and the two prominent causes which led to the fatal act, namely intem-

[9] See ante, p. 524.

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perance and covetousness, and he concluded with a prayer[10] to the prisoner and others. This for a moment seemed to effect Johnson, but he was soon calm and collected. He was then seated in a wagon with two or three clergymen, and the procession moved up Broadway to the place of execution, on Second Avenue. Here prayers were said for about half an hour, when Johnson ascended the platform with a firm step. He conversed a few minutes with the sheriff and under-sheriff about the adjustment of the rope, when the cap was drawn over his face, the drop fell, and he ceased to exist without a struggle. By order of the Court, the body of Johnson was handed over to the surgeon for dissection.

[10] He said: Fellow citizens, this morning we are assembled to witness the execution of the sentence of the law of God and of our country, upon an unfortunate creature, for the horrid crime of murder. Though painful to assert, it is a fact which can not be denied, that our city, as its population increases, too much abounds in vice and immorality. Murder is the greatest criminal offense, which can possibly be committed, whether against God or man. It is assuming the rights of the Majesty of Heaven by violently taking away the life of a fellow creature, which none but God can give, and which the murderer can not possibly restore; and while it deprives the public of a useful citizen, the criminal act of the murderer hurries the soul of the victim into eternity, prepared or not, to stand before the judgment seat of his God, there to receive its final doom, whether in Heaven or in Hell. So awful and so malignant is the atrocious crime of murder—unless the act of murder be committed from a principle of premeditated revenge, it usually proceeds through the two great avenues of intoxication or of covetousness. By the fiery draught, the mind loses its restraining tone,—reason is prostrated, and the man becomes capable of committing that offense which may produce his own misery. The unfortunate person, now a spectacle before you, confessed to me, "If I had not been drunk, I should not have killed the man." Take warning, therefore, my fellow citizens and beware of the sin of intemperance, which has become a growing evil, is a source of crime, and too frequently destroys the happiness of families. This poor miserable criminal, discovering the bags of money in the chest of James Murray, coveted the money for his own use, and committed the murder to conceal his own theft. "Take heed, therefore, and beware of covetousness, and be content with such things as you have," lest, by overreaching yourselves before you are aware, you fall down the precipice of destruction. It is most devoutly to be wished that Providence may overrule the present awful exhibition of justice, by making it an effectual warning to every class of citizens, and so produce the most desirable moral reformation.

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My poor fellow sinner, what can I say to you? Solemn and dreadful is your prospect of an immediate death. Whatever may be the public opinion concerning your case, I most earnestly entreat you to penetrate the secrets of your own breast, and make such a confession as your God may read at his final judgment. Look to that blessed Saviour, who alone can pardon your crimes, through the shedding of his own blood upon the cross, and grant you peace with your offended God. Whether you already enjoy a sense of such mercies, or not, may the compassionate Redeemer meet with you on your way to death; and in your last moments enable you to commit your departing soul into his hands for a blessed immortality. That the God of grace may prepare this distressed man for his last conflict in death, and sanctify this event for the moral benefit of our community, let us offer our prayer at the Throne of His Mercy.

LETTER TO JOHNSON FROM HIS WIFE A FEW DAYS BEFORE HIS EXECUTION.

I have written you one or more letters, but have not received any from you. If you can, I wish you to write to me, or to get some person to write for you, for I want to receive a letter from you before you die. The children are well, and so is the cattle; we have dragged the stones from the field near Mr. T. We have sowed the field with clover and timothy, and we have made the fence ourselves; I have bought the plow as I wrote you for seven dollars; the barn will be up on Monday next,—My dear husband, I love you as well as I ever did; I want to see you before you die, but it is so far that I do not feel able to come. I pray night and morning, and every day that God will have mercy on your poor soul. Farewell, Amen, Amen. (Then the daughter writes in her own name.) Mother is almost sick with crying; Mr. A. B. C. talked of going down to see you; I hope you won't let them see you; they say up here you are going to make a speech; you don't know what folks says about you when they come here; I hope you will not make any dying speeches, to be printed in books when you are died, for there is enough now printed in the papers to take half the day to read; I hope you will keep a closed mouth. You have said too much. J. P., and D. the children, all send their love to you, and pray for you night and morning. This letter was signed by the daughter; the letter continued in the same handwriting as from the mother, which goes on to request him to pray to God and to die innocent, as I believe you are, and to keep your lips shut.

JOHNSON'S FAREWELL LETTER TO HIS FAMILY, BRIDWELL PRISON, SATURDAY, MARCH 28, 1824.

Once more before I leave this earthly prison, I write to you; perhaps you will not get this while I am in this world. But my dear, I thank God that I am quite easy and resigned to death, for I have the greatest hope in the pardon and forgiveness of God,

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trusting in the mercies of Jesus Christ our Saviour, who is able to forgive all our sins. My dear, I have done all in my power, with prayers and tears of repentance, and I am in a state of mind that I hope I will make a happy change. The Clergy attend me regularly every day. I am preparing to take my sacrament on Wednesday; you know what a solemn thing it is. Mr. Onderdonk attends me, so I hope with God's help all will be for my good, but still I am troubled for you and the children. But if you will commit all of your affairs to God, pray for his mercies and blessings, you will find that all will work together for good for you. Don't despair; God says he will help the widows, and the fatherless. Mr. Onderdonk has wrote to Mr. Brown for you, and the Rev. Mr. Ogleby has wrote to the Rev. Mr. Johnson, in Newburg, for to see to you and the children. Go and see them; they will help you to bear your trouble. My dear, for God's sake pray for patience, don't grieve for me, for I am so well supported by the grace of God, that I hope I will died a happy death. Trusting myself to Jesus, who died for us all; my dear, don't let the reports of the newspaper trouble you; they say everything about us all; but God knows all things; leave all to God. My dear, I got your letter; I am content that you are at home with my dear children. God bless you all. My dear, when you are able to go, Mr. Thorp will give you my bed clothes and books, and you must see Mr. Onderdonk, and the Rev. Mr. Feltus, in the Bowery, wants you to call upon him, he wants to see you; and Mr. Ogleby, the minister who attends me, wrote to Mr. Johnson about you; he wants to see you at his house, No. 511 Greenwich street. He says it will help you and the children. So my dear, you will find that God will turn up friends for you, therefore, be content; trust to God, and all will be for your good. My dear, since I got my sentence of death, I am greatly changed, I now plainly see that I did not lead a Godly life. You may thank God that you have your health, and I hope in God that my children will live in fear of God, and be a comfort to their mother. I know that I have ruined you, my dear wife and children, but I hope you will forgive me, and I hope God will forgive me. My dear, you have a hard world to come through; but you won't starve with hunger; a little will do you. A short time will end your cares and troubles of this world. May the Lord take you and his little flock under his care, until such time as we shall meet in a better world. My dear, I can't write no more; my hand begins to tremble; we must part for a time. To God I give my charge, my dear wife and children. Oh, oh, my prayers; may God take all and bless all, until we meet again in Heaven. Farewell.

On Friday next
Then I must bid you all adieu,
That is the weeping day;
That God may heal your broken hearts,
And wipe your tears away.
To Heaven I hope my soul will go,
God will I go to see.

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And all my children here below,
Will soon come after me;
My dear, I bid you all adieu,
I leave you in God's care;
For in this world I'll ne'er see you,
In Heaven I'll meet you there.

Call on Mr. Carter, 136 Mulberry street. He attends me every day. He is a good friend of mine, he will do something for your help with your family. He is with me to my dying moment, one of my divines.

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THE ACTION OF GEORGE SPENCE AND WIFE AGAINST BARNEY DUFFEY, FOR FALSE IMPRISONMENT, NEW YORK CITY, 1816

THE NARRATIVE

A woman went shopping in the city of New York nearly a hundred years ago, and, just as she would to-day, she wanted the clerk to come down in the price of the piece of cloth she desired. The clerk cut it off, and then she would not take it, whereupon the proprietor was summoned and refused to let the woman leave the store until she paid for the goods. The husband sued the proprietor for damages and the jury gave him a verdict, the Court holding that the storekeeper's conduct was entirely unjustifiable.

THE TRIAL[1]

In the Mayor's Court of New York City, February, 1816.

HON. RICHARD RIKER, *Recorder.*[2]

February 9.

The action to recover damages for an assault and battery upon and the false imprisonment of Eleanor Spence, wife of George Spence, came on for trial to-day.

Mr. Price, for the Plaintiff; *Mr. Sampson,*[3] for the Defendant.

The plaintiffs' witnesses testified that Mrs. Spence went into the store of the defendant in New York City, and inquired the price of several pieces of cloth, and that one piece was shown for which the defendant asked $6.75 a yard. She offered $6.00, which was refused; but at length, before any bargain was made and before he was requested to do so, the clerk cut off the quantity he had understood she wanted. The lady then stated that she had not

[1] New York City Hall Recorder, see 1 Am. State Tr. 61.
[2] Am. St. Tr. 361.
[3] See 1 Am. St. Tr. 63.

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requested him to cut it, refused to take it, and was proceeding out of the store, when the defendant followed her into the street, required her to return, and actually brought her into the store by the arm. On leaving the store, she was afterwards brought in twice by the defendant, in the same manner. It appeared that at length she unwillingly paid for the cloth and departed.

The defendants' witnesses testified, in substance, that they saw no violence offered to the lady, but that on her leaving the store, after she had purchased the goods and refused to take them away, by reason that the color did not suit her, the defendant followed her into the street and took her gently by the arm, and in a mild manner requested her to take the goods, which she at length did voluntarily.

Mr. Sampson (to the Jury). It has of late become so fashionable for women to assume the character of suitors in this court, that I am fearful your attention will soon be exclusively confined to the litigations of the sex. I know in what a melting mood a woman's cause is apt to find the jury; that an appeal will be made to your gallantry, and that you will be conjured, in compassion to the tenderness of the sex, to pronounce a heavy verdict against my client; but all of you know the way in which shoppers like the plaintiff tax and fret the time and patience of industrious dealers like my client. The evidence is very contradictory and I have no doubt Mrs. Spence actually purchased the article in question, previous to any difference on the subject. I therefore ask you to find a verdict for the defendant, and thus teach the plaintiff, that instead of acting as an angry suitor, in a court of justice, she would be more profitably employed in mending stockings and making puddings for her family.

Mr. Price. The slightest touching of the person of another in a rude or angry manner is an assault and battery, and proof of such an act, or the shortest possible detention of the plaintiff, will support the present action. I do not mean to inquire whether Mrs. Spence had purchased the cloth in question. Indeed, but as affecting the amount of damages, I am willing to admit that she went a shopping for amusement, nay, that she entered the store to trouble or perplex the defendant. Although such conduct might have

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legally excused him for turning a woman out of his house, it would never justify her detention for a single instant. Under the circumstances of this case, the way in which he took hold of her arm, gentle as his nature may be, was rude, unmanly and unlawful. If she had failed to perform the contract for the cloth, his resort would have been to a court of law, and not that superior force which was given to him for any other than the coward purpose of harming a defenseless woman. The actual injury to the plaintiff is, indeed, not great. The verdict ought to be sufficient to convince the defendant, that in driving his trade hereafter, he must endeavor to make his own interest harmonize with the rights and feelings of others.

The RECORDER charged the jury, that the least restraint or detention of the person was sufficient to support this action; that if the jury believed that in this case there was such restraint or detention of Mrs. Spence for the shortest possible time, it would be their duty to find a verdict in favor of the plaintiff, and that the question of damages belonged exclusively to the jury.

The *Jury* found a verdict in favor of the plaintiff for $40.

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THE TRIAL OF THOMAS O. SELFRIDGE FOR THE KILLING OF CHARLES AUSTIN, BOSTON, 1806.

THE NARRATIVE

The shooting of young Charles Austin by Thomas O. Selfridge on the public street in the city of Boston, at the beginning of the nineteenth century caused such excitement and passion among its citizens as few homicides have since done either in this country or in Europe. The men belonged to different political parties; the killing was the result of political temper and the victim was an innocent one, for it was the alleged sins of the father which in this case were visited upon the son.

A few months before the fatal day, there had been a dinner given by the Democratic Party of Boston on the fourth of July. Mr. Benjamin Austin was the Chairman of the Committee which had it in charge and was responsible for the bill. But when it was presented the Committee thought that it was too high, and refused to pay it. The caterer brought suit but it was finally compromised and paid. During the negotiations, the caterer had consulted Mr. Selfridge about bringing the suit and had asked him to take it on a contingent fee which the lawyer refused to do. The fee being agreed upon, the suit was brought by Mr. Selfridge.[1]

Shortly after the settlement Mr. Selfridge learned from several persons that Mr. Benjamin Austin had circulated a story to the effect that the Federal lawyer (i. e., the lawyer of the opposite political party) who had filed the suit against the Democratic Committee had gone to the caterer in person and had instigated him to bring the suit and he considered it a most unprofessional and disgraceful act. Mr. Selfridge became very angry when he heard this and an interview with

[1] Daniel Scott, p. 612; Eben Eager, p. 615.

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Mr. Austin did not improve matters, and sending for his friend, Mr. Thomas Welsh, he gave him a letter addressed to Mr. Austin stating that he had evidence that he had told various parties in the city that he had sought out the caterer and solicited him to institute a suit against the Committee for the bill for the fourth of July dinner; that this was a charge highly derogatory to him as a lawyer; that the charge was absolutely false, and that he demanded a retraction. Mr. Welsh delivered the letter the same day. When he had read it, Mr. Austin replied that he had nothing to say beyond what he had already stated to Mr. Selfridge himself: viz., that he had heard the report from another person; that what he had said was, that Mr. Eager (the caterer) had not asked any lawyer to sue the Committee, but a lawyer had solicited him to do so, which he considered disgraceful and unprofessional; that he had never once mentioned Mr. Selfridge's name. He added that he would call on the person from whom he had heard the story and see if he would consent to have his name revealed. Next morning Mr. Austin and Mr. Welsh met on the street and Mr. Austin informed him that he had been investigating the report and had found that the charge was untrue and that he had been around contradicting it to the persons he had told it to. He said that when he told the rumor he did not know what attorney was meant and that he had never suggested to anyone that Mr. Selfridge was the man. He said that he thought that ought to satisfy Mr. Selfridge. But the latter when his friend Welsh carried back this excuse was not content; he insisted on a formal written retraction which could be published in the newspapers. Mr. Austin would not consent to this, and so on July 30th Mr. Selfridge sent a second letter to Mr. Austin in these words:

Sir: The declarations you have made to Mr. Welsh, are jesuitically false and your concessions wholly unsatisfactory. You acknowledge to have spread a base falsehood against my professional reputation. Two alternatives therefore present themselves to you—either give me the author's name or assume it yourself. You call the author a gentleman and probably a friend. He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen

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your friend, you must acknowledge it under your own hand and give me the means of vindicating myself against the effect of your aspersion. A man who has been guilty of so gross a violation of truth and honor as to fabricate the story you have propagated, I will not trust; he must give me some better pledge than his word for present indemnity and future security. The positions I have taken are too obivously just to admit of any illustration and there is no ingenious mind would revolt from a compliance with my requisitions.

On receiving this letter Mr. Austin told Mr. Welsh that he thought Mr. Selfridge was taking very high ground, as he had done all that he thought he should be called upon to do in the matter. Mr. Welsh answered that Mr. Selfridge was in possession of evidence that he (Austin) had used his name in connection with the charge. "And as to your denial," said Mr. Welsh, "we think that you have not made the contradiction to all the persons to whom you told the story, and even a verbal denial to all of them would not reach the numerous persons to whom they may have repeated it. This is why Mr. Selfridge insists on a letter which may be published in such a way that it will reach the whole community." Mr. Austin again refused to do this, and Mr. Welsh returned with the refusal to his principal; there was a long conference between them, in which Mr. Selfridge told his friend that as a proper retraction from Mr. Austin was now an impossibility and further negotiations were useless, his means of redress were reduced to three: prosecution, chastisement or posting. A prosecution was out of the question, for a legal remedy even were it certain would take two or three years; few persons would read the result, which would be delivered long after public interest in the suit had ceased; and the damage which he had sustained would be difficult of proof, for it would be impossible to prove who or how many had abstained from employing him professionally in consequence of the slander, and while the process was pending his business would dwindle away. On account of his age and infirmity, a personal contest was out of the question; to ask his friends to take the matter up in this way for him would be the act of a coward;

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that this mode of redress savored too much of malice and revenge to be compatible with an honorable desire to procure reparation for an injury and would have no effect in disproving the charge with those persons who believed in law and order and whose opinion he wished to retain. Therefore posting was the only remaining alternative. Accordingly in the *Boston Gazette,* on the morning of August 4th, the following card appeared:

"Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases, I hereby publish said Austin as a coward, a liar and a scoundrel, and if said Austin has the effrontery to deny any part of the charge he shall be silenced by the most irrefrangable proofs.

Thomas O. Selfridge.

"p. s.—The various editors in the United States are requested to insert the above notice in their journals and their bills shall be paid to their respective agents in the town."

Mr. Austin read the card in the morning and his reply appeared in the *Independent Chronicle* the same day:

"Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day: if any gentleman is desirous to know the facts on which his impertinence is founded any information will be given by me on the subject.

"Those who publish Selfridge's statement are requested to insert the above and they shall be paid on presenting their bills."

Matters had come to a crisis! The very day of the publication Austin told a friend he should not himself meddle with Selfridge, but some person on a footing with him would take him in hand. About noon Selfridge told a person who had called at his office that he anticipated an attack on himself by Mr. Austin or some of his friends; that he was not a man to engage in fisticuffs but that he was prepared to protect and defend himself, and an indiscreet friend of Mr. Selfridge had previously reported to him that Mr. Austin was going to get some bully to chastise him on 'Change where he usually went at midday.

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Mr. Selfridge during the correspondence had made some preparations for defense if attacked. He had purchased an additional pistol and provided himself with powder and shot.[2] Mr. Austin does not seem to have done anything of the kind but his son, Charles, a youth of eighteen, and a student in college, had said to more than one person that he intended to resent the insults to his father and it appears that the day before the killing he had purchased a heavy walking stick which he proceeded to carry in place of a little one which he generally used.[3] Charles was a delicate youth, had never taken part in athletics and was not a person likely to come out first in a personal encounter.[4]

Shortly after one o'clock on the same day, August fourth, Mr. Selfridge left his office and walked down the street towards the Exchange with his hands behind him in his pockets. He suddenly met young Austin, and at once Selfridge drew a pistol and fired at Austin while at the same time Austin struck Selfridge a heavy blow over the head with his walking stick. He continued to strike him several more blows, and then fell to the ground, was taken into a neighboring shop where his wound was examined and found to be fatal and he soon expired.

On December twenty-third, Selfridge was put on trial for the manslaughter of young Austin, the Grand Jury having refused to return a true bill for the higher crime of murder. The Commonwealth contended that Selfridge's act in publishing the card of August fourth and his declaration that he was ready to defend himself were with the object of drawing old Mr. Austin, his son and his friends into a combat in which he would have an opportunity of killing one of them; that he was never in any fear of assault or attack by anyone; that he went into the encounter with Charles Austin as the result of a quarrel of his own seeking and thereupon being himself the aggressor, he lost the right to take life in self

[2] Master Glover, p. 604.
[3] William Schaffer, p. 589.
[4] William Fales, p. 588.

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defense. The defense on the other hand maintained that Mr. Selfridge went on the street on the fourth of August about his lawful business and with no design of engaging in an affray; that he was in the habit of carrying a pistol and that it was very uncertain whether he took the weapon to defend himself against the attack that day, but even if he did, he had this right; that young Austin's attack on him with the stick was so sudden that he, a feeble old man, could neither defend himself with his hands nor retreat with safety and that the blows which young Austin would have given him, had he not fired, would inevitably have killed him and that the previous quarrel with Mr. Austin senior was the result of the latter's evil conduct which had injured him greatly.

The trial lasted several days, the evidence was most full, the speeches of counsel on both sides, able and learned, and the Jury returned a verdict of Not Guilty after a short consultation.

The case, and the charge of Mr. Justice Parker, remained for three-quarters of a century and is perhaps even at this day the leading American authority on the Law of Self-Defense.

THE TRIAL.[4a]

In the Supreme Court of Massachusetts, Boston, August, 1806.

HON. ISAAC PARKER,[5] *Judge.*

[4a] *Bibliography*—"Trial of Thomas O. Selfridge, attorney at law, before the Hon. Isaac Parker, Esquire, for killing Charles Austin, on the Public Exchange, in Boston, August fourth, 1806. Taken in short hand by T. Lloyd, Esq., reporter of the debates of Congress, and Geo. Gaines, Esq., late reporter to the State of New York, and sanctioned by the Court, and reporter to the State. Copyright secured. Boston. Published by Russell and Cutler, Belcher and Armstrong, and Oliver and Munroe. Sold by them, by Wm. Blagrove, No. 5 School street, and by the principal booksellers throughout the Union."

The preface says: "The publishers have spared no labour or expense to obtain an authentic and accurate report of this trial. The

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December 23.

On May twenty-fifth a grand jury had been empaneled and the case had been submitted to them by Chief Justice Parsons[5a] and on December second they had returned a true bill against Thomas Oliver Selfridge of Boston for killing, by shooting him with a gun, Charles Austin of the same place[6] on the day named.

evidence, being originally taken by two eminent stenographers, has been compared by Mr. Tyng, Reporter of the Decisions of the Supreme Judicial Court, with the notes of the testimony taken by him, and with the minutes of the Hon. Judge, who sat in the trial. The several addresses have been submitted to, and corrected by the respective speakers."

* "Correct Statement of the Whole Preliminary Controversy between Tho. O. Selfridge and Benj. Austin. Also a Brief Account of the Catastrophe in State Street, Boston, on the 4th of August, 1806. With some remarks by Tho. O. Selfridge. 'He takes my life, when he doth take the means whereby I live.'—Shakespeare. Charlestown: Printed by Samuel Etheridge. For the Author. 1807."

[5] See 1 Am. St. Tr. 108.

[5a] PARSONS, Theophilus. (1750-1813.) Born Byfield, Mass. Graduated Harvard 1769. Was appointed Chief Justice of Massachusetts in 1806 and held the office until his death.

[6] At the Supreme Judicial Court begun and holden at Boston within the County of Suffolk, and for the Counties of Suffolk and Nantucket, on the fourth Tuesday of November, in the year of our Lord one thousand eight hundred and six.

The jurors for the Commonwealth of Massachusetts upon their oath present, that Thomas Oliver Selfridge, of Boston, in the county of Suffolk, gentleman, otherwise called Thomas Oliver Selfridge of Medford, in the county of Middlesex, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fourth day of August, in the present year, with force and arms, at Boston aforesaid, in the county of Suffolk aforesaid, in and upon one Charles Austin, in the peace of God and the said Commonwealth, then and there being, feloniously, wilfully, and of the fury of his mind, did make an assault; and that he the said Thomas Oliver Selfridge, a certain pistol of the value of five dollars, then and there loaded and charged with gun powder and one leaden bullet; which pistol he the said Thomas Oliver Selfridge, in his right hand, then and there held, to, against and upon the said Charles Austin, then and there, feloniously, wilfully, and of the fury of his mind, did shoot and discharge; and that he the said Thomas Oliver Selfridge, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder, shot and sent

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The following jurors were selected after the JUDGE had asked each one two questions, viz.: Have you heard anything of this case, so as to have made up your mind? Do you feel any bias or prejudice for or against the prisoner at the bar? Paul Revere, Thomas Fracker, Isaac Parker, Micajah Clark, Ward Jackson, Francis Tufts, Lemuel Turner, Elisha Learned, Ebenezer Goffe, John Fox, John West and Dester Dana.

James Sullivan,[7] Attorney General, and *Daniel Davis,*[7a] Solicitor General, for the Commonwealth.

Christopher Gore[8] and *Samuel Dexter*[9] for the Defendant.

The Clerk. Gentlemen of the Jury hearken to the Indictment found against Thomas Oliver Selfridge. To the indictment the defendant has pleaded Not Guilty and has put himself upon the country, which country you are and you are now sworn to try the case.

forth as aforesaid, the aforesaid Charles Austin, in and upon the left breast of him the said Charles Austin, a little below the left pap of him the said Charles Austin, then and there, with the leaden bullet aforesaid, out of the pistol aforesaid, by him the said Thomas Oliver Selfridge, so as aforesaid, shot, discharged and sent forth, feloniously, wilfully, and of the fury of his mind, did strike, penetrate and wound, giving to him the said Charles Austin, then and there, with the leaden bullet aforesaid, shot, discharged and sent forth out of the pistol aforesaid, by him the said Thomas Oliver Selfridge, in manner aforesaid, in and upon the left breast of him the said Charles Austin, a little below the left pap of him the said Charles Austin, one mortal wound, of the depth of six inches, and of the breadth of one inch, of which mortal wound aforesaid the said Charles Austin then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that he the said Thomas Oliver Selfridge, the said Charles Austin, etc., etc.

[7] SULLIVAN, James. (1744-1808.) Born Berwick, Me. A revolutionary leader and member 1775 of the Massachusetts Provincial Congress. Judge Superior Court. Attorney General 1790-1807. Governor of Massachusetts 1807.

[7a] DAVIS, Daniel. Born 1762 in Barnstable, Mass. Solicitor General of Massachusetts 1800-1832. Author of "Criminal Practice," and "Precedents of Indictments."

[8] GORE, Christopher. (1758-1827.) Born Boston, Mass. U. S. District Attorney (Mass.) 1789. Governor of Massachusetts 1809. U. S. Senator 1813-1816.

[9] DEXTER, Samuel. (1761-1816.) Born Boston, Mass. Represen-

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Solicitor General Davis. Gentlemen of the Jury. I cannot discharge my duty to explain to you the crime with which the defendant is charged without recurring to the authorities which treat on the subject of Homicide. It is impossible to understand the crime of manslaughter with which crime the defendant is charged, without attending to the subject of homicide at large, and without a previous acquaintance with the crime of murder. Writers have so blended the different degrees of guilt attaching to these crimes and the shades are in many instances so faintly delineated that it is difficult to understand the distinction. I shall, therefore, before I state the facts and call the witnesses, ask your attention to several authorities on the law with a view to define the crime, and which you ought in the beginning of the cause to understand.

In 4 Blackstone's Com.[10] that learned author says:

"Of crimes injurious to the persons of private subjects, the most principal and important is the offense of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himself, or another, but in some manner, either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation."

The author then proceeds to state what would be justifiable homicide; but the crime with which the defendant is charged is not of that nature, and of this I shall say nothing; because, nothing can occur in the present trial, which can render the homicide of that nature.

In pages 180 and 181, he proceeds, in the next place, to consider such homicide as takes place to prevent a crime.

"The Roman law," he says, "also justifies homicide, when committed in defense of the chastity either of one's self or relations; and so also, according to Selden, stood the law in the Jewish republic. The English law justifies a woman, killing one who attempts to ravish her: and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not

tative in Congress 1793-1795. Senator 1799. Secretary of War 1800. Secretary of Treasury 1801.

[10] P. 177.

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the other. And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds, 'that all manner of force, without right, upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint.' However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death."

In page 183, the author considers that species which consists in self-defense.

"Homicide in self-defense or *se defendendo,* upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defense must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defense, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word chance-medley, or rather (as some choose to write it) *chaud-medley;* the former of which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion; both of them are pretty much of the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. viii, c. 5, and our ancient books that it is properly applied to such killing, as happens in self-defense upon a sudden rencounter. This right of natural defense does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defense, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law.—Wherefore, to excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant."

In page 188, the learned writer describes the nature of felonious homicide:

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"Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done, either by killing one's self, or another man."

I will thank you, gentlemen of the jury, to attend to the distinction between that offense, and the one for which the defendant stands indicted, and which I am about to state from the same elegant author.

In page 191, he says:

"Manslaughter is therefore thus defined, the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act."

"As to the first, or voluntary branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion: and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo,* since there is no absolute necessity for doing it to preserve himself; yet neither it is murder, for there is no previous malice; but it is manslaughter."

There is only one other definition, which I will trouble you, Gentlemen, to attend to in the history of this trial; it is the definition of the crime of murder, as given in the 195th page of the same book, in the words of Sir Edward Coke.

"Murder is therefore now thus defined, or rather described, by Sir Edward Coke: 'When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied,'"

it is murder. He then goes on to give different descriptions of the several branches of murder, which it is not necessary in this state of the trial to trouble you with.

I thought it my duty, Gentlemen, to read to you such passages in the book I have resorted to on this occasion, as contained the description of all the different branches of homicide, from wilful murder down to justifiable self defense.

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I will now state my reasons for so doing. So far as I am acquainted with the facts of this case, it will turn out, from the testimony of the witnesses on the part of the Government, that this event happened in such a manner, that it may become a question whether the fact charged by this indictment was murder, or manslaughter.

I do not mean to insinuate that it is possible to convict the defendant on this indictment of a higher species of homicide than manslaughter; but you will find by recurrence to other books, and on investigation of the facts, that though he be indicted for manslaughter, if from those facts he might have been found guilty of murder, he must be found guilty of manslaughter.

I mention this, because, it is possible, that distinctions of this kind may be set up; that, either the facts amount to murder, or to justifiable self defense, in either of which cases, you must acquit. I say it is possible, because it is out of my power exactly to anticipate on what ground the defendant's counsel will place their defense. But I may suppose, that they will rest it on that. It is therefore necessary that you should have a just idea of this, and I have laid all these things before you that will show you, that you cannot convict of murder on an indictment for manslaughter; for though you find that the facts approach the degree of murder, you must from every principle of public justice say, that the defendant is guilty of manslaughter only.

I will now state to you generally, the facts which will appear in evidence to you on the part of the Government, and before I proceed particularly to state those facts, I will mention that it is necessary that the Government prove these two things; first, that Charles Austin, the person named in the indictment, is dead; secondly, that he came to his death by the instrumentality of the defendant at the bar, and under the circumstances alleged in the indictment; which two facts will amount to the crime of manslaughter. These then are the facts which the Government must prove before it can be entitled to your verdict; and you are to judge from the evi-

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dence that will be laid before you, whether these two points are or are not substantiated on the part of the Commonwealth.

I expect that it will appear, that on the day mentioned in the indictment, between the hours of one and two o'clock in the afternoon, Selfridge was in his office employed about his ordinary business; that a few minutes before he proceeded from thence into State street, he had a conversation, in which he mentioned that he anticipated some attack in the course of the day, (probably about 'Change hours) and that he then stated a conversation which took place between Mr. Benjamin Austin and Mr. Welch, in which Mr. Austin had threatened to have him chastised; that Mr. Selfridge declared to the person with whom he had conversation, that he was not a man to engage at fisticuffs, though he was prepared to protect and defend himself; to this, will be added other circumstances which tend to show, that Mr. Selfridge went out of his office with the pistol, which was the instrument of the death of the deceased, and which was deliberately loaded for that purpose. About twenty minutes after Mr. Selfridge went out of his office, down into State street, and the deceased was then on 'Change, standing near the door of Mr. Townsend's shop; that Mr. Selfridge walked down State street with his hands in his pockets or behind him, with, probably, an intent to conceal the instrument he had in his pocket, and with which he gave the deceased his death wound; that in passing down in this manner, Austin leaving the place at which he stood, approached him with a stick in his hand; that they met together a few paces from the door of the shop, and that there a combat ensued. It will appear that the deceased came with a stick in his hand, in a manner to make an assault; but from the evidence we shall introduce, it will be impossible, I think, to decide, whether the pistol was discharged, and the death wound given before, or after Austin gave Selfridge a blow.

It is not necessary now so very minutely to state the circumstances of this affecting tragedy; I shall rely on the information of the witnesses for these facts, but it will ap-

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pear from the whole, that this tragedy was performed in the course of twenty seconds at the farthest; the parties met, the pistol and first blow given were discharged, probably, at the same instant. Austin then fell to the ground, and soon expired; he was carried into the shop of Mr. Townsend, where his wound was examined, found mortal, and of which he died.

When the people collected, Mr. Selfridge appeared perfectly in possession of his mind; declared himself in a state of recollection, and said, he knew what he had done, and was ready to answer for it at the bar of his country. These were the defendant's declarations; and whether just or not, will come under your consideration.

I mention this to show that he was in the possession of his mind.

These are the outlines of this case; these facts, I am confident, from what I know of the former testimony of the witnesses, they will again declare, and, perhaps, something further in favor of the Government. If so, it will be impossible the defendant should escape the punishment the law affixes to the crime. Taking it for granted that I shall prove the facts, it may be convenient at this time to ask your attention to those rules of law applicable to a case of this kind. When I have so done, their applicability will easily be perceived and the cause will be fully opened on the part of the Government.

I do not know that the book I have in my hands, has ever been read as an authority. It is 1 East's Pleas of the Crown, which contains the best treatise on the subject of homicide that has been printed; and though it has been but recently published, I presume I may read the authorities adduced by him, in support of what he lays down, as they are the original authorities on the subject.

I will begin, by reading some part of the 19th sec. chap. 5, page 232. If any question is made as to the correctness of the principles, I have Hale, Hawkins, and the other authorities cited, which can be referred to.

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The part I cite, is that which treats of homicide from transport of passion, or heat of blood.

"Herein is to be considered under what circumstances it may be presumed that the act done, though intentional of death, or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone. Upon this head it is principally to be observed, that whenever death ensues from sudden transport of passion, or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder. For let it be again observed, that in no instance can the party killing, alleviate his case, by referring to a previous provocation, if it appear by any means that he acted upon express malice."

I shall now read part of the twenty-first section of the same chapter:

"It must not however be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter. This I know has been supposed by some, but there is no authority for it in the law. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offense, it is rather to be considered as the effect of a brutal and a diabolical malignity, than of human frailty; it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation. Barbarity, says Lord Holt, in Keate's case, will often make malice."

I will now read another rule from the twenty-third section, page 239:

"In no case, however, will the plea of provocation avail the party, if it were sought for and induced by his own act, in order to afford him a pretense for wreaking his malice. As, where A and B, having fallen out, A says he will not strike, but will give B a pot of ale to touch him; on which B strikes A and A kills him: this is murder. And in all cases of provocation, in order to extenuate the offense, it must appear that the party killing, acted upon such provocation, and not upon an old grudge; for then it would amount to murder."

Mr. Gore. The gentleman has stated and laid down principles which I shall oppose; and I may as well take the opinion of the Court now as at any time hereafter. The

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gentleman has said that on this indictment he shall offer evidence to show, that there was that sort of malice which is described in the crime of murder. He has stated that by entering into the conversation and antecedent circumstances, he will be able to prove there was a previous malice, and that those circumstances, and malice amount to the crime of murder; now the indictment being for manslaughter negatives all idea of malice; he therefore can give no testimony on the ground of malice, as it does not comport with crimes stated in the indictment. It is confounding all rules of law, if under this indictment for manslaughter, he should attempt to set up a proof of malice; to this point I quote Hawkins.[11]

"Homicide against the life of another amounting to felony is either with or without malice. That which is without malice is manslaughter, or chance medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all, and from hence it follows, that there can be no accessaries to this offense before the fact, because it must be done without premeditation."

Here is an exact definition of the crime of manslaughter, corroborated by other definitions in the Books cited in the margin, which perfectly excludes all idea of malice. Therefore they cannot, under this indictment, attempt, according to any rule of law (that I know of,) to prove malice in my client, for it would make a distinct crime, different from that with which the defendant is charged.

Solicitor General Davis. I had no inducement to make this statement to the Jury, or to intimate the nature of evidence I should offer, but that of doing what I apprehend to be my duty. I stated that it was impossible for me to anticipate on what grounds the defense would be placed; but if it should turn out that it should be, that the defendant is not guilty of the crime of manslaughter, according to the technical definition of that crime, because the evidence may show that it was either murder, or may tend to prove justifiable self defense; that on the first case, it was clearly law, that if, on

[11] Book 1, chap. 30.

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an indictment for manslaughter, the evidence should show the crime was murder with malice, the jury would be justifiable in convicting him at least of manslaughter. The reason upon which I bottom this opinion is, that they being judges of the facts and of the law as it applies to those facts, they are competent to the decision, and they will find themselves warranted in so doing by the opinion Judge Holt delivered in Mawgridge's case, reported by Kelyng, on page 125. The principle I lay down, was then recognized, and on the authority of that case, I ground myself on the present occasion. Holt then, after speaking of homicide or manslaughter says,

"The killing of a man by assault of malice prepense hath been allowed to be murder, and to comprehend the other two instances."

PARKER, J. I see no reason to doubt that principle. If the evidence proves the defendant guilty of a higher crime than that with which he stands indicted: for example, if they prove him guilty of murder, it is competent to the jury, to find him guilty of manslaughter, for which he is indicted.

Mr. Dexter. I wish to know what is precisely the question, and to what point it is necessary to turn our attention. If it be true, that the whole question before the Court and jury, is whether the same evidence can be given on a trial for manslaughter as on an indictment for murder, and it be decided that it can, it appears to follow that the cause is to be tried on principles on which there can be no legal decision; if we are to try on the present occasion for murder, the jury cannot convict nor acquit. It seems to me clear law that no case can be decided, but that which is in issue.

The indictment is for manslaughter; the definition of this crime is that it must be committed on a sudden, without malice. If malice aforethought be proved, then no part of the definition is substantiated. We cannot have come here to defend what we are not charged with. We have no objection to go into every fact anterior, but we ought to have an opportunity to know of this, and of what was intended by the prosecution,

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and further we ought to have known of it legally, that is by the indictment. The defendant is not prepared to meet suggestions of malice. We are not willing to exclude any facts, but the truth is, that not expecting a charge of this kind, the defendant is not completely prepared; we do not wish to escape from the offense, if it be one; but it ought to have been described with technical precision. We insist that it has not. The authorities exclude malice and premeditation, and we cannot be prepared to meet them, nor is it competent for the Government to show them, nor is it incumbent on us to prove that they were not in existence.

PARKER, J. There is no definite motion before the Court; the observations now made, arise from what the Solicitor General expected to be able to prove. I understand, that he expected to show a previous preparation, and that what was done by the defendant was not to protect himself from attack. Whether the offense was manslaughter or excusable homicide, depends perhaps on the instrument that was employed, the opportunity to conceal it, whether he carried it before him, or whether he took up a stick in the street to defend himself. The object of the Solicitor General was to show whether it was merely in defense of himself, or whether there was any previous malice; it appeared to me proper to go into evidence to that effect.

I state this, that if from the evidence admitted, and laid before the jury, they should be of opinion that the crime was of a higher nature, the same facts would prove manslaughter was committed. I believe there can be no doubt of this.

Att'y Gen. Sullivan. If by excluding evidence that would show a previous design, they can get rid of this indictment, it would amount to saying, if it could be proved that he was guilty of murder, he shall not be guilty of manslaughter.

Mr. Davis. I was reading to you, Gentlemen, a passage from the same authority which occupied your attention when I was interrupted; it was from East's Pleas of the Crown.[12]

[12] Sect. 23, p. 239.

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"And in all cases of provocation, in order to extenuate the offense, it must appear that the party killing acted upon such provocation, and not upon an old grudge; for then it would amount to murder."

And in the next section 24, he proceeds,

"But there is another class of cases, where the degree or species of provocation enters not so deeply into the merits of them as the foregoing; and those are, where upon words or reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken or sought on either side: if death ensue this amounts to manslaughter."

The application of this rule will be to that part of the case, by which it will appear that the defendant took an undue advantage, by being secretly armed; a fact, of which the deceased could have had no knowledge at the time. I shall therefore next read the latter part of section 30, from the same chapter, page 251.

"It has been shown that such malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offense given, and cruel, and dangerous in its nature; because the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation must have entertained at least a general, if not a particular malice, and have before determined to inflict such vengeance upon any pretense that offered."

I will now beg leave to state part of section 44, of the same chapter, page 272.

"A man may repel force by force, in defense of his person, habitation, or property against any one who manifestly intends or endeavors by violence, or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self defense."

The next authority, which I shall ask your attention to, is in Section 47, page 246.

"In another case however, where the assault, though a very violent one, was plainly with a view to chasten the party for his misbehavior, and there appeared no intent to aim at his life; his killing the assailant was holden not to be lawful or excusable under the

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plea of self defense. That was Nailor's case, tried before Holt, C. J., Tracy, J., and Bury, B. The prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed: his father ordered him to go to bed, which he refused to do; whereupon a scuffle happened between the father and son. The deceased, who was then in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him, and beat him, the prisoner lying upon the ground with his brother upon him, not being able to avoid his blows, or make any escape from his hands. And as they were striving together, the prisoner gave his brother the mortal wound with a penknife. At a conference of all the judges after Michaelmas Term, 1704, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity, so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to have intended to chastise him for his misbehavior to his father: and to excuse homicide upon the ground of self-defense, there must always appear to have been such a degree of necessity as may reasonably be deemed inevitable. At the conference in the above case, Powell, J., put the case: If A strike B without any weapon, and B retreat to a wall, and then stab A, that will be manslaughter, which Holt, C. J., said was the same as the principal case: and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking without any dangerous weapon, that the intent of the aggressor rose so high as the death of the party stricken: and without there be a plain manifestation of a felonious intent, no assault, however violent, will justify killing the assailant under the plea of necessity."

And in the same section it is further laid down,

"In no case can a man justify the killing of another under the pretense of necessity, unless he were wholly without any fault imputable by law in bringing that necessity upon himself."

The next section I shall read is section 51, page 279. This section contains a rule and principle directly applicable to the present case, and the most important distinction you will have to take into consideration in this trial. I therefore ask your particular attention to it.

"It has been shown that where death ensues from a combat on a sudden quarrel, without prepense malice, such act amounts but to manslaughter; being attributed to heat of blood arising from human infirmity."

I presume it will be impossible for the defendant's counsel to place his defense on stronger grounds than the one in this

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rule. Now the authority proceeds, that in this necessity, which you will probably find to be the precise case of the defendant,

"In order to reduce such offense from manslaughter to self-defense upon chance medley, it is incumbent on the Defendant to prove two things: 1st, that before a mortal stroke given he had declined any further combat, and had retreated as far as he could with safety; 2nd, that he then killed his adversary through mere necessity, in order to avoid immediate death."

And here you observe it will be a fact of inquiry whether the defendant declined the combat and retreated as far as he could with safety, and then killed the deceased through mere necessity, in order to avoid his own immediate death. If the facts should turn out to be such that the defendant cannot justify himself on one or other of these principles, so long as they remain the rule of law, the defendant must be found guilty.

PARKER, J. There is a natural exception to that rule, which you will find in the book you have read; it is, that if the retreat would be such as would cause his own death, then the retreat is not necessary.

Mr. Davis. That forms a part of the rule itself, and is not, I presume, an exception to it. I shall read some authorities to that by and by, and will not trouble you any farther, except for the purpose of reading part of section 55, page 285:

"As to the other point to be established, namely, the existence of the necessity under which the party killing endeavors to excuse himself, he can in no case substantiate such excuse if he kill his adversary, even after a retreat; unless there were reasonable ground to apprehend that he would otherwise have been killed himself. And therefore where nothing appeared in Nailor's case above mentioned, to show that the deceased aimed at the prisoner's life; although he held him down on the ground, beating him, and the prisoner could not avoid his blows, it was ruled manslaughter."

That is the rule to which your Honor referred. The author proceeds:

"It is to be noted in that case, that the prisoner struck the mortal blow with a penknife, which was a dangerous, mischievous weapon; from whence it was to be presumed, that he intended to rid himself of the chastisement which his brother was then inflicting on him, by

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his death. Mr. Justice Foster, in alluding to this case, seems to lay a stress upon the want of an inevitable necessity, so as to excuse the killing in that manner."

It is unnecessary to read any farther; the cases you will find have a direct application to the present cause; the books which contain them will be adverted to in the course of the trial, by those gentlemen who follow me—I will only read one from Foster's Crown Law, and then pass to one or two other authorities; and that will be all that is necessary in the opening. I adduce this for your information, and by which you can apply the evidence more correctly, and also to advertise the defendant's counsel of the books we shall rely on to establish that the defendant must be convicted of the crime for which he stands indicted. The first I shall now read, is from Foster's Crown Law, page 255:

"In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant, in this instance, standeth upon just the same foot that every other defendant doth: the matter tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

There is a case, 1st Hale's History of the Pleas of the Crown, page 479. It contains a single sentence only, and very short, but which appears to me directly applicable to the present case. It is this:

"A assaults B, and B presently thereupon strikes A without flight, whereof A dies; this is manslaughter in B, and not *se defendendo*."

He further adds, in page 480:

"Regularly it is necessary that the person that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for though in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy; yet in cases of assaults and affrays between subjects under the same law, the laws own not any such point of honor, because the king and his laws are to be the *vindicis injuriarum*, and

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private persons are not trusted to take capital revenge one of another."

One or two other passages in Hawkins, are all that is necessary to trouble you with in opening and stating the law on the subject. In 1st Hawkins' P. C., Chap. 28, Sec. 25, page 109, there is a sentence which has a remarkable degree of applicability to the present case:

"However, perhaps in all these cases, there ought to be a distinction between an assault in the highway and an assault in the town. For in the first case it is said, that the person assaulted may justify killing of the other, without giving back at all; but that in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance."

You will recollect, gentlemen, the scene where this tragedy was performed, and will recollect from that scene, from the circumstances, situation, and possiblity of assistance, how immediately applicable the quotation is to the present case.

One other authority I shall adduce which will have a reference to the authority I read to you, as to the defendant's being master of his temper and in possession of his mind; it is from page 123, Chap. 31, Sec. 23:

"And whenever it appears, from the whole circumstances of the case, that he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly therein; or perhaps if he have so much consideration, as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he would have the disadvantage, by reason of the height of his shoes, etc."

These are the cases and principles which I consider to have a direct reference to the nature of the cause you have to determine. I have now stated the facts, and the only remaining duty for me to perform is to call the witnesses to prove them. But before I do that, I will give you the usual evidence of the death, or first fact—this I shall do by the inquisition taken under the coroner's inquest.

Mr. Dexter. We object to that.

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Mr. Davis. I read it merely to prove the fact of the death of the person deceased.

Mr. Sullivan. It has been used as mere evidence of the death, and this before the revolution—it was done in the case of the British soldiers, and there admitted to prove the fact of death—and it was recently offered in the case of Fairbanks of Dedham—it was there objected to and allowed by the Court.

PARKER, J. I really should think it, were there no other evidence of the fact of the death, very important, because it might prejudice the minds of the jury on the subject; have you not plenary evidence of another sort?

Mr. Davis. Yes, but I do it as being merely the counsel of the Court, and have no view to create an impression on the minds of the jury, as we had agreed to leave out all those words which might have had that effect, and to read it merely to show that the death was occasioned by the injury received from the discharge of the pistol.

Attorney General. We can show, from the authority of Hale and Hawkins, that it is admissible.

PARKER, J. As the practice has been as stated either way, I should like to have some authority upon the subject.

Mr. Davis. We waive reading the Coroner's inquest for the present, and now proceed to call our witnesses.

WITNESSES FOR THE COMMONWEALTH.

Dr. Thomas Danforth. I was desired on fourth of August to step into the shop of Mr. Townsend, and there saw the body of a dying man, lying on his back. The shirt was torn down and the neckcloth taken off when I discovered a wound a little below the left pap, the pulse was gone, there was yet a natural heat on the skin, and I thought some slight remains of life, but no respiration; waited about a minute, when I noticed the body to give the last gasp, immediately after which it expired; then proceeded to examine the wound, and introduced my finger into it, and noticed that the fifth rib was cut. Dr. Jarvis came into the shop. I took up a small hammer, and passed the handle of it about three inches into the wound; the wound was upward, and on withdrawing the hammer the blood flowed very freely from it; every circumstance satisfied me that he died of that wound. Found it was a young man, a Mr. Austin; did not know him at first—I instantly after, however, recognized him. The

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wound was oblique and diagonal with the trunk of the body, inclining upwards towards the left side; it must have passed through the lungs, but not the heart, for it lodged above it. Should say that the immense flow of blood would have produced syncope, and perhaps subsequent death; a wound of a large blood vessel might not be attended with instant death, but would produce syncope, and death afterwards. A wound of the kind of which the deceased died would produce spasm; a sort of convulsive action.

James Richardson. Was in Mr. Selfridge's office a little time before the event happened; he gave me some short account of the cause of the controversy between him and Benjamin Austin—

Evidence of the facts anterior to the encounter was objected to but after argument it was agreed that both sides should have a right to go into the cause of the dispute, etc.

Mr. Richardson. The first part of the conversation took place between twelve and one o'clock on the fourth of August. Mr. Selfridge appeared to have some intimation that he should be attacked. He observed, that he did not expect old Mr. Austin would attack him, but some bully employed by him; that he did not intend to keep himself shut up, as his business required him to go abroad; that he would go out, notwithstanding any apprehension he entertained of being attacked; that every man who knew him, knew he was no man for bullying or fisticuffs, or some such expression. Believe I begun the conversation myself; believe I asked him what was the controversy between him and Austin. He said it would be foolish, or silly, to keep himself shut up, when his business required him to be abroad. Saw no arms in his office nor did defendant say anything about arms. Mr. Shaw was in the office part of the time. Went out and down State street. I was near the Branch Bank when I heard a pistol—within four minutes after I left Mr. Selfridge in his office.

Cross-examined. Mr. Selfridge said he had had an application from a tavern keeper to bring an action against the republican committee at whose instance he had provided a public dinner for the party on Copp's Hill; that he had put the man off two or three times and had advised him not to take out a writ; the man, however, insisting upon it, the writ was at length issued; that Mr. B. Austin had told some persons that there would not have been anything done about the business if it had not been for the interference of a damned federal lawyer; said that he had Austin in his power; that he could prove that he had tried to settle the difficulty, and that Austin had promised him to contradict the aspersion, in the same public manner, and in the same places wherein it had been made. Said he had applied himself to Mr. Austin to contradict the report, but he had not done it; that Austin had confessed that he was wrong in what he had reported, and that he promised to contradict it, and that afterwards he refused to comply with his promise, that he had ordered the publication to be suspended for two or three days, in order to give him an opportunity of re-

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tracting what he had said, and that the last message he received from him was, that he was a damned rascal, and might help himself as well as he could. He was my classmate at College. He never was robust or hearty, and he didn't mix in manly or athletic exercises. He was calm and cool. I saw nothing like ill temper in either his words or manners.

Benjamin Whitman. In the morning of that day, I had seen the two publications in the papers, one in the Chronicle, the other in the Gazette—one signed T. O. Selfridge, and the other B. Austin. Passing Mr. Selfridge's office, I saw him leaning against a cask, which stood on the flagging near the door of his office, in conversation with a person whom I now know to have been his client. Asked him how he and B. Austin came on. He smiled and said, "I understand he has hired or procured some one or some bully (I do not recollect exactly which of the two phrases he used) to attack or to flog me." I made no reply, for I thought it was a kind of smoke which would fly off when the parties grew cool and had wasted their fire. He asked me for some tobacco. I gave him some and left; walked pretty direct to the head of the exchange, near Mr. Townsend's shop, when I heard the report of a pistol. Turning myself instantly round, I saw a person in the act of striking a blow with a cane. The cane was elevated, but whether striking, or recovering from a blow struck, cannot say positively. Defendant's position was inclining backwards: he seemed to me to be regaining a perpendicular posture, which he had lost as it were by a retreat. I saw the smoke of the pistol about breast high. The pistol itself was not raised higher than his chin. Saw a number of blows struck at him with the cane; I think as many as four. They grew fainter in succession. Saw the deceased fall and it appeared as if some person eased him down; the deceased fell very near my feet; there was but one person between him and me; had on a white frock, which was afterwards very bloody, from supporting the deceased when falling. Soon after, I saw Mr. Selfridge standing near the spot where the rencounter took place, a great crowd gathered round him. Some persons cried, "Who is the damned rascal that has done this?" Heard Selfridge say, I am the man, or I have killed him. He retired soon afterwards, but which way I do not know. When the rencounter happened the parties were within reach of each others' hands. About two hours after, I saw Mr. Selfridge, he had a wound on his head and another on his arm, his hat was fractured in the front part. The wound on his forehead was oozing blood at that time. It was a fur hat, and was broken across the top about two inches in length. This was two hours after the affray. The breach in the hat was such a one as might be occasioned by a severe stroke with a stick or a cane; it was a black hat, but do not recollect the lining.

John M. Lane. A little after one o'clock on August fourth, was standing at the door of my shop, which is on the north side of State street; was looking directly across the street, and there saw defendant, whom I knew,

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standing on the brick pavement or side walk, in front of Mr. Townsend's shop. His face was towards me. The person, who was afterwards shot, and whom I did not at that time know, was standing in front of defendant, a little to the right; defendant stood with his arms folded, or rather crossed horizontally, the right arm being uppermost, and in that position he fired the pistol, which I saw just as it went off, at the deceased. He turned round instantly, and gave the defendant several strokes before he fell. He was not more than a foot from the defendant when the pistol was discharged; saw the defendant throw the pistol at the deceased, while he was striking. At that time blood was issuing from his mouth. He fell and I saw no more of him. Did not go from my shop door. Major Melvill and a gentleman from Salem were in the shop at the time There might be fifteen or twenty people on the side walks between Congress street and Mr. Townsend's shop. There were also some moving up and down on the stone pavement.

Cross-examined. Am positive that the defendant was facing me; his arms were crossed at the time the pistol was dicharged; am positive he did not extend his arm. His right arm rested on his left when he fired the pistol.

Edward Howe. At a quarter past one o'clock on fourth of August, I went from Mr. Townsend's shop in State street, home to dinner. Crossing the east end of the old State House, met Mr. Selfridge, at the distance of about two rods from Townsend's shop. He passed me about three feet off on my right hand. Took particular notice of him, having seen the publication in the Chronicle of that morning. He had on a frock coat, and his hands were behind him, but I am not able to say whether they were outside of his coat or not. Passed on six or eight steps, when I heard a very loud talking behind me. Turned immediately round, and the first thing I saw was Mr. Selfridge's hand with a pistol in it, and immediately the pistol was discharged. The instant afterwards, I saw the person, who had been shot at, step forward from the side walk, and strike Mr. Selfridge several very heavy blows on his head. These blows were struck with so much force, that I think, if Mr. Selfridge had not had on a very thick hat, they must have fractured his skull. He stood about three or four feet from the brick pavement or side walk, in front of Mr. Townsend's shop, and was facing up the street. Saw defendant throw his pistol at the deceased, but I cannot say whether it hit him or not; saw it roll on the pavement towards Mr. Russell's door. The instant after the pistol was fired, deceased sprang from off the brick pavement towards defendant and struck him as I have related before.

Ichabod Frost. On the fourth of August, between one and two, I was standing at the door of No. 75 State street. directly opposite Mr. Townsend's shop. Was looking at some gentlemen who were standing at the door of the Post Office, heard the report of a pistol, and turning my eyes, saw the smoke, and at that instant the deceased was stepping from the side walk with his stick up. He

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struck Mr. Selfridge several blows on his head, and Mr. Selfridge either struck at the deceased with his pistol or threw it at him; am unable to say whether it went out of his hands or not. At this moment, saw blood issuing from deceased's mouth. Had seen Mr. Selfridge pass down the street immediately before I heard the report of the pistol.

Cross-examined. Defendant was within six or seven feet of the pavement. His face was towards the Post Office. Did not see either of the parties before the pistol was discharged, but instantly on the report, I turned towards them. The blows with the stick and the throwing or striking with the pistol seemed to be at the same instant. Did not see defendant retreat from the deceased, with his hands held up to ward off the blows. He appeared to press towards the deceased. When I first saw the defendant, after the report of the pistol, his arm was lifted and aiming a blow with the pistol at the deceased, who was striking with his stick at the same moment.

THE DEFENSE.

Mr. Gore. Gentlemen of the Jury. Permit me to ask for your candid attention and indulgence, while I address you in behalf of the defendant at the bar, who stands charged by the grand inquest of this county with the crime of manslaughter. A patient investigation of the evidence, so far as it is necessary to the attainment of the truth, a strict observance of the law of the land as it is derived from the natural character of man, as it is recorded and laid down in our books, as it has been invariably known and practiced in all civilized countries as well as in our own, and as it shall be pronounced to you by the Court, with a due regard to such arguments and observations as may be founded in reason and common sense, unbiased by any previous impressions, but what shall be imposed by the law and the testimony, constitute all I have a right to expect, and be assured that, notwithstanding the solicitude I may justly be presumed to feel on this occasion, it is all I have even a wish to obtain.

After the most mature reflections I have been able to give to this cause, and as I trust it will appear to you when the whole transaction is exposed, I cannot prevail on my mind to raise a doubt as to the issue, however important the event

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may be to the public justice of the country, and however interesting to the property, the freedom and character of my client; provided the cause be decided on its own real and intrinsic merits. Yet I cannot but feel some apprehension from the various measures taken to pre-occupy the public mind, nor is it surprising that I should be thus apprehensive, when I call to mind the cruel, unjustifiable and illegal conduct which has been resorted to through the newspapers, to influence the judgment, to inflame the passions, and cause such an agitation through the whole community, that its effect might be felt even here, where the rights of all require that justice assisted by the calmest deliberation, should alone preside. Whence should be banished every thing that can tend to stir or move the passions, where every feeling which can disturb the judgment or influence the imagination ought to be extinguished, and no impression admitted but from the unerring voice of truth and of law, which are the same to all men and on all occasions, which bend not to the supplications of mere distress, because extreme or deplorable, nor the clamors of the few, or the many, however overbearing in power or terrific in threat, however eager and violent in their calls for the sanction of judicial authority, or their own wild and intemperate decrees.

It will not be strange that I should feel something like apprehension, something like dismay when I behold the effect of this incitement in the immense multitude that throng around, and the crowd assembled in this court. Many, no doubt, are brought here by the most laudable motives, on a case the most solemn, affecting an individual in the most tender part, involving every interest that can be dear to man. If any be here with other views, I am sure they have seen, I am sure they will see nothing in the conduct and decision of this cause, but what will convince them of this irrefragable truth, that the liberties, life, reputation and property of every man, essentially and mainly depends on the impartial administration of justice; and this is true at all times and on all occasions, whatever passion or prejudice, or party

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spirit itself, may whisper to the contrary, or urge as an exception. On the impartial administration of justice, I repeat, depends at all times and on all occasions the liberties, life, reputation and property of man, and in the very best of times, it is the best reliance, and only solid foundation for the rights of all men.

In evil times, which sooner or later befall every community, it will be found the only protection for the possessions of the rich against the grasp of the needy, and the violence of the profligate; the only safeguard and shield for the rights of the poor and oppressed against the insolence of wealth and power; may we not therefore indulge the hope, that all men, of whatever sect or party, persuaded of this truth, which will be found the more apparent, the more it is reflected on, will bring to the altar of public justice their passions and prejudices however warmly they may have excited the one, or closely they may have clung to the other, as a tribute and willing sacrifice for their own good and that of their country?

From the nature and circumstances of this case, known as they were or would have been, at the moment of this dreadful catastrophe, which we all deplore, from the age and relation of the deceased to the cause which produced the fatal event, the subject of our present enquiry—the most unfavorable conclusions were made against my client. The deceased was young, just emerging from a state of pupilage, to a state of manhood, glowing in all the bloom of youth and pride of strength, to behold him of graceful and well proportioned form, of athletic muscle and nervous arm, in a moment stretched lifeless on the ground, his heart's blood gushing in copious streams from his manly face and heart, called forth the commisseration and regret of every beholder. These feelings almost as instantly changed to resentment against him who was supposed to have done the deed—for the hundreds, I may say thousands, who saw the last part of this tragic scene, there are not ten, perhaps not five, who saw the whole transaction, and witnessed the necessity im-

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posed on the defendant, with which he could neither equivocate nor compromise, of preserving his own life at every expense of him who assailed it. And yet, even of these, some hurried away by the impulses of the instant, and catching the contagion of other men's passions, may have surrendered their judgment to their emotions, and have joined with others in the general execration of the deed, and blaming the conduct of the defendant, have found or thought they found an apology for this strange abandonment of their reason, by assuming the doctrine, that no man can innocently spill the blood of another. This is a position unsupported by any law, human or divine; contradicted by the nature of man and the very purposes of his creation. I shall contend, and I have too much respect for those I address, to doubt of proving, that every individual has not only the right, but is in duty bound to defend his own life at every hazard and expense of him who assaults it. The principle of self defense is founded in the nature and the constitution of man. It is indispensable to, and inseparable from his character. It is not derived from books, nor from the institutions of civil society, though they confirm it. It is born and created with us, coexistent with the first germs of life; conceived, felt, and apparent in the first dawn of being, and continues the same through all the stages, relations and conditions of human existence. Without this right, and without its exercise whenever the occasion arises, man could perform no duties and enjoy no rights. He could not discharge even those duties imposed on him by a state of nature, neither could he perform those duties and superadded obligations created by, and incurred in a state of society. If this be true, and that it is is so self evident that none will, or can deny it, the consequence indisputably follows, that man has not only a right, but is in duty, a duty which he owes to himself, society and his maker, bound to defend and protect his own life, by all the means in his power, at every hazard and expense of the life of him who assaults him, and that whatever the results may be, they are imputable not to him who may destroy, but

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to him who imposed the necessity. The institutions of civil society are made not only for the whole, but for every part, as well as the whole, and to confirm those rights derived from nature, and which are necessary for the performance of those duties imposed on man by the laws of that civil society itself. The first and fundamental principle in every free government is, that obedience to the government and protection to the subject are reciprocal, and whenever statutes are made to abridge so essential and natural a right as that of self defense, they are bottomed on this condition implied, as strongly as if expressed in language the most forcible, that the government can and will, by its laws afford complete and perfect protection. The civil and subordinate rights the subject is forbidden to defend by force, because the laws of society hold out restoration if deprived of them, or a full indemnity for the injury sustained by their loss. Now life once taken away cannot be restored, and for the privation of being there is no indemnity. It follows therefore that society acknowledges and admits, that every man is bound and ordered to protect his own life, when the government cannot do it for him, at every hazard and expense of the life of him who assaults it. Vain and absurd, nay impracticable would be that statute which would demand of an individual to wait the formal and slow decision of a Court of Law, when the uplifted hand of violence was ready to end his days, to sink him into the earth, far beyond the reach of any earthly tribunal. I have said that the laws of civil society admit and confirm the right of self defense. They stop not here; they go further. The institutions of civil society authorize and justify a man in taking the life of another who shall attempt to enter his house in the night. They justify the taking the life of him who shall attempt to rob of the smallest mite of property. The law excuses the man who shall take the life of another on an apparent, though not real necessity of defending his own.

When I come to read to you some of the authorities I shall offer, and which contain the law of our own country,

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you will be convinced that I have advanced no one principle which they do not warrant, nor do I, gentlemen, wish to extend them beyond their fair import in behalf of the cause I defend. At present, my only object is, by propositions so plain, that they must command the assent of every human understanding, to efface any erroneous impressions which may have been made in relation to the law on this subject.

There is another important, though groundless charge and prejudice, against my client, which I wish and trust to remove. It is founded on this fact, that he had in his pocket a pistol with which he preserved his life, against a man who would have beaten out his brains with a cudgel; an instrument, gentlemen, as effectual for the purposes of death as a pistol, and, if we take into view some considerations, perhaps far more so; for the pistol, once discharged, is useless against an assailant armed with a stick, and, unless some vital part be struck by the bullet, can do no further injury. But a wrong blow with a cane may be rectified; a second may be given with more certainty; others may be discharged and discharged again and again, till the person bring his victim, maimed, disfigured and disgraced, dying and dead at his feet.

I wish to bring before you this single fact, the circumstance of wearing a pistol, distinct from any relation to the particular state of the defendant, or the reason which, had the law been as is pretended, might and would have justified him in wearing an instrument of this sort. There is no law written or unwritten, no part of the statute or common law of our country which denies to a man the right of possessing or wearing any kind of arms. I say there is no such law, and in every free society a man is at liberty to do that which the law does not interdict, nor can the doing that which is not forbidden be imputed as a crime. But it may be again said, as it has already, that possessing a pistol is evidence of malice. If it be lawful to possess and wear such an instrument, it would be unjust in the highest degree to make it, unconnected with anything else, evidence to change another act, lawful in itself, into an act criminal and unlawful. For

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instance, it ought not, and I trust would not, in the opinion of any court or jury, change a justifiable homicide into manslaughter, or manslaughter into murder.

I will attempt to illustrate this by putting one or two cases. Every man has a right to possess military arms of every sort and kind, and to furnish his rooms with them. Suppose a man occupying a house thus furnished, a neighbor comes in, and from some warm conversation an affray ensues, the owner glances his eye on the sword, instantly snatches it from the place where it hung and destroys his neighbor. But for this possession it would, I presume under such circumstances, be manslaughter; can that possession be so tinctured with criminality as to render this crime of manslaughter, murder? If so, do but alter the case: Suppose the visitor, not the occupier of the house, to cast his eye on the sword, and to use the same instrument in the destruction of his opponent, would he be guilty of manslaughter only? The like fact committed by one man would then, be murder, and by another only manslaughter. Can the mere circumstances of the not being owner of the instrument used, change the act from murder to manslaughter.

Further, a man about to travel a road infested with robbers, and knowing it is lawful for him to kill another who attempts to rob him, arms himself with a pistol; on the road he is attacked, by a person who means to rob him, on which, in the exercise of his right, he uses his pistol and destroys the life of the aggressor; if the having a pistol with him be an argument against him, will not that which was a lawful act become an argument to prove it unlawful, and merely from having the precaution to supply himself with what the law authorizes him to carry? Again, suppose a man having occasion to travel a road infested by robbers, and, for the purpose of defending himself and his property, that he provides himself with a pistol; on the way to the road, or on the road, or on his return from it, he is met by a person who attacks him without any intention of robbing, but with a view of assaulting his person only, makes an attack with

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so much violence that his life is brought into imminent hazard, on this, he uses his pistol and destroys his assailant. Shall you draw, from the fact of his having a pistol, for the just and lawful purpose of defense against one sort of violence, and using it to another equally just and lawful, although not the object of his being so provided, an argument to turn justifiable homicide, into the crime of murder? A doctrine which leads to such absurd consequences cannot be founded in truth or justice, and it is on these principles that this cause must be determined. The quality of every act must be according to the intention and design of the agent at the moment. It is by this intention and design that you must decide the quality of the act, not by the manner of doing it, or its event. So says our law, and so say the laws of God and of reason. For should a man have an instrument of death for an unlawful purpose, and be compelled to use it for one lawful and just, it would be the extreme of injustice, so to tincture this lawful act, by an unlawful intention, which was never executed, as to render that criminal, which was right and just in itself. For instance, suppose a man armed for the purpose of a duel; he meets in the way to the place of appointment a person who attacks him, and in defense of his own life destroys the assailant. Can you say that the having the pistol would make it a crime? If you can say so it would be to confound every principle of law and justice: you would decide a lawful and just act to be criminal merely because an unlawful act was intended, which could at the worst be but a misdemeanor. I draw from these premises this inference, that you cannot make any conclusion against Mr. Selfridge from the circumstances of his having a pistol about him. It cannot be of the smallest weight. For if he had it with an intention that was lawful, it cannot give an unlawful quality to this act of homicide. If he possessed it for any other purpose not lawful, and used it for a lawful end, it will not alter this lawful act. If then you shall be satisfied that the homicide committed was either justifiable, or excusable self defense,

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all presumptions which may arise from Mr. Selfridge's having a pistol with him, are totally destroyed, for presumptions are resorted to only in the absence of express testimony. Wherever there is express evidence presumptions are necessarily excluded; otherwise you will go into the wide field of uncertainty, when you have certainty to rely on. If then you are satisfied from all circumstances which happened at the moment of acting, that it was a lawful act of self defense, all further inquiry is precluded, and much more so all presumption or conjecture of unlawful motives, from any preceding act.

For the purpose of enabling you fully to understand the nature of the charge against the defendant, I shall read to you first, from 3 Coke's Inst. p. 56.

"Manslaughter is felony, and hereof there may be accessaries after the fact done: but of murder, there may be accessaries, as well before, as after the fact."

"Some be voluntarily, and yet being done upon an inevitable cause are no felony. As if A. be assaulted by B., and they fight together, and before any mortal blow be given, A. giveth back, until he cometh unto a hedge, wall, or other strait, beyond which he cannot pass, and then in his own defense, and for safeguard of his own life, killeth the other: this is voluntary and yet no felony, and the jury, that find it was done *se defendendo*, ought to find the special matter. And yet such a precious regard the law hath of the life of man, though the cause was inevitable, that at the Common Law, he should have suffered death: and though the statute of Glocester save his life, yet he shall forfeit all his goods and chattels. Hereof there can be no accessaries, either before or after the fact, because it is not done *felleo animo*, but upon inevitable necessity *se defendendo*. If A. assault B. so fiercely, and violently, and in such a place, and in such manner, as if B. should give back, he should be in danger of his life, he may in this case defend himself; and if in that defence he killeth A. it is *se defendendo*, because it is not done *felleo animo*, for the rule is, when he doth it in his own defense, upon any inevitable cause, *Quad quis ob tutelam corporis sui fecerit, jure id fecisse videtur.**"

*What every one doth for the defense of his body, he seemeth to do lawfully.

I shall now call your attention to Foster's Crown. Law, p. 273.

"Self defense naturally falleth under the head of homicide founded in necessity, and may be considered in two different views."

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"It is either that sort of homicide *se et sua defendendo,* which is perfectly innocent and justifiable, or that which is in some measure blameable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law."

"The writers on the Crown Law, who, I think, have not treated the subject of self defense with due precision, do not in terms make the distinction I am aiming at, yet all agree that there are cases in which a man may without retreating oppose force to force, even to the death. This I call justifiable self defense, they justifiable homicide."

"They likewise agree, that there are cases in which the defendant cannot avail himself of the plea of self defense without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self defense culpable, but through the benignity of the law excusable."

"In the case of justifiable self defense the injured party may repel force by force, in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable."

"The right of self defense in these cases is founded in the law of nature, and is not, nor can be, superseded by the law of society. For before civil societies were formed, (one may conceive of such a state of things, though it is difficult to fix the period when civil societies were formed,) I say, before societies were formed for mutual defense and preservation, the right of self defense resided in individuals; it could not reside elesewhere; and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law, with great propriety and strict justice, considereth them, as still in that instance, under the protection of the law of nature."

"Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force; and his servant then attendant on him, or any other person present may interpose for preventing mischief, and if death ensueth, the party so interposing will be justified. In this case nature and social duty co-operate."

There may, gentlemen, be some confusion in your minds from the expression "a known felony." In order to do it away, and explain what is meant when the terms "of a known felony being intended" are made use of, I shall read some authorities to show you that when there is, from circumstances, an apprehension of this tendency, the party is excused and may justify the killing his opponent. The first I shall advert to, is from East's P. C. 276.

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"Other cases have occurred, wherein the question has turned upon the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. As in Mawgridge's case; who upon words of anger between him and Mr. Cope, threw a bottle with great violence at the head of the latter, and immediately drew his sword: on which Mr. Cope returned a bottle with equal violence; which, says Lord Holt, it was lawful and justifiable for Mr. Cope to do; for he who hath shown that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand. The words previously spoken by Mr. Cope could be no justification for Mawgridge; and it was reasonable for the former to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life; and this at a time when he was off his guard, and without any warning. The latter circumstance forms a main distinction between that case and the case of death ensuing from a combat, where both parties engage upon equal terms: for there, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon, suspend his arm till he has warned the other, and given him time to put himself on his guard; and afterwards they engage on equal terms; in such case it is plain that the design of the person making such assault is not so much to destroy his adversary at all events, as to combat with him, and to run the hazard of his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood, which has before been treated of."

In the same work, page 273, the author speaking of known felonies says,

"There seems, however, to be a distinction between such felonies as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken such urgent necessity as will not allow of any delay, and others of a different sort, if no resistance be made by the felon; and therefore a party would not be justified in killing another who was attempting to pick his pocket. But if one pick my pocket, and I cannot otherwise take him than by killing him; this falls under the general rule concerning the arresting of felons. The above is further confirmed by the term known felony, made use of in our books, which contra-distinguishes it from secret felonies; and seems to imply, that the intent to murder, ravish, or commit other felonies, attended with force or surprise, should be apparent, and not left in doubt: for otherwise the party killing will not be justified. It must plainly appear, says Lord Hale, speaking of a felonious attack upon B., by the circumstances of the case, as the manner of the assault, the weapon, etc., that his life was in danger, otherwise the killing of the assailant will not be justifiable self defense.

"Yet still if the party killing had reasonable grounds for believing that the person slain had a felonious design against him,

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and under that supposition kill him; although it should afterwards appear that there was no such design, it will only be manslaughter, or even misadventure; according to the degree of caution used, and the probable grounds for such belief. As where an officer, early in the morning, pushed abruptly and violently into a gentleman's chamber in order to arrest him, not telling his business, nor using words of arrest; and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber, and stabbed him: it was ruled manslaughter at common law, though the defendant was indicted on the statute of stabbing. It is to be inferred from the form of the indictment, and what was said by Lord Hale, that the bailiff had no offensive weapon in his hand, from whence the party might reasonably have presumed that his life or property was aimed at; and therefore there seems to have been a manifest want of caution in not demanding the reason of such intrusion by a stranger; especially as some interval must have elapsed before the sword was taken down and drawn."

From this authority it will appear that the officer went into the room without any weapon, and there could be no inference that he intended any bodily harm, yet it was held manslaughter, but if he had an offensive weapon it would undoubtedly have been excusable if not justifiable homicide, this would have been so on the apparent attempt, and therefore if a man has reason to suppose any felony is to be attempted on him, he has a right to defend his own life, by taking that of his assailer.

I will now read a case from the opinion of Powell J. in Nailor's case.

"If A. strike B. without any weapon, and B. retreat to a wall, and then stab A. that will be manslaughter, which Holt, C. J., said was the same as the principal case, and that was not denied by any of the Judges. For it cannot be inferred from the bare act of striking without any dangerous weapon, that the intent of the aggressor was so high as the death of the party stricken, and without there be a plain manifestation and felonious intent, no assault, however violent, will justify killing the assailant under the plea of necessity."

It would seem here that if the party who kills, was resisting a person who had a dangerous weapon, it would be excusable homicide; and Nailor's case, which has been read to you by the Solicitor General, turned on that principle, for though the prisoner there, was first in fault it is clearly in-

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ferable, that if the other who was killed had had a dangerous weapon it would have been justifiable homicide and not manslaughter, or at most excusable homicide.

On the same point as to the apprehension of a felony I shall adduce the same authority page 293.

"Hawkins indeed says, that if a servant, coming suddenly, and finding his master robbed and slain, fall on the murderer immediately and kill him, it may be justified; for he does it in the heat of his surprise, and under just apprehensions of the like attempt on himself. But he adds, that in other circumstances (which must be understood where he has no just reason to apprehend the like attempt on himself, and the fact is not recent) he could not have justified the killing of such an one, but ought to have apprehended him. The fact will be either murder or manslaughter, according to the circumstances above alluded to."

You have already heard gentlemen, that a man has a right to defend his own habitation, by taking the life of another who attempts to enter it feloniously. In the same book from which I last read to you, it is laid down in page 321.

"In civil suits the officer cannot justify the breaking open an outward door or window to execute the process: If he do, he is a trespasser, and consequently cannot be deemed acting in the discharge of his duty. In such case, therefore, if the occupier of the house resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose for himself and his family. And it is not murder in this case, says Lord Hale, because it is unlawful in the officer to break the house to arrest. Secondly, it is manslaughter, because he knew him to be a bailiff. But, thirdly, had he not known him to be a bailiff, or one who came on that business, it had been no felony because done in his house. This last instance, which is set in opposition to the second, must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent; and that the party did not know, as in the second instance, nor had reason to believe that it was merely as a trespasser with a different intent."

I shall now quote another passage from the same book of which perhaps you will see the applicability as I read, though it may possibly strike you more forcibly after you have heard the evidence. It is from page 278.

"If A. challenge B. who declines to fight, but lets A. know that he will not be beaten, but will defend himself: and B. going about

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his occasions, and wearing his sword, be assaulted by A. and killed; this is clearly murder. But if B. had killed A. upon that assault, it would have been *se defendendo,* if he could not otherwise have escaped, or bare manslaughter, if he might and did not. But if B. had only made this a disguise to evade the law, and had purposely gone to a place where it was probable he should meet A; then it had been murder: but herein the circumstances at the time of the fact done must guide the jury."

Thus if the person who is threatened says, I will not fight but I will not be beaten, and under these circumstances meets a man who attacks him and in resisting that man, destroys him, it is justifiable self defense, and that I take to be the law of this case.

In page 393 which I shall now read to you, you will find principles equally governing the present occasion.

"A mayhem or maim, at common law is such a bodily hurt as renders a man less able in fighting to defend himself or annoy an adversary: but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem. Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye or fore-tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims, but the cutting off his ear or nose are not such at common law. But in order to found an indictment or appeal of mayhem, the act must be done maliciously; though it matters not how sudden the occasion."

You have it in evidence gentlemen, that the defendant's skull was attempted to be broken, and as the authorities say, if a man be attacked by another with a view to commit a felony, that is a known felony, as the law terms it, he may take away the life of the assailant. I shall now read a part of the same page to show that a mayhem is a felony.

"All maims are said to be felony; because anciently the offender had judgment of the loss of the same member, etc., which he had occasioned to the sufferer: but now the only judgment which remains at common law is of fine and imprisonment."

I have quoted these last passages for the purposes of showing that breaking a man's skull is a mayhem, and that every mayhem is a felony. We shall give the most satisfactory

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proof that the deceased intended to break the defendant's skull.

From a book which has been cited on the part of the Government, I shall beg leave to read a few lines; it is from 4 Blackstone's Com. 184-192.

"Manslaughter therefore on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge."

If, therefore, there was an apparent necessity, and if putting yourselves gentlemen, in the defendant's situation, you think there was a necessity of preserving his life by taking away that of the deceased it was done in excusable self-defense.

Manslaughter is a sudden act of revenge, excusable self-defense when there is an apparent necessity, though it may turn out not to be real, as was the case of the gentleman who was attacked in his room.

That this is the true distinction between manslaughter and excusable self-defense, I refer to

1 Hale's Hist. P. C. 479. "Homicide *se defendendo* is the killing of another person in the necessary defense of himself against him that assaults him."

"In this case of homicide, *se defendendo*, there are these circumstances observable."

"1. It is not necessary that the party killed be the first aggressor or assailant, or of his party, though commonly it holds."

"There is malice between A. and B.; they appoint a time and place to fight, and meet accordingly. A. gives the first onset, B. retreats as far as he can with safety, and then kills A. who had otherwise killed him; this is murder, for they met by compact and design, and therefore neither shall have the advantage of what they themselves each of them created."

Ibid. 482. "In respect to the manner of the assault."

"If A. assault B. so fiercely, that B. cannot save his life if he gives back, or if in the assault B. falls to the ground, whereby he cannot fly, in such case if B. kills A. it is *se defendendo*."

Having read to you gentlemen, the authorities which confirm and go, indeed, beyond the principles I stated, I will proceed, before I remark on the testimony adduced on the

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part of the Government, to call some witnesses which the gentleman on the behalf of the Commonwealth, called, but did not choose to examine; that we may obtain from them the whole of the testimony respecting this transaction.

WITNESSES FOR THE DEFENSE.

John Bailey. On August fourth, a little before one o'clock, being at work in Mr. Townsend's shop, saw Charles Austin pass down the street, and afterwards saw him pass up as far as Mr. Smith's, he returned and took his stand directly in front of the shop where I was at work. Young Mr. Fales was with him; Austin had a stick in his hand of an unusual size. Had frequently seen him with a rattan. Said to a person in the shop "we shall have a caper." Soon after, saw defendant passing down street, —he had his right hand in his pocket, his left hanging down. I was standing in the door way of the shop, the door being open. When Mr. Selfridge first came in sight, deceased was standing on the side pavement in front of the shop in conversation with Fales, and playing with his cane. The moment defendant caught his eye, he left Fales, and stepped off the brick pavement into the street. He moved with a quick pace, and while going shifted his cane from his left to his right hand. After he got off the pavement, he turned and went towards defendant with his cane raised up. They met about seventeen paces from the place the deceased had left. The deceased held the cane by the upper or largest end. The cane was uplifted, and actually descending to give a blow at the time the pistol was discharged. The blow was not struck till after the pistol was fired; the first blow was a long blow, which staggered the defendant. The deceased struck four or five blows after the first; the first blow was on defendant's forehead; it was struck sidewise, and I thought passed under the defendant's hat. After the first blow, defendant held up his hands to ward off the blows from his head. As the blows were repeated, the defendant aimed a blow at the deceased with his pistol; do not know that it hit him, defendant's face was down street, and inclining towards the shop were I stood. Mr. Selfridge could readily see Austin advancing towards him. He stopped the instant Austin stepped off the side walk. There were some people on the side walk with Austin, and he passed between two gentlemen as he stepped off into the street. The place where they met was nearly in a direct line from Mr. Townsend's shop to the northeast corner of the old State House, about thirty paces from the corner and about seventeen paces from the shop. When deceased went off from the side walk, with his cane up, no person attempted to stop him. There were two gentlemen standing on the edge of the side walk, between whom the deceased passed, but do not know whether they so covered the deceased that

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the defendant could not see him, until he had passed by them.

Zadock French. About one o'clock on fourth of August, was going up State street, when near Mr. Townsend's shop, heard a person say there was to be a scuffle. Recollected the piece in the newspaper, and stopped. The same person said, there's Selfridge. I looked up and saw him coming round the northeast corner of the old State House. Made the observation they were pretty equally matched. He walked very deliberately with his hand behind him or under his coat. His course was towards the Branch Bank. When opposite to me, he was a little south of the middle of the street. All at once he turned or wheeled towards me. At the same instant Austin stepped off from the brick pavement and walked with a very quick step towards him having his cane raised; Selfridge, as he turned towards me, presented a pistol, as if to defend himself. It appeared to me that Austin's breast went against the muzzle of the pistol. Austin struck the defendant a blow on the head, and the pistol was fired at the same instant. The blow was a heavy one; the pistol was not held out, before I saw Austin advancing towards defendant. Defendant did not advance towards deceased after he turned, he stepped one foot back, as if to put himself in a posture of defense. There were a good many people but they stood chiefly lower down the street. When people cried out, who is the damned rascal, who did it? Mr. Selfridge said, "I am the man." Mr. Selfridge took hold of the cane after firing the pistol, but Mr. Austin retook it, apparently with great ease. Mr. Selfridge would have been fifteen or twenty feet from Mr. Austin in passing by, if the latter had kept his situation, and Mr. Selfridge pursued the course he was going. When Austin was going towards defendant, his cane was raised, the end which he had hold of was even with his hip, the other end was elevated about to the height of his shoulder. No time passed from Selfridge's taking out the pistol, and his firing it, the whole was instantaneous.

December 24.

Richard Edwards. As I was passing in State street a little past one o'clock, saw Mr. Benjamin Austin going down the street —heard some one say there would be some scuffling. Standing with Mr. French near Mr. Townsend's shop I saw Mr. Selfridge come round the northeast corner of the old State House—he was passing slowly in a direction towards the Branch Bank. I pointed him out to Mr. French, who did not know him.— In less than a minute a person passed quickly from behind me towards the street, and brushed my arms as he passed me—this occasioned me to turn, and I saw the same person walking quickly towards the middle of the street. By the time I had turned he had got nearly to the middle, and I saw Mr. Selfridge immediately before him, with his arm extended, and a pistol in his hand. The person had a cane in his hand, and at the instant the pistol was discharged, I saw the cane elevated, but am not able to say whether it was descending to strike a blow, or recovering from strik-

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ing one. After the pistol was discharged, the deceased struck several blows with the cane. Mr. Selfridge raised his arms, but whether to give blows, or to ward off those aimed at him, I am not able to say; defendant retired to the side walk near me, and leaned against Mr. Townsend's shop, when the deceased fell. The first blow with the cane was not so severe, as some which were struck afterwards. Think the deceased saw the pistol in the defendant's hand, before it was discharged, it glistened so that I saw it very plainly—deceased was nearly in the same direction from it that I was. Deceased was advancing very fast towards Mr. Selfridge, with his stick level with his shoulder. When the pistol was discharged, they were so nigh each other, that the stick might reach defendant.

Zadock French. After the first blow was given, and the pistol discharged the deceased struck several blows, from three to five. Mr. Selfridge seemed to stand or pause, and finding the blows repeated, he struck at Mr. Austin with his pistol. Mr. Austin made a mis-step, and sallied two or three paces down street. Mr. Selfridge threw the pistol at him, but it passed him without hitting him. After Mr. Austin had sallied, as I have mentioned, and returned, Mr. Selfridge lifted his hands, and seemed taking hold of the cane. Mr. Austin fell very soon. When Mr. Selfridge had hold of the cane, Mr. Austin recovered it out of his hands and fell with it in his hands; he took it with as much ease as a man would from a boy.

William Fales. About half past nine o'clock in the morning of August fourth, was walking in State street, with a friend, and met Charles Austin. He asked us why we had not been to see him lately. I went with him to his father's house, and tarried there until near eleven o'clock, when I left him at home, and went over to Charlestown. Returning a little before one o'clock, I again met the deceased in Court street, and we went together into Concert Hall, in company with two other young men who had joined us. One of these was a Mr. Prince, who appeared to be an officer of the navy. Prince and Austin were in conversation about a ball—they had something to drink, but I am not able to say what it was, not having tasted it myself—and Austin and myself left Prince at the hall, and walked up to Judge Donnison's, to see his son. About one o'clock we went down State street, intending to visit a Mr. Dexter in Broad street, whom we had engaged to call upon. When we had gone as far as Kilby street, Austin said he would go no further, and we returned up State street. Opposite Mr. Townsend's shop we met Mr. Horatio Bass, with whom Austin conversed until the affray took place. When Austin left the side walk where we were standing, my back was toward the street. He moved very rapidly. When I turned round, I saw Mr. Selfridge standing with his face towards the Post Office; Austin was opposite to him with his cane raised—was greatly confused. Am not able to say whether a blow was actually given before the pistol was discharged or not. Did not see the pistol until it was thrown by the defendant. After the pistol

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was fired, was so much agitated and confused, that I apprehend I cannot relate any thing that passed correctly. Did not see the defendant's arm extended with the pistol. Saw Austin strike several blows, think four or five. Cannot say whether the cane, when I first saw it, was descending to give a blow, or ascending after having given one. While walking down with him, deceased said that so long as he remained connected with the college, he could not, consistently with that connection, take any notice of the publication of that morning; but that after he left college, neither T. O. Selfridge, nor any one else, should asperse his father or his connections with impunity, or words to that effect. Deceased usually carried a rattan cane. Did not ever before see him in town with so large a one as the one he had that day, but when he walked to Cambridge he frequently carried one as large. Deceased was about eighteen; was tall, but not stout; was not strong. Did not hear him in the morning express any expectations of a rencounter.

Horatio Bass. On fourth of August as I was going from the Long Wharf to the post office; saw the deceased and Mr. Fales standing in front of Mr. Townsend's shop; shook hands with Mr. Austin and had some conversation with him—soon after this saw Mr. Selfridge coming from the north side of the State House, and Mr. Austin left me, and walked quickly towards him, with his cane lifted. Selfridge took out his pistol and shot at Austin—at the same instant Austin was striking at Selfridge with his cane. Which was first, the blow from the cane or the discharge of the pistol, is impossible for me to say. When I first saw Mr. Selfridge he was walking deliberately in a direction towards the Branch Bank, his hands hanging behind him, as I have observed him usually to walk; on seeing Mr. Austin, he faced round towards him. After the pistol was discharged Mr. Austin struck three or four heavy blows, with the cane, and Mr. Selfridge struck two or three times with his pistol at Mr. Austin's face, but I cannot say that he hit him—Mr. Austin sallied, and Mr. Selfridge threw his pistol, which passed on the left side of Mr. Austin without hitting him.

John Erving. Saw Charles Austin and Mr. Fales go down State street, and very soon after saw them return; observed Austin to have a stick much larger than he usually walked with; called a young man from the adjoining room, and soon saw Austin with his cane raised, moving from the side pavement, at a quick pace, but not running, towards Mr. Selfridge, who had his left arm lifted as if to parry a blow—he took a pistol from his right hand pocket and fired under his arm. The first blow and the firing of the pistol seemed to be at the same instant. Austin made a second blow. Selfridge held up his arm to defend his head, and threw his pistol at Austin. At the fourth blow Selfridge caught hold of the stick; Austin recovered it and fell immediately after.

William Schaffer. About a quarter past ten Charles Austin came into my shop, and picked out a cane; he bent it and asked me if it was a strong one, and would stand a good lick; told

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him it would. It was a good piece of hickory; heavy for hickory; I told him it was as good a one as I had in the shop. He had usually bought small India joints.

Lewis Glover. Went into State street on the morning of the fourth of August expecting to see something take place; was standing near the head of Congress street, in State street, when Mr. Selfridge came down from his office in a direction which would have brought him to the Suffolk buildings; when he came opposite Mr. Townsend's shop a young man stepped quickly off from the sidewalk with his cane lifted; Selfridge had his hands behind him, but suddenly turned; when deceased came up to Mr. Selfridge he struck him on his hat; deceased stepped out very quick, raising his cane as he went along; while he was aiming the second blow, Selfridge took his hands from behind him, presented a pistol and fired it; he afterwards threw away the pistol, while Austin continued striking him; am confident there was one blow before the pistol was discharged, and that it was a violent one, sufficient to knock a man down that had no hat on; Mr. Selfridge stepped back one pace, after he had turned, to take a position as it were to fire. Austin struck three or four blows afterwards before the blood issued from his mouth, and he fell; went to his assistance, and with the aid of Mr. Scollay I carried him into Mr. Townsend's shop. Dr. Danforth shortly after came in, and I held the deceased up, took off his neck handkerchief and hat, and slipped his shirt down to find the wound; Dr. Danforth presently discovered that the person was dead. I went on 'Change on purpose to see an affray, though I own I might have been better employed; had observed old Mr. Austin to go three or four times up and down the street, and I followed him, expecting that a fracas would take place between him and Mr. Selfridge. Cannot say that there were any words spoken before the blow was struck; if there were, did not hear them; there was not time for many words; the thing was done instantaneously.

John C. Warren. Was called on the evening of the fourth of August to visit Selfridge; found a large contusion which he had received on his forehead, about the middle of it; it was three inches in length, two in breadth, and one in depth. It was so serious a wound, that I though it necessary to let blood, which was done that evening. He must have received the blow through his hat. The skin was not broken, and it was impossible to say what would be the consequence if the hat had been off.

Mr. Dexter. I ask whether if such a blow, given on a man's head without a hat would probably have fractured his skull?

The *Attorney General.* I object to this, and ask the Court whether it is proper to put a question for the opinion of a physician?

PARKER, J. A physician may, I think, be questioned as to the probable effect of a wound. I understand this to be the practice.

Attorney General. Is it not more proper for the jury to draw from the facts what would be the consequence of the blow?

Mr. Gore. Every man cannot

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judge equally for want of anatomical knowledge.

PARKER, J. I think a physician may declare what in his judgment would be the probable effect of a wound, but not as to the force of a blow.

Mr. Dexter. I will submit the fact to the jury.

Dr. Warren. I cannot say whether the blow would have fractured the skull had the hat been off. It was on a part of the skull that is very liable to be fractured, as the bone is thinner there than in any other part of the skull, and was the hat off it is not unlikely that it would have caused a fracture; but it is impossible to say what would have been the effect. Was acquainted with the defendant at college; was my classmate. He was very feeble in muscular strength, more so than any young man of his size in the class; he did not engage in any of the athletic exercises or amusements of the college.

Mr. Dexter. I wish to know whether a man having received such a wound which caused his death within five or six minutes, could have sufficient muscular strength to have struck a blow to produce such a wound as that on Mr. Selfridge's forehead, through a thick hat?

Attorney General. That is a complex question, and is to be decided rather by opinion than by matter of fact. It contains a perfect argument.

Attorney General. After a shot had perforated the left lobe of the lungs, would it be possible to give a stronger blow instantly after the wound received than the person could have given before?

PARKER, J. Is this not the same question that was asked Dr. Danforth? All these things are conjectural, and the jury had better infer them from facts proved.

William Ritchie. Have the hat Mr. Selfridge wore on the fourth of August; received it from Mr. Selfridge in prison; when he came into my house the crown was raised up, and it was indented here, and it was broken here (pointing to the front of it), on the edge of the crown in front, so as to see the lining through the aperture; saw the hat was broken before we left the street. When he went into my house I took the hat, examined it more particularly, and found it as I have described. He went immediately from the Exchange into my house; was standing near the Fire and Marine Insurance Office with my face down the street, when a pistol went off. On hearing the report, heard some one exclaim, "Selfridge has shot Austin." Was standing near the gutter looking down the street, and when I heard the pistol discharged, ran to the spot from whence the report came: as I was going to it, saw the parties engaged; did not then know it was Mr. Austin; Mr. Selfridge's hands were raised up; but whether to strike or ward off blows I cannot say. When I got up to Mr. Townsend's shop, Mr. Austin had fallen. Mr. Selfridge was standing with his back towards the wall. Some of the people were about taking him. He spread open his arms, and said, four or five times, "I am the man." I advised Mr. Selfridge to go off the exchange; he declined it, and said he would not. I prevailed on him to go about ten paces, when Major

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Melvill came up to him, and said, that after committing such a deed he ought not to go off. He said he did not mean to: but after some persuasion, I induced him to move a little, but very reluctantly; and when he was as much as ten or eleven feet from the place, he said he would not go away, but would go to my house, and in making that declaration he went off; he desired some one or other to say that he was gone to my house, and particularly to tell Mr. Bell, the Deputy Sheriff, to come to him. When I observed to him that he was agitated, he said, "not so much as you are." He said that he knew what he had done.

Duncan Ingraham. On Sunday evening, the third, Mr. Selfridge was at my house in Medford. I desired him to get an execution for me at the clerk's office at Cambridge, on a judgment he had before obtained for me. It was upon a mortgage of a house in Concord.

Attorney General. Is this proper?

Mr. Gore. I was going to show the motive which induced Mr. Selfridge to go on 'change on the fourth of August; that it was in consequence of an arrangement with Mr. Ingraham, that he went there with the execution in his pocket, and that Mr. Ingraham went there himself to receive it.

PARKER, J. I think this evidence admissible. Proceed.

Mr. Ingraham. He promised to go to Cambridge for it, and it was agreed that he should give it me on 'change the next day; I went there twice to meet him, once before and once after the accident.

Dr. James Jackson. When I saw Mr. Selfridge in prison on the fourth of August it was six o'clock in the evening, four or five hours after the accident; observed a contusion on the forehead; it was about three inches long, near two wide, and elevated above the surface of the skin about half an inch; near the center the skin was broken, and it appeared to me to have been bleeding; it was not bleeding when I saw it. He complained of great pain in his head generally, not only in the part where he had received the blow, but through the whole head; he had also a blow on his arm, but it was not very considerable; there was also an appearance of a fever; if he had a hat on, it would have covered the part where the blow was received. The highest part of the wound extended a little under the hair. It was oblique upon the front part of the forehead; the skull was not fractured; have had occasion to know the state of Mr. Selfridge's health for several years past, having attended him professionally; recollect his telling me about four years ago, that his muscular strength was very little—that he was generally feeble from his having at some former period lost the use of his limbs, and that a boy of fifteen years of age could manage him; consider his relation of his debility to be true; his mode of walking and general manner of carrying his body, also satisfied me of the truth of his assertions.

Dudley Pickman. Was in Mr. Lane's shop on the fourth of August when the pistol was fired in State street; was sitting in the shop with my face towards the street. Lane was sitting within his shop with his back

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towards the inside door when the pistol went off. When the pistol was heard, I said, "Mr. Lane there is a report of a pistol." He rose up, went to the door, and I followed him; am positive he did not get up till after the report. I followed Lane to the door, we went out almost at the very same time, I then saw Mr. Selfridge and another person near the middle of the street, between Mr. Lane's shop and Mr. Townsend's. Mr. Selfridge had his arms raised up to ward off the blows that Austin was giving. The blood was then gushing out of Mr. Austin's mouth. Mr. Selfridge retreated towards Mr. Townsend's shop; the crowd gathered around them, and Aus tin soon fell.

John Brown. I lived a near neighbor to Mr. Selfridge; he lost the use of his limbs in a great measure in early life, be fore he went to college; he was always a feeble and weak young man; he was freed from military duty in consequence of his infirmity and weakness in his limbs.

Dr. Isaac Rand. Was in the evening of the fourth of August requested by Dr. Jackson, to visit Mr. Selfridge; found a large tumor on the left side of the head; it was almost two inches and a half long, one and a half wide, and considerably elevated. He appeared to labor under a considerable acceleration in the circulations; his pulse was hard and quick, so much so that I thought it necessary he should be bled; the operation took place. He said he should faint, the pain in his head was so very violent, he lay down, but immediately rose again, saying he could not lay. His countenance was flushed; the inflammation was so great that it was necessary to apply every method to alleviate it; did not seek him for a fortnight afterwards, the appearance of the wound was not gone; round the part where it was inflamed the discoloration remained, and the tumor was not totally dispersed. There was a small fissure in a right line, and the blow not having broken the lower integuments of the head, the contusion was so much the greater; had the skin been broken, the effect on the brain might probably have been less. If the blow had been given without the intervention of any substance, it is highly probable that the skin would have been more lacerated.

Mr. Davis. Is it your opinion that after a man has received a mortal wound in the lungs, it would have left him the power of muscular action? I believe that when there is an existing volition for a muscle to act, though a fatal wound be received, yet, that volition existing at the time, and exerting itself on the muscle, would take effect. The muscular power depends on the quantity of blood when a person is in health; if a diminution of the blood take place, the muscles will be less full, and less extended, their force and power therefore decreased, and as the pulmonary artery must have been injured, a great quantity of blood must have been discharged; by this the muscular strength must have been reduced; but as this would not operate on the arm till the blood left the muscles there, the blow might not have been impeded by the wound. If the volition was instantaneous or contemporane-

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ous, the stroke would descend with the whole force of the blow; but if the blow was given three or four seconds after such diminution of blood, he could not have struck with such force. If the party was in the act of striking when he received the fatal shot, the blow would be equally forcible; after the diminution of blood in the muscles, the blow would become weaker and weaker. A wound sometimes increases muscular action. I have seen persons spring up four or five feet after receiving a mortal wound.

Solicitor General. Is not that the case of persons who are wounded in the heart? There is such a sympathy between the heart and the other parts of the human system, that in general there is instant death.

Solicitor General. Have you not known a person to be wounded in the lungs and yet recover? I have known a part of one of the lobes to be taken off and yet the patient recover.

Solicitor General. Might not the immediate cause of the death of Mr. Austin have been the bursting of a blood vessel in consequence of the wound? If so, might he not have given the blow with his full power? When a ball passes through a man, it is with such velocity as to cauterize the wound and prevent an instantaneous hemorrhage, so that it does not immediately diminish the muscular strength.

Warren Dutton. Saw Mr. Selfridge walking down State street, on the morning of the fourth of August last; immediately preceding this rencontre; not one minute before; cannot recollect with certainty the position of his hands; it is in my mind that they were either folded or behind him under his coat. The sun shone in his face, he had his hat over his eyes, and his arms as I think folded behind him; I had hardly turned my eyes from him when I heard the pistol.

Lemuel Shaw. On Monday, the fourth of August, after he was in prison, I inquired of Mr. Selfridge whether he had any services for me. He said yes. I called on him the next morning and took from him a writ of possession in favor of Duncan Ingraham, Esq., against Oliver Williams of Concord; and he requested me to deliver it to Mr. Ingraham. I occupied the same office with Mr. Selfridge; he came to town on that day from Medford, between nine and ten o'clock. He mentioned the subject of his controversy with Mr. Benjamin Austin. The chief that I heard was when Mr. Richardson was present. Being engaged in business, and having known the affair before, I did not pay much attention to the conversation at that time. There was a boy in the office at the time; do not recollect seeing any pistol that day; he had kept for many months before a pair of pistols in an open desk in the office. Do not know if he usually carried pistols with him in riding to and from Medford; was in the office when he went out to go on 'change; did not go till after I heard the report of the pistol; Mr. Selfridge had on a common long coat; there was a pocket inside, in which he usually kept his pocket book, but whether there were other pockets, or whether they were outside or in-side, I cannot say. In

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walking think he generally rests his hands in some way or other; either by folding them before or behind him, or supporting them in the arm-holes of his jacket.

Solicitor General. Should you know one of those pistols, if it was shown to you? I think I should. They were steel barrels — what are generally called screw-barrel pistols.

Solicitor General. (Showing the pistol which Mr. Selfridge had carried). Is that one of them? I think it is—have no doubt it is one of the same. It is the same sort, but there may be many others of the same kind; after hearing the pistol I ran out upon the exchange, and saw Mr. Selfridge. I observed a break in his hat, and saw something through it.

Henry Cabot. Had a conversation with Mr. Selfridge on the morning of the fourth of August, on the subject of his controversy with Mr. B. Austin.

Mr. Gore. Please relate what he told you.

Attorney General. I must object to evidence as to what the defendant said to any person respecting this matter, before it took place, unless when his confessions are given in evidence against him, and then what he said at the same time may be inquired of, and shown in his favor. But to produce his declarations in testimony as to what he said before the fact, to establish the quo animo, is not otherwise admissible.

Mr. Gore. I will then inquire only what Mr. Cabot told him; which I understand to have been to this effect: that he was that day to be attacked by some one who would be procured or hired to beat him.

PARKER, J. As the having a pistol, and conversations before the defendant went on 'change have been shown, I do not see but that the defendant may now show that it was necessary to put himself upon his guard.

Mr. Cabot. In the morning before this affair took place, I notified him that he was to be attacked by a bully hired for the purpose. I drew this inference from a conversation with Mr. Welch.

Attorney General. I have a motion to make, that this may be considered as a transaction from the first day of August to the day of the affray, etc.—it is in writing, and I shall use it bye and bye.

Mr. Gore. If you will connect it with what passed in July, I have no objection.

Attorney General. I cannot say that I can do that, as I have no knowledge of any transaction in July being connected with that of the fourth of August. But if there be any connection I have no objection to going back to January.

PARKER, J. If the evidence offered be as to any information given to the defendant, of his being about to be attacked, so far as it is necessary to go back for that purpose, I see no impropriety in it. But I cannot permit improper testimony to be given, though it be agreed to by the parties.

Attorney General. Can we not ask questions, in order to show that the defendant did not believe this was a reality?

PARKER, J. Yes; but as to going back, I do not see where the counsel mean to limit their inquiries. However, it is unnecessary to decide now, how far they

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may go back. The information of an intended attack, though previous to the affray, may, I think be received.

Mr. Cabot. Mr. Welch in the morning informed me that Mr. Austin, senior, had said to him that he would have no personal altercation with Mr. Selfridge, but that some one would take him in hand who was able to handle him. The idea conveyed to me was that he did not think himself able to contend with Mr. Selfridge, but that he would procure some body nearer his match, or one who was able to cope with him. When I told Mr. Selfridge he was to be attacked by some one, I thought it would be some bully, from my having seen, as I came down the street, a stout, athletic person with a horsewhip in his hand standing near Mr. Selfridge's office. I mentioned this to Mr. Selfridge but he said there was no danger of that man, as he was a client of his. Mr. Selfridge bowed his head and gave me to understand that he knew what was to happen, or had been previously notified, or was ready, or something to that effect; I do not recollect the words he used.

John Brooks. Saw Mr. Selfridge before the affray, going down towards the exchange; he was walking slowly, with his hands hanging loosely behind him, outside of his coat. I lost sight of him when he got one-third across the street. As long as I saw him his hands were behind him, and without a pistol.

Mr. Gore. Before I proceed in the defense, as we have now closed our evidence, I will beg leave to read one or two authorities.

Grotius, book 2, chap. 1, § 3 says:

"We have before observed, that if a man is assaulted in such a manner, that his life shall appear in inevitable danger, he may not only make war upon, but very justly destroy the aggressor; and from this instance, which every one must allow us, it appears that such a private war may be just and lawful; for it is to be observed, that this right or property of self defense is what nature has implanted in every creature, without any regard to the intention of the aggressor; for if the person be no ways to blame, as for instance, a soldier upon duty; or a man that should mistake me for another, or one distracted, or a person in a dream, (which may possibly happen) I don't therefore lose that right that I have of self defense; for it is sufficient that I am not obliged to suffer the wrong that he intends me, no more that if it was a man's beast that came to set upon me."

Ibid. Sec. 6 page 10. "But what shall we then say of the danger of losing a limb, or a member? When a member, especially, if one of the principal, is of the highest consequence, and even equal to life itself; and 'tis besides doubtful whether we can survive the loss; 'tis certain, if there be no possibility of avoiding the misfortune, the criminal person may be lawfully and instantly killed."

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3 Grotius. chap. 1, sec. 2, page 2. "Wherefore, as we have remarked elsewhere, if I cannot otherwise save my life, I may by any force whatever, repel him who attempts it, though perhaps he who does so is not any ways to blame. Because this right does not properly arise from the other's crime, but from that prerogative, with which nature has invested me, of defending myself."

Attorney General. We have some witnesses to examine in behalf of the Commonwealth, and who we beg may be called.

OTHER WITNESSES FOR THE COMMONWEALTH.

William Donnison, Jr. About three weeks or so previous to the circumstance taking place in State street, I was walking with Charles Austin down Court street, near Mr. John Phillips' office. Mr. Selfridge met me and inquired respecting my father's health; while I stopped to speak to him, Mr. Austin passed on, and Mr. Selfridge, pointing at him as he left me, asked whether that was not young Austin, and I replied that it was. Young Austin was always very nice in his person; about eighteen years old. Just after twelve, on August fourth, I met him, young Mr. Austin, with young Mr. Fales, in Court street, near Concert Hall. We concluded to go in, and I sat about of a quarter of an hour, and after that, we went to my father's house, and staid there till about ten or fifteen minutes after one. The bell was ringing for one o'clock while we were standing at the door. He and young Fales went away together, leaving me at home He told me he had made a purchase of a new stick that morning. About the difference between his father and Mr. Selfridge, I merely mentioned the circumstance in walking up Cornhill; he seemed to treat it very lightly, and observed, that he could not with propriety resent it while in college, but after he came out of college he would not suffer any thing of the kind to be said with impunity; never saw him with so large a stick before.

Rev. Charles Lowell. Called at the house of Capt. Prince the morning Austin died, to inquire after the health of Mrs. Prince, and there met with a young man who was introduced to me as Mr. Austin; had never seen him before, and I conjectured then that he was the son of Mr. Benjamin Austin; was there about half an hour, and had considerable conversation with him. He appeared to me to be a pleasant young man, and made a favorable impression on my mind; that was about eleven o'clock; remember he had a cane, a black one. Saw or heard nothing at that time about any other weapon, pistol, or any thing else.

Attorney General. The evidence we propose now to offer is this:—It's nature and tendency will appear from the motion I now make, which for the purpose of being explicitly understood, I have reduced to writing, and beg leave to read.

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"James Richardson, having, on a cross examination by the defendant's counsel said that the defendant a few minutes before the fact of killing had said that Austin had abused his professional character by saying that an action he had brought for a tavern keeper against Austin, would not have been brought but for the interference of a damned federal lawyer; that he could prove it to be false, and had him in his power; that he had applied to him, and he had confessed it and refused to publish it; that the advertisement that day published was overpowered by that slander; and having sworn Duncan Ingraham and Lemuel Shaw, to prove the design he went on Change with, and having produced Henry Cabot to prove that he told Selfridge that morning that an attack would be made on him, and having produced Lemuel Shaw to prove that he commonly carried pistols to guard himself when he went out of town:—The Government now offer evidence to prove that this threatening to defend himself was from his unlawful intent to draw the father of the deceased or his family and friends into a mortal combat, with a design to destroy the life of any one who should be so drawn in; that in pursuance of this design he had within a few days previous, on the first and second of August, sent letters and messages to B. Austin, the father of the deceased, to provoke him to a combat, and that he was under no fear of an assault but what arose from his own seeking, and from what he intended by the advertisement he had published on that day."

I do not pledge myself that the witnesses will support this to the full extent, but if I did not suppose they would in a great measure, I would not waste the time of the Court in hearing it, nor unless I believed it to be pertinent.

Mr. Gore. I do not exactly know from the course this cause has taken that we ought to object to this motion, because our desire is, if it be consistent with the rules of law, to go into all the anterior circumstances.

PARKER J. My own opinion is, that nothing is proper evidence excepting what took place on the same day or very shortly before; and more particularly that anything which goes to show a previous quarrel with another person, or even with the same person, is not proper; the law being clear, that no provocation by words will justify blows. It therefore appears to me that this sort of evidence would not be proper. But as the Government, should I so decide, could not have the question revised in case of an acquittal, I do not wish to decide it alone, but am desirous to request the aid of the Chief Justice, who is in town.

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Attorney General. I would wish to hear the opinion of a full court. If the evidence is admitted wrongfully, the defendant can have the opinion of the whole court. But if the Chief Justice should come in, I know not whether, not having heard the antecedent evidence, he would be competent to decide on the admissibility of the evidence proposed by the motion I have submitted.

PARKER J. I should not have proposed inviting the Chief Justice to come into court, had you not stated in your motion all the circumstances on which you ground it.

Mr. Gore. I was about remarking what was our peculiar situation: while we have an earnest desire to show everything that relates back, and think it had better be admitted, we have had an intimation from the Court, that this would be improper; we will accede to the motion, under this condition, that the counsel for the Government will not object to what we may adduce. But it seems to be implied by the terms of the motion, that that part of the examination which went to what was prior to, and not a part of this transaction, was introduced by us. That is a mistake.

Attorney General. I do not say so—if I am mistaken I wish to be corrected.

Mr. Gore. The words of the motion are, "that James Richardson, having on a cross examination by the defendant's counsel." Everything that came out was from Richardson, who was called by the Government. He was their witness. We wanted to go into the question and were not permitted. I mention this merely to rebut the charge of anything having proceeded from us. We consent that every particular antecedent to the rencounter shall be gone into without keeping back a tittle.

Attorney General. If the Court are willing to admit the whole I have no objection.

PARKER J. I do not think the Court ought, if it be not admissible, to receive it as legal testimony, although it be so agreed by the counsel on both sides.

Attorney General. I do not believe it would take up a quar-

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ter of an hour, or near so long as debating it. It may however go to the jury by consent of parties, and I am willing that this motion, as it is on paper, and the evidence in support of it, should afterwards be laid before the whole Court, if the defendant be found guilty.

PARKER J. Do you consent that the evidence shall be gone into?

Mr. Dexter. If the whole of the antecedent circumstances may be gone into; upon that condition.

Attorney General. I wish to be set right if I am wrong, and as my voice is very feeble and the gentlemen on the other side are at some distance, I wish also to set them right, for I find that they misunderstood what I say, and therefore I will turn rather more towards them. I wish to be corrected in our facts if they be not so. I have said that "James Richardson having on a cross examination by the defendant's counsel." I did not mean this as a charge against them. But I will appeal to the minutes of any person who is taking notes, if all that Richardson said respecting Mr. Selfridge's being the damned federal lawyer did not come from questions put by the counsel on the other side.

Mr. Dexter. You say you wish to be set right, and therefore I only mention that Richardson was called by the Attorney General to testify to the conversation. He did so at the request of the Attorney General, and when cross examined by the defendant's counsel they proceeded as to the same conversation. It was to facts which made part of the same conversation that they examined.

Attorney General. As there is some doubt respecting the right to go into the evidence proposed by the motion, I shall read some authorities which I think pertinent to the question. The first is from 1 East's C. L. p. 239.

"In no case, however, will the plea of provocation avail the party, if it were sought for and induced by his own act, in order to afford him a pretense for wreaking his malice. As, where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him; on which B. strikes A. and A. kills him; this is murder. And in all cases of provocation, in order to extenuate

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the offense, it must appear that the party killing, acted upon such provocation, and not upon an old grudge; for then it would amount to murder."

I expect by the testimony proposed to show an old grudge against the father of the deceased; and that the advertisement from its common and usual effect, which the defendant published that morning, and must have published with an intention to provoke a quarrel, and that this intention further, in going armed in an unlawful, not to say felonious manner, was, to resent whatever he might conceive to be an injury to his person or character.

The principle is, that when there is a mischievous intention of killing, and in consequence of that a man does a deliberate act with intent to take occasion to kill, it cannot be excusable homicide, but manslaughter, if not murder.

It is easy for the Court to see that the defense intended to to be set up is, that the defendant killed the deceased on a sudden provocation; and that it is designed to maintain this on two principles; in the first place, that in all assaults, the person assaulted has a right to kill the assailant: secondly, that if the assault be such as to endanger the party attacked, he is then excusable, and perhaps justifiable in killing in his own defense. This is answered by observing that the excuse or justification of self-defense is taken away from the defendant when it appears, that he sought the quarrel, and went out expecting it or that he armed unlawfully, and then did anything to provoke an affray. Thus far the evidence proposed would show that the defendant published an irritating advertisement, in which he called the father of the deceased a liar, scoundrel and coward. I have to submit it, whether that is not evidence of its being done to provoke a quarrel. Should I be told that it is not to be deemed so, I will desist. But they have proved from the testimony of Mr. Cabot, that he told the defendant, that he expected Mr. B. Austin was going to get some bully to handle him, probably to chastise him on the Exchange. Then the evidence will show, that he went on 'Change unlawfully armed. There

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may be such a time in which a man may thus arm; but it could not be necessary at noon day, and when going on so public a place. The next evidence is that he expected this combat, not from the father, but from some other person, and went out with an intention to kill such person. I say then that he went out with an unlawful design. They have put it on his going there on a lawful design to deliver an execution to a client, and not with a design to kill; and that the attack on him was a sudden affray, without any fault in him: if that be the point of defense, the jury have a right to infer from the evidence I propose, that he was the cause of this attack, and that the advertisement was designed to bring on the resentment of Mr. Austin and his family; that he went on 'Change to meet an occasion of quarreling; this will connect itself with the defense set up, and show that it is a mere pretense, and that he had other views. For he said to Mr. Welsh that he did expect such a quarrel, and Mr. Welsh had orders for the printers to stop the press, and not to publish the advertisement, if Mr. Austin the elder would make such concessions as the defendant might require; we shall show that Austin said he would not, as he had given satisfaction enough. We have proved that Mr. Austin had not said the defendant was a rascal, for the words are not of that import. We will show that Mr. Austin said he was ready to give full satisfaction to him. If the killing happened from the preceding quarrel, it is not of consequence which was originally to blame. We mean to show, that this going armed was unlawful, because he provoked the quarrel, and expected it, and that if he had not gone so, this manslaughter would not have been committed. He ought to have demanded sureties of the peace, or he need not have gone out without taking some friends with him; but to say that he might go at noon day to meet any person who might attack him, having a felonious intention to kill him, and to say that with this previous quarrel it was lawful to go so armed, is more I hope than ever will be said in this court. All the things I wish to show, are parts of the case, and tend to prove that the defendant went on

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'Change unlawfully armed, on account of a quarrel of his own seeking, and therefore the loss of life being by his own act, it is not excusable; because if he would excuse himself, it is necessary, as all the authorities say, that he himself had no sort of blame. If this evidence is rejected, there will be no remedy for the Government, but if admitted, there is a remedy for the defendant, for he may have the opinion of the whole Court whether it was or was not admissible. I further say, that as I suppose, what they wish to offer in evidence, is respecting the suit brought against Mr. B. Austin, as a member of the democratic committee, and his saying that it was occasioned by Mr. Selfridge, or that it would not have been brought, I am willing to let in everything to that point, and even to admit the facts.

PARKER J. Is the admitting this evidence consented to?

Mr. Dexter. If the whole transactiton can be gone into.

PARKER J. How far do you mean to extend it?

Mr. Dexter. So far, as to the origin, as to show that what Mr. Austin said to Mr. Selfridge, was not true.

PARKER J. I am not inclined to give any opinion on the legality of the testimony, but to admit it, as it does not injure the defendant.

Jonathan Hastings, (Post Master). About a quarter past one, the deceased came to my office, and inquired if there were any letters for him. There were none. He gave me an invitation to his commencement; I met him in the morning, as I came down to the office, and the only observation I made to him was, that there was a piece in the paper that might be attended with bad consequences, and that people ought to be cautious and guarded in their conduct; he said he hoped they would, I think, and passed on. Saw Selfridge after I heard the pistol discharged; went to the window and saw a great concourse of people. Mr. Ritchie had hold of Mr. Selfridge, requesting of him to go away; he said I am not at all agitated: I am the man; Mr. Selfridge's name was not mentioned in our interview.

Hugh Rogers Kendall. A little past one o'clock, on fourth of August, I was passing from Congress street, towards the market; when about the middle of State street, heard a pistol go off; turning round, saw two persons engaged; knew Mr. Selfridge, his face was towards me; the back of the other was towards me, and I did not know him; he was striking blows at Mr. Selfridge, with a cane; saw the pistol in Mr. Selfridge's

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hand, but did not see him throw it. Mr. Austin struck two pretty smart blows; the two or three which he struck afterwards, were pretty faint ones. The cane was then out of my sight. I had lost sight of the pistol before. It appeared to me that the parties were too near each other for them to strike fair blows. The people crowded round them, and they moved towards the side of the street. As Austin fell, it appeared to me, Mr. Selfridge was in the act of striking with his fist. The first idea I had that there had been any thing more than powder in the pistol, arose from my seeing the blood. Mr. Selfridge retired from the crowd, and I saw no more of him.

Israel Eaton Glover. Am past thirteen; have lived with Mr. Selfridge, in his office. On the Saturday before this affair he sent me to buy some lead first, but I did not get it. I went back, and there were several persons in the office, Mr. Shaw and Mr. Hayward. He then asked Mr. Shaw how much shot was, a pound. He gave me a 4½d. piece to go and buy some shot; asked him what sort of shot; he said it was no odds what sort; it was near night. I went and bought the money's worth at Mr. Odin's shop. It was small shot; Mr. Selfridge came in between nine and ten o'clock on Monday, and had a whip in his hand; there used to be two pistols in the office; for about three of four weeks there was one missing; saw Mr. Selfridge put the shot in his pocket. Mr. Selfridge sometimes put his pistols in the carriage when he went out of town; I recollect once I put them in the chaise myself.

Thomas Welsh. On Tuesday, twenty-ninth of July, Thomas O. Selfridge, Esq. requested me to deliver a letter to Benjamin Austin, Esq., which I did in the afternoon of that day. This is the letter I think.

PARKER J. Read the letter.

Boston, 29th July, 1806.

Mr. Benjamin Austin,

SIR: My friend, Mr. Welsh, will deliver you this note and receive any communication you may see fit to make.

You have to various persons, and at various times and places, alleged, "that I sought Mr. Eager, and solicited him to institute a suit against the committee (of which you were chairman) who provided the public dinner on Copp's Hill, on the fourth of July," or language of similar import. As the allegation is utterly false, and if believed, highly derogatory to any gentleman in his professional pursuits, who conducts with fidelity to his clients, integrity to the courts, and with honor to the bar; you will have the goodness to do me the justice, forthwith, to enter your protest against the falsehood, and furnish me with the means of giving the same degree of publicity to its retraction, that you have probably given to its propagation. I had hoped the mention of this subject to you yesterday, would have spared me the trouble of this demand; that twenty-four hours would have enabled you, without difficulty, to

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have obtained correct information, as to the fact; and that a just sense of propriety would have led you to make voluntary reparation, where you had been the instrument of injustice. The contrary however, impresses me with the idea, that you intended a wanton injury from the beginning, which I never will receive from any man with impunity.

Tho. O. Selfridge.

Mr. Welsh. Mr. Austin, after reading the letter, said, that he could say nothing further, concerning the thing, than he had done to Mr. Selfridge yesterday; that he had heard the thing from another gentleman, and had mentioned it merely as a report, which he had heard; that he had not mentioned Mr. Selfridge's name; but had merely stated, in the presence of a number of persons, that he had been informed that Mr. Eager had not called upon the attorney who filed the writ, but that the attorney had called on him; and he at the same time expressed an opinion that such conduct in an attorney was disgraceful; he then observed, and repeated it once or twice afterwards, that he would call on the person from whom he had heard the story, and would advise with him whether it was proper that he (Mr. Austin) should give up his name. Next morning, Mr. Austin met me in the street, said that he had made inquiry concerning the truth of the report which he had circulated concerning Mr. Selfridge's conduct in Eager's suit against himself and the other gentlemen of the committee; that he was now convinced that the report was false, and that he had been to those persons to whom he had mentioned it for the purpose of removing the unfavorable impression which such a report, if true, would naturally make upon their minds. He observed, that it was not true that he had used Mr. Selfridge's name; that at the time when this conversation took place, he did not know the name of the attorney; and that this was the only apology that he should make. He also said that he had convinced the person from whom he had received his information concerning Selfridge's conduct in Eager's suit, that the information was incorrect; he did not mention the name of the person from whom he had received it, although I requested him to do it, because he (Mr. Austin) would then be exculpated, and the controversy would be between Mr. Selfridge and Mr. Austin's informant

I stated this to Mr. Selfridge, when I returned from seeing Mr. Austin. He then requested me to call again on Mr. Austin.

The same day, July thirty, about two o'clock, I called Mr. Austin out of Russell's Insurance office, and mentioned to him that I had communicated to Mr. Selfridge the conversation of the morning. I observed to him that Mr. Selfridge was not satisfied with the result of it; that he conceived that he had a right to demand of him the means of counteracting the effects of the falsehood, to which he acknowledged he had given currency. He answered that he entertained a different opinion, and did not conceive that any thing more could reasonably be expected of

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him. I then observed, that as he acknowledged that he had circulated a report highly injurious to Mr. Selfridge's reputation as a lawyer; and that, as upon investigation he had convinced himself of its falsehood, Mr. Selfridge insisted upon an answer to his letter of yesterday, in which should be contained a retraction of the assertion. He said that he could not consent to do this, and that he did not perceive Mr. Selfridge's object in requesting it of him, as he had never mentioned the name of that gentleman, and as he had stated to Mr. Scott, the only person to whom he had related the thing, that he had made inquiry of the truth of the report and was convinced of its falsehood. He said, it was impossible that he could have used Mr. Selfridge's name, as he did not know at the time when he had the conversation with Mr. Scott, that Mr. Selfridge was the attorney who commenced the suit. I expressed my opinion, that Mr. Selfridge ought to be satisfied with the acknowledgment which he had made, were it true that Mr. Selfridge's name had never been used by him, when speaking of this affair; and were it also true that he had declared to the persons to whom he had spoken concerning Mr. Selfridge's conduct in the management of the suit in question, that upon inquiry he found that he had been misinformed, and that Mr. Selfridge's conduct had been correct. At this moment, Capt. Daniel Scott passed out of Russell's office, and Mr. Austin requested him to step to the place where we were talking, which Capt. Scott did. Mr. Austin inquired of him whether he had used Mr. Selfridge's name, when he mentioned to him the conduct of the "federal lawyer" who commenced the suit against the gentlemen of the democratic committee. Mr. Scott answered that he did not. Mr. Scott was then called away by a young man. Upon this I told Mr. Austin I would communicate to Mr. Selfridge the result of our conversation, and left him.

On Thursday, the thirty-first of July, I was prevented by business from calling on Mr. Austin with a letter, of which the following is a copy; and it was not delivered to that gentleman until the next day.

July 30th, 1806.

Mr. B. Austin,

SIR: The declarations you have made to Mr. Welsh are jesuitically false, and your concessions wholly unsatisfactory.

You acknowledge to have spread a base falsehood, against my professional reputation. Two alternatives, therefore, present themselves to you; either give me the author's name; or assume it yourself. You call the author a gentleman, and probably a friend. He is in grain a liar and a scoundrel. If you assume the falsehood yourself to screen your friend; you must acknowledge it under your own hand; and give me the means of vindicating myself against the effect of your aspersion.

A man, who has been guilty of so gross a violation of truth and honor, as to fabricate the story you have propagated, I will not

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trust; he must give me some better pledge than his word, for present indemnity, and future security. The positions I have taken, are too obviously just to admit of any illustration, and there is no ingenuous mind would revolt from a compliance with my requisitions.

I am Sir, your humble serv't.

Tho. O. Selfridge.

Mr. Welsh. As soon as he had read the letter, he observed that he did not expect to hear again from Mr. Selfridge upon this subject; that he had done all that could reasonably be expected from him, in a case of this kind; that after being convinced of the falsehood of the report, which he had circulated, and which he had merely mentioned again, after hearing it from another person, he had been to that person, and satisfied him as to its falsehood, which he likewise had done to all the other persons to whom he had repeated it. He observed that Mr. Selfridge was pursuing him in an extraordinary manner, and asked what Mr. Selfridge meant by taking this high ground. I then answered, that Mr. Selfridge would have been perfectly satisfied with the recantation, which Mr. Austin had declared that he had made, were he convinced that it had been done in a proper manner, and were he not in possession of evidence that he (Mr. Austin) had not only used his name, (Selfridge's) connected with the report complained of, to other persons, but had never seen those persons for the purpose of declaring to them its falsehood. He then repeated that he had never mentioned Mr. Selfridge's name, when speaking of this business; and that he had done every thing that any gentleman would consent to do under similar circumstances.

I then told him that Mr. Selfridge had procured from Mr. Abraham Babcock, a certificate, that he, (Mr. Austin) had told him, that Mr. Selfridge had instigated the suit in question, that Mr. Eager did not apply to Mr. Selfridge, but that Mr. Selfridge had sought Eager; had induced him to commence the suit, and that Mr. Austin had never made any recantation to Mr. Babcock. He then inquired who Mr. Babcock was. I told him he was a friend of Eager, and was the person who had settled the bill with himself, and the other gentleman of the democratic committee; at first, he said that he did not know Babcock, but afterwards he said he recollected him; but made no observations upon what I stated to him, as to the contents of Babcock's certificate; he then adverted to the orders, which he pretended were given by Mr. Selfridge to Mr. Hartshorn, the Deputy Sheriff, to arrest him, and the other gentleman of the committee, and made use of this circumstance to justify his having spoken the words, at which Mr. Selfridge had taken the exception. I replied, that this, if true, would be no justification, and that he had had time to convince himself, that it was not true, by applying to Mr. Hartshorn, to whom I had applied,

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and who had informed me, that he had never received such orders from Mr. Selfridge; and that according to what he had repeatedly stated to me, it was impossible that he should have been induced by any injury, which he supposed Mr. Selfridge had done him in giving such orders, to circulate such a report concerning Mr. Selfridge, because, he had invariably stated to me, that at the time the suit was commenced, he was ignorant who the attorney was. I also stated to him, that Mr. Selfridge was not satisfied with the retraction, if it were true that he had made it, because each of those persons, who had heard Mr. Austin utter the obnoxious words, might have repeated them to many other persons, and that verbal recantations to the persons, who heard them from Mr. Austin, were by no means commensurate with the injury. This conversation was extremely desultory. Mr. Austin being very much irritated by the contents of the last letter; after he became more calm, I requested him to take the letter into consideration, and give me an answer to it, in the course of the day, he answered that he would have nothing more to do with it. I then told him that Mr. Selfridge was determined to have satisfaction of some kind or other for the injury, which had been done him, and that if he (Mr. Austin) should alter his determination that I should be happy to be notified of it, and be the bearer of any communication satisfactory to Mr. Selfridge; he answered that he would give no further satisfaction whatever.

After I communicated to Mr. Selfridge, Mr. Austin's refusal to make any further concession, Mr. Selfridge said his only motive in moving in the affair, was to rescue his professional conduct from the foul imputation which Mr. Austin had so unjustifiably thrown upon it, and that he would not relinquish the pursuits, till the object was accomplished, but said before he adopted other measures, he would leave Mr. Austin a day or two to reflect, which might induce him to comply with one of the alternatives proposed in his last note. The time elapsed and no proposals were made. From the temper discovered by Mr. Austin in my several interviews with him; but more especially the last—Mr. Selfridge thought any further advances for accommodation were not advisable; and remarked that his means of redress were reduced to a triple alternative, a prosecution, chastisement, or posting. A prosecution he said was out of the question, because a legal remedy, from its nature, were it certain in the event, could not be so promptly and efficaciously administered as the degree and kind of injury imperiously required. It would take two or three years to have an action decided; but few persons, comparatively, would ever know the result, and those few would be those only, who were conversant with the reporter's volume, and not clients and men of business, from whom he derived his living; that the damage arising to him would be unsusceptible of proof, for it would be impossible to prove who had abstained from employing him professionally, in consequence of the circulation of the report; and while the process was pending, his business would

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dwindle away, and the cause would be unknown or forgotten, and the permanency of the evil would remain unrelieved;—from his imbecility, a personal contest, he said, was impracticable; and to rely upon friends for protection, or to permit them to interfere when he commenced the affray, would be an act of cowardice;—that this mode of redress savored too much of malice and revenge to be compatible with an honorable desire of procuring reparation for an injury; that dog-fighting in the streets, was what he had ever reprobated, and it could have no tendency to disprove to those whose good opinion he was solicitous to retain, a falsehood, the effects of which, if not efficiently resisted, must annihilate his business upon any other supposition than that the calumny of Mr. Austin could acquire no credit with the public. Posting, therefore, he said was the only remaining alternative. This preventive remedy could be promptly applied to the mischief, and in its operation, would be extensive with all its possible consequences. If one man injure another, no matter from what inducement, and after notice of the injury, and a demand of indemnity, commensurate with the injury, he refused to make satisfaction, having the ability, he leaves the party injured a perfect right to protect himself against all the consequences of the injury, by the surest means in his power; and the severest exercise of this right absolves the party exercising it, from the imputation of malice or revenge; for although the man who committed the original wrong, may suffer, his suffering is merely incidental, and follows from the exercise of a perfect right, which can never be adjudged an immoral invasion of the rights of another, though it may sensibly affect them. But no man has a right to complain of those consequential sufferings which may be reasonably expected to flow from his own falsehoods or injustice. Mr. Selfridge said, by adopting this measure, the facts alleged by him, if denied, would come fairly before the public, and the infamy of barratrously stirring up lawsuits would be justly laid at his door, or transferred to the villain, who engendered the lie, or who screens the liar from his merited deserts.

Did not see Mr. Selfridge on Saturday. On Sunday was requested by Mr. Cutler, one of the editors of the Boston Gazette, to call at their office, with which I complied—while there, Mr. Selfridge's advertisement, of the fourth of August, was shown to me; and I was informed that Mr. Selfridge had directed it to be suppressed, in case I should have received any favorable communication from Mr. Austin. I told Mr. Cutler that I had not seen Mr. Austin since Friday, and had not received any communication from him since that time.

The following is Mr. Selfridge note of August fourth:

Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct, in a certain cause, and having refused to give the satisfaction

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due to a gentleman in similar cases—I hereby publish said Austin as a coward, a liar, and a scoundrel; and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proof.

Thomas O. Selfridge.

Boston, fourth August.

P. S. The various editors in the United States are requested to insert the above notice in their journals, and their bills shall be paid to their respective agents in this town.

Mr. Welsh. Mr. Austin obtained knowledge that he was posted, and published in the Independent Chronicle of the same morning, the following note, viz.:

Considering it derogatory to enter into a newspaper controversy with one T. O. Selfridge, in reply to his insolent and false publication in the Gazette of this day; if any gentleman is desirous to know the facts, on which his impertinence is founded, any information will be given by me on the subject.

Boston, August fourth. Benjamin Austin.

☞ Those who publish Selfridge's statement, are requested to insert the above, and they shall be paid on presenting their bills.

Mr. Welsh. About nine o'clock on Monday morning, fourth of August, Mr. Austin met me, and after some immaterial conversation, said, "he should not meddle with Selfridge himself, but some person upon a footing with him should take him in hand,"—or words to that effect. After leaving Mr. Austin, I was met by Mr. Henry Cabot, to whom I mentioned the conversation which had just passed between Mr. Austin and myself; Mr. Selfridge never expressed a vindictive spirit against Mr. Austin; he expressed a wish to have the matter accommodate; he said he only wished to have that done which would put his character on the same ground as it stood before the report against it. Always conceived that Mr. Selfridge wished that Mr. Austin should sign something to show he had circulated a falsehood; never asked Austin any thing more, than that he should put on paper that the report was not true; never asked him to criminate himself.

Benjamin Austin. Mr. Welsh has made a very lengthy statement; mine will be very short; if there is any difference the Court will be able to judge of it. I met Mr. Selfridge about the twentieth or twenty-second of July in Court street; he came up to me, and said, he had understood by Capt. Scott, that I had used his name improperly at Mr. Russell's Insurance office, respecting the action brought by him against the committee of arrangements for the dinner on Copp's Hill, on the fourth of July. I replied, that I had never made use of his name, and was surprised that Mr. Scott had said

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so. As we went down the street, Mr. Selfridge said that it was an injury to his character. I said that there was a light conversation with Mr. Scott on the subject, but as I had not used his (Selfridge's) name, so nothing I had said could affect his character, and again expressed my surprise, that Capt. Scott should give such information; walked on till I came by Mr. Selfridge's office; Mr. Selfridge asked me in. I answered that I was in haste, and did not go in, but again repeated that I had not used his name to any person. On the twenty-eighth or twenty-ninth of July, I received by the hands of Mr. Welsh the letter which has just been read. The epithets certainly raised some indignation. When I had read it, I told Mr. Welsh that I would go with him to Russell's Insurance office, and see Mr. Scott. We then went there, and found both Mr. Scott and Mr. Brazer. I asked them whether I had made use of Mr. Selfridge's name or not. They said I had not. I then turned to Mr. Welsh and said, "You find, Sir, Mr. Selfridge is wrong in his information, what more would you have me do?" He appeared to be perfectly satisfied, and I thought the business was ended there. A few days afterwards I received another letter, which was also brought to me by Mr. Welsh. I then told him I was surprised at Mr. Selfridge's pursuing this matter and asked, what more was wished for. No proposition was made. Welsh answered that the contradiction had only been made verbally, and Mr. Selfridge wished me to sign a paper. I told him, I did not know what more I could say, and as to giving any thing in writing, the case did not require it, for I had not mentioned Mr. Selfridge's name, and Mr. Scott and Mr. Brazer had both declared the same thing in presence of Mr. Welsh. On parting, Mr. Welsh asked me what answer I meant to return to Mr. Selfridge. I said, I do not know that I can do any thing more. Do you, said he, mean to make any further answer. I said, I do not know of any I can make. He went away, and I heard nothing more of the business till I saw the publication in Monday's paper. Mr. Welsh mentions that I said I would get some person to handle Mr. Selfridge. I said no such thing. I said, your friend has pursued this matter a great way, and expressed my surprise at the publication in the Gazette. I told him I had put in an answer in the Chronicle, and meant to take no further notice of it. I did not tell him that any one else would, for I did not know that any one would. I said, if Mr. Selfridge attacks me, I hope to have such support from friends at hand, as I shall be able to avoid any injury. I had no thoughts of assaulting him; I appeal to God, he would have passed me as safely as he stands here at your bar; went on about half past twelve to the insurance office, on August fourth. While I was in the office saw my son go by the window with Mr. Fales, it could not be more than four or five minutes before the event took place; did not expect him there; I never said a word to him on the subject of this dispute, or the publication; my son usually walked with a small cane. I understood he had bought one that day, but he

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had one at home, that when he had occasion to go over to Cambridge after it was dark, he used to walk with; it was twice as large, but he left it at home that morning; it was as much as twice as heavy as the one produced; he used it when he walked after dark.

Thomas Melville. Was in Mr. Lane's shop at the time this affair took place; the boy had combed and lathered me for shaving when the report of the pistol was heard. Mr. Lane was standing at the street door; I heard the report and asked what it was? Mr. Lane made answer, "It is Mr. Selfridge, he has fired a pistol and he has killed a man." I asked if it was Mr. Austin. Mr. Lane replied, "No, it is some young man I do not know, he is a very young man." I went into the street and afterwards saw Mr. Selfridge. I went up to him and tapped him gently on his shoulder, and told him it was reported he had killed a person, and desired him not to go away. He answered me with civility, and said he had no intention of going away. Some one called out loud, (and I am sure it was Maj. Russell,) and said no man had a right to stop him; I sat facing towards the door.

Henry Flagnor. Was in Mr. Lane's shop at the time referred to; Mr. Lane was standing at the front door with his hands behind him; he had been sitting; but before the pistol was fired, he had gone to the door.

WITNESSES FOR THE DEFENSE.

Daniel Scott. About the lawsuit that has been alluded to, Mr. Austin told me that a federal lawyer, who filed the writ against the committee went down several times to the tavern keeper to persuade him to institute a suit against the committee. He did not state who was the lawyer, but I knew who he meant; it was Mr. Selfridge. A number of gentlemen had questioned Mr. Austin as to the suit commenced against the committee; that the federal lawyer who filed the writ had been to the tavern keeper to persuade him to institute the suit; he repeated this observation turning round and speaking at me. I asked him if he knew the person who filed the writ; he did not state that he knew the person, but said the whole matter would come out by and by; from his manner he gave me to understand, and every one in the office, that it was Mr. Selfridge. I asked him if he positively knew that the lawyer who filed the writ did personally solicit the suit; he said, "Yes, I do."

PARKER, J. At any time before, when conversing about this in the presence of Mr. Austin, was it said that Mr. Selfridge had filed the writ? No, Sir. How did you know that Mr. Selfridge had filed it? I did not know it till I communicated it to Mr. Selfridge, which I did from what I then conjectured.

Abraham Babcock. On the twenty-eight of July, I met Mr. Austin in Court street, and told him I was desired by Mr. Eager to settle for his bill of the fourth of July dinner. Mr. Austin desired me to go to Col. Gardner, and agree with him what should be paid for the dinner. I did so, and we agreed. I afterwards

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told Mr. Austin of this; he said he was glad of it, and told me that Dr. Noyes would pay me the money. He inquired of me how Mr. Selfridge came to be employed in this business. I told him I did not know. He replied, that he sought it, or went after it, I can't say which expression he used. I went directly to Mr. Selfridge's office, and informed him that the action was settled. He said he was glad of it. He then observed, Mr. Austin says I went after this business. I answered, yes, he has just told me so. Mr. Selfridge asked me to give him this in writing, which I declined doing; he made a minute of it himself; Mr. Welsh was present in the office. Afterwards I met with Mr. Austin in Col Gardner's office. He inquired of me what he had said to me in the street; I related it to him; he said, if the story was not true, he had been wrongly informed. He said it arose from what he had heard from Col. Gardner, as he supposed; this last conversation, it was sometime in the week before the affray, but I cannot tell what day it was; was in the street, but saw nothing before the pistol was discharged. On hearing that I turned round, and saw the young man strike Mr. Selfridge several strokes with his cane. I afterwards heard Mr. Selfridge say he was not going to leave the ground; he was ready to answer for what he had done.

Nathaniel P. Russell. Heard Mr. B. Austin say that the action against the committe was commenced by a federal lawyer at his own solicitation. He did not mention the name of the lawyer, nor was I led from what he did say, to think it was Mr. Selfridge that was meant. Do not know that I heard him mention it more than once. There were a number of gentlemen in the office at the time. Never heard Mr. Austin contradict this.

M. Carrol. I live in Flag Alley, close by the Market—I was opposite to the post office; heard a pistol fired behind me, and I ran round to see what had happened; was in my shirt sleeves; saw Selfridge and Ritchie together; Ritchie said to Selfridge that he was extremely agitated, to which Selfridge replied, I am not agitated; I have done what I intended to do, or meant to do.

Benjamin Austin (recalled).

Attorney General. Did you ever tell any one that you had destroyed the letters received from Mr. Selfridge, by the hand of Mr. Welsh? I never did. The gentlemen here must know I could not have said so, the letters being in court now.

Attorney General. Have you ever contradicted the story about the federal lawyer? I went to the insurance office, and there made a declaration that I had been misinformed as to the circumstance. I asked Mr. Scott if I had used Selfridge's name; he told me I had not. In short, I cannot remember every particular, so many different circumstances have happened to affect my mind since, that it is not surprising I should forget.

John Osborn. Was at Mr. Benjamin Austin's on the evening of the fourth of August; young Mr. Fales was there; some gentlemen asked him whether young Mr. Austin struck before the pistol was discharged. Mr. Fales said that he was in State street with Mr. Aus-

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tin, and some other gentlemen, and on a sudden young Austin stepped from them; that he then turned round, and saw Mr. Austin strike Mr. Selfridge one blow, and then the pistol was discharged. He said also that Mr. Austin struck several blows after the pistol was discharged. Mr. Benjamin Austin was present at that time. He was attentive to this conversation and asked many particulars.

Perkins Nichols. Was at Mr. Austin's on the evening of the fourth of August; heard Mr. Fales, among other things, say to Mr. Austin that he went down Cornhill with his son that day; his son said to him, "I must be in State street;" that he, Fales, said to him, "You had better not go, but had better go home with me;" that he urged him to give up his cane to him; but that he refused; that they turned down State street together; that he saw Selfridge before Austin came up to him; that Austin went with his cane up, and struck him one blow over the head; that Selfridge made a pause, and then drew his pistol from his pocket and fired it; that when the pistol went off Austin was striking a second blow.

John Parkman. About five minutes after the event was standing in State street with several other persons; Mr. Fales came up to us, and one of us asked him if the pistol was fired before any blow was given; he said it was not; there was one blow first; he was a good deal agitated; some days after I conversed with him, but he said he could not recollect at that time how the facts were.

William Fales (recalled).

Attorney General. You have heard this testimony, what will you say of it? I believe Mr. Parkman's relation is pretty correct; I think I told him at the time he alludes to that Austin struck a first blow before the pistol was fired; I do not recollect seeing those gentlemen at Mr. Austin's house in the evening. I was very much confused and agitated that evening.

Attorney General. What do you say now as to the fact? For three or four days after the event, I thought of the subject anxiously, and endeavored to recollect the circumstances; I then wrote them down as correctly as I could. I am not able now to say whether a blow was given before the pistol was fired or not; what I have related is according to my best recollection and belief; several of Mr. Selfridge's friends, I remember particularly Major Russell, advised me to write down the account; none of Mr. Austin's friends did.

James T. Austin. Was at Mr. Benjamin Austin's the evening of the fourth of August; everything was in great confusion; Mr. Fales was much agitated, and we could get no distinct account from him; remember he said deceased struck three or four blows, but I have no recollection of any discrimination being made between blows before and after the pistol was discharged.

Joseph Wiggin. About five minutes after one o'clock I left my store and went on 'change; there I saw the deceased with a cane; he seemed uneasy. I saw Mr. Selfridge coming from the corner of the State House, and turned round to see if Austin had moved from his place, and found he had; at that moment I heard

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a sound as of a stroke of a stick on a coat. Casting my eye round I then saw Mr. Selfridge present his pistol, stepping back one step, and fire; at the same instant Austin was striking a blow; he afterwards struck two or three strokes more.

James Cutler. The Gazette of the fourth of August was printed in our office, at the request and on the account of Mr. Selfridge; contained the note already read.[11]

The Saturday before, Mr. Selfridge told me he expected to be under the necessity of putting a piece in our Monday's paper. In the evening he showed me the piece. I hesitated about publishing it. He related to me the circumstances of the dispute; said he could obtain no satisfaction; expressed his regret at being reduced to the necessity of such a measure, and wished the printing delayed to the last moment; desired it might not be printed, until we should have seen his friend Mr. Welsh. On Sunday I called on Mr. Welsh; he told me nothing had been done, and he gave me no directions to omit printing the note.

Ephraim French. About one o'clock I was in Mr. Townsend's shop, and seeing old Mr. Austin go down, expected a squabble. I saw two young gentlemen go down street, and presently return. Mr. Bailey said one of them was young Mr. Austin. I saw Mr. Selfridge coming from the corner of the State House; he walked very deliberately, and looked sober. Young Austin went from near where I was standing towards Mr. Selfridge. As he advanced I saw the pistol go off, and Austin struck several severe blows, and then fell near my feet. I should say that the pistol, according to my observation, was one or two seconds before the first blow was struck. I did not see any cane raised before the pistol went off. I looked particularly at Mr. Selfridge from the time he came in sight. After he had discharged his pistol he held up his arms to defend his head from the blows, and afterwards threw his pistol. No person stood between me and the parties, so that I saw them very distinctly, having gone out of the shop and stood on the sidewalk by Mr. Townsend's shop before they met.

Eben Eager. Saw Mr. Selfridge passing the street; told him I was the landlord that provided the dinner on Copps' Hill the fourth of July, and wanted him to sue the committee for my bill. I told him I would give him a five dollar bill to undertake it. Mr. Clough was to explain the whole to him. I afterwards called at his office, he told me he was satisfied that I could support an action, but wished it to rest a few days. I went to see him at Medford; he was discouraging in his discourse; talked about law suits being long; I asked him what I should do for money; requested him to advance me some on account of this demand, and told him I was willing to take three hundred dollars in cash for the whole account rather than wait. He refused to have anything to do in this way; said it would be dishonorable to him in his position; that no honest man as a lawyer would do it.

[11] See *ante*, p. 609.

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He told me he would not work cheap, and that his fee would be twenty-five dollars. I told him to go on with it. My whole bill was six hundred and thirty dollars. They offered me at one time three hundred and fifty dollars, but afterwards they told me they would have nothing to do with it. They offered me three hundred and sixty dollars; I would not take it then because I thought I could get the whole; but afterwards finding it was not to be obtained but by a law suit, I offered him the half; I certainly wished to have a part rather than lose the whole.

PARKER, J. This was then settled as a point of honor between the Committee and yourself?

Attorney General. This question has no bearing on the issue. I have asked it merely to know whether the witness has acted from himself.

Mr. Gore. Gentlemen of the Jury: Before I proceed, I shall beg leave to read a few sentences from Grotius.

No man is permitted to destroy another except in defense of that which if once lost is irrecoverable for ever, as life and chastity. 2 Grotius 19.

If a man is assaulted in such a manner that his life shall appear in inevitable danger, he may not only make war upon, but very justly destroy the aggressor; and from this instance which every one must allow us, it appears that such a private war may be just and lawful; for it is to be observed that this right or property of self defense is what nature has implanted in every creature, without regard to the intention of the aggressors. 2 Gro. 7.

What shall we then say of the danger of losing a limb, or a member—when a member, especially if one of the principals, is of the highest consequence, and even equal to life itself; and it is besides doubtful whether we can survive the loss; it is certain if there be no possibility of avoiding the misfortune, the criminal person may be lawfully and instantly killed. 2 Gro. 10.

So is he reputed innocent by the laws of all known nations, who by arms defends himself against him that assaults his life which so manifests a consent is a plain testimony that there is nothing in it contrary to the law of nature. 1 Gro. 117.

If I cannot otherwise save my life, I may by any force whatever, repel him who attempts it, though perhaps he who does so is not any ways to blame.—Because this right does not properly arise from the other's crime, but from that prerogative with which nature has invested me, of defending myself. 3 Gro. 2.

After having made a few preliminary observations which I thought pertinent, merely with a view to placing you in a situation, in which I presume you are disposed to be placed, that of being free from every bias or prejudice; and I in the like manner, wish to be heard, as the Attorney General said

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he was disposed to be heard, that is, as if this were a cause between two indifferent persons of whom you know nothing; for that I presume to be the very essence of justice; and if it were possible that a Court and Jury should ever decide the suit between them, abstracted from the parties, and merely by fictitious names, we should have decisions more correct than we now have; not that I mean to find fault with our own jurisprudence, or the organization of our courts, but it is sometimes impossible to be unaffected by the parties who are to be benefited or to suffer. It was therefore that I took the liberty to remark on the danger of prejudice, and to illustrate it by propositions so simple and plain, that they would receive the assent not only of the minds to which directed but of every human being to whom they could be addressed. The consequences that followed were so natural and necessary, that they could not be mistaken, and I did flatter myself, and I do flatter myself that they apply to the cause I now defend.

Having stated the law, from the several authorities which I have read in support of the principles I laid down, I went into the examination of the evidence, and you have heard it with an attention and patience which will enable you to determine this issue according to the dictates of impartial justice.

This is a day of anxiety and solicitude to my client, and of interest to his counsel; yet I can say that it is a day of humble hope and tranquillity; a day of firm confidence in the truth and justice of his case, for it is on these that he must depend for his acquittal, and on these alone does he wish to depend. I should say, this was to him a day not only of consolation, but of joy, if joy could be presumed to enter the heart of a man who for more than four months has been immured within the damp and unwholesome walls of a prison, when his constitution demanded free and open air, who required liberty for the discharge of the usual duties of life, but who felt himself at that time subject to the most unfounded calumny, yet would not from his respect to the laws

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of his country reply; for though he could have replied, he did not. No speeches were made, no observations were addressed to the public, except to request that they would not prejudge his cause, but wait patiently for the time when he might have it in his power to state fairly to the world, the law and facts of his case; when he would put himself on trial by his country, which country, you, gentlemen of the jury, are; and it is now on that law and on those facts, as they shall be laid before you, that he is willing to depend for his acquittal. With respect to the law, it is my duty, and I have no disposition to go beyond it, to state the principles as they have been read to you from the books; to ascertain what it is in this case, and when that is done, to state the facts, that you may apply the one to the other, and come to a just issue. The law I read to you, is not of this day; it is not novel, or of recent date. It is older than any of us, older than society, old as nature herself. It is founded in nature and in the principles of society, and without it man could not exist.

Of the authorities that were read, one of the first was from Lord Coke, who says, that if A. assault B. so fiercely and violently, and in such place and in such a manner, that if he should give back he should be in danger of his life, B. may defend himself, and if in that defense he killeth A. it is *se defendendo,* because it is not done *felleo animo.* Whatever a man does in preservation of his person he does not do feloniously. This I take to be the sense of the doctrine laid down by Lord Coke.

I took the liberty of reading another authority from Grotius; one of the first and brightest ornaments of the age in which he lived, who has done more for civilizing and humanizing the world, than any author who ever wrote; who has written more forcibly and effectually on the rights of man and in support of the religion of Jesus, than perhaps any divine however celebrated. What says he? He says that if a person be in danger of life, or losing a limb, or a member, especially one of the highest consequence, and it be eve-

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doubtful if he can survive the loss, and there be no probability of avoiding it, the criminal person may be lawfully and instantly slain.

We then come to Judge Foster, one of the ablest judges that ever sat on a British bench: He tells you, that the injured party may repel force with force, in defense of his person, habitation, or property, against one who manifestly endeavors, with violence and surprise, to commit a known felony upon either: in these cases, he is not obliged to retreat, but may pursue his adversary, till he find himself out of danger; and if in the conflict he happen to kill, such killing is justifiable self defense.

You have the same doctrine laid down by Lord Hale, who was one of the best and most humane of judges, as well as one of the most devout christians that ever appeared. Both he and Hawkins support the same doctrine; and in Hawkins it is further said, if the party assaulted cannot conveniently and safely retreat, and if he kill the assailant to avoid this beating, it is justifiable homicide. This is the law from those writers.

The next is Blackstone, whose doctrines have never been controverted. He tells you, that the party assaulted must flee, as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or enormous bodily harm, and then in his defense, he may kill his assailant. He does not put it on the question of life being in danger, but says, that where a man is in danger of any enormous bodily harm, he is not to wait till the case has happened, but has a right to kill his assailant. This forms the law of justifiable homicide, and is the doctrine of universal justice, as well as of our municipal law.

Thus, Gentlemen, I have shown from the books, the principles that govern in relation to justifiable homicide. I will now read one or two cases which more perfectly establish this doctrine, and show what is the nature of the assault, that justifies the assaulted in taking the life of the assailant.

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In Maugridge's case, who upon words of anger between him and a Mr. Cope, threw a bottle with great violence at the head of the latter, and immediately drew his sword, on which Mr. Cope returned a bottle with equal violence, Lord Holt says, it was lawful for Mr. Cope so to do, for he who hath shown that he had malice against another is not fit to be trusted with a dangerous weapon in his hand; and he adds it was reasonable for Mr. Cope to suppose his life in danger when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life.

It appears to me that this case justifies him who shall kill, where a weapon is used which would endanger his life, though it have not the effect; and that the person assaulted has a right to attempt the destruction of the assailant, that he himself might not be destroyed. You there have the particular case. This case will depend on the law of justifiable homicide. It therefore is not necessary to have recourse to such as are so strong as that I have read. The law says, that if there be reasonable ground to suspect that life is in danger, a man shall be excused, if he exercise the right nature has given him to destroy and take away the life of him, by whom his own has been endangered.

As to Nailer's case, I do not mean to contradict it, any further than it is contradicted by the doctrine I state. You recollect, Gentlemen, that it was a case, where, a son in consequence of hearing a scuffle between his father and brother rose from his bed, threw his brother on the ground, fell upon him and beat him; that while in this situation, he who was undermost, not being able to escape or avoid the blows he received, gave his brother a mortal wound with a penknife. This was ruled to be manslaughter, because, the prisoner was, in the first place, in the wrong, as much so as any man can be who offends against the law of society and of nature by fighting with his father; and further because he was not necessitated from the attack of his brother, which brother was without any weapon in his hand, to have recourse to such

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violent means for defense; because also he was in a wrong act, and then made use of a mischievous weapon. For, says the book, from the manner, in which he was attacked, there was no reason to believe his life ever was in danger. But had he been attacked with a dangerous weapon, then he would have been clear of crime. The law will not countenance a man in destroying his assailant, unless there be a reasonable ground to believe that his life or person is in imminent danger; and whether it be so or not, may be determined from the circumstance of the weapon, whether it appeared to be such a one, with which life might be destroyed.

On this apparency of intent and reasonable ground of apprehension that life was in danger, was determined the case of the servant, who coming up found his master robbed and slain and instantly killed the murderer. Although not attacked himself, yet on account of the apprehension which it was supposed he might be under of being attacked, and his own life put in danger, it was held excusable homicide.

That is the principle on which some writers defend the authority given by the law of destroying the robber who demands your purse; because the same man who comes to rob, would, if necessary for his purpose, take your life.

Further, if an officer, going to arrest a man in a civil suit, break into a house, which he is not justifiable in doing, and the person within kill him knowing him to be a baliff, it is manslaughter; but, adds the authority, if he had not known him to be a civil officer, the breaking in would have afforded a reasonable ground of suspicion that it was done with a felonious intent, and of course excusable homicide.

There was another case read to you which it is important perhaps to notice. It is that of the officer who entered the chamber of a gentleman who was in bed, on which he sprang out of bed, seized a sword, and ran the officer through the body. This was determined to be manslaughter. Because he did not use sufficient caution, and because the officer had no weapon in his hand, for had there been any, that circumstance might have led the gentleman to think there was a

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felonious intent in entering his room, and then it would have been excusable homicide.

It will be important, Gentlemen of the Jury, for you to keep these doctrines in your minds when you come to consider this case on the evidence. It will be incumbent on you to further recollect the decision of Maugridge's case as to excusable homicide, as distinguished from manslaughter. If I recollect aright, the true criterion between homicide in chance medley upon self defense and manslaughter is, where both parties are actually fighting at the time when the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer had not begun to fight, or having begun had endeavored to decline any further struggle, and afterwards, being closely pressed by his adversary, kill him to avoid his own destruction, this is homicide excusable in his own defense. Manslaughter therefore on a sudden provocation, differs from excusable homicide *se defendendo* in this, that in the one there is apparent necessity, for self preservation, to kill the aggressor; in the other there is no necessity at all, being only a sudden act of revenge, and then it is manslaughter.

This distinction I wish you, gentlemen, to keep in your minds when you come to examine this particular case.

Having stated the law as I conceive it to be, on reflection, it will be found to be supported by the books which have been read, and as it will, I presume, be given to you by the Court, I now come to state the facts, for it is my duty only to state the facts as they have appeared in evidence, without arguing upon them.

In doing this, although I do not mean to go into a critical examination of the testimony you have heard from some of the witnesses, nor in the least to question their veracity, yet there is a fitness and propriety that some of them should be laid out of the way. I mean Mr. Lane. And though I have not the slightest intention of impeaching his character, yet it is manifest from the whole current of the testimony delivered, that Mr. Pickman must have been right, and Mr.

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Lane, as well as the other witnesses who were examined in support of his evidence, mistaken. Because Mr. Lane says that the transactions he testified to, were on the brick pavement, when all the other witnesses, as well as Mr. Pickman who was with him, say the scene was in the middle of the street. I shall say no more on this point. It would be wasting time to suppose you can attach the least weight to the testimony of Mr. Lane. On that of Mr. How, I have only to beg you will compare it with that of the other witnesses; because, as the first time he saw the parties together, was when they were on the brick pavement, he could not have seen the first blow and the earlier parts of the transaction; he could not have witnessed all those ingredients, which go to enable you to make a just conclusion from the whole; he could not have seen those circumstances which took place before the firing.

On the previous circumstances that have been detailed to you, I mean the misunderstandings that took place between the defendant and Mr. Benjamin Austin, the father of the deceased, it is not necessary to say much. I shall merely ask you to consider the statement made to you by the witnesses examined. It is from them only that I wish you to judge the serious provocation received.

You have the testimony of Messrs. Babcock, Scott, and Russell, as to expressions used by Mr. Austin, and the manner in which they were delivered. It is by putting yourselves in the situation in which these witnesses stood, that you must examine the force of Mr. Austin's expressions. Mr. Scott so perfectly understood the meaning of Mr. Austin, that he went to Mr. Selfridge to communicate it; and permit me to say, that whatever took place at that time, if from the general apprehension of yourselves, you think it was applicable to Mr. Selfridge, you will believe and suppose it to be true, that Mr. Austin meant to charge Mr. Selfridge with being the damned federal lawyer, who had solicited the action; and in a court of law it cannot but be believed it was as high a charge as could be made; it amounted to a criminal offense,

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for it was that he went about stirring up and soliciting suits. You saw Mr. Scott on the examination stand, and have to decide whether he did, or could believe it was Mr. Selfridge that was meant. The story from Mr. Austin is that he had contradicted the report to the very persons to whom he mentioned it. Mr. Scott says that he never did; Mr. Russell, who also heard the imputation, and knew, it appears, how it was intended to be implied, says that Mr. Austin never did contradict that fact. The conduct then of the defendant in demanding a written recantation from Mr. Austin must appear, I trust, to have been perfectly justifiable, and warranted from the general charge against him. He did not persist in his demand of reparation more pertinaciously than what in duty to himself and family he was bound to do. He asked only for the means of proving that Mr. Austin himself had acquitted him from the charge he had made against him, as he found Mr. Austin would not do it himself. This satisfaction was refused. You have it in evidence that he never received anything like a satisfaction, which a man of honor in his profession, or as a man of any decent standing in society could be satisfied with. For, there is not the smallest evidence that there was a contradiction of the report, but only an evasion. Mr. Austin did not contradict the charge that he had made; he merely said that he had not used the name of Mr. Selfridge; this, too, was not done by way of disavowal to the man himself to whom he had said it; and was, from the very manner, rather a confirmation than denial. Having thus acknowledged that he had not used the name of Mr. Selfridge, Mr. Austin satisfies his conscience that he had made every amends. Can any honorable man say that he had, when Mr. Russell and Mr. Scott say that he never had contradicted it to them? When asked, did you contradict it to Mr. Babcock, he in the first place says that he heard it from Mr. Babcock, and that this was after the suit was brought. I shall not enlarge on this point; I refer you to the evidence for Mr. Austin's behaviour. His own testimony is against him. Can you then have any doubt that Mr. Self-

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ridge persisted more than he ought to have done in requiring Mr. Austin to contradict in writing what he had circulated; because said Mr. Selfridge, I find that when you say you have contradicted the assertion in person, these very people to whom you say you have done it, declare it has not been done. Was it then honorable in Mr. Austin to refuse giving to the defendant a written acknowledgment, that the report was without foundation? I put it to you, gentlemen, if you had stated to various persons, from misinformation, that which bore hard on the character of anyone, and you were asked to give a note in writing that you were misinformed, would either of you have refused that small and honest avowal? No; I know you too well to think it; for I know that no honorable man could or would refuse it. For where I have undesignedly done an injury, by spreading a false report of another, would I not try to retract it, that I might make reparation as much as I could, and even put it in his power to show that he was right and I in an error? Examine whether there was, throughout the whole, a desire in the defendant for Mr. Austin to do anything more than to enable him to have this retraction, that it might be in his power to use it for his own justification. He says, in his conversation with Mr. Welsh, that his only motive in moving in the affair, was to rescue his professional conduct from imputation. That he could not relinquish this pursuit; but before he adopted other measures, he would leave Mr. Austin a day or two to reflect. Was this the language of a man who sought revenge? No; it was that of calm and mild expostulation asking redress for an injury sustained. I shall say no more on this part of the testimony, than to observe, it rests with you; if you give credit to Mr. Austin, you must believe Mr. Welsh tells a falsehood; you must believe that Eager, Russell, and Scott all tell falsehoods, or are most strangely, not to say grossly mistaken. You cannot, I say, believe the relation of Mr. Austin, unless you believe that all these persons are mistaken.

I now come to the motives and to the conduct of the de-

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fendant on this unhappy day. If you are of opinion that there was no felonious intent on the part of Mr. Selfridge, at that time, then you cannot find him guilty of manslaughter, because manslaughter must be committed with a felonious intent. If there were no felony in his mind, no crime in his heart, he must be decided by your verdict to be an innocent man.

I wish now to trace the conduct of Mr. Selfridge on that day:—You find there had been a suit prosecuted by him, in which he was by the desire of Capt. Ingraham to sue out an execution, and deliver it to him on 'Change. Capt. Ingraham is positive that he told the defendant on Saturday or Sunday evening, to get the execution; and that he himself went twice to the Exhange for the purpose of receiving it from Mr. Selfridge. You have therefore the very reason why the defendant went there; when in the common practice of his profession, it would be natural to go on the Exchange in the general course of business; but here is a particular piece of business to meet a person by appointment; there can therefore be no doubt, that he went there for that purpose, and for that only.

In the conversation with Mr. Richardson, the defendant said, he could not confine himself; that his business was of a peculiar nature, and that he must go about it as usual. Perhaps he recollected at the time, that he was to go out on special business, and that was the reason why he spoke to Mr. Richardson as he did. When this took place with Mr. Richardson, he had no idea of the affray which afterwards happened. It is hardly possible, if he had entertained the smallest intention of provoking a quarrel, that he should not have mentioned it in conversation to Mr. Welsh and Mr. Richardson, persons who were his intimate professional acquaintances. After Mr. Selfridge left his office, you find him walking on 'Change, in as calm and deliberate a manner as ever he did in his life; and if any of you, gentlemen, have ever observed Mr. Selfridge walk, you must recollect that he does hold his hands in walking, exactly as the witnesses

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have described; for it is the natural position of a man who would wish to aid the debility of his body; and the manner in which Mr. Selfridge is stated to have walked, gives the exact description of the walk of a weak and feeble man.

From the testimony offered, you will further find, and particularly by the evidence of Brooks, (for I wish to trace the defendant down to the Exchange) that he is clear Mr. Selfridge's hands were behind him, and not in his pocket. Mr. Brooks stood at Clark's shop, and observed Mr. Selfridge from the moment of his entering State street. He therefore must have seen the position of his arms best. Some of the witnesses suppose that his hands were in his pocket; this was a mistake that might easily arise from not having a full view of his body. It would be difficult in some kinds of coats which have the pockets behind, to ascertain whether the hands were actually in them or not; but Brooks, who saw him pass first in the front, and then in the rear, must be the best qualified to determine what was the actual situation of the defendant's hands. Irwin tells you that his hands were behind him; that in this position he came down the street, but that when Austin came out from the side walk, Mr. Selfridge held up his left hand, as if to guard his head, took his right hand from behind him, put it into his pocket, drew out a pistol, extended his arm, and fired.

Take this with the testimony of French, Bailey, and Shaw, who received from the defendant the execution he sued out at the request of Mr. Ingraham, and the current of evidence from other witnesses; for on these facts it is, that you have to determine, and if you must judge from the weight of evidence, and decide according to the number of witnesses, you can have no doubt that the defendant, instead of going to meet an affray, was going down to 'Change on special business, with his hands behind him, and walking very deliberately, when he was assaulted by young Mr. Austin. To further prove that he could not have gone to seek this insult, you will please to recollect that he went with his face looking towards the Branch Bank, and not towards the place where

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the deceased was. When in this situation, judge you whether a man with, as you are told, the sun in his eyes, and his hat flapped or slouched over them, could have seen Mr. Austin, who stood with his back against Mr. Townsend's shop. It is manifest that Mr. Selfridge could not, from the course he was taking, have looked that way, and it is in evidence that he did not bear towards Mr. Townsend's shop, till obliged, from the violence of young Austin's attack, to turn to defend himself. Some say that he stepped back, others, that he turned round to do this.

It would seem that when the defendant had got a little to the southward of the middle of the street, the unfortunate young man rushed out and made an attack upon him. Let us for the purpose of ascertaining this, now compare the testimony. Lewis Glover states to you that he went into State street that day, for the express purpose of seeing what would take place, supposing there would be an affray between Mr. Selfridge and some other person, in consequence of the publication in the Gazette. He says he took a station where he had a full view of the defendant, as he came down the street; that he walked very deliberately with his hands behind him; that Austin went from the pavement with a quick pace directly against Selfridge, with his cane uplifted, and gave the defendant a violent blow, and as he was giving the second, Selfridge fired. If you believe this, there was before the discharge of the pistol, as violent a blow given, as could be struck by an athletic young man, directly on the defendant's head. The witness' credit stands totally unimpeached, even if alone; but is it not corroborated? For was not Edwards also in expectation of some affray, and stopped before Mr. Townsend's shop? He saw Mr. Selfridge walking in a direction that would have brought him on the brick pavement near the Branch Bank, when a person brushed by him, and got near the middle of the street, with a stick in his hand; he adds, that it was uplifted, but whether in the attitude of giving or receiving a blow, he could not say; but that the cane descended, and the pistol was fired at the same

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instant. You have it however in evidence, that just before, something caught the eye of Mr. Edwards, and he turned his head to Mr. French. Does not this interval afford time for the first blow deposed to by Glover? Were there no other testimony but that delivered by these two witnesses, would not this of Edwards be the strongest corroboration of that of Glover? Would you not on giving a due credit to both, say that his evidence is confirmed by the statement of Edwards? Consider the situation of the parties; Selfridge coming down the street pursuing a course that would have taken him to the left of Austin, towards the Branch Bank, as soon as Austin perceived him, he changed his stick from the left to the right hand, and brushed by everyone with a quick pace. Consider the distance between him and Selfridge, the few paces that intervened; that Mr. Austin was running on the defendant, as you have been told, as if he was going to attack a wild beast; that he sprung from the pavement and rushed on him, when it was not possible for Mr. Selfridge, whose hat was over his eyes, and when his hands were behind him, to guard himself before a blow could have been given. The circumstances of the case render the testimony of Glover so connected, as not to leave you a possibility of doubting it, and unless what is testified be contradicted, you cannot reject it; but if it be of such a nature, that it can be reconciled with, and is supported by circumstances and other evidence, you cannot but believe it. See how this is established more and more by every comparison. Wiggin says that he was in State street also, for the purpose of seeing anything that might take place; that he was conversing about young Austin and Selfridge; that he saw Mr. Austin with a stick in his hand, and Selfridge coming down the street, that he looked around for Austin, after having seen Mr. Selfridge, and while his eye was thus momentarily directed, he heard a blow. Can you account for this, and the other blow which followed, unless there was one given before the pistol was fired. Mr. Wiggin could not have been deceived, when all his attention was awake for the purpose of observation;

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and he saw, when the pistol was fired, the hand descending again. There is a corroboration as strong as possible of this fact, that a blow was given before the discharge of the pistol, from the testimony of Bailey and French. They tell you the assault was as violent as possible, and that they could not tell which was first, the blow or the firing of the pistol. Now if their eyes were turned aside, but for an instant, there can be no doubt but that this evidence is true, and that they did not see the whole of the transaction.

From some of the testimony, it appears, that in wounds of this kind, the strength is very great, and the muscular action quicker and more sudden. Do not these circumstances go to corroborate the statement of Mr. Glover, and to account for the instantaneous act of the blow, and discharge of the pistol?

It is but fair to draw this conclusion, that when witnesses testify positively to a fact, which other persons might not have seen, but which is neither contradicted by, nor contradicts the testimony given by others, to believe that what was seen by some of the witnesses, might have escaped the observation of the others. Because if you do this, you give credit to each party, without supposing either to have sworn falsely.

I now come to the testimony of Mr. Fales. I mean not by any means to discredit him. I believe him to be an honorable young man; nor has anything that has taken place, caused me to doubt it. I however do believe, that when a transaction is recent and fresh, the impressions are stronger than at a future day. I need not contend for a proposition like this. There is no reason to suppose that he could then tell what was untrue. He relates that there was some conversation between young Austin and himself about the cane, from which you will draw your own conclusions. It appears however, that he had some apprehensions about his friend's having this cane, for he asked young Austin to give it to him, and he states, that when at Townsend's shop, the deceased brushed by him, and went toward Mr. Selfridge.

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He further tells you, and he tells you very candidly that he cannot tell which was first, the blow, or the firing of the pistol.

When you see the sensibility of this young gentleman, who could not but be agitated on the occasion, when he was deceived and deluded by his friend, who had told him he was not on this errand, could he be unruffled, calm and unagitated? Surely not, for even at our time of life, when the nerves are hardened, when we are not so liable to be agitated as a young man like Mr. Fales, should we see a person spring forward to do that which we should so earnestly wish he was not going to do, would we not feel agitated and alarmed?

Had he any motive on earth not to declare the actual fact? Had he any occasion to prevaricate? None. Would you, Gentlemen of the Jury, or would you not believe what he said at that time? Can you think he did not then feel every disposition to speak in favor of his friend who lay bleeding and dead on the spot he had left? He must have had every feeling alive to the memory of his friend and would have been happy to raise it in the estimation of those he addressed. It is but natural that he should. But it is not in nature that he should wish to say anything against him. How then can you account for the answer? It was the undisguised voice of truth, at a moment when she could be the least concealed, in answer to a distinct and positive question. It is on that answer that I would rely, and it is on that, that you will, I trust, also rely.

Look to the further declarations of Mr. Fales on this unhappy occasion. In the course of the evening, when Mr. Benjamin Austin must have felt all that resentment which a parent may be supposed to feel against the man who had taken the life of his son; when he could not wish to hear his child deemed the aggressor; when Mr. Fales could not have wished to plant a dagger in a father's bosom; when he must have gone to the house of Mr. Austin with far different intentions; when he went to administer balm and consolation to an aged an afflicted parent; when it might, without im-

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peaching the character of Mr. Fales, be well supposed he wished to hide the truth, but truth must be told. What was it that he then answered to a father's question? "Your son struck a blow first; a violent blow before the pistol was fired." Had Mr. Fales the least motive to represent his friend's conduct as influenced by a bravado spirit, or to give that color to the transaction? Mr. Nichols went and made a memorandum of the words. You have this fact fully in evidence. There was then every motive on earth but that of truth; to tell a different story. From the representations made by the friend of the deceased at the very hour of his death; from his answer to an inquiring and afflicted parent, you, therefore, have the testimony of Glover most fully and completely corroborated. There must necessarily have been one violent blow first, and on the second blow descending, the pistol was fired. Thus then stands the evidence of this important fact; you have to it, the positive testimony of Glover, corroborated by that of Edwards, and of Wiggin, by a circumstance as strong as if he had seen the blow, for he heard it. You have it corroborated not only by the first declarations of Mr. Fales, but from probability arising, from the manner, in which he delivered his testimony when on the stand.

This then was the situation of the defendant, he was going down State street not only on his just and ordinary business, but on a special engagement to meet a client there for a particular purpose. True, he had notice that some person was to be hired to destroy or attack him. It may have been said that he could have gone to a magistrate, and obtained the protection of the laws of his country and have taken security, for keeping the peace. I agree that this would have been a fair answer to the question of, what could he do? If Mr. Cabot had said, young Austin is to attack you, speaking as I do in a court of justice, it was, under such a circumstance, his duty to have done so. But it was not so said to him, it was merely mentioned to him that some person was to be hired or employed to destroy or beat him. He had it not

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then in his power to avail himself of the protection of the law by taking security, for he did not know by whom he was to be assailed. It became then, as the laws of his country could not afford him protection, a duty in him to protect his own life by all the means in his power. The particular purpose for which he had the pistol in his pocket I know not. What it was is not fully in evidence. But the plain fact is this, that the defendant with a pistol in his pocket was going down to the Exchange on business, and was met by a man coming upon him like a person attacking a wild beast; a blow was struck on his head which would have fractured his skull had it not been for the hat which he had on. What did nature, what did law and reason prompt to do on such an occasion? Was it not to make use of every means in his power to defend himself? Let me here ask what were these means? You have heard accounts of his debilitated state, his total want of muscular serength. He could not have defended himself by his hands; he could not have gone out of the way; for he was unable to fly. You have it in evidence, that Austin was on the run; he could not then have even turned around without receiving two or three blows, perhaps fatal ones. What then could he do? That only which he could do in defense of his life. The only remaining thing he had to do, was what he was compelled to do. He took his pistol from his pocket, and, after having received one blow, killed, as he was receiving another from the assailant, who would have killed him. This is the defense we make to the charge against Mr. Selfridge. This we contend to be the legal and proper one, of justifiable homicide to preserve his own life. If this be unwarrantable, our defense is gone. But if nature, if reason, if instinct impel every created being, when attacked to make use of all the means in his power to defend his life and person, you cannot adjudge this to have been unlawful in the defendant, without reducing everyone, that is assailed by a ruffian, to this dreadful alternative, of perishing by the hand of violence, or by the verdict of a jury. After this was done, Mr. Selfridge defended himself by hold-

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ing up his hands. Some say he struck; I must say, that from the testimony, it appears to me he did not. But allowing that he did, it was natural that he should do so. He threw his pistol it is true; but whether at the deceased or not, does not appear. The person says it was thrown at his head, and Howe tells us it rolled towards Mr. Russell's printing office.

The conflict over, no violence was seen on the part of Mr. Selfridge. Nothing barbarous, nothing even like anger or rage. He went forward as if exhausted, and leaned against Mr. Townsend's shop. Some cried out, who is the rascal that has killed him? I, said the defendant, am the man. I mean not to go away. I know what I have done, and am ready to answer for it to the laws of my country.

Mr. Melville came up to him, and said, you ought not to go away. I do not intend to, was still the answer.

When other persons, seeing a crowd assembled, and violence talked of, advised him to retire, he went off, sending for the officers of Justice, that he might be ready to answer to the laws of his country, if he had offended against them. He desired Mr. Bourne to let Bell be informed where he was to be found. This was the conduct not of guilt, but of conscious innocence. It is attempted to be done away by saying, that he was to have dined with Mr. Bell; but could any man, especially a lawyer, after an act of this sort, have imagined that he might take his dinner, without interruption, in a public house? There can be no doubt therefore, that he told where he was to be found by the sheriff of the county. True, he went away, but not to fly. It was in that awful moment, as in this, that he appealed from the passions of the people to their judgment, from their imagination to their reason, from their feelings, to their sense of justice, from their violence, to his country. You, Gentlemen of the Jury, are that country.

It is not possible to conceive any motive to do this act, but what arose from necessity, imposed at the very instant. It is hardly in evidence, that Mr. Selfridge knew this unfortunate young man.

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If there had been any feelings of revenge to gratify, would he have gone on the Exchange to indulge them? No, he would have sought some other opportunity. And what was his behaviour there? He was tranquil and calm. Look at his after conduct. It was not the result of hardness of heart, but of that conscious innocence which protects the man unpolluted with sin, when every friend flies from him; which in the hour of terror and dismay, whispers comfort and consolation to his soul: for the heart which knows no crime, can be tormented with no remorse.

This, Gentlemen, is, I believe, the whole of our story. I am not permitted, by the rules of the Court, to go into argument on the facts. I have barely stated the law; not what are my notions of it, but from the books. I took especial care not to state the case before the witnesses were examined. For it was not my wish either to exaggerate or diminish. I meant to place it on the ground of the evidence itself, and to leave, without any appeal to the passions, your minds open to receive the fair impressions from the testimony I have attempted to recapitulate. Having said nothing but what they testified, I have done all the duty which in this state of the case, I am at liberty to perform. I therefore leave the defendant with you, barely stating my own conviction, as a lawyer, a christian, and a man, that he has committed no offense, either against the law of society, of religion, or of nature. That he has not, against the law of society, I bottom myself on the authorities which have been read. That he has not against the laws of religion, I infer from the duty which every created being owes to Him, who in his beneficence, brought us into existence, to defend life, by all the means in his power. Not against the law of nature, for whatever theorists, or speculative men may say to the contrary, yet, when the alternative arises, whether a man must fall, or whether it must be he who assaults him; whether he must sacrifice all his duties to God, to religion, and to society, or put to death the man by whom he is assailed, nature would

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assert her prerogative, the aggressor must die, and the innocent man remain alive.

Stephen Skelton. Very shortly after the death I saw the defendant; he was standing near the post office; a gentleman that was by him said to him, "you are agitated." He replied that he was not, he had done as he meant to do, or what he meant to do, or no more than he meant to do.

Richard Edwards. Was by when Mr. Selfridge went from State street; had been observing him to see if he was going away, and which way he should go; heard him say that he was the man; that he did not intend to go away; when Major Melville came up and told him he hoped he would not think of going away, he said he was not going off; afterwards Mr. Ritchie pressed him and took him away with him; heard no such observation as Mr. Skelton has testified to.

William Ritchie. Heard nothing of the speech which Mr. Skelton has testifed to. When I advised him to go with me he would not; had hold of his arm and was pressing him to go when Major Melville spoke to him; he broke from me and refused to go; he said he was not so much agitated as I was; he knew very well what he had done; he afterwards went with me to my house and when he heard of the death (I had no belief that Austin was dead before I went home) he expressed great regret and said if he should be permitted to attend the funeral, he believed he should be as sincere a mourner as any one in the procession except the parents themselves.

Job Bass. First saw Mr. Selfridge standing at his office door, saw him walk down to the corner of the old State House; when past the corner he put his hands behind him and walked slowly towards Congress street; saw Mr. Austin standing near Mr. Townsend's shop, and when he stepped out towards Mr. Selfridge, he raised his right arm. Mr. Selfridge's arm was removed from behind him, and raised to a horizontal position. The pistol went off immediately, and then Mr. Austin struck him violently across the forehead.

Mr. Dexter. Gentlemen of the Jury—It is my duty to submit to your consideration some observations in the close of the defense of this important and interesting cause. In doing it, though I feel perfectly satisfied that you are men of pure minds, yet I reflect with anxiety, that no exertion or zeal on the part of the defendant's counsel can possibly insure justice, unless you likewise perform your duty. Do not suppose that I mean to suggest the least suspicion with respect to your principles or motives. I know you have been selected in a manner most likely to obtain impartial justice; and doubtless you have honestly resolved, and endeavored

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to lay aside all opinions which you may have entertained previous to this trial. But the difficulty of doing this, is perhaps not fully estimated; a man deceives himself, oftener than he misleads others; and he does injustice from his errors, when his principles are all on the side of rectitude. To exhort him to overcome his prejudices, is like telling a blind man to see. He may be disposed to overcome them, and yet be unable because they are unknown to himself. When prejudice is once known, it is no longer prejudice, it becomes corruption; but so long as it is not known, the possessor cherishes it without guilt; he feels indignation for vice, and pays homage to virtue; and yet does injustice. It is the apprehension that you may thus mistake—that you may call your prejudices, principles, and believe them such, and that their effects may appear to you the fruits of virtue; which leads us so anxiously to repeat the request, that you would examine your hearts, and ascertain that you do not come here with partial minds. In ordinary cases there is no reason for this precaution. Jurors are so appointed by the institutions of our country, as to place them out of the reach of improper influence on common occasions; at least as much so as frail humanity will permit.

But when a cause has been a long time the subject of party discussion—when every man among us belongs to one party or the other, or at least is so considered—when the democratic presses throughout the country, have teemed with publications, fraught with appeals to the passions, and bitter invective against the defendant;—when on one side everything has been done, that party rage could do, to prejudice this cause; and on the other, little has been said in vindication of the supposed offender; though on one occasion I admit that too much has been said; when silence has been opposed to clamor and patient waiting for a trial to systematic labor to prevent justice; when the friends of the accused, restrained by respect for the laws, have kept silence, because it was the exclusive right of a court of justice to speak, when no voice has been heard from the walls of the

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defendant's prison, but a request that he may not be condemned without a trial; the necessary consequence must be, that opinion will progress one way—that the stream of incessant exertion will wear a channel in the public mind; and the current may be strong enough to carry away those who may be jurors, though they know not how, or when, they received the impulse that hurries them forward.

I am fortunate enough not to know, with respect to most of you, to what political party you belong. Are you Republican Federalists? I ask you to forget it; leave all your political opinions behind you; for it would be more mischievous, that you should acquit the defendant from the influence of these, than that an innocent man, by mistake, should be convicted. In the latter case, his would be the misfortune, and to him would it be confined; but in the other, you violate a principle, and the consequence may be ruin. Consider what would be the effect of an impression on the public mind, that in consequence of party opinion and feelings, the defendant was acquitted. Would there still be recourse to the laws, and to the justice of the country? Would the passions of the citizen, in a moment of frenzy, be calmed by looking forward to the decision of courts of law for justice? Rather every individual would become the avenger of imaginery transgression—violence would be repaid with violence; havoc would produce havoc; and instead of a peaceable recurrence to the tribunals of justice, the spectre of civil discord would be seen stalking through our streets, scattering desolation, misery, and crimes.

Such may be the consequences of indulging political prejudice on this day; and if so, you are amenable to your country and your God. This I say to you who are Federalists; and have I not as much right to speak thus to those who are Democratic Republicans? That liberty which you cherish with so much ardor depends on your preserving yourselves impartial in a court of justice. It is proved by the history of man, at least civil society, that the moment the judicial powers become corrupt, liberty expires. What is liberty but

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the enjoyment of your rights, free from outrage or danger? And what security have you for these, but an impartial administration of justice? Life, liberty, reputation, property, and domestic happiness, are all under its peculiar protection. It is the judicial power, uncorrupted, that brings to the dwelling of every citizen, all the blessings of civil society, and makes it dear to man. Little has the private citizen to do with the other branches of government. What to him are the great and splendid events that aggrandize a few eminent men and make a figure in history? His domestic happiness is not less real because it will not be recorded for posterity: but this happiness is his no longer than courts of justice protect it. It is true, injuries cannot always be prevented; but while the fountains of justice are pure, the sufferer is sure of a recompense.

Contemplate the intermediate horrors and final despotism, that must result from mutual deeds of vengeance, when there is no longer an impartial judiciary, to which contending parties may appeal, with full confidence that principles will be respected. Fearful must be the interval of anarchy; fierce the alternate pangs of rage and terror; till one party shall destroy the other, and a gloomy despotism terminate the struggles of conflicting factions. Again, I beseech you to abjure your prejudices. In the language once addressed from Heaven to the Hebrew prophet, "Put off your shoes, for the ground on which you stand is holy." You are the professed friends, the devoted worshippers of civil liberty; will you violate her sanctuary? Will you profane her temple of justice? Will you commit sacrilege while you kneel at her altar?

I will now proceed to state the nature of the charge on which you are to decide, and of the defense which we oppose to it; then examine the evidence, to ascertain the facts, and then inquire what is the law applicable to those facts.

The charge is for manslaughter; but it has been stated in the opening, that it may be necessary to know something of each species of homicide, in order to obtain a correct idea of that which you are now to consider.

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Homicide, as a general term, includes, in law, every mode of killing a human being. The highest and most atrocious is murder; the discriminating feature of which is previous malice. With that the defendant is not charged: the Grand Jury did not think that by the evidence submitted to them, they were authorized to accuse him of that enormous crime. They have therefore charged him with manslaughter only.

The very definition of this crime, excludes previous malice; therefore it is settled, that there cannot, with respect to this offense, be an accessory before the fact; because the intention of committing it is first conceived at the moment of the offense, and executed in the heat of a sudden passion, or it happens without any such intent, in doing some unlawful act. It will not be contended that the defendant is guilty of either of these descriptions of manslaughter. Neither party suggests that the defendant was under any peculiar impulse of passion at the moment; and had not time to reflect; on the contrary, he is said to have been too cool and deliberate. The case in which it is important to inquire, whether the act was done in the heat of blood is where the indictment is for murder, and the intent of the defense is to reduce the crime from murder to manslaughter; but Selfridge is not charged with murder. There is nothing in the evidence that has the least tendency to prove an accidental killing while doing some unlawful act. It is difficult to say, from this view of manslaughter, when compared with the evidence on what legal ground the defendant can be convicted; unless it be, that he is to be considered as proved guilty of a crime which might have been charged as murder, and by law, if he now stood before you under an indictment for murder, you might find him guilty of manslaughter, and therefore you may now convict him.

This does not appear to be true; for the evidence would not apply to reduce the offense from murder to manslaughter, on either of the aforementioned grounds. Perhaps it may be said that every greater includes the less, and therefore, manslaughter is included in murder; and that it is on this

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principle that a conviction for manslaughter may take place on an indictment for murder. I will not detain you to examine this, for it is not doing justice to the defendant to admit, for a moment, even for the sake of argument, that the evidence proves murder. Our time will be more usefully employed in considering the principles of the defense. Let it be admitted then, as stated by the counsel for government, that, the killing being proved, it is incumbent on the defendant to discharge himself from guilt. Our defense is simply this, that the killing was necessary in self defense; or, in other words, that the defendant was in such imminent danger of being killed, or suffering other enormous bodily harm, that he had no reasonable prospect of escaping, but by killing the assailant.

This is the principle of the defense stripped of all technical language. It is not important to state the difference between justifiable and excusable homicide, or to show to which the evidence will apply; because, by our law, either being proved, the defendant is entitled to a general acquittal.

Let us now recur to the evidence and see whether this defense be not clearly established.

[*Mr. Dexter* then went into a minute examination of the whole evidence. In the course of it he endeavored to prove, that Mr. Selfridge went on the Exchange about his lawful business, and without any design of engaging in an affray; that he was in the practice of carrying pistols, and that it was uncertain whether he took the weapon in his pocket in consequence of expecting an attack; that if he did, he had a right so to do, provided he made no unlawful use of it; that the attack was so violent and with so dangerous a weapon, that he was in imminent danger; that it was so sudden, and himself so feeble, that retreat would have been attended with extreme hazard; that the pistol was not discharged until it was certain that none would interfere for his relief, and that blows, which perhaps might kill him, and probably would fracture his skull, were inevitable in any other way, and that the previous quarrel with the father of the deceased,

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if it could be considered as affecting the cause, arose from the misbehaviour of old Mr. Austin, and that the defendant had been greatly injured in that affair.]

It cannot be necessary, gentlemen, for the defendant to satisfy you beyond doubt, that he received a blow before the discharge of the pistol. There is positive evidence from one witness, that the fact was so, and other witnesses say much that renders it probable. But if the defendant waited until the cane was descending, or even uplifted within reach of him, reason and common sense say, it is the same thing: no man is bound to wait until he is killed, and being knocked down, would disable him for defense. The killing can be justified only on the ground that it was necessary to prevent an injury that was feared; not that it was to punish for one that was past. This would be revenge, and not self defense.

The same law authorities, which tell you, that a man must retreat as far as he can, say also, that if the assault be so violent, that he cannot retreat, without imminent danger, he is excused from so doing. If this means anything, it is applicable to our case: for perhaps you can hardly imagine a more violent or more sudden assault. When to this is added the muscular debility of the defendant, it certainly forms a very strong case. He could neither fight nor fly. Had he attempted the latter, he must have been overtaken by his more athletic and active antagonist, and either knocked down, or maimed, or murdered, as the passions of that antagonist might dictate.

But it is said, and some passages from law books are read to prove it, that the necessity which excuses killing a man, must not be produced by the party killing; and that he must be without fault. You are then told, that the defendant sought the affray and armed himself for it, and that he had been faulty in calling Mr. Austin, the father, opprobrious names in the newspaper.

As to the affray being sought by the defendant, there is no evidence to support such an assertion, but what arises

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from his conversations with Mr. Richardson and Mr. Whitman, or from the fact of his having a pistol in his pocket. These only prove that he was prepared to defend himself if attacked; and if he did defend himself lawfully, this is the best evidence to show what was his intention; it cannot be presumed that he took the pistol with an unlawful intent, when he never expressed such intent, and when his subsequent conduct was lawful. He had been informed that he should be attacked by a bully; in such case what was his duty? Was he bound to shut himself up in his own house? Was he bound to hire a guard? If he had done so, this would have been urged as the strongest evidence of his intention to commit an affray. Could he obtain surety of the peace from a future assailant, whose name was unknown to him? Or was he bound to go about his business, constitutionally feeble and unarmed, at the peril of his life? There would be more color for this suggestion, if the defendant had gone on the exchange and there insulted either old Mr. Austin, or his son, or voluntarily engaged in altercation with either of them. But he went peaceably about his ordinary business, and made use of his weapon only when an unavoidable necessity happened. A man when about to travel a road, infested with robbers, lawfully arms himself with pistols; if he should be attacked by a robber, and from necessity kill him, is he to be charged with having sought this necessity, because he voluntarily undertook the journey, knowing the danger that attended it, and took weapons to defend himself against it? As little is the defendant to be censured for going about his ordinary business, when he knew that it would be attended with danger and arming himself for defense, in case such an emergency should happen, as that the laws could not afford him protection. I have here supposed that the pistol was taken for the purpose for which it was used; this however is far from being certain from the evidence, as it is in proof, that the defendant had daily occasion for pistols in passing between Boston and Melford, a road that has been thought attended with some

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danger of robbery; and that he sometimes carried pistols in his pocket. There is not the least pretense for saying, that he expected an affray with young Mr. Austin. He could not presume that his father would employ him; and it is not probable that he knew him in the confusion that the sudden attack must have produced. As to the publication in the newspaper against old Mr. Austin, though this might be in some sense a fault, yet it is far from being within the principle established by the books. When it is said the party must be without fault, it is evident that nothing more is meant, than that he must be without fault in that particular transaction. If we are to leave this and look back, where are we to stop? Are we to go through the life of the party to examine his conduct? If the defendant had libeled Mr. Austin, that was a previous and distinct offense, for which he was and yet is liable to an action or an indictment; and unless it be presumed without evidence and against all probability, that it was intended to produce this affray it can have no connection with the principle stated. There is another obvious motive for it, and there is nothing in the evidence tending to convince you that it was intended to provoke an attack: The defendant had been defamed; retaliation was the natural punishment; and there is no reason to presume that anything more was intended, unless it was to blunt the shafts of calumny from Mr. Austin, by destroying his credit and standing in society. It is true, that it is said by several respectable compilers of law that the party killing must be without fault; but they all refer to one adjudged case, which is found stated in 1 Hawkins P. C. 440, and by recurring to the statement of this case, it appears that the persons who killed, and would have excused it on the ground of necessary self defense, had forcibly entered and disseized the rightful owner of a house, and continued forcibly to detain it against him; in an attempt by the owner forcibly to recover possession, those who held wrongfully were reduced to the necessity of killing; and it was holden, that as they were then engaged in an unlawful act, namely,

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forcibly detaining the house against him who had a right to enter, they had produced this necessity by their own wrongful conduct, and therefore it should not excuse them.

So that this principle seems to be related to another and in reality to be involved in it; I mean the well known principle that he who kills another by accident, while performing an unlawful act, should be guilty of manslaughter. It would be absurd, that a man who kills by accident, while performing an unlawful act, should be guilty of manslaughter; and yet that he who kills, from design, while performing an unlawful act, however necessary it may have become, should be guiltless. It is settled that if on a sudden affray, A makes an assault on B, and afterwards the assaulter be driven to the wall so that he can retreat no farther, and then kill B necessarily in his own defense, that is excusable homicide in A; and yet here A was in fault in this very affray, by making the first assault; but having afterwards retreated as far as he could, the law extends to him the right of self-defense. This shows that unless at the moment of killing, the party be doing wrong, the principle contended for on the other side does not apply. In proof of this I will also read to you an authority from 1 Hale's P. C. 479.

"There is malice between A and B, they meet casually, A assaults B and drives him to the wall, B in his own defense kills A. This is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large; for it was not a killing on the former malice, but upon a necessity imposed upon him by the assault of A.

"A assaults B and B presently thereupon strikes A without flight, whereof A dies; this is manslaughter in B and not *se defendendo*. But if B strikes A again, but not mortally, and blows pass between them, and at length B retires to the wall, and being pressed upon by A, gives him a mortal wound, whereof A dies, this is only homicide *se defendendo*, although that B had given divers other strokes that were not mortal before he retired to the wall or as far as he could. But now suppose that A by malice makes a sudden assault upon B. who strikes again and pursuing hard upon A. A retreats to the wall, and in saving his own life, kills B. Some have held this to be murder, and not *se defendendo*, because A gave the first assault, Cromp. fol. 22 b, grounding upon the book of 3 Edw. 3, Itin. North. Coron. 287; but Mr. Dalton, *ubi supra*, thinketh it to be *se defendendo*, though A made the first assault either with or without malice, and then retreated."

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I am bound in candor to add, that the law, as above laid down, on the authority of Dalton, has since been doubted as to that part of it which supposes previous malice. This passage has been reviewed by Hawkins and East in their several treatises on crown law, and I have chosen to read it from this very circumstance, because it appears that it has been well considered; and when subsequent and eminent writers on full examination reject a part, and admit the residue to be law, it is strong confirmation of that residue. It is that alone on which I rely, and it is amply sufficient to prove, what I have before stated; that if A first assault B on a sudden affray without malice, A may still excuse killing B from a subsequent necessity in his own defense; and yet none will deny that first assaulting B, though without malice was a fault.

On this point, I submit to your consideration one further remark. The publication in the newspaper is nothing more than provoking language; now if the defendant had immediately before the affray, made use of the same language to old Mr. Austin, no lawyer will pretend that this would have been such a fault as would have precluded the defendant from excusing himself for the subsequent necessary killing on the principle of self-defense. If it were so, we should find it so stated in books of authority that treat on this subject; for the case must often have happened, as provoking language generally precedes blows. On the contrary, we find it settled, that even making the first assault does not deprive the party of this defense. It would be absurd then to say, that rude and offensive language, which cannot even justify an assault, should produce this effect. It can hardly be necessary to add, that, if these words, spoken at the moment, would not have deprived the defendant of this defense, having published them before, in a newspaper, cannot produce this consequence.

I have hitherto admitted that the publication in the newspaper was a fault in the defendant; nor am I disposed entirely to justify it; yet circumstances existed which went far

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to extenuate it. He had been defamed on a subject, the delicacy of which, perhaps, will not be understood by you, as you are not lawyers, without some explanation. Exciting persons to bring suits is an infamous offense, for which a lawyer is liable to indictment; and to be turned away from the bar. It is so fatal to the reputation of a lawyer, that it is wounding him in the nicest point, to charge him with it. It is the point of honor; and charging him with barratry, or stirring up suits, is like calling a soldier a coward. Mr. Austin, the father, had accused the defendant publicly of this offense, respecting a transaction in which his conduct had been punctiliously correct; the defendant first applied to him in person, and with good temper, to retract the charge; afterwards in conversations with Mr. Welch, Mr. Austin acknowledged the accusation to be false, and promised to contradict it publicly as he had made it; yet he neglected to do it; again he said he had done it; but the fact appeared to be otherwise. This induced the defendant to demand a denial of it in writing; though Mr. Austin privately acknowledged he had injured Mr. Selfridge, yet he refused to make him an adequate recompense, when he neglected to make the denial as public as the charge. This was a state of war between them upon this subject, in which the more the defendant annoyed his enemy, the less power he had to hurt him. It was therefore a species of self-defense; and Mr. Austin, who had first been guilty of defamation, perhaps had little cause to complain. To try the correctness of this, we will imagine an extreme case.

Suppose a man should have established his reputation as a common slanderer and calumniator, by libeling the most virtuous and eminent characters of his country, from Washington and Adams, down through the whole list of American patriots; suppose such a one to have stood for twenty years in the kennel, and thrown mud at every well dressed passenger; suppose him to have published libels, until his style of defamation has become as notorious as his face, would not every one say, that such conduct was some excuse for bespattering him in turn?

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I do not apply this to any individual; but it is a strong case to try a principle; and if such conduct would amount almost to a justification of him who should retaliate, will not the slander of Mr. Austin, against Mr. Selfridge, furnish some excuse for him?

It has also been stated to you, gentlemen, and some books have been read to prove it, that a man cannot be justified or excused in killing another in his own defense, unless a felony was attempted or intended. Some confusion seems to have been produced by this, which I will attempt to dissipate. It has been settled that if a felony be attempted, the party injured may kill the offender, without retreating as far as he safely can; but, that if the offense intended, be not a felony, he cannot excuse the killing in his own defense, unless he so retreat, provided circumstances will permit. On this principle, all the books that have been read to this point, may easily be reconciled. But the position contended for by the opposing counsel, is in direct contradiction to one authority which they themselves have read. In the fourth volume of Blackstone's Commentaries, page 185, the law is laid down as follows:—

"The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life or enormous bodily harm; and then in his defense he may kill his assailant instantly. And this is the doctrine of universal justice. . . . And now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house) kills the person by whom he is reduced to such an inevitable necessity."

From these two highly respectable authorities, it appears that, though nothing more be attempted than to do great bodily injury, or even to beat a man, and there be no possibility of avoiding it, but by killing the assailant, it is excusable so to do. When the weight and strength of the cane, or rather cudgel, which the deceased selected is con-

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sidered and the violence with which it was used, can it be doubted that great bodily harm would have been the consequence, if Selfridge had not defended hmiself? The difference between this weapon and the pistol made use of by the defendant, perhaps, is greatly exaggerated by the imagination. The danger from the former might be nearly as great as from the latter: when a pistol is discharged at a man in a moment of confusion and agitation, it is very uncertain whether it will take effect at all; and if it should, the chances are perhaps four to one, that the wound will not be mortal. Still further, when the pistol is once discharged, it is of little or no use; but with a cane a man, within reach of his object, can hardly miss him; and if the first blow should prove ineffectual, he can repeat his strokes until he has destroyed his enemy.

If it were intended to excite contempt for the laws of the country, a more effectual method could hardly be taken, than to tell a man, who has a soul within him, that if one attempts to rob him of a ten dollar bill, this is a felony; and therefore esteemed by the law an injury of so aggravated a nature, that he may lawfully kill the aggressor; but that, if the same man should whip and kick him on the public exchange, this is only a trespass, to which he is bound to submit rather than put in jeopardy the life of the assailant; and the laws will recompense him in damages.

Imagine, that you read in a Washington newspaper, that on a certain day, immediately on the rising of Congress, Mr. A. of Virginia, called Mr. B. of Massachusetts, a scoundrel, for voting against his resolution; and proceeded deliberately to cut off his ears. Mr. B. was armed with a good sword cane, but observed, that his duty as a citizen forbade him to endanger the life of Mr. A. for that cutting off a man's ears was by law no felony; and he had read in law books that courts of justice were the only proper *vindices injuriarum,* and that he doubted not, that by means of a law suit, he should obtain a reasonable compensation for his ears. What are the emotions excited in your breasts, at this supposed

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indignity and exemplary patience of the representative of your country? Would you bow to him with profound respect on his return? Or rather would not his dignity and usefulness, by universal consent, be lost forever?

We have now taken a view of the facts, and the positive rules of law, that apply to them; and it is submitted to you with great confidence, that the defendant has brought himself, within the strictest rules, and completely substantiated his defense, by showing that he was under a terrible necessity of doing the act; and that by law he is excused. It must have occured to you, however, in the course of this investigation, that our law has not been abundant in its provisions for protecting a man from gross insult and disgrace. Indeed it was hardly to be expected, that the sturdy hunters, who laid the foundations of the common law, would be very refined in their notions. There is in truth much intrinsic difficulty in legislating on this subject. Laws must be made to operate equally on all members of the community; and such is the difference in the situations and feelings of men, that no general rule, on this subject, can properly apply to all. That, which is an irreparable injury to one man, and which he would feel himself bound to repel even by the instantaneous death of the aggressor, or by his own, would be a very trivial misfortune to another. There are men, in every civilized community, whose happiness and usefulness would be forever destroyed by a beating, which another member of the same community would voluntarily receive for a five dollar bill. Were the laws to authorize a man of elevated mind, and refined feelings of honor to defend himself from indignity by the death of the aggressor, they must at the same time furnish an excuse to the meanest chimney sweeper in the country for punishing his sooty companion, who should fillip him on the cheek, by instantly thrusting his scraper into his belly. But it is too much to conclude, from this difficulty in stating exceptions to the general rule, that extreme cases do not furnish them. It is vain and worse than vain, to prescribe laws to a community, which will require

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a dereliction of all dignity of character, and subject the most elevated to outrages from the most vile. If such laws did exist, the best that could be hoped, would be, that they would be broken. Extreme cases are in their nature exceptions to all rules; and when a good citizen says, that, the law not having specified them, he must have a right to use his own discretion on the subject; he only treats the law of his country in the same manner in which every christian necessarily treats the precepts of his religion. The law of his master is "resist not evil" "if a man smite thee on one cheek turn to him the other also." No exceptions to these rules are stated; yet does not every rational christian necessarily make them? I have been led to make these observations, not because I think them necessary in the defense of Mr. Selfridge; but because I will have no voluntary agency in degrading the spirit of my country. The greatest of all public calamities, would be a pusillanimous spirit, that would tamely surrender personal dignity to every invader. The opposing counsel have read to you, from books of acknowledged authority, that the right of self-defense was not given by the law of civil society, and that, that law cannot take it away. It is founded then on the law of nature, which is of higher authority than any human institution. This law enjoins us to be useful, in proportion to our capacities; to protect the powers of being useful, by all means that nature has given us, and to secure our own happiness, as well as that of others. These sacred precepts cannot be obeyed without securing to ourselves the respect of others. Surely, I need not say to you, that the man who is daily beaten on the public exchange, cannot retain his standing in society, by recurring to the laws. Recovering daily damages will rather aggravate the contempt that the community will heap upon him; nor need I say, that when a man has patiently suffered one beating, he has almost insured a repetition of the insult.

It is a most serious calamity, for a man of high qualifications for usefulness, and delicate sense of honor, to be driven to such a crisis, yet should it become inevitable, he is bound

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to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God. Whatever may be the consequences, he is bound to bear them, to stand like Mount Atlas,

> "When storms and tempests thunder on its brow,
> "And oceans break their billows at his feet"

Do not believe that I am inculcating opinions, tending to disturb the peace of society. On the contrary they are the only principles that can preserve it. It is more dangerous for the laws to give security to a man, disposed to commit outrages on the persons of his fellow citizens, than to authorize those, who must otherwise meet irreparable injury, to defend themselves at every hazard. Men of eminent talents and virtues, on whose exertions, in perilous times, the honor and happiness of their country must depend, will always be liable to be degraded by every daring miscreant, if they cannot defend themselves from personal insult and outrage. Men of this description must always feel that to submit to degradation and dishonor, is impossible. Nor is this feeling confined to men of that eminent grade. We have thousands in our country who possess this spirit; and without them we should soon deservedly cease to exist as an independent nation. I respect the laws of my country, and revere the precepts of our holy religion; I should shudder at shedding human blood; I would practice moderation and forbearance, to avoid so terrible a calamity; yet, should I ever be driven to that impassable point, where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honor.

It has been intimated, that the principles of christianity condemn the defendant. If he is to be tried by this law, he certainly has a right to avail himself of one of its fundamental principles. I call on you then to do to him, as in similar circumstances, you would expect others to do to you; change situations for a moment, and ask yourselves, what you would

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have done, if attacked as he was. And instead of being necessitated to act at the moment, and without reflection, take time to deliberate. Permit me to state, for you, your train of thought. You would say this man, who attacks me, appears young, athletic, active and violent. I am feeble and incapable of resisting him; he has a heavy cane, which is undoubtedly a strong one, as he had leisure to select it for the purpose; he may intend to kill me; he may, from the violence of his passion, destroy me, without intending it; he may maim or greatly injure me; by beating me he must disgrace me. This alone destroys all my prospects, all my happiness, and all my usefulness. Where shall I fly when thus rendered contemptible? Shall I go abroad? Every one will point at me the finger of scorn. Shall I go home? My children—I have taught them to shrink from dishonor; will they call me father? What is life to me, after suffering this outrage? Why should I endure this accumulated wretchedness, which is worse than death, rather than put in hazard the life of my enemy?

Ask yourselves whether you would not make use of any weapon that might be within your power to repel the injury; and if it should happen to be a pistol, might you not with sincere feelings of piety, call on the Father of Mercies to direct the stroke.

While we reverence the precepts of christianity, let us not make them void by impracticable construction. They cannot be set in opposition to the law of our nature; they are a second edition of that law; they both proceed from the same author.

Gentlemen, all that is dear to the defendant, in his future life, is by the law of his country placed in your power. He cheerfully leaves it there. Hitherto he has suffered all that his duty as a good citizen required, with fortitude and patience; and if more be yet in store for him, he will exhibit to his accusers an example of patient submission to the laws. Yet permit me to say in concluding his defense, that he feels full confidence that your verdict will terminate his sufferings.

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The *Attorney General.* Gentlemen of the Jury: It is my official duty to close this cause on the part of the Government. If I can perform this duty by a simple, accurate and intelligible arrangement of the facts, and a just and pertinent application of the legal principles by which they are governed, I shall be satisfied.

I will not play the orator before you, or pretend to make a speech if I was capable. I would not do it on this occasion.

Circumstanced as I am, nothing but my duty could induce me to undertake the task. No pecuniary reward could engage me in the cause. Nothing, I repeat it, but the sense I have of my official duty and a compliance with the public expectation could induce me to appear this day before you on this occasion. But, I thank God, that through a course of what may be called a long life, I have had firmness to do my duty when I had a duty to do.

The prosecution of this cause on the part of the Government has been conducted in every respect similar to prosecutions in other cases on like occasions. When it was said, that one of our fellow-citizens, in the open street, at noonday, had undertaken to destroy the life of another, it was necessary to inquire by what authority he did it; what legal process or warrant of law he had for conduct of such consequence to the public, as well as to an individual citizen.

Is there any cause of wonder that on the day it happened, he should be apprehended and carried before a Magistrate, who exercised the same power in this particular as he would have been obliged to do had it been the case of either of you gentlemen of the jury, or any other member of the community?

The Magistrate found the killing to have been voluntary and not occasioned by any accident: what ought the Magistrate to do? Was he to undertake to decide the difficulties which you have to encounter in this cause? Was he to undertake to say that the act of the killing amounted to murder, or manslaughter, or to justifiable or excusable homicide?

The Magistrate was bound to commit him to take his trial,

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to which he is now brought. Was there anything wrong in this? If there was, he had the remedy in his own power. The Supreme Court upon a *Habeas Corpus* might have set him at liberty; it is a writ of right, and would have been granted if by law it ought, as of course if he had applied for it. If he chose to decline the application and lay in prison, he had his reasons for it. He as a lawyer must have known the consequences. Would not every other man in the community have had to suffer a like inconvenience with that sustained by the defendant under similar circumstances —certainly they would. Why then this warm and eloquent address to the passions and feelings of the public? Do they expect to influence you, gentlemen of the jury, and divert your attention from the justness of the case by an appeal to the feebleness of his health and the weakness of his person? Is it to injure the reputation of the officer, who, *ex officio,* moved the commitment of the defendant to prison, that his counsel apply to your compassion and tender feelings? Be it so, but I hope that I shall continue conscientiously to discharge the duties of my public function, regardless of every other consideration, than that of the duty which I owe the Commonwealth.

It is said, that a great crowd has attended the court during this trial, and we are asked the reason—many, I suppose attend from curiosity. Is it to be wondered at that a crowd attended also at the exchange, on the day, that the defendant shot the young man in State street? The human mind naturally shudders at death, and when a man destroys his fellow citizen, it naturally draws the attention of all men to the fact. The insinuation respecting a crowd in this court room, seems to glance at party spirit, but had party spirit anything to do with the crowd that assembled on the exchange? When one man has struck another out of being, so far as being depends upon his existence in this world, is it marvelous that the public attention should be on tip toe on this occasion? Is the agitation anything more than the effect of nature's law? Is it anything more than the uniform prin-

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ciple of our holy revealed religion? Is it not the voice of God?

It is true, when the crowd assembled in State street, an inquiry was made—who was the man that did this? The defendant boldly stood forth, and said, I am the man; and it appears that he raised himself in the middle of the crowd to make the declaration. He had courage in the midst of this universal cry of who is the man that has done this, to stand forth and avow himself the perpetrator. But courage is not the criterion of truth, this firmness of nerve, this unexampled boldness has not changed the nature of the crime, nor can it give us the law to govern the fact. Does the definition of an offense or the rights of men in civil society depend on the character of individuals, or the different constitutions of men?

The question before you, is this, has the Government produced evidence to convince you beyond a reasonable doubt, that the defendant killed Charles Austin, in the manner and form as set forth in the indictment. If you are satisfied of this question, then the burthen of the cause has devolved upon you, and you must undertake it whatever may be the consequences.

If you are not satisfied of this fact, there is no further inquiry to be made, but if you are, then there is a second question. Has the defendant shown you beyond a reasonable doubt, that the fact of killing, independent of any previous circumstance against him, attached to it, was done in such a manner as will render the killing lawful, and excuse him from any share of guilt?

Why this devolves upon him I will show from an authority in which it is better expressed than I can express it in my own language. Fost. C. L. 255.

"In every charge of murder, the fact of killing being first proved, all circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume: The defendant in this instance

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standeth upon just the same foot that every other defendant doth, the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

And why must it devolve upon him? Because if he had a legal warrant he could produce it. Whether there was malice or not, in killing, upon any legal authority, depends upon the feelings of the heart, and no man can be so well acquainted with them as the person who perpetrates the act. I will adduce another authority to the same point from 1 East, C. L. 224.

"The implication of malice arises in every instance of homicide amounting in point of law to murder: and in every charge of murder, the fact of killing being first proved all the circumstances of accident necessity or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him."

The question you have before you is, whether the defendant has proved either accident, or necessity, as fully as the Government has proved the fact of killing? If he has not, he is guilty of the homicide charged in the indictment. Has he proved circumstances that will reduce it to excusable homicide or that he has done nothing but what he had a right to do? If there was any premeditation a share of blame attaches itself to the fact though it were but momentary: the law makes it a crime in that case, and it cannot be less than manslaughter; but if the defendant has proved beyond a reasonable doubt by the evidence he has offered, or what arose out of the evidence offered on the part of the Government, that the fact of killing, in the manner it was committed, independent of any previous circumstances attached to, or explanatory of it, was excusable homicide, yet if the Government has given convincing proof of a premeditation his excuse cannot avail him.

First, have we proved the fact of killing? That is admitted to be proved beyond a doubt. And you have secondly to inquire, whether the defendant has given evidence to justify what he has done, or to show it to be excusable from a legal necessity. Thirdly, you will inquire whether the

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government has given evidence of such facts and circumstances previous to the transaction as will take from the defendant all his claim of excuse and render him guilty of a felonious homicide.

These three questions include every fact and every principle of law that can arise in the cause. They will embrace and call into examination every circumstance which has been given in evidence by the witnesses, and every principle of law by which the facts are to be governed and decided upon.

This cause is an important one, and presents to our discussion a question of principles: It is of no consequence who are the parties, or what the facts are, on which the issue rests, otherwise than to call into examination the principles that are to guide you to a verdict. It would be desirable to lay out of the question the persons of the deceased and the defendant; and to consider the cause in the abstract, as if between persons of whom you had never before heard. The principles on which this cause is to be tried, must stand or fall by themselves, without any regard to the parties. The principles on which the issue rests must be fixed and determined.

Without fixed and permanent principles, religion itself is a delusion. Morality is a cheat. Politics are a source of oppression and cruelty, and the forms of law but the vehicle of corruption, the mask of chicane and injustice.

Principles are no other but the primordial nature of things upon which systems are predicated, for the use and happiness of rational nature; without those, all is insecurity and confusion; the world is a waste, society is a curse, and life itself but a dream of misery. While religion, founded in the self existence of the Deity, and the relation of man to the Divine nature; while morals, predicated upon the connection between man and man, as brethren; while stubborn nature, fixed on eternal and unchangeable laws, deny to yield to man the inflexibility of their principles, he is left to raise, for himself, those systems of civil social government, and juris-

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prudence, which are best adapted to his situation, and circumstances, and in this society is left to decide for itself.

When the sovereign will of the civil community has arranged these, the obligation of each member to submission, becomes a moral obligation. Crimes result from disobedience, to disobedience penalties must be attached.

Despotism is adapted to a state of savage barbarity, where fear is the only motive to action or forbearance; yet even there, the will of the people, let it be founded in what it may, either in prudence, or in cowardice, is the foundation of the sovereignty.

A monarchy and aristocracy, mixed together to form a government, supports a state of servile dependence, where the hopes of favor and interest exclude the idea of reward for merit, bring patriotism and public virtue into base contempt, and render fraud, deceit, chicane and cunning, the insolent claimants of the rights of truth, talents and integrity.

In a free government only, it is that principles, founded in the nature of social virtue, can claim the decision of what is right between man and man, or between an individual and civil society, without the corruptions arising from the destruction or irregularity of rights and privileges, from party distinctions, from the frauds of chicanery, incident to factitious morals, and cunningly devised systems of religion and policy.

I will not spend any more of your time by such an appeal as has been made by the counsel for the defendant, who have preceded me. I will not invoke you to put aside your prejudices, if you have any; an appeal on this head is altogether nugatory, for if you will not obey the obligation which devolves upon you, from your situation resting on your consciences by the sacred solemnity of an oath, you are not to be reasoned into it, by the powers of rhetoric; I therefore consider it as improper to attempt it. I conceive that it must necessarily follow from the circumstances of your situation, that a verdict will be given upon the facts according to the

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rules of law. To a jury, acquainted with the obligations of an oath, a caution against being led astray by their prejudices, is to caution them against acting corruptly, and against doing wilfully wrong; if their oath cannot guide their consciences, I should despair of guiding them by anything that I can say. I should have spared myself these observations as altogether irrelevant to the issue, had not the defendant's counsel gone largely and learnedly into the subject, and urged you to do your duty free from the influence of party prejudices, regardless of the clamors of newspaper writers, or addresses to the people. In this caution, the counsel for the Government heartily concur.

The misconduct of newspapers, in publishing matters relative to a trial, while it is pending, is to be deprecated; so is all conversation tending to spread false reports; yet such are the feelings of mankind, throughout the world, that they will talk and also print on such subjects where the press is free. It is one of those alloys, which mingle with the precious metals, better it is to enjoy the freedom of the press, though attended with this inconvenience, than to restrain it by governmental laws, as is the case in every other country. The impressions made in that way, are very inconsiderable; the enlightened minds of this jury are above all considerations, arising from that source, whatever you may have heard out of doors, is left at the threshold of this sanctuary of justice, and passes by like the idle wind, and is no more regarded than the whistling of a schoolboy, trudging along with his satchel in his hand. As the report of this cause will probably be published, the world will judge how far your decision is made up from the testimony you have heard at this bar; they will know how to estimate the various reports you have heard, and the newspaper clamors, and artfully devised handbills; these, with the papers themselves, will be consigned ultimately to the neglect they deserve.

One man has killed another; the laws of God, and of our Government call upon you to inquire, if he can excuse himself. This is no light subject. There is an omniscient judge

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before whose seat we shall all appear to answer for our conduct on this solemn day. We must therefore decide with purity and integrity, if we expect to avoid the judgment pronounced against those who corrupt the tribunals of human justice.

I will place a mirror before your eyes, by which each of us may compare the fairness and justice of his intentions in the case, and perceive how far he is misled by his prejudices, or political principles.

Suppose the slander, which is said to be traced to the father of the deceased, was correct, and suppose B. Austin to have gone forth armed with a deadly weapon in expectation of an assault from Selfridge, or his friends; that Selfridge had made an attack on him as young Austin did on Selfridge, and Austin the father had, with the weapon (carried as Selfridge carried his) killed him, at noon day in a crowded street, what would be your verdict on such a case? I flatter myself, your verdict would be the same as that which you will give in this cause. This is the standard of security, this the solid tenure, by which our fellow citizens hold their equal right to public justice, ensured to us by our Constitution and our laws.

The counsel for the defendant has addressed you with warmth and energy, as a politician; he supposes you to consist of two conflicting parties, and with elegance of manner, and strength of language, peculiar to himself, he has conjured you to lay aside all political impressions, whether they be favorable to the Federal Republican or Democratic party; he particularly addressed himself to those who are of the same way of thinking as himself. I will imitate him in some degree, but I will address you as being all of the same way of thinking as myself; for I believe none of you wish to subvert the government or infringe the law. If then, you mean to support our happy Constitution, and obey the dictates of our holy religion, you are of the same party as myself. Would you break up the foundation of the great deep and destroy the basis of the present federal government, and

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leave it to chance, when or how we should obtain another (you may think the present Constitution might be made better, but it might be made worse, and though like other human inventions, it has its imperfections) you would not unnecessarily encounter the hazard. I say then you are all of my party. If you prefer our democratic government, to a monarchy, an aristocracy, or a mixed government then we all think alike. Is there one of you who would alter our system of jurisprudence, or relinquish the inestimable right of trial by jury; if there is not then, you all think as I do. If there is one of you who thinks the millions of money expended at the city of Washington in the public buildings, and improvements, for the accomodation of the general government, which serves to tie the several states of this continent in the indissoluble knot, of perpetual union and amity; if you think that money well employed as a mean of producing that grand effect, I think so likewise. Is there one of you but believes that State House on Beacon Hill, was intended for, and will produce the happy purpose of combining the interests of the several parts of the state of Massachusetts? Although attended with expense, it may prove a blessing. All of you join in this belief, I also am of your opinion (the gentlemen who are strangers, and reporting this cause, will pardon me for being so local; they are not perhaps acquainted with our domestic politics; but I love and feel for my native state; and the circumstance I have alluded to, has been of importance.) If you think of your union at home, and our foreign relations, as Washington the great and good thought, and as he has written in his farewell address to the citizens of the United States, you will engrave it on the tablet of your memory, teach it to your children, and bind it as a talisman to your heart, in order to perpetuate the freedom of our common country to the end of time.

Is there one of you who would engage your country in foreign wars, in order to benefit a few great men who would become the leaders, as they have been the agitators of such a desperate measure? The conseqeunces of war are known

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to many who hear me; never more do I wish to see the parched earth of my country drenched with the blood of my fellow men; the tender mothers, wives and children, flying from their dwellings into the wilderness, to escape the foe. You, Gentlemen of the Jury, are friends to the peace of your country, and therein I cordially join with you. I address you as the lovers of your country, and there is no difference in our opinions.

To return from this episode to the question in the cause, I will proceed to inquire whether the fact of T. O. Selfridge's killing young Austin, is proved by the Government. That catastrophe has been clearly made manifest by the testimony of Doctor Danforth, Edward Howe, John Lane, Ichabod Frost, Isaac Warren, and many others. I will not attempt an argument on it.

The second question is, has the defendant shown you, beyond a reasonable doubt, that the fact of killing was done under such circumstances, as that it was lawful, and he is excusable of blame?

In this inquiry (and certainly, it is an important one) we must have some guide, some settled rule, some law, some known, established principles, or society no longer exists. A confused state of nature reigns. Every man's arm, his art or his cunning is his own safety and every man is the avenger of his own wrongs.

Had I the sentiments expressed by my learned brother (Dexter) feeble and imbecile as I am, I would go forth from day to day in arms, trusting in mine own arm alone, with the aid of such weapons as my strength would bear. Magistrates should be avoided, and the volumes of laws become pavement for the soles of my shoes.

Many things are said by professional men, in the feelings and warmth of debate, which, in their cooler moments, they would gladly retract. Upon the manner and measure of resentment or self-defense, is there no law fixed, but the different feelings of men? Are there men, nay, a multitude of men, who have a natural right, from their feelings, and a

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high sense of honor, to defend themselves, when and where others of less feelings could not do it in the same manner? And is this the voice of nature, which makes the exception? Is this sense of honor, and those feelings, a privileged exception to those individuals, above the rules of the gospel? Is the rule, "Do to others as you would be done unto," reduced to the standard, that a juror, shall acquit the defendant, if he believes he should have acted himself by the same motives, or been seduced by the same temptation? Is there then a distinction between the would-be nobleman and the chimney sweeper, (for I suppose these, from the distinction taken by the defendant's counsel to be the Alpha and Omega, the head and the tail, of the links that form civil society.) Is there a distinction between them as to the privilege of self-defense? And is the push of the sweep, or a stroke with his scraper, at the head of his comrade, to be murder in him, whilst the would-be noble, shall be allowed with his gold-hilted cane, or his elegantly mounted pistol in defense of his honor, to play a secure but mortal game, and be justified in killing, on a like provocation, either his friend or his foe, or, as in this case, a man he is said hardly to know? You are not then to determine his case by the circumstances attending it, but by the nice sense of honor of the gentleman, or the distinction and dignity of his station in life.

What then has become of that part of the Constitution which declares ours to be a government of laws, and not of men. If the law does not apply equally to A and B, and so through every letter of the alphabet, how can it be said that every man holds his life and fortune by the same tenure as his fellow citizens, whatever may be his rank or his condition, or standing, in society.

We are told that there are a number of men in society who will with their own arm vindicate their rights, and stand the guardians of their own honor. There may be such men, but I do not know them. I hope I shall not meet with any citizen who does not rely for his safety on the laws of the government, and the justice of civil society.

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But we are told that the laws of christianity lend us a defense by our own arm; and we are asked how then the laws of society can regulate this matter? I do not admit this position to be just. All men are bound to surrender their natural rights upon entering into civil society, and the laws become the guardians of the equal rights of all men. Why are duels criminal if the men who engage in them have this privilege of maintaining their own honor?

It is said the defendant was driven to such an awful crisis, that he could not extricate his honor; and his counsel ask, what could he do? I answer, appeal to the laws. But say they, the laws are ineffectual; suits are slow of remedy, and uncertain in their end. Where would such reasoning lead us? You have it in testimony, that the defendant reasoned in this way; and that mode of reasoning brought on this sad event. You have heard his counsel, in a strain of eloquence, advance the same idea, and make a personal application of the principle. "No man," said he, "is bound to surrender his own honor. If I do, I wish my arm may be shriveled by the palsy, and drop from its socket. No, I will vindicate mine own honor to the death." I would rather that he should retain the use of his limbs, as well as the faculties of his mind, in order to employ them in the true field of honor, the defense of his country, when necessity may require their exertion. The defendant's counsel are obliged to adopt the same erroneous course of reasoning in order to justify him. Have we then, as a civil society, higher authorities than our own law books to appeal to, on such an occasion? Are they such as the counsel on the other side would not shrink from on the penalty of his life?

We will not take up the glove; we will rest our defense, both of the lives and honor of our fellow citizens, upon the laws of the land; we will trust to them rather than to a deadly weapon, for our protection. Such declarations as are made by the gentlemen on the other side, would countenance all the duels that have been fought in the world, and render unavailing all the laws that have been

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enacted for the punishment of illegal and savage combats. It is said that the defendant adopted this course because the tardy steps of the law were too slow to keep pace with his rapid stride to obtain immediate vengeance. What if his fame and character had been injured? Has he superior privileges? Or, ought he not take the common lot of his countrymen? Has he any excuse more than others? Has he the excuse even of an officer? He is both a lawyer and a gentleman; but this does not give him a right beyond what all the individuals of this society possess. If the defendant suffers on this occasion, he will have to suffer no more than what every other person who should perpetrate a similar act must suffer, while controlled by the laws of his country. If he is innocent, he will be acquitted; if he is guilty, he will take the common lot of other men. I do not feel any interest in what your verdict may be, further than that justice in the common way, and on general principles, should be done.

Is the measure of a man's conduct, when he leaps the bounds of written established law, to receive a standard from the feelings of his wife and children, or the notions of honor in the congregation of fashionable men and can a man appeal to Heaven in this way, and be a pious christian? When I heard that this doctrine had been advised on this occasion, by professional men, I shuddered at it.

Gentlemen—Not being able to fathom this abyss of troubled waters; not having the courage and firmness to cast away the guardianship of social protection, and the laws; not having an imagination that can show the lines of security beyond those of the civil government, I will yet believe the laws to be fully adequate, where we have time to apply to them; and I will fondly suppose that I am, to every possible purpose, in a state of civil society and social security. The laws may be so imperfect, for human nature is so, that the remedy may be slow, and below my wishes; but I will not claim to be my own judge; I will not say that I have a right to appeal to this arm to avenge an injury, whilst the law affords me a complete remedy. The defendant's counsel asks how he could have gone

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home to his wife and children, with his honor stained, by the blow he had received on the public exchange from young Austin. I put a case hypothetically: If a man of honor and great irritability of nerves, should have recevied a blow, could he appeal to the laws of his country without tarnishing his honor, or injuring his family? If his wife was a virtuous woman, she would applaud his moderation, and be gratified in teaching her children to pursue a similar course through their future lives; no person would deem him disgraced by the blow, though he had not destroyed his adversary. If we are to return to the barbarous times so well described by Robertson, in his history of Charles V, where every great man was to go armed with his trained bands behind him, in order to encounter any whom he might meet, without regard to laws either human or divine—if heroism and honor and chivalry are to return, we may expect to see again those combats so well described in the well-known ballad of Chevy Chase; and this promised land, flowing with milk and honey, to be turned into a field of battle, and crimsoned by the blood of our fellow citizens. I trust we are now too far advanced in civilization to return from the light of this day to the barbarisms of the Thirteenth century, when the interposition of the authority of the Pope and his council became necessary in order to prohibit these misadventures. Whatever opinions we may have of the Roman Catholic religion, we are indebted to its influence for this one good deed, which all the potentates of Europe combined together could not have effected.

There is something in this cause which has unnecessarily been introduced, and which I wish to lay out of the question before we proceed: The gentleman on the other side is above personalities in a cause of this importance, but he draws a picture in the darkest colors, and leaves you to point to the original;—he says that some one has been standing in the gutter for twenty years past, throwing mud at every well dressed gentleman that passed by, and that he can have no ground of complaint if he should be a little spattered himself, I ask whether if it was true that a man had done this, is he to be

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outlawed? Is he and his family to be hunted and shot down at noon day? That is not the punishment for libels, if he is to be condemned for libeling, let the innocent man among his accusers cast the first stone. I have had my share of such opprobrium, but it never came into my mind to redress myself by shooting one of my fellow-citizens. He wrote against Washington, they say; so did Hamilton; he wrote against Adams and others of his administration; so did Alexander Hamilton and others; but Austin authorizes me to deny the charge of his writing against Washington. Who wrote against Hancock and Samuel Adams and Washington and all the great men who produced the revolution? Are all those writers outlawed? If any of them were punished, it was in pursuance of the laws of the country—we have no check beyond that. Who is there of consequence enough to deserve notice, but is the object of daily slander? Does Benjamin Austin do all this?

Where will these ideas carry us? Are they compatible with the elegant expostulations of both my brethren against party political prejudice? I think they would carry us back to the barbarous ages; in which case it will become necessary for every man to become an expert combatant. These ideas will, I presume, excuse robbery in those who are too proud to beg.

Should we lower our notions of honor, and condescend to bring our feelings to the rules of law, we should then have to inquire,—whether the defendant has proved beyond a reasonable doubt that the fact of killing was committed in such a manner as to render it lawful, and excuse him of all blame. In this the first inquiry is—Was the death a voluntary killing—that is to be decided by the weapon and manner. Was it by justifiable or legal warrant? Was it an accident? Was it on a sudden provocation? Was it on a sudden combat? Or was it done in pursuance of a design unlawful in itself, and unjustifiable by the established laws of our government? Should you be satified from the opinion of the Court, that it is of no consequence as the evidence is whether the pistol was fired before a blow was given by the deceased, you will be

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much relieved; but if that fact should be considered as important in the case, you will then have to inquire

First, Was the assault previous to the mortal wound,

Second, Was it at the same instant, or

Third, Was it after the mortal stroke?

In these inquiries, what shall guide you? Are you left to the nice feelings of a man of honor, to be decided on his apprehensions of the moment, to make a separate law in each case as it arises? Or are there established laws to guide you? The constitution has fixed a system by which the courts of justice are to be governed: these books which have been cited contain those laws, which are laws, though they were not made by the legislative authority; they were made by the voice of the people; and this, which is the highest authority, has said that these books shall be the law of the land: For this I refer you to the sixth section of the sixth chapter of the constitution, where it is declared that all the laws, rules and practices in the judiciary department, which have been heretofore adopted, shall continue to be law, until they shall be altered by the general court of this commonwealth. They were brought by your ancestors from the land of slavery; they have been wet with the mists of the Red Sea, washed in the waters of Jordan, and are now our garments of comfort in the promised land; yes, in the promised land! You young men, who have only heard of the revolution, may smile at the simile, but the venerable and aged members of this community, many of whom I see around me, know what it was to have passed through the wilderness, through difficulties and dangers almost unparalleled; those will not willingly relinquish their principles.

By these rules if the defendant entertained a grudge or ill will against the father of the deceased, can the malice in such a case be transferred to the son? If it should appear that the defendant went out armed with a deadly weapon, with an expectation of meeting the elder Mr. Austin, and did thereupon kill the son, it would be such a malice as to constitute the crime of manslaughter at least.

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Now we come to an examination of the testimony which has been laid before you and from which you will have to determine the degree of guilt incurred by the defendant.

Was the assault of young Austin made upon Selfridge previously to the firing of the pistol, that instrument which gave the mortal wound? To this point we have the testimony of John M. Lane and Job Bass. I will make one or two observations on Lane's evidence. Mr. Lane said he was standing in his shop door and saw Selfridge fire the pistol and the person who was fired at raised the stick and struck at Selfridge after the pistol was discharged. The evidence of shooting before the blow, is from the testimony of Bass and Lane. Howe, Frost and others say they did not see any blow struck before the pistol was fired, but perhaps these two witnesses will be sufficient to satisfy your minds that the deadly wound was given before a blow was struck, and there is a distinction in law between an assault and battery. The counsel for the defendant have attempted to disparage the testimony of Mr. Lane without intending to impeach his moral character. Mr. Lane's standing in society is above imputations of that sort, for my part I am astonished that the circumstances of this case should not have been attended with greater variations than they appear to have from the witnesses on both sides. It is an extraordinary thing in a scuffle of this kind at noon day, on the public exchange, done on the sudden that the testimonies should come so near together as they do in respect to the time, place, etc. I shall not however insist that the pistol was fired before the assault was made.

I come now to the second question whether the killing and the blow were at the same instant of time, and here you have the testimony of a number of witnesses to prove that both happened at the same moment.

I do not deny that from their testimonies, an assault may be inferred, and that there was an intention on the part of young Mr. Austin to commit a battery, but I do deny that it was such an assault as would justify the defendant in putting

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the assailant to death with a deadly mortal weapon prepared and charged on premeditation for the purpose.

I now come to the consideration of another point, that the blow was given by Mr. Austin before the defendant gave the mortal wound. On this head you have only the solitary testimony of Lewis Glover, I know nothing of his prejudices or party feelings, for he is quite a stranger to me; while on the stand, he told you that he had expected something would take place in the course of the day between Selfridge and Austin, the father of the deceased, that he meant to amuse himself by attending the exhibition. As in former days the Romans had gladiators to amuse the public, so this witness watched the parties that he might see them sink below the character of men; he owns, however, that he might have been better employed; there I agree with him, I think he would have been better employed if he had gone to a magistrate and apprised him of his suspicions, in which case the magistrate would have taken a necessary precaution to prevent the town of Boston being disgraced by actions of this kind. He says that he saw the deceased give one violent blow, which struck Selfridge on the hat, that he recovered his cane in order to repeat the stroke, and that the second blow and pistol went together. This I say is the solitary testimony of Glover, unless you take the testimony of Mr. Wiggin as a corroboration of it; and even then, there are upwards of thirty others who were present at the time that know nothing of the circumstance. Mr. Wiggin has said that he thought he heard a blow which sounded as if it had been struck upon a coat; Mr. Glover may be right and Mr. Wiggin correct, their stories are consistent; for Glover says the first blow was not so severe as those which followed, therefore its sound might be softened, there is another circumstance urged in the defense as going in support of this testimony. The defendant's hat was indented and broken, and there was a contusion on his forehead. This is answered in this way, all the witnesses agree in the fact, that the subsequent blows were given with increased violence, so much so that several of the witnesses thought the

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charge had not taken effect, or the pistol had been only loaded with powder. You have heard the opinion of the physicians, and you learn from them that a wound in the lungs is not always mortal. They have mentioned a case where a part of the lobe of the lungs has been separated and the patient survived; you have heard of animals being mortally wonded, and yet leaping from the ground, with increased muscular strength six or eight feet high. Similar observations must be familiar to every one of you gentlemen, even the worm that you crush beneath your feet, springs with manifest vigor from the assault; we need no argument in support of these remarks; give pain to a fly or a spider, and you have occular proof. Have we not then very full proof that this fracture of the hat and contusion of the forehead was the consequence of one or more of the blows subsequent to the discharge of the pistol? In that case, as it must have been done after the pistol was fired and the deceased had received his death wound, however grievous and heavy the stroke might be, it furnishes no excuse for a mortal wound previously given.

I am requested to make an observation upon the testimony of young Mr. Fales, the favorite and classmate of the deceased; I do this merely because it is desired, not because it is necessary. The Court and you have already seen that his testimony is correct. It is on facts which happened on the agitation of hurry and confusion, and can only be according to the best of his recollection.

The defendant has brought Perkins Nichols and J. Osborn, in order to discredit the testimony of young Fales; they say that they went to Mr. Austin's house, not I apprehend as the friends of Mr. Austin, to condole with him on the unfortunate death of his son, but to find and lay hold of any circumstance that might be beneficial at this trial, to their friend Selfridge; one of them, Mr. Nichols, made a memorandum of the conversation that had taken place, and he swears from that memorandum, that Mr. Fales had said that the young man (meaning Mr. C. Austin) struck Selfridge before the pistol was fired; that at the time of this conversation, Mr. Fales appeared

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to be extremely agitated. There are two other witnesses, however, who were present at the same time, that declare that they did not hear any such declaration. But suppose such a declaration had been made by Mr. Fales to the father of the deceased, can it not be accounted for by supposing that Mr. Fales, in order to soothe the parent, who perhaps was half distracted at the horrid circumstance, that he should insinuate that his son was not wholly free from blame; and that he had struck at the defendant before the pistol was discharged. The character of that young gentleman would have been safe if I had said nothing about it. You have seen with what caution and diffidence he has delivered his testimony; it appears that his mind was in a state of confusion, occasioned by the death of his friend, and that he does not even to this day pretend to have a perfect recollection of the order of time in which the facts took place. But admitting that the assault was made by the deceased before the defendant gave the mortal wound, you will have to inquire whether it was such an assault or such a battery as would justify the defendant in killing the deceased at that time, in such a place, and in that manner, with a formed intention, and with a deadly weapon.

My state of health and want of strength, seem to forbid my doing full justice to a cause of this magnitude. I will, however, endeavor to add something more. To do this, I return to the inquiry, whether it is of any consequence that the blow was given after or before the mortal wound. This brings us to another question—whether, if the assault was made before the discharge of the pistol, the killing in that manner, and with such a weapon, was excusable.

Was the defendant in such imminent danger of his life that he was obliged to slay the deceased as the only means of saving himself? The law on this point will be found in Foster's C. L., pages 276, 277 and 278.

"Two cases of self-defense are supposed. In the one a forfeiture of goods was incurred, in the other not. What therefore is the true import of the words self-defense upon chance-medley, which the statute useth as description of that offense which did incur the forfeiture homicide, *per infortunium*, which hath been stiled chance

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medley, cannot possibly be meant; for in that case the party killing is supposed to have no intention of hurt; whereas in the case the statute mentioneth he is presumed, to have an intention to kill or do some great bodily harm, at the time the death happened at least, but to have done for the preservation of his own life. The word chance-medley therefore as it standeth in this statute connected with self-defense must be understood in the sense which Coke and Kelyng, in the passage already cited, say was the original import of it a sudden casual affray commenced and carried on in heat of blood; and consequently self-defense, upon chance medley must, as I apprehend, imply that the person when engaged in a sudden affray, quitted the combat before a mortal wound be given, and retreated or fled as far as he could with safety and then urged by mere necessity, killed his adversary for the preservation of his own life.

"This case bordereth very nearly upon manslaughter and in fact and experience the boundaries are in some instances scarcely perceivable; but in consideration of law they have been fixt. In both cases it is supposed that passion hath kindled on each side and blows have passed between the parties. But in the case of manslaughter it is either presumed that the combat on both sides hath continued to the time the mortal stroke was given or that the party giving such stroke was not at that time in iminent danger of death.

"He therefore, who in the case of a mutual conflict, would excuse himself upon the foot of self-defense, must show, that before a mortal stroke given, he had declined any farther combat, and retreated as far as he could with safety; and also that he killed his adversary through mere necessity and to avoid immediate death; if he faileth in either of these circumstances, he will incur the penalties of manslaughter."

Whatever may have been advanced by the counsel to the contrary, in this trial, yet by all the authorities it appears, that while a man may defend himself against a felonious attack, there is a difference in the law between a felonious and a simple assault, and that this difference is determined by the circumstances of each case: if a man is assaulted by another with his fist or a stick, not likely to kill, the other is not justified in employing a deadly weapon to kill the assailant. This runs through all the books, and it marks the intention of the person who employs such a weapon as being malicious. What were the facts in the rencontre between the defendant and the deceased? Supposing the former to have been attacked, was he likely to have been killed? You have seen the cane with which the deceased struck Selfridge—you know

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the place where the affray happened, and you have heard that it was done in the presence of numerous witnesses; is it possible that under all the circumstances of this case, the defendant can be justified by the defense in preservation of his life, or that of his person from great bodily harm? Does it not absolutely appear to you in testimony, that the defendant went to the Exchange with a deadly weapon concealed in his pocket or behind him, and that he was assaulted by young Austin with a walking cane? I will not stop to inquire whether the defendant was lawfully on the Exhange, though an attempt has been made to prove to you that he was there by appointment, on its lawful occasions; they have produced Mr. Ingraham to show that there was an appointment to meet at the Exchange; that the appointment was made on Sunday, third August, to meet the next day, in order to receive an execution which the defendant was to procure for Mr. Ingraham. This the jury will observe was an arrangement made by the defendant subsequent to his writing the advertisement against Austin, which appeared in Monday's paper, and from the publication of which the affray is supposed to have arisen, and which he intentionally provoked by that piece of abuse. Laying aside every suspicion which may arise from these circumstances, yet we must inquire, whether it was lawful for him to be there with a loaded pistol concealed in his pocket? Had he reason to apprehend, when he went on 'Change, that he was in imminent danger of his life? From the testimonies of Mr. Richardson and Cabot, it does appear that this danger could have been avoided by a more prudent mode of conduct. And was not his taking such measures full evidence of a heart void of social duty, and so fatally bent on mischief, as to be completely that kind of malice known in law under the description of malice aforethought? In the conversation he had with Cabot and Welsh, it was observed very cooly and deliberately that an attack would be made upon his person by some one employed by Mr. Austin. It does not appear, however, from the testimony, that this information was correct; and the words used in the

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conversations were varied by the imagination of the reporter, who is one of those witnesses; he went so far in his supposition, as to believe that a gentleman standing on the opposite side of the way with a whip in his hand was the person employed to chastise the defendant, and cautioned the defendant against it. Selfridge replied to him, with a nod and air of indifference, that he was prepared for the attack.

Now, Gentlemen of the Jury, under these circumstances, what would you do? Would you conceal a weapon to kill your antagonist, as if you would act the assassin, or would you not say openly, I am not good at fisticuffs, neither have I learned the art of cudgeling, but if I am attacked and my life put in jeopardy, I carry openly in my hand a loaded pistol to defend myself against any felonious attack which may be attempted, if I cannot save myself without? Gentlemen, you would not have put a deadly, murderous weapon in your pocket to conceal it, until the voice of death should give utterance to a municipal right; circumstanced in this way, you would carry it openly in your hand, and by such manly, open conduct, would preserve yourselves from any assault. But if the defendant brought the assault upon himself, by his previous conduct, in the publication of an advertisement calling the father of the deceased a liar, scoundrel, and a coward; if he has provoked a combat by such approbrious and abusive language, where are his grounds of defense? From the conversation he had a few minutes before with Mr. Richardson and Cabot, it is apparent that he was determined on shooting any person who might assault him in any manner, however lightly, on the Exchange; that he had prepared himself for that purpose; and that he intended this, two days before, when he purchased the lead, or the shot, for casting the bullet. What is the law on this premeditation? Clearly that the party was guilty of murder; that without such premeditation, if it was done on a sudden affray, the slayer is guilty of manslaughter. Will his feeble habit of body be a justification under this premeditation? A man who is a cripple, and can walk only with a crutch, will be privileged to arm himself

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with a deadly weapon, in order to kill any man who may assault him; he cannot be required to retreat to the wall, because his lameness prevents him from running; the ground upon which he stands, or the crutch upon which he leans, is to him a wall, and he may shoot down his assailant: thus the misfortune of decrepitude throws a subject into a state of nature, and raises him above the control of, or dependence on, the laws of his country.

Ought not the defendant in this case to have made some attempt to retreat, or have called for help before he employed his deadly weapon in shooting the deceased? It will not be pretended that the attack was made with a felonious intent, that Austin intended to rob or to kill him, neither did the defendant understand it in that way; for he said in the conversation with Cabot and Richardson, which I have already alluded to, that he was not good at fisticuffs or cudgeling, but had prepared himself in another way. By this it appears clearly that the defendant expected to be attacked with a whip or a cane, and that he had determined to kill anyone who assaulted him in that manner. Was not the language he had used in the scurrilous advertisement calling B. Austin a liar, a coward, and a scoundrel, such abuse as he might and did expect would be resented by a kicking or a caning? In this reasonable view of a situation he courted, how is it possible that the defendant could apprehend any other assault than a chastisement for his insolence, not an assault with a felonious intention? Even if the defendant had reason to fear a felonious attack, was there not such a want of caution, and such premeditation, such malice on a previous quarrel, as will deprive him of the excuse he would otherwise have had?

Shall we go into an examination of the right of one man to kill another for a simple assault? The counsel for the defendant have advanced this doctrine: the authorities they rely on are Grotius, Hawkins, and 4th Blackstone.

Where a man is unexpectedly assaulted and kills another with a weapon he has in hand, and without time to reflect, these authorities do not infer malice from the nature of the

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instrument, but where a deadly weapon is prepared for the purpose, the case is widely different. Whether it was prepared for the purpose and whether it was worn as a part of dress, are prime considerations in all questions of this kind. We have much law on this point, in the trial of the Soldiers in this town for a homicide, which took place on March 5, 1770,[1] on the very place where Austin was killed. In Wyer's case and Abbott's case, more recently the distinction I now make were agreed to. In the trial of the soldiers it was agreed that their arms were legally in their hands, that they marched into the street in obedience of the orders of Capt. Preston, that they were sent to support and protect the sentry stationed at the door of the Custom House, and it was admitted by the Court, that if they had not been there in obedience to their Captain's order they would have been guilty of murder, that the instruments they used, were lawful instruments of labor being such as by which they obtained their living. Had they laid down their guns and taken up other weapons, such as axes, hatchets, spades or hammers, that would have brought the crime up to murder; it is true only two of them were convicted of manslaughter, but that arose from the particular circumstance of the case. Those men, at that time, were found guilty of manslaughter for doing that which was deemed to be their duty and attempted to be justified by the repeated assaults made by the town's people, by throwing lumps of ice, brick bats and other missiles; and though in fact they did retreat to the wall, it was held to be manslaughter. Are the times so changed, and the laws so altered, that what was then held to be a felonious homicide, shall now be considered in this town without any extenuating circumstances justifiable homicide? Has the distinction between Republicans and Federalists, overset our Constitution? Is the one under the protection of the law and the other left to a simple state of nature for his protection?

I now come to a question which will fix the different shades of guilt on the various views of the fact; was the defendant

[1] See 4 Am. St. Tr.

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in nothing to blame in this unfortunate and bloody catastrophe? Was he or was he not the provoker of this quarrel? If he was in any wise to blame in that respect, all the books concur, that he cannot avail himself of any circumstances, that may be set up in justification or excuse under pretence of necessity. And is there nothing to show that he promoted this quarrel? What is the nature of the advertisement that he wrote and caused to be published? Did he not understand and expect in the morning, of the publication, that it would provoke an assault, in consequence of which he unlawfully armed himself to be his own avenger? Before he put in this advertisement, could he not have informed Mr. Austin that he would defend himself as a gentleman, why did he not write his advertisement in another manner? Could he not say that my reputation as a lawyer is of the first consequence to me, that Mr. Austin has represented that I solicited a law suit from the man who furnished the entertainment of the Republicans on the 4th day of July, that I prevailed upon the man to bring the suit against the Republican committee, that I had convinced Mr. Austin that he was mistaken in the fact, and he promised me to contradict it, which he has hitherto neglected to do? Would not this statement have obtained the same credit with those who knew him? Where was the necessity of calling Mr. Austin a liar, coward and a scoundrel, admitting the mistake, why was it necessary to use the epithet coward, unless he meant to provoke him up to an act of violence, that he might have a pretext to kill him? That a combat of some kind was intended by the defendant is very apparent. Several of the witnesses have told you that they expected an attack by Mr. Austin upon Selfridge as the inevitable consequence of that publication. Did he recollect, when he gave this challenge the feebleness of his frame, or the weakness of his nerves and limbs? And why did he not add in order to put Mr. Austin upon his guard, I will not join with you in fisticuffs or cudgeling, but I carry a loaded pistol concealed in my pocket to kill anyone who shall dare attempt to horse-whip or cane me?

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Is it not true that the advertisement was the origin of this quarrel? If he was to blame in provoking it, if he went out unlawfully armed with a deadly weapon concealed in his pocket expecting to be assaulted, and thereupon was assaulted under a determined resolution to shoot the person who should assault him and did actually kill the deceased the instant the assault was made, pursuant to a premeditated but concealed design; where is his ground of excuse or justification? If he has not made out to you beyond any reasonable doubt, that he was compelled to kill young Austin in his own defense it is your duty, and you are bound by your oath to return a verdict that he is guilty. If he is not guilty of manslaughter, he is guilty of nothing on this indictment; his being guilty of murder cannot excuse him on this issue.

Suppose the assault was not felonious but the person assaulted had some reason to suppose it so, is the person who is put upon his defense warranted in killing the assailant? It is a fixed principle in our laws that no man can be justified in killing another, but from unavoidable necessity to preserve his own life or property which may be feloniously attacked. In every affray, where there is no felonious intent, it is a fixed principle, that the person put upon his defense shall retreat as far as possible before he is justified in killing the assailant. A robber on the highway may be killed the instant he makes the assault, so may a burglar in the attempt to rob a house, so a woman may kill a man in the necessary defense of her chastity; but a woman knowing her chastity is to be assaulted, must not put herself in the way of the assailant and kill him, for in that case it will be considered, that she had premeditated the destruction of the man's life, and this would constitute the crime of murder; and in like manner, if another expects to be assaulted, he must not go in way of the assailant with an intention of killing by a concealed deadly weapon. Was such homicide to be allowed as lawful, where would it lead us? Duels might openly, and excusably be fought at noon day in the open street, in the bosom of the town.

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Suppose a truckman to be taken by the nose and with the butt of his whip he strikes the person who assaults him and kills him dead with the stroke he is held guilty of manslaughter only, it is not excusable homicide, because the assault was not of that dangerous nature as to put his life in jeopardy. The instrument I have mentioned in this case is one belonging to his profession, and which he lawfully uses in pursuing his ordinary avocation. But suppose a truckman, imitating those gentlemen of nice honor, we have heard of, was to drive his truck about the streets armed with a sword by his side, and another truckman had run against his horses or his truck, the first had drawn his sword and killed the other with the thrust, this certainly would change the nature of the offense, instead of manslaughter it would be murder. Thus the degree of guilt resulting from the nature of the instrument is fully exemplified. A loaded pistol against a cane is equal to a sword against a truckman's whip. The truckman has nothing to do with the sword; the lawyer has no concern with this pistol.

If a gentleman riding in his carriage should be run against by a hackney coachman, and he conceives that it was intended to injure his property in the carriage or intended to kill his wife or children who may be with him, has he a right to fire his pistol and kill the hackney coachman on his box? This principle as contended for, by the counsel on the other side if supported, will go a much greater length than they acknowledge. He is not only justified in killing the coachman upon the assault, but he may be justified upon the mere apprehension, and supposing that the hackney coachman intend to cross him and struck the wheels of his carriage, he may spring out, and with a sword, which is a gentlemanly weapon, run the coachman through the body, under a pretense of apparent necessity to save his wife or children. Shall I add anything more, in order to expose these extravagant and novel ideas of the privilege of self defense?

If on every small misadventure, or trifling assault, a man

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has a right to lay another dead at his feet, what nice calculations we are under a necessity to be compelled to make. A man desirous of killing another should only go to a lawyer and inquire the degrees of assault that would bring down murder to manslaughter, and manslaughter to excusable or justifiable homicide. One man has a higher notion of honor than another; and the various notions of honor must be the graduated scale upon which a jury is to determine the true degrees of guilt on homicide. This cannot be the law of our country; yet some authorities have been read by the defendant's counsel to give it this coloring. I thought when they were read, they were but partially quoted. Grotius has been cited, to show that the right of self defense, is what nature has implanted in every creature, without any regard to the intention of the aggressors. I suspected that this general rule had some qualifications, and a little further on I find in the same author, that the danger to which the person is exposed, must be that of losing a limb, or a principle member of his body, or his life, and that there must be no possibility of avoiding the misfortune otherwise. These are the circumstances that authorize him, lawfully, and instantly to kill the aggressor. Further on he observes, that self defense may sometimes be omitted, that it is not lawful for a christian to murder a man for a box on the ear, or such other slight injury, or to avoid his running away. That murder in defense of our goods, is permitted by the law of nature, but even here, there must be an absolute necessity of killing the thief to save the goods.

But this treatise of Grotius on the rights of war and peace, explaining the laws and claims of nature and of nations, and the principles that relate either to the civil government or the conduct of private life, is a treatise that was written on what was the law among the Romans and other ancient nations, particularly what is termed the civil law; he explains what is the law of nature, and he describes God as nature herself, and infers that men have all the rights in society which they possessed under the revealed will of their

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creator, where the protecting laws of the government cannot be applied. In this case Selfridge had the whole state to protect him, even in a quarrel he provoked himself.

In 1 Hawkins, b. l, chap. 30, sec. 1, it is held that homicide against the life of another, amounting to felony, is either with or without malice:

> "That which is without malice, is called manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all."

The same author lays it down, that if he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly theron.

In 4 Blackstone, 184, it is laid down as a principle, that the person who kills another in his own defense, should have retired as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon the assailant. There is a distinction in the law between a combat and a sudden affray, a combat is when two men meet by agreement to fight. In the present case the defendant appears to be within the meaning of the word combat; for it appears he was told that there would be an assault, and to make it a combat he went armed with a loaded pistol. The same author proceeds to say, that the person shall not fictitiously appear to retire or to avoid the affray, in order to catch his opportunity of killing the assailant, but from a real tenderness of shedding his brother's blood. Apply this doctrine to the present case, and examine whether the evidence has shown to you that the defendant entertained this tenderness in shedding the blood of young Austin. When he armed himself with a deadly weapon, and concealed it in his pocket, in order to shoot down anyone who should assault him, can it be thought he had a tenderness against shedding human blood? When he declined having a recourse to the laws of his country for protection—when he chose to take vengeance into his own hands and perpetrated this act, can it be thought

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he had that tenderness which the law requires in him who shall unfortunately be driven from necessity to shed his brother's blood?

If the defendant had not written the advertisement, this quarrel would not have taken place—it was that which produced it. It appears that the consequences were produced exactly as he intended they should be, except that he killed one man instead of another. Retrace the whole of the transaction, and you will see the defendant bent on a bloody purpose. The letters of the 29th and 30th of July, appeared to have been intended to provoke a duel. But his counsel tell you that he was provoked to take these measures, on account of the injurious words spoken by B. Austin. Suppose it true that Mr. Austin had spoken disrespectfully of the defendant, or that he had printed the most opprobrious slander of him, would it justify the defendant's going armed with a loaded pistol concealed in his pocket? The law holds that words either spoken or written can never justify an assault; it is of no consequence, therefore, whether B. Austin was to blame or not, the defendant ought not to have defended himself in this way. It is true that the reputation of a lawyer is of great importance to himself, and to some of the community. As one of the profession, I wish the order was more respectable than the conduct of some of its members have lately rendered it; in that case we should not at this day have heard the outcry against them, which seems to prevail too much throughout the United States.

To me the original conversation which is said to have occasioned this unhappy event, does not appear necessarily to have involved the affront which the defendant seems to have conceived. From the testimony of Mr. Scott, we find that some gentlemen had been joking Mr. Austin, at Russell's Insurance Office, on the Republican Committee being sued for the expense of the dinner the party had on Copp's hill; and that Mr. Austin, when he was going away, laughingly retorted, that if a Federal lawyer had not interfered, it

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would not have happened; it was a reply upon the other party, and was not a personal attack upon Mr. Selfridge. Mr. Scott inferred that he alluded to Mr. Selfridge, because he thought Mr. Austin addressed himself to him, as he was one of the Federal party. Mr. Selfridge's reputation was not affected, but he pursues him with a dreadful vengeance, and throughout the whole appears to be determined to have him at his feet, alive or dead; how could he have suffered in his character or his business? Is there any Federalist who thinks it dishonorable to sue a Democrat? Or is there any Federalist who would decline to employ Selfridge on that account? For my part, I apprehend from what I have seen on the present trial, there was no ground for what is said to be the apprehension of the defendant.

One further observation—Mr. Carrol says that he heard the report of the pistol when he was at the post office; immediately after he saw Mr. Ritchie and Selfridge together, and Mr. Ritchie said to the defendant, that he was extremely agitated; to which the defendant replied, I am not agitated, I have done what I intended to do, or meant to do. Mr. Hastings says that he heard Selfridge speak also when it was inquired who had done the deed, and say, I am the man, I am not agitated. Mr. Ritchie says that the defendant said, I know what I have done, I am not so much agitated as you are; and that he stood firm, erect, and upright. Does this look as if the killing was done upon a sudden affray? Would either of you gentlemen, who should have been driving your carriage, and had the misfortune to run over a poor child begging alms in the street, and kill him, stop short, and say, I am the man who has done it, I know what I have done, I am not agitated. I am totally unacquainted with human nature, even at this advanced period of life, if there is a man among you but who would shudder at the accident, and lament the effect of such carelessness. If any of you, in firing a gun, should be so unfortunate as to kill one of your neighbors without intending it, your hearts would be too full, and you would be too much affected, to vaunt in a

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confident manner that you were the man that had done it; that you had done nothing more than what you intended. If the defendant had killed young Austin by accident, he must have shown some degree of agitation; but he was cool and collected, and did no more than what he intended to do. This was true, or why did he carry with him a loaded pistol? If there is in your opinion, any degree of premeditation, he must be at least guilty of manslaughter.

I have, I think, candidly examined this case, and have done only that which appeared to me to be my duty to do. I did expect that the indictment would have been for murder. It ought on every principle to have been so; there is no precedent to the contrary. The testimony I had heard, rendered such an indictment proper; not that I wished that he should have been convicted of that offense, but because I thought it would furnish an opportunity for a full examination of the unfortunate event. The Grand Jury having found a bill for manslaughter only, have, in some measure, restrained us from such an inquiry, and the opportunity we might have had of conducting the trial before a full bench of the Supreme Court. I have no doubt but what his Honor, the judge who presides, will give you correct directions in his charge; but still it is not the charge of a full bench, and therefore cannot be so satisfactory, as it might have been. I ought to have no expectation either that a wrong verdict will be given, or that the verdict, be it what it may, will throw the community into convulsions. Fear of consequences is an inadmissible principle in our judicial proceedings; higher motives must urge us to our duty, and the base principle of fear, can have no affect in the trial.

If the defendant has suffered, or must suffer, is it not the consequence of his own fault? And is it not right that one who avowedly raises himself above the laws should suffer, rather than that the essential laws of society, the first law of natural reason, and the law of God, promulgated by the highest sanctions, shall be set at defiance?

Gentlemen, I consign this cause to you; to be decided ac-

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cording to the laws of our country, which laws his Honor will state to you from the bench; you will decide as in the presence of Him who knows all our motives, and before whom we must all soon appear and have to answer; and in the presence of the whole human race, for the motives on which the present decision shall be formed.

THE JUDGE'S CHARGE.

PARKER, J. Gentlemen of the jury, as this most interesting trial has already occupied four days, and as you must by this time be nearly exhausted, I shall endeavor, in discharging the duty incumbent on me, to consume as little more of your time as may be consistent with a clear exposition of the principles necessary to be understood, in order to form a just and legal decision. You have heard the important facts in the case, minutely and distinctly stated by the witnesses, ably and ingeniously commented upon by the counsel, and the principles of law elaborately discussed and illustrated in as forcible and eloquent arguments as were ever witnessed in any court of justice in our country. It is now left to you upon the whole view of the case, both of the law as it shall be declared to you by the Court, and the facts as proved by the testimony, to pronounce a verdict between the defendant and your country.

That in so important a trial, it should have devolved upon me, alone, to preside over its forms, as well as to declare the principles upon which your decision is to rest, is by no means a subject of congratulation. It is a situation which of all others I should have avoided, had not official duty imperiously imposed it upon me. But the organization of the court, and distribution of the services of its members are such as to have rendered any other arrangement difficult, if not impossible. Under our present judiciary establishment, all criminal cases, other than capital, are triable before one judge; and this system has proved itself to be eminently calculated for the dispatch of public business;

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That in so important a trial, it should have devolved upon me, alone, to preside over its forms, as well as to declare the principles upon which your decision is to rest, is by no means a subject of congratulation. It is a situation which of all others I should have avoided, had not official duty imperiously imposed it upon me. But the organization of the court, and distribution of the services of its members are such as to have rendered any other arrangement difficult, if not impossible. Under our present judiciary establishment, all criminal cases, other than capital, are triable before one judge; and this system has proved itself to be eminently calculated for the dispatch of public business;

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other provisions in the system ensure as great a degree of correctness as can be expected of any human institution.

It is true that although at a term holden by one judge, if others are present, they may proceed together. But at this time, the court being in session in three, if not four several counties, it was impracticable, had it been desirable, to have more than two judges engaged in the present trial. The great delay which would have taken place, in consequence of a division of opinion (a case not unlikely to happen in the course of any trial) between two judges, rendered it altogether inexpedient that more than one should attend; and as this term had been previously assigned to me, the unpleasant task of officiating in the present case, seemed unavoidably to belong to me.

Since it has thus fallen to me to execute a painful and anxious duty, I shall not shrink from the task of declaring to you the principles of law by which you are to be governed in your investigation and decision of this case. If in doing this, I should be found capable, in order to retain the favor of one class of the community, or to court that of another, of abusing my office by stating that to be law which I know to be otherwise; this is the last time I should be suffered to sit upon this bench, and I ought to meet the execration and contempt of the society to which I belong.

The crime charged by the Grand Jury upon the defendant is manslaughter; a crime of high consideration in the eye of the law. This crime, however, is not defined by our statute, but its punishment is by it provided for.

In order therefore, to ascertain the nature and character of the crime, it is necessary to resort to the books of the common law, the principles of which, by the Constitution of our government, are made the law of our land, until they shall be changed or repealed by our own legislature.

The counsel for the government, as well as for the defendant, have therefore wisely and properly searched the most approved authorities of the common law, for the principles upon which the prosecution or the defense must be supported.

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It is from those books alone, that any clear ideas of the offense which is on trial, or the defense which has been set up, can be attained.

The crime of manslaughter, according to those authorities, consists in the unlawful and wilful killing of a reasonable being, without malice express or implied, and without any justification or excuse.

That the killing of a human being, under some circumstances is not only excusable, but justifiable, is proved by the very terms of this definition.

Some persons, however, have affected to entertain the visionary notion, that it is in no instance lawful to destroy the life of another, grounding their opinion upon the general proposition in the Mosaic code, that "whosoever sheddeth man's blood, by man shall his blood be shed." There is always danger in taking general propositions as the rules of faith or action, without attending to those exceptions, which if not expressly declared, necessarily grow out of the subject matter of the proposition.

Were the position above alluded to, true, in the extent contended for by some; then the judge who sits in the trial of a capital offense, the jury who may convict, the magistrate who shall order execution, and the sheriff who shall execute, will all fall within this general denunciation, as by their instrumentality the blood of man has been shed.

The same observations may be applied to one of the precepts in the decalogue. Thou shalt not kill, is the mandate of God himself. Should this be construed literally and strictly, then a man who, attacked by a robber, or in defense of the chastity of his wife, or of his habitation from the midnight invader, should kill the assailant, would offend against the divine command, and be obnoxious to punishment. But the common understanding of mankind will readily perceive that the very nature of man, and principles of self-preservation, will supply exceptions to these general denunciations.

Our laws, like those of all other civilized countries, abundantly negative such unqualified definitions of crime, and

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have adopted certain principles by which the same act may be ascertained to be more or less criminal or entirely innocent, according to the motive and intent of the party committing it.

Thus when the killing is the effect of particular malice or general depravity, it is murder and punished with death.

When without malice, but caused by sudden passion and heat of blood, it is manslaughter.

When in defense of life it is excusable.

When in advancement of public justice, in obedience to the laws of the government, it is justifiable.

These principles are all sanctioned by law and morality, and yet they all contradict the dogma, that "whosoever sheddeth man's blood, by man shall his blood be shed."

It is not necessary for you to run a nice distinction between justifiable and excusable homicide; if the one now on trial be either the one or the other, it is sufficient for the purpose of the defendant.

A distinction existed in England, which does not exist here. There the man who had committed an excusable homicide forfeited his goods and chattels; while he who had a justification, forfeited nothing. Here, whether the homicide be justifiable or excusable, there must be an entire acquittal.

Numerous authorities, ancient and modern, have been read to you upon this subject. Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrassments, there being in some instances an apparent though in none a real incongruity. But I apprehend you need not trouble yourselves with the books out of court, for I think I shall be able to state all the principles you will have occasion to consider; there being in fact no disagreement about them from the time of Sir Edward Coke, one of the earliest sages of the law, down to Sir William Blackstone, one of its brightest ornaments. These same principles, although taken from English books, have been immemorially discussed, and practiced upon by our lawyers, adopted and

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enforced by our courts and juries, and recognized by our legislature. To prove this, I now need say no more, than that the same learned Judge Trowbridge, who was quoted by the Attorney General, in his charge to the jury in the trial of the soldiers for the massacre of 1770, laid down discussed and illustrated with great precision and clearness, every principle which can come in question in the present trial.

These principles I will endeavor to simplify for your consideration.

First. A man, who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm; may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power.

Secondly. When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

Thirdly. When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Of these three propositions, the last is the only one which will be contested anywhere; and this will not be doubted by any who are conversant in the principles of criminal law. Indeed, if this last proposition be not true, the preceding ones, however true and universally admitted, would in most cases be entirely inefficacious. And when it is considered that the jury who try the cause are to decide upon the grounds of apprehension, no danger can flow from the example. To illustrate this principle, take the following case. A. in the peaceable pursuit of his affairs, sees B. rushing

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rapidly towards him, with an outstretched arm and a pistol in his hand and using violent menaces against his life as he advances. Having approached near enough, in the same attitude, A., who has a club in his hand, strikes B., over the head before or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only and that the real design of B. was only to terrify A. Will any reasonable man say that A. is more criminal that he would have been if there had been a bullet in the pistol? Those who hold such doctrines, must require, that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol is loaded. A doctrine which would entirely take away the essential right of self defense. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.

These are the principles of law, gentlemen, to which I call your attention. Having done this, I might leave the cause with you, were it not necessary, to take a brief view of some other parts of it.

As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold the privilege of the jury to ascertain the facts, and that of the Court to declare the law, to be distinct and independent. Should I interfere, with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of a judge, into that of an advocate. All which I conceive necessary or proper for me to do, in this part of the cause, is to call your attention to the points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occured, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my opinion of the subject

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is. Where the inquiry is merely into matters of fact, or where the facts and the law can be clearly discriminated, I should always wish the jury to leave the stand without being able to ascertain what the opinion of the Court as to those facts may be, that their minds may be left entirely unprejudiced, to weigh the testimony and settle the merits of the case.

An important rule in the present trial is, that on a charge for murder or manslaughter, the killing being confessed, or proved, the law presumes that the crime as charged in the indictment, has been committed, unless it should appear by the evidence for the prosecutor, or be shown by the defendant on trial, that the killing was under such circumstances as entitle him to justification or excuse.

On the point of killing, there is no doubt in this case. The young man named in the indictment, unquestionably came to his death, by means of the discharge of a pistol by the defendant at the bar. This part is confessed as well as proved.

The great question in the case is, whether according to the facts shown to you on the part of the prosecution, or by the defendant, any reasonable, legal justification or excuse has been proved. Whether the killing were malicious or not, is no farther a subject of inquiry than that if you have evidence of malice, although the crime charged does not imply malice, it may be considered as proving this crime, because it effectually disproves the only defense which can be set up, after a killing is established.

From the testimony of several witnesses examined by the Solicitor and Attorney Generals, it appears that on the day set forth in the indictment, the defendant was in his office a little before one o'clock—that in a conversation about his quarrel with the father of the deceased, he intimated that he had been informed an attack upon him was intended, and that he was prepared. That a short time afterward, he went down from his office, which is in the Old State House, crossing State street diagonally, tending towards the United States Bank. That as he passed down his hands were be-

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hind him, outside of his coat, without anything in them, is proved by the testimony of Mr. Brooks, who saw him pass down, and by that of young Mr. Erving, who saw him when the deceased approached, put his right hand in his pocket and take out his pistol, while his left arm was raised to protect his head from an impending blow.

The manner of his going down upon 'Change, the weapon which he had with him, the previous intimation of an attack which he seems to have received, from Mr. Cabot or Mr. Welsh, and the errand upon which he went down as stated by Mr. Ingraham, are all circumstances worthy of your deliberate attention.

Passing down State street, as before described, several witnesses testify that the deceased, who was standing with a cane in his hand, near the corner of the Suffolk buildings; having cast his eye upon the defendant, shifted his cane into his right hand, stepped quick from the sidewalk onto the pavement, advanced upon the defendant, with his arm uplifted; that the defendant turned, stepped one foot back, and that a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterwards given and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who becoming exhausted, fell down, and in a few minutes expired.

This is the general course of the testimony; the scene was a shocking one, and all the witnesses state to you that they were exceedingly agitated. This will account for the relation given by Mr. Lane and one other witness, I believe Mr. Howe, who state the facts so differently from all the other witnesses produced by government, as well as by defendant, that however honest we may think them, it is impossible not to suppose they are mistaken. Indeed, the Attorney General has wisely and candidly laid their testimony so far as it differs from that of the other witnesses, out of the case.

There is one witness, Mr. Glover, who states the transac-

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tions somewhat differently from the other witnesses. He says, that having expected to see a quarrel upon Exchange, in consequence of the publication against the deceased's father, in the morning, he went there for the express purpose of seeing what should pass—that he saw Mr. Selfridge coming down street, saw young Austin advance upon him, that he had a full view of both parties, was within fifteen feet of them, that he saw a blow fall upon the head of Selfridge with violence, the arm of the deceased raised to give a second blow, which fell the instant the pistol was discharged. This is the only witness who swears to a blow before the discharge of the pistol; but he swears positively, and says he has a clear, distinct recollection of the fact; his character is left without impeachment. If you consider it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances proved by other witnesses which may corroborate or weaken the testimony of Mr. Glover.

On this point you will attend to the testimony of Mr. Wiggin, who swears that he heard a blow as if on the clothes of some person, that he turned, and saw the deceased's arm uplifted, and another blow and the discharge of the pistol were together.

You will consider the testimony of young Erving, who swears that the left arm of the defendant was over his forehead, as though defending himself from blows, when he saw the blow fall. You will consider that all the witnesses but Glover state that the blow which they saw, and thought the first, was a long blow across the head, that the blow which Glover says was the first, was a direct, perpendicular blow, and that he then saw the second blow, which was a cross one, as testified by the other witnesses.

If you find a difficulty in settling the fact of the priority of the blow, take this for your rule, that a witness who swears positively to the existence of a fact, if of good character, and sufficient intelligence, may be believed, although twenty witnesses, of equally good character, swear that they were pres-

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ent, and did not see the same fact. The confusion and horror of the scene was such, that it was easy for the best and most intelligent of men to be mistaken, as to the order of blows, which followed each other in such rapid succession, that the eye could scarcely discern an interval. You will, therefore, compare the testimony of the witnesses, where it appears to vary, attending to their different situation, power of seeing, and capacity of recollecting and relating, and settle this fact according to your best judgment, never believing a witness who swears positively, to be perjured, unless you are irresistibly driven to such a conclusion. Upon this point you will also attend to the testimony of Mr. Fales, and of Mr. Osborne, and Mr. Perkins Nichols, touching the testimony of Mr. Fales.

The counsel for the defendant seem, however, to deem it of little importance to ascertain whether the blow was given before the pistol was discharged or not, as there is evidence from all the witnesses, that an assault, at least, was made by the deceased, before the pistol was fired. I think differently from them upon this point. When the defense is, that the assault was so violent and fierce that the defendant could not retreat, but was obliged to kill the deceased, to save himself, it surely is of importance to ascertain whether the violent blow he received on his forehead, which at the same time that it would put him off his guard, would satisfy him of the design of the assailant, was struck before he fired or not.

I doubt whether self-defense could in any case be set up, where the killing happened in consequence of an assault only, unless the assault be made with a weapon which if used at all, would probably produce death.

When a weapon of another sort is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm, which would alone authorize the taking his life on the principles of self-defense.

But whether the firing of the pistol was before or after a blow struck by the deceased, there is another point of more

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importance for you to settle, and about which you must make up your minds, from all the circumstances proved in the case; such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigor of the defendant and his power to resist or to fly. The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the real stress of the case. If you believe under all the circumstances, the defendant could have escaped his adversary's vengeance, at the time of the attack, without killing him, the defense set up has failed, and the defendant must be convicted.

If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted, unless his conduct has been such prior to the attack upon him as will deprive him of the privilege of setting up a defense of this nature. It has, however, been suggested by the defendant's counsel, that even if his life had not been in danger, or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honor and natural right by which the killing may be justified.

These are principles which you as jurors, and I as a judge cannot recognize. The laws which we are sworn to administer are not founded upon them.

Let those who choose such principles for their guidance, erect a court for the trial of points and principles of honor; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned. I therefore declare it to you as the law of the land, that unless the defendant has satisfactorily proved to you that no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him, except killing his adversary, were in his power—he has been guilty of manslaughter, notwithstanding you may believe with the grand jury who found the bill, that

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the case does not present the least evidence of malice or premeditated design in the defendant to kill the deceased or any other person.

I ought not to rest here; for although I have stated to you that when a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may from the existence of other circumstances proved against him, forfeit his right to a defense which the laws of God and man would otherwise have given them.

If a man, for the purpose of bringing another into a quarrel, provokes him so that an affray is commenced, and the person causing the quarrel is overmatched and to save himself from apparent danger kill his adversary, he would be guilty of manslaughter, if not of murder, because the necessity being of his own creating, shall not operate in his excuse.

You are therefore to inquire whether this assault upon the defendant by the deceased, was or was not by the procurement of the defendant; if it were, he cannot avail himself of the defense now set up by him. And here you are called upon to distinguish pretty nicely, and to attend to a part of the case which I thought was going too far back to have an influence upon this trial, but which the urgency of the Attorney General and the consent of defendant's counsel finally induced me to admit.

You have heard the whole story of the misunderstanding between the defendant and the father of the deceased. Who was originally in the wrong, it is not for me to say, but I feel constrained to say, that whatever provocation the defendant may have conceived to have been given him, and however great the injury which the deceased's father may have done him, he certain proceeded a step too far in making the publication which appeared in the paper which came out on the morning of this unhappy disaster.

To call a man coward, liar and scoundrel, in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever.

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Such a publication is libellous in its very nature, as it necessarily excites to revenge and ill blood. Indeed, I believe a court of honor, if such existed, to settle disputes of this nature, would not justify such a proclamation as the one alluded to. A posting upon 'Change or in some public place, we have heard of, but I never before saw such a violent denunciation as this in a public newspaper.

Neither can I refrain from censuring the managers of the paper who admitted such a publication, for so readily receiving and publishing what in its very nature would tend to disturb the public peace. But, gentlemen, it is one thing for a man to have done wrong, and another thing for that wrong to be of a nature to justify an attack upon his person. If personal wrong, done by the father of the deceased to the defendant, would not justify him in publishing a libel; neither would the libel have justified the deceased or his father in attacking the person of the author of the libel.

No man can take vengeance into his own hands, he can use violence only in defense of his person. No words, however aggravating, no libel, however scandalous, will authorize the suffering party to revenge himself by blows.

If, therefore, Mr. Austin himself, the object of the newspaper publication, would not be justified had he attacked the defendant and beat him with a cane; still less would the circumstances have justified the unfortunate young man, who fell a victim to the most unhappy and ever to be lamented dispute.

For however a young and ardent son may find advocates in every generous breast, for espousing his father's quarrel, from motives of filial affection, and just family pride; yet the same laws which govern the other parts of the case, would have pronounced him guilty, had he lived to answer for the attack which was the cause of his death.

The laws allow a son to aid his father if beaten, and to protect him from a threatened felony, or personal mischief, and in like cases a father may assist a son, and should a killing in either case take place it is excusable; but neither one

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nor the other can justify resorting to force, to avenge an injury consisting in words however opprobrious, or writings however defamatory.

You will therefore consider, whether these facts, antecedent to the meeting on 'Change, can have much operation in the cause, let which party will, be found by you to be in the wrong.

Upon the whole, therefore, of these circumstances, should you be of opinion that the defendant, in order to avenge himself upon the father of the deceased, prepared himself with the deadly weapon which he afterwards used, went upon 'Change with a view to meet his adversary, and expose himself to an attack, in order that he might take advantage of and kill him, intending to resort to no other means of defense in case he should be overpowered; there is no doubt the killing amounted to manslaughter. But if from the evidence in the case, you should believe that the defendant had no other view but to defend his life and person from an attack which he expected, without knowing from whom it was to come; that he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise, than by the death of the assailant—then the killing was excusable, provided the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent. Of all this you are to judge and determine, having regard to the testimony of the several witnesses who have given evidence to these several points in the defense.

The principles which I have thus stated are recognized by all the books which have been read, and are founded in the natural and civil rights, and in the social duties of man.

The last subject on which I shall trouble you, is the address which has been so forcibly urged upon your minds by the counsel on one side, and as zealously and ably commented on by the Attorney General on the other, touching the necessity of excluding all prejudices and prepossessions relative to

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this cause. I do not apprehend these observations were in any degree necessary, as I cannot bring my mind to fear that the verdict of twelve upright, intelligent jurors, selected by lot from the mass of their fellow-citizens, will be founded on anything beside the law and evidence applicable to the case.

Every person of this numerous assembly, let his own opinion of the merits of the cause be as it may, must be satisfied of the fairness, regularity, and impartiality of the trial, up to the present period; and sure I am that nothing which is left to be done by you, will impair the general character of the trial. If you discharge your duty conscientiously, as I have no doubt you will, whether your verdict be popular or unpopular, you may defy the censure, as I know you would disregard the applause of the surrounding multitude.

Least of all do I apprehend that party spirit will come in to influence your opinions.

However the storms of party rage may beat without these walls, I do not believe the time has yet come when they shall find their way within. Nor do I believe that a general apprehension is entertained, that a man accused of a crime is to be saved or destroyed according to political notions he entertains. If ever the time should come when a general belief shall be entertained that trials are conducted and judgments given with a view to the political character of the parties interested, vain and ineffectual will be the forms of your constitution, and useless the attempt to administer the laws. A general resistance would be the consequence, and if this belief should be founded in fact and truth, that resistance would, in my apprehension, be perfectly justifiable, for no people would be bound to respect the forms of justice, when the substance shall have vanished; when the fountains of justice shall be manifestly corrupt and the forms and parade adhered to for the purpose of imposing on the citizens and subjecting them to oppression under the garb of law.

You, gentlemen, will not be the first to violate the solemn oath you have taken, and seek for a conviction or an acquittal of the defendant upon any other principle than those

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which that oath has sanctioned. And as I trust, that in performing my duty, I have conscientiously regarded that oath which obliges me "faithfully and impartially to administer the laws according to by best skill and judgment," so that in discharging yours, you will have due regard to that which imposes upon you the obligation well and truly to try the cause between the Commonwealth and the defendant, according to law and the evidence which has been given you.

THE VERDICT.

The *Jury* retired and returned in a short time with a verdict of NOT GUILTY.

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THE TRIAL OF JOHN MORRIS FOR ASSAULT AND BATTERY, NEW YORK CITY, 1816

THE NARRATIVE.

Nash's private school for boys and girls in New York City was in the early part of the Nineteenth century patronized by the leading citizens of the metropolis. Mr. John Morris had two children there—boys of seven and twelve. The younger was inclined to be unruly, and his father had requested Mrs. Nash, who was also a teacher in the school, to punish him if he persisted in lending his books to his associates, a habit which the father evidently desired to stop.[1] The boy having done so again, he was reprimanded by his teacher who repeated his father's order, whereupon the boy made an impudent reply, on which the teacher told him to hold out his hand for the strap. He refused and swore at his teacher, when she called on Hedden, the assistant master, to put him on the table as an example to the school, a mode of punishment in vogue then, and this was done.

Some time previous to this, the older Morris boy had been punished by the assistant master[2] and had complained to his father, who asked Mr. Nash not to allow his children to be punished by anyone but himself. Mr. Nash's answer was that all the scholars must be treated alike; that if his children behaved well, they would be treated well; if they behaved badly, they would be punished. Mr. Morris made no further objection, and continued to send the two boys to the school.

When the elder brother saw the young one on the table of disgrace, he ran out of the room and carried the news to his father, who a short time after appeared in the school room and demanded in a loud and angry voice, who had put

[1] William B. Hedden, p. 705.
[2] William B. Hedden, p. 705.

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his child on the table. Hedden replied that he had. "You placed my child there, you rascal," returned Morris with an oath, and he ordered the child to come down from the table, which he did. Hedden ordered him to leave the room, but he refused, whereupon he seized him by the collar and tried to put him out, a struggle ensuing, which Morris got the better of, Hedden being so injured as to be confined to his room for several days. During the affray the entire school was in a state of great confusion and alarm, Mr. Nash's whole energies being devoted to preventing a panic and the scholars rushing down the stairs into the street.

Morris being indicted for assault and battery, was found guilty and fined, the Court instructing the jury that what the master had done was right and lawful and what the prisoner had done was illegal and inexcusable.

THE TRIAL.[3]

In the Court of General Sessions of New York City, March, 1816.

HON. RICHARD RIKER,[4] *Recorder.*

WILLIAM COULTHARD, THOMAS R. SMITH, } *Aldermen.*

14.

The prisoner, John Morris, having been indicted by the Grand Jury for an assault and battery on William B. Hedden, the trial came on to-day.

John Rodman, Prosecuting Attorney, and *Mr. Fay,*[5] for the People.

Mr. Wilkin,[6] for the Prisoner.

The jurors having been sworn, *Mr. Fay* briefly stated the nature of the case, alleging that it was a cause of unusual interest, inasmuch as it concerned not only the peace and good

[3] New York City Hall Recorder, see 1 Am. State Tr. 61.
[4] See 1 Am. State Tr. 361.
[5] *Id.* 718.
[6] *Id.* 62.

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order of society, but was intimately connected with the rights of teachers, the government of schools, the interest of literature, and the general happiness of the community. It involved the important question, how far and in what manner the master of a school should take the place and hold the authority of a parent, while the child is under his care; and in what way a parent, dissatisfied with the discipline of the instructor of his child, should interpose his authority; whether by threat, violence and outrage, or by mild and rational methods. The peculiar features of the case, said the counsel, will be presented by the testimony, and I shall reserve any further comment until the evidence has been heard and the defense exhibited to the jury.

THE EVIDENCE.

William B. Hedden. I am 20 years of age, and the son of William Nash; am assistant in my father's school, which is located in Broadway. This school is large; composed of about eighty scholars, young misses and young masters, from among the most respectable families in the city. Mr. John Morris had two children at the school, one about seven, the other about twelve years of age. He had given orders to Mrs. Nash, who was also an assistant teacher in the school, and had the particular superintendence of the class to which his younger son belonged, to prohibit that boy from lending out his book, and to punish him should he disobey. Notwithstanding the orders of the parent, imparted by Mrs. Nash, the child lent the book to one of his mates; whereupon the lady reprimanded him, and repeated his father's order. The boy replied with some impudent insulting words, on which she required him to approach her, and hold out his hand to be punished by the ferule, a knife strap. The boy peremptorily disobeyed the order — resisted the mistress— imprecated the curse of God on her, and called her abusive names. Finding it difficult to subdue his temper, she called on me to place him on the table, as an example to the school. This was done. Mr. Morris' older lad had formerly been punished by me, and having complained to his father, he expostulated with Mr. Nash, and requested him not to suffer any punishment to be inflicted on his children except by himself. Mr. Nash replied that the children in his school must all be treated alike; and that if the children of Morris behaved well they should be treated well; if ill they must be punished in the same manner as others were. To this Morris made no further objection, and continued his children at the school.

The elder brother ran out of the school, about the time Mr.

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Nash was making arrangements to dismiss the scholars and made some representation to him. The father in a short time came to the door of the school room, which he had burst open with violence, flew into the room with his hat on, his countenance indicating the most ungovernable rage and demanded who had placed the child on the table. I stepped towards the defendant and informed him that the child had been placed there by my means, and that he had not been treated improperly. Defendant raised his fist and said, "You place my child there, you d—d rascal?" and immediately ordered the child to come down from the table, which he did. I then ordered him to quit the room. The school was in a state of alarm and uproar, and Mr. Nash, to prevent the scholars from rushing out of the door and going down a narrow pair of stairs, whereby their lives might have been endangered, and a mob at least raised about the house, was solely employed at this juncture in closing the doors and quieting the scholars. I repeated my order to the defendant to quit the school, which being refused I seized him by the collar, and attempted to push him out. A violent struggle between us ensued, in which it appears that I threw the defendant, but permitted him to rise. Defendant then seized and threw me, beat me when down, and attempted to gouge out one of my eyes. By reason of the injury received, I was incapable of attending to business for several days.

Attempts were made by the defendant to prove that the child had been injured in the spine, that it was weak in the head in consequence of a former complaint, and that it was punished with much severity; but the proof failed, and it clearly appeared that neither the mistress nor Hedden had been guilty of any impropriety towards the child in the infliction of the punishment.

Mr. Wilkin. The assistant teacher had no right to order the defendant to quit the school; that right only belonged to the master. The conduct of Hedden was calculated to invite aggression, rather than to conciliate and sooth the angry passions. He was, in fact, the first aggressor; he undertook to put the defendant out of the school, and first committed the assault and battery himself. The father had given orders to the master not to suffer Hedden to correct his children; and from the representations made to him, he believed the child abused by Hedden. Under this belief, and possessed with the feelings of every father, he entered the school.

Mr. Wilkin here detailed the circumstances of the fray, the commencement of which he attributed to the assistant

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teacher, and concluded by urging the jury to bring home the case to themselves, and to make all due allowance for the influence of passion, induced by the belief of a real injury inflicted on a child of tender years, by a person in school who had no right, and had been forbidden by the order of the father to inflict such punishment.

Mr. Fay. Gentlemen of the Jury. It is not because I think my talents equal to those of the learned counsel, who, in his official station, advocates the rights of the people, that I appear on this occasion as the public prosecutor. This complaint was first made to me by this injured individual, who has this day appeared before you, at a time when the District Attorney was absent, and when it was supposed his business might not permit him to return to this city in season to conduct this prosecution. It is from no apprehension that you will not by your verdict pronounce the defendant guilty, that I undertake to reply to the ingenious arguments advanced by his counsel; nor do I entertain a fear that the Court will not, by their sentence, punish this culprit as he deserves; but I feel it a duty which I owe to this injured complainant, to this Court and Jury, to the audience who now listen to me, and the community at large, to express my utter abhorrence of this crime, this daring outrage, and to exhibit it to the public eye in all its glaring deformity.

The history of this affair may be comprised in a few words. The mistress had been directed by the defendant not to suffer the younger child to lend his book. The order was imparted to the child. He disobeyed, and the lady, impressed with a sense of duty, undertook to correct the child, in pursuance of the order of the father. The child resists, and he resists with force. He not only resists with force, but calls his mistress abusive names, and far worse than all, he calls aloud on the name of his God, and imprecates a curse, a bitter curse, on the head of his instructor. Not willing to wrestle with this young rebel, Mrs. Nash requests her son, the assistant teacher, to place the boy on the table, as a spectacle

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of shame to the school. This is done in a mild manner, in the mode related by the testimony. Here this affair would have ended, but for the malicious and wicked interference of the elder brother. He had once smarted under the lash for his diobedience, and a favorable moment presented itself for vengeance. Slyly stealing from the school, he flies to his father, and no doubt tells him a most lamentable tale.

What course, under such circumstances, would a prudent, discreet parent, solicitous for the future welfare and happiness of his child, have taken? Every good father is sensible that the surest way to ruin his child is to take his part against a master's authority. He would therefore, first have inquired, with calmness, into the truth of such representation, and if unfounded, as the event has justified, would have punished the author. Or if even there had been truth in the report, the father would rather have sought a private conference with the master and with reason have expostulated on the impropriety of such chastisement. But the defendant did not on this occasion, think proper to adopt a course, mild, pacific, or rational. Indignant at the fallacious idea with which his mind was possessed, or rather destitute of any definite idea, he starts for the school. Incited with rage, fury and madness, he burst open the door, and rushed like a demon of destruction into this assembly of infants. Pale with anger—his eyes flashing terror—his fists clenched—his whole frame agitated with rage—in the situation in which he has been described by the testimony, he was utterly destitute of reason, nay, more dangerous than the most ferocious animal. As such it was justifiable for any person, by any means, to have expelled him headlong from the school.

He enters gentlemen, in the manner I have described, without any regard to the sacredness of the place, to decorum, to common decency; and with his hat on, impudently demands, with a horrible oath, "Who has placed my child on that table?" Mr. Nash attempts to explain. The school begins to be confused—Hedden undertakes to pacify—the defendant storms and rages, and all things assume such a

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threatening aspect, that the master flies to prevent the scholars from rushing into the street in this state of trepidation and alarm. At this crisis, Mr. Hedden very properly requires the defendant to quit the school. He refuses with threats and bitter execrations—raises his fists in the attitude of striking Hedden, who then attempts to expel him by force from the school. Here ensues a scene of disgrace, outrage and horror, so appalling to the feelings, so disgusting, that I shall not attempt a description, but shall leave it to yourselves, aided by the testimony, to imagine the mortification of a respectable teacher—the fears of the young ladies—the terror and dismay of all—the injury sustained by Hedden—the brutality of the defendant, and the bloody catastrophe which terminated this disgusting scene.

That Hedden was torn and lacerated by this tiger, as to endanger his eye-sight—that the rights of a teacher have been assailed—that the sacred sanctuary of a school has been polluted, and the peace of society broken by this defendant, are all too clearly proved to admit a doubt.

But we have been told, gentlemen, that the conduct of Hedden provoked aggression; that he injured the child in the punishment, and was insolent to the parent. It is not so. The child was not injured. It is only the cunning of the father that has framed this suggestion, which is so faintly supported by the testimony, that even the ingenuity of the counsel has not given it the color of plausibility. So far was the conduct of Hedden from being aggresive, that I am surprised he did not fly instantly to this madman, and, at the first sight, have thrust him headlong down the steps of this entrance. The very manner of the defendant was an assault. His threatening aspect—his ungovernable fury—his entrance into this school, were of themselves an indecent, unjustifiable attack on the Master, whom Hedden, as a son and an assistant, was bound to defend. The first step taken by the defendant, was a breach of the peace; and his very look contained a declaration of war against the whole school. After the defendant came into the school with his hat on,

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his fists closed for battle, to say that Hedden could by any possibility, have been the aggressor, brings to mind the wolf in the fable, who, drinking in the stream on the hill, first accused, and next tore the lamb who stood drinking in the stream below, for disturbing the water. I can only account for the fact that the Master and Hedden did not instantly hurl Morris out of school, but by the supposition that the attack carried panic and dismay into the hearts of all. Well it might. What a spectacle did his conduct exhibit to little children. A tiger in the sheep-fold, exciting terror, dismay and consternation in the flock. And gentlemen, this defendant merits the censure of the good, the frowns of all considerate fathers—the marked punishment of public justice.

Before I close, I beg leave to add a few remarks, by way of comment, on the impropriety of this man's conduct in trampling on magisterial authority. For myself, gentlemen, from the years of my earliest infancy, I have been taught to believe that a school was a place for the improvement of manners as well as of mind. Whenever I entered a school, I was taught to pull off my hat—to make a bow of respect to my instructor—to march in silence to my station, and if I only whispered, so as to disturb others, I was sure to be punished according to my deserts. It was this wholesome discipline that has formed in my mind an habitual respect for authority—a love of good order—an attachment to study, and a sacred regard for that noble institution, a public school. Here I first contemplated civil society in miniature, and learned in early years, that obedience and respect to superiors, that principle of subordination which binds together, cements and supports society in all its various gradations. In a school, where the human mind is first placed under human care, to be fitted for the grand purposes of life, the child should be taught to consider his instructor, in many respects superior to the father in point of authority. The infant mind early apprehends and distinguishes with a surprising sagacity, and is more influenced by example than

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precept. When a child, therefore, sees his parent entering the school, pulling off his hat, and making a bow of respect, thereby acknowledging the tutor for a higher authority—the respect, and obedience, and love, from the pupil towards the master, are strengthened; and the principle of subordination is engrafted in the mind of the child, by the influence of example.

It is by this happy conspiracy between the tutor and the father, that a new power and influence is acquired over the infant mind, which it is the interest of the parent to cherish and support, and is of infinite importance to the welfare and happiness of society. What a wretch must he be who would aim a blow at that power. Yet of this crime is the defendant guilty. He struck at the very basis of magisterial authority. It was to support that important principle, that a learned and judicious schoolmaster said to Charles II. in the plenitude of his power, "Sire, pull off thy hat in my school—for if my scholars discover that the King is above me in authority, they will soon cease to respect me." And although the turbulent and unthinking Morris, on this occasion, dared to trample on this sacred principle, that august and accomplished prince pulled of his hat, to demonstrate by example, that magisterial authority should be supported and protected even by the monarch.

And now, gentlemen, what ought to be done with that rash and passionate man, whose ungovernable rage has driven him into one of the most respectable institutions of our country—into an extensive school of harmless innocents; and who, in that sacred place—at the very altar of science, has displayed the ferocity of a tiger, prostrating that altar, and inhumanly violating the person of the Master. May he feel the weight of law in court; and out of court, may he meet with merited scorn.

The RECORDER. Gentlemen of the jury, the rules of law applicable to this case are plain and simple. Every Master has a right to correct his scholar with moderation; and as

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long as he confines himself within proper bounds, is protected in law. In this case, no fault in the mode or extent of the punishment of this child can be reasonably imputed to the Master, the Mistress, or Hedden; the correction was mild, without passion, and not exercised with any degree of severity.

The father, without doubt, had a right to go into the school to make inquiry relative to the truth of the representation made by the elder brother, but he had no right to enter the school in a passion, and commit a breach of the peace.

It will be your duty on this occasion, to determine who was the first aggressor; and if you find that the defendant first committed an assault on Hedden, it will be your duty to find him guilty. Should you, moreover, believe, that after the defendant was suffered to rise by Hedden, he again commenced the contest, or struck Hedden after he was down, and attempted to pluck out his eye, you must undoubtedly pronounce him guilty, even should you believe that Hedden committed the first assault; because a man has no right to employ more force than is absolutely necessary in repelling an attack.

The Court also charge you to return with your verdict, should it be against the defendant, the fact as you may find, whether the defendant, during this affray, did attempt to deprive his adversary of an eye, for the decision of the jury on that point, will furnish a criterion to the Court in affixing the punishment.

The *Jury* pronounced the defendant generally guilty.

THE COURT. There are some circumstances in this case, which the Court has considered in mitigation of the punishment. Hedden was a very young man; the defendant a man in years, and the head of a family. The conduct of Hedden, in ordering a man older than himself to quit the school, perhaps was not the most discreet course which could have been taken to allay the fervor of a mind under the strong influence of passion. The Court also understands from the counsel, that suits have been commenced against

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the defendant for private damages. Under these circumstances, the Court thinks proper to impose a fine of $20 on the defendant, and to require from him a security, by recognizance, himself in the sum of $500, and two sureties in the sum of $250 each, to keep the peace generally, and especially towards William B. Hedden.

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THE TRIAL OF DR. JOHN W. HUGHES FOR THE MURDER OF TAMZEN PARSONS, CLEVELAND, OHIO, 1865

THE NARRATIVE.

On the ninth of August, 1865, John W. Hughes, physician and surgeon, of Cleveland, Ohio, committed a murder in the small neighboring village of Bedford, which, from the nature of the case, the character of the parties to the tragedy, and the antecedents of the deed, forced him upon the attention of the people of Cleveland and of the whole of the State of Ohio. The public was shocked on the following morning by the publication in the newspapers that Miss Tamzen Parsons, a young lady of seventeen years of age, had been shot down in the streets of Bedford by this man, who had been her lover, and who, under cover of a forged decree of divorce from his wife, had married her in Pittsburgh, in December, 1864, and suffered in the Pennsylvania penitentiary, the penalty attaching to the crime of bigamy.

Dr. Hughes was born in the Isle of Man, educated at a Scotch University, and emigrated with his wife to the United States in 1862. After practicing his profession of a physician for a few months in Chicago and Cleveland, he enlisted in an Ohio regiment as a private, but was very soon promoted to the position of Assistant Surgeon of the 48th United States Infantry. After serving for about a year he resigned on account of the illness of a son in November, 1864. He now began the practice of medicine in Cleveland, but making the acquaintance of Tamzen Parsons, he induced her to go with him to Pittsburgh, after showing her a paper which he persuaded her was a decree of divorce from his wife. For this he was convicted and sentenced to one year's imprisonment in a Pennsylvania penitentiary, but was pardoned after serving five months. Returning to Cleveland, he resumed the practice of medicine and after having sent

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his wife and child back to the Isle of Man on a visit, he endeavored to win again the affections of Tamzen, who refused to have anything more to do with him. One night in July after drinking deeply, he went to the house of her father in the village of Bedford at night and, by his noise, aroused the old gentlemen, who tried to eject him. Hughes refused to leave the house, and objected with sufficient force to give ground for a charge of assault and battery, which was brought on the following day, Tamzen herself appearing and making the affidavit against him, an act which enraged him. Personal differences, however, were at length adjusted and legal proceedings stayed, the Doctor solemnly promising that he would thenceforth have nothing to do with the Parsons family.

But, alas! a drunken revel with a companion, Oscar Russell, on the night of the eighth of August, ended in their driving to Bedford and drinking at all the road houses on the way. Hughes, Russell and their driver, Carr, issued from a hotel in Bedford, and drove to the house of Mr. Parsons. Dr. Hughes entered the house and learned that Tamzen and her mother had gone blackberrying. They drove on, but soon met the women, and the Doctor sought a private conference with Tamzen. A neighbor, however, came along in a wagon and took her home, while the men drove to the grocery, where they held a drunken revel for two hours. Hughes learning that all the Parsons family had gone to Bedford for safety and to arrest him, started to the village and, seeing Tamzen coming out of the house, he ran after her, calling on her to stop. She flew up the walk, saying, "No, I will not stop," and rushed through the gate, endeavoring to reach the front door. But before that asylum was reached, the pursuer laid hands on her, and shouting, "You won't stop, will you?" fired his revolver. The ball glanced off her head, she screamed, but the piteous cry was instantly hushed by a second and fatal discharge of the deadly weapon.

The noise attracted a number of persons, who pursued

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Hughes, who jumped into the carriage with Russell and Carr, and, menacing the crowd with his revolver, succeeded in getting a good start of his pursuers. But he was captured in a few hours and landed in jail.

Indicted by the Grand Jury for murder,[1] after a trial lasting eighteen days, he was convicted, though his counsel tried very hard to prove that he was insane at the time he committed the act. On February 9th, 1866, he was hanged in the yard of the Cleveland jail.

THE TRIAL.[2]

In the Court of Common Pleas of Cuyahoga County, Cleveland, December, 1865.

HON. JAMES M. COFFENBERRY, *Judge.*

December 2.

The Grand Jury having previously (November 25th) returned an indictment against John W. Hughes for the murder of Tamzen Parsons, the day was occupied in em-

[1] Russell and Carr were also indicted as accomplices, but the charge against them was subsequently dismissed, and they were never put on trial.

[2] *Bibliography*—*"The Trial of Dr. John W. Hughes, for the Murder of Miss Tamzen Parsons; with a sketch of his life, as related by himself. A record of love, bigamy and murder, unparalleled in the annals of crime. Published by John K. Stetler & Co., Cleveland, Ohio. Cleveland: Printed by the Leader Company, No. 142 Superior street. 1866." The pamphlet is not illustrated, but there is a portrait of Dr. Hughes on the cover and on the title page.

At a term of the Court of Common Pleas, begun and held at the Court House in Cleveland, within and for said County of Cuyahoga, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and sixty-five, the Jurors of the Grand Jury of the State of Ohio, and of the County of Cuyahoga, good and lawful men, then and there returned, tried, empaneled, sworn and charged to inquire within and for the body of the County of Cuyahoga, at the term aforesaid, upon their oath aforesaid, in the name and by the State of Ohio, do present and find that John W. Hughes, late of the county aforesaid, on the ninth day of August in the year of our Lord, one thousand eight hundred and sixty-five, with force and arms

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panelling a special jury which was composed of the following:

Moses Hunt, Brecksville; William Barr, Brecksville; Buell Stearns, Olmstead; Jesse H. Luce, Orange; Henry Fish, Brooklyn; William C. Snow, Parma; Dr. Marius Moore, Dover (foreman); John G. Hasserott, Cleveland; Thomas Garfield, Newburgh; Joseph Slaght, Cleveland; Lawton Ross, Brooklyn; Alfred Kellogg, Brooklyn.

Charles W. Palmer and *Albert T. Slade* for the State.

M. S. Castle, R. C. Knight and *William Kerruish*[4] for the Prisoner.

at the county aforesaid, in and upon one Tamzen Parsons, then and there being, did, unlawfully, forcibly and of deliberate and premeditated malice, make an assault, and that the said John W. Hughes a certain pistol then and there charged with gun powder and one leaden bullet, which said pistol he, the said John W. Hughes, in his right hand then and there had and held, then and there unlawfully, purposely and of deliberate and premeditated malice and with intent then and there and thereby purposely and of deliberate and premeditated malice she the said Tamzen Parsons to kill and murder, did discharge and shoot off to, against and upon the said Tamzen Parsons, and that the said John W. Hughes with the leaden bullet aforesaid, out of the pistol aforesaid then and there by force of the gunpowder aforesaid by the said John W. Hughes discharged and shot off as aforesaid, then and there unlawfully, purposely, with deliberate and premeditated malice and with intent thereby purposely and of deliberate and premeditated malice, her the said Tamzen Parsons then and there to kill and murder, did strike, penetrate and wound the said Tamzen Parsons in and upon the back of the neck of her the said Tamzen Parsons, purposely and of deliberate and premeditated malice, one mortal wound of the length of one inch, of the breadth of one inch, of the depth of four inches, of which said mortal wound so as aforesaid, purposely and of deliberate and premeditated malice given by the said John W. Hughes to the said Tamzen Parsons, she the said Tamzen Parsons then and there died; and so the Jurors aforesaid, upon their oath aforesaid, do say that the said John W. Hughes, her the said Tamzen Parsons, in the manner and by the means aforesaid, on the day and year aforesaid, at the County of Cuyahoga aforesaid, purposely and of deliberated premeditated malice did kill and murder, contrary to the form the statute in such case made and provided and against the peace and dignity of the State of Ohio.

[4] *Mr. Kerruish,* who is the senior member of the firm of Kerruish,

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An application was made by the defense for a postponement and after argument the Court continued the case until Wednesday, December 6.

December 6.

The case was opened by *Mr. Palmer,* who gave a summary of the incidents which led to the tragic death of Miss Parsons.

Kerruish, Hartshorn & Spooner, of Cleveland, Ohio, in a letter dated April 29th, 1913, gives the following account of the persons engaged in the trial:

"I am the only survivor of all those who had any connection with the Hughes trial; every Juryman who participated in it is dead, as well as the Sheriff who executed the prisoner. The Judge who presided at the trial, *Hon. James M. Coffenberry,* who was an excellent lawyer and a good judge, died about sixteen years ago. He was a native of Ohio. The Prosecuting Attorney, *Charles W. Palmer,* a native of this city, an able lawyer and a fine advocate, died about ten years ago, and his assistant at that time and his successor as Prosecuting Attorney (*Mr. Slade*), also a native of this county and an exceptionally able man, has been dead about ten years. *Walter S. Castle,* the oldest of those who defended Dr. Hughes, died some fifteen years ago. He was a successful lawyer, especially in criminal cases. *Robert E. Knight,* the next in order of age was likewise a successful attorney. I was then the youngest of them all, but am now the oldest practising attorney at the Cuyahoga Bar, but am taking life easy and am in good health.

The trial of Dr. Hughes attracted more attention than any criminal trial which was ever had in this part of the country. Dr. Hughes was a man of education, had traveled extensively, and had served for a time in the Civil War. He yielded, however, occasionally to strong drink and was under its influence at the time he shot down his victim in the streets of an adjoining village in a fit of anger and jealousy of the woman he thought had slighted him and with whom he had been intimate, although he had a wife who was at the time in Europe. He made a long speech from the scaffold, and the last word he uttered was 'Good-bye,' as calmly as if starting on a pleasant journey. The day before his execution, while I was visiting him in his cell, he said, 'Kerruish, you and I come of a race that has many superstitions. Tomorrow at this hour I will be dead, but mark these words of mine,—if such a thing is possible as that I am able to make myself manifest to you in any way remember that I will do so.' But he never fulfilled his promise. He was a man of education and of marked ability, but the victim of an unfortunate habit and an illicit love."

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WITNESSES FOR THE STATE.

Joseph B. Haynes. Reside in the village of Bedford. Knew Tamzen Parsons, who was sister of my wife. Have known the defendant since December, 1864. Having had information that Tamzen had gone to Pittsburgh with Dr. Hughes, I started, at the instance of her parents, for that place, on December 20, 1864. Went to the Mayor's office on twenty-first, and, aided by policemen, succeeded in finding Tamzen in a room at the St. Clair Hotel, where I was shown, by her, a certificate of her marriage with Dr. Hughes. The Doctor was soon after arrested in the office of the hotel, and taken to the lock-up. He was soon brought before the Mayor, when he declared he would never live with his wife again, on account of her dissipated habits. He had been home two or three times and found her beastly drunk, and was resolved to leave her. He proposed to me then to go as a substitute in the army, and give Tamzen his bounty and leave the country, if the prosecution could be stopped, adding that it would be better for her, as a continuation of it would lead to unpleasant disclosures.

Saw Hughes later at Pittsburgh—in jail. He still expressed anxiety to have the prosecution stopped; next saw him on the day of his trial; saw him again on the day of the murder in Bedford, near the Franklin House, in the village, about two o'clock p. m. Had seen Tamzen five minutes previous, as she and her mother had come to my house. Miss Parsons went out in a few minutes and Mrs. Parsons started after Tamzen. I soon followed and saw a considerable number of excited people running to and from Mr. Christian's house. Saw a carriage move off towards Cleveland with Dr. Hughes in it. People were running around inquiring what the matter was; heard some say Tamzen Parsons was shot. I got a horse from a stable and started in pursuit of the carriage; was joined by Elisha Matthews on horseback; met a Mr. Scott; he took Matthews' horse, Scott having a revolver; after passing railroad about one-half of a mile saw the carriage stop and a man get out who jumped over the fence and ran towards the woods; we came back with the carriage to the railroad crossing; Scott took the carriage and I parted with him there; went to Newburg and with Cleveland officers came towards Bedford and when two miles this side of Bedford met a carriage containing Dr. Hughes, Andrews and others; did not identify the person who jumped out of the carriage and ran to the woods. When Tamzen left my house she said she was going to Mr. Christian's; left my house in less than five minutes after Tamzen left.

Eliza Krum. Reside in Bedford township, just across the street from Thomas Parsons, on the plank road, one mile from the village of Bedford. Saw defendant about two weeks before the death of Tamzen, about twelve o'clock at night. Mr. Parsons came to our house, woke us up, and requested me and my

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husband to go over and stay with his daughter while he went to Bedford for her mother. We went immediately, my son and myself. Dr. Hughes stood outside on the front doorstep. Tamzen opened the front door and spoke to Dr. Hughes, saying: "I see you there behind the bushes." He advanced when she shut the door. He asked for a drink of water, she inside, he outside. She got a light, procured a glass of water, took it to the front door and opened the same. He had driven down in front of the door, in the road. She spoke to him, saying, "you must be thirsty." He asked her to come out to the gate to speak. She went out and talked with him until her father returned. She went into the house, got a shawl and went out the second time. Shortly after the Doctor and she went into the house. She said, "Doctor, I wish you would go away, for father won't talk with you." Mr. Parsons, who was in the kitchen, took hold of him and attempted to put him out of the door. The Doctor came out into the sitting room and said to her, "I have a home already furnished nicely for you, and will make a lady of you." She told him she would not go. He asked my son to get a pail of water for his horse, and soon got into his buggy and drove toward the Plank Road House. He was gone an hour; saw him come back. He went into the kitchen at Mr. Parsons', sat down and smoked a pipe. When I went in he asked Tamzen who I was. She said, "a neighbor." Went back home, leaving my son with Tamzen. Saw him go away again toward the Plank Road House.

Tamzen told the Doctor that she wouldn't go with him to Cleveland, for he had deceived her once, and she was afraid he would again. He told her his first wife had gone home. He had given her money and she had gone home to her friends.

When the Doctor was on the steps, she went to him, and he put his arm around her and tried to coax her to go to Cleveland.

Next saw the Doctor at his examination for housebreaking. Saw him again the day after. He was at Mr. Thomas Parsons' house, with a man named Parsons, from the city. They took supper at my house that night—the Doctor and his companion Parsons—and left for Cleveland.

Next saw the Doctor the day of the murder. He came to our house about ten that morning with a man whom he called either Major Hazen or Hanson. He asked how Miss Parsons got along, and where she was. Was told she had gone blackberrying. Mr. Parsons came through our gate, and they shook hands, when they went round the side of the house and talked about half an hour, when they, the Doctor and his companion went away towards the Plank Road House. Before that I went over to Parsons' and found Mrs. Christian who said: "You needn't worry yourself, Doctor, for her affections are elsewhere placed." He got up immediately and left the room. He looked as if he felt bad and hateful.

Saw Dr. Hughes drive back and stop at our gate. Tamzen had left for Bedford with her father. The Doctor asked my husband to get in and ride down

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to the village. His companion, Major Hanson, wanted us to get them something to eat. My husband joined them and rode to Bedford; told the Doctor before he started that Mr. Parsons' people were going to arrest him again. He replied that he would have that business all settled; did not see Hughes again before the murder; half an hour after they left I heard of the murder.

William Krum. Was at home the night Dr. Hughes entered the house of Thomas Parsons about two weeks before the death of his daughter. Dr. Hughes was in his own buggy in the road, and Tamzen was standing in her father's yard by the fence. Hughes asked her to get into the buggy and go with him to Cleveland. She said he had deceived her once and he couldn't again. He said he had a room in Cleveland, well furnished—and added that she had no need to alarm the neighborhood; they might have a talk, and no one know anything about it; that the old man had gone down to Bedford to get help, but better believe I am pretty damned well armed. He added, "I 'spose you'll go down to morrow and spread it around." She replied that she thought she should. He said, "you can tell Joe Haynes that if I meet him in the street I'll wring his nose for him." She said, what will you do to me if you meet me; he said he wouldn't hurt a hair of her head.

The conversation between Hughes and Tamzen was tender, though he called her once or twice a fool.

Next Sunday Hughes told me he had a friend over at Mr. Parsons' house, who was "trying to settle his difficulty with them," referring to his trial for breaking into Mr. Parsons' house. While Hughes was talking with Tamzen in the buggy, I heard him say, "I am the drunkest I have been since—," and that was all I heard.

On the day of the murder was cradling oats near the Plank Road House and saw the carriage driving toward the house from Bedford. Went to the house to get a glass of beer. Dr. Hughes slapped me on the shoulder and said, "Old man, you are just in time to get a glass of beer." He handed me a glass, and I drank it. By the alternate orders of Hughes and Russell, the glasses were filled and drank half a dozen times. About that time a Dutchman came in. Russell said, "mother, get us some beer for this Dutchman." He drank from ten to a dozen glasses. We had several glasses after that. Hughes and Russell went into another room, and I went home. While the Dutchman was there he did all the drinking. The beer drinking was in a grocery opposite the Plank Road House, not in that house. It was remarked then that Hughes' face was very red, and Russell (the major) rubbed flour on it. Do not think the beer drank at the grocery was very intoxicating: was as sober when I drank the last glass as I was at first. After taking dinner at home, I started back to work, when my boy said, "there comes Hughes' carriage." The Doctor asked me if Mr. Parsons' folks were at home. Told him I thought not; that I heard they had gone down to Bedford. Asked me to get

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into the buggy and go to the village, and I got in with the Doctor and the Major.—There was a driver on the box. Hughes told the latter to drive pretty fast. When we got opposite the postoffice in Bedford, Hughes got out and went into Mr. Christian's tailor shop, and was there a moment or two.—Was going to get into the carriage, when he saw Mr. Thomas Parsons in a wagon just back of us. The Doctor walked back and met Mr. Parsons, and talked a minute, and then got into the carriage. Got out to go into Mr. Hammond's store. When I got to the postoffice, heard that the Doctor had killed Tamzen Parsons, turned about and saw the carriage starting off toward Cleveland.

Did not discover anything wrong in the Doctor when he came into my house the last time, from the Plank Road House. Don't know that he spoke a word going down to Bedford.

Dr. Ben. F. Wray. Know Hughes; saw him at Warrensville two weeks before Tamzen's death, when he told me he had been to Chagrin Falls to perform a surgical operation. Had been to Parsons' house the night before, he said. Found him asleep on the sofa at my office. After dinner he got up and wanted to know how long he had been sleeping. We went to the bar-room and drank a glass of beer. He inquired if I knew where Miss Parsons was—told him I did not know. He said she was calling herself Mrs. Hughes, and said it was a disgrace to him; asked me if I had a revolver or pistol; I told him I had neither one; I then said, "Doc., what do you want it for?" and he replied, that if Miss Parsons persisted in calling herself Mrs. Hughes, he would blow her d——d brains out, and would also do likewise by Joseph Haynes; said, at the time of his arrest at Pittsburgh, he had given some valuable papers to Miss Parsons, and wished to get them in his possession again; that he was going to her fathers' house. Hughes at this time first said he had been at Chagrin Falls making an amputation, and got $300 for it. Next saw Hughes some time afterward. He told me he had been arrested for an insult upon Parsons, and asked me what time it was that he came to see me that morning, and what conversation took place between us. He said on that morning he had come directly from Parsons' house; that he had had a little difficulty with the old gentleman; that he refused to leave his premises, and also to drive off, after getting into his carriage; that Miss Parsons came out and talked with him some time after he was in the carriage. He said that Parsons went over the way and got some one from the house opposite; that his examination on charge of assault would take place the next day, and wanted me to come and attend it.

Ori Carr. Live in Cleveland. Dr. Hughes and Russell came to my carriage on Bank street, between nine and ten P. M., the night before Tamzen was shot. They called me "Bug," a nickname. Russell introduced me to Hughes, and he asked me what I'd charge to go to Bedford; told him ten dollars. Russell has a saloon under Hughes' old office.

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They got into the carriage and I drove to several houses to get some women to go with them, but did not succeed—Hughes took some liquor from a flask he had. Then we drove to Bedford, stopped at the Franklin House. Drove on until we came to Krum's house, where Hughes and Russell got out. A little boy from Krum's house went over to Parsons'—came back and said, "they ain't there—they've gone a blackberrying." Mr. Parsons came from his house into the road, and Hughes called to him. Parsons came to Hughes and talked with him, and Hughes afterward went over to Parsons' house, staying there half or three quarters of an hour. Then we drove on toward the Plank Road House, and in about a mile saw two women coming along, with tin pails in their hands. Hughes called, "Miss Parsons! Miss Parsons!" She turned around and said, "What do you want?" Hughes said, "Nothing, only I want to talk to you." She started on, saying, "I don't want nothing to do with you." Hughes watched them a few minutes and then got out and followed them; they walking as fast as they could, he walking fast too. Could see the old lady motioning her hand toward Hughes, as if she was talking loud to him. The old lady got into a wagon. Hughes approached the girl, who stood near the wagon, and talked with her a minute, and then she got into the wagon. Hughes put his hand on her and talked to her some time, until the wagon was driven off. I said to him, "The old lady was laying it down to you pretty hot." He said, "Yes, but that is all right." He directed me to go to the Plank Road House, where we stopped. We went to a grocery across the road, and had some beer; drank about two glasses, when Krum came in, and we had two or three more glasses of beer. Then a Dutchman came in, and all drank five or six glasses of beer. Went to Krum's and stopped. Hughes got out and asked a lady there if the Parsons' folks were at home, and was told they had gone to town. Heard somebody tell Hughes that Parsons' folks had gone to Bedford, and were going to have him (Hughes) arrested. He said something about settling or fixing it. We went to Bedford, Krum going with us. Hughes said, "Drive on as fast as you can to Bedford,"—we went to the Fountain House to get some beer. Hughes saw Parsons coming along in a wagon, and Hughes asked him to have a glass of beer. Parsons said, "No, I don't want to be shot." They got out at the Fountain House, and Hughes, as we were going in, turned around and went out. We had been there quite a little while when I started out doors, and saw a lot of people running toward Columbus street—followed, and saw a crowd gathering, and heard some one say that Hughes had shot somebody. I went back to the Fountain House and told Russell, who said, "Let's go and see." Drove down toward the place where the crowd was. Saw Hughes coming along with a man holding on his arm—stopped my carriage—Hughes shook the man off his arm, took out a revolver, swung it around, and said,

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"Don't another man lay hold of me!" He came to the carriage and jumped in. As he jumped in I jumped off the carriage, went to the door and said, "What do you want?" He said, "Drive on!" I hesitated, and he said, "Drive on, as I tell you." I got on the carriage and drove on a few feet, when a lot of men cried out to me to stop the team. I stopped, when Hughes shook his pistol at me, and said, "Drive on, as I tell you." I drove ahead, when a man said, "Stop the carriage; there's a murderer in it." I stopped, when Hughes said, "You drive on, or I'll blow you through!" I drove on at a pretty good pace, and soon Russell came up and got into the carriage. We went a few rods when Russell got out and got on the carriage with me. I motioned to the people to come after and overtake me—was not going very fast. Russell told me, "For God's sake drive faster or we'll be shot!" I drove on as fast as we could, till we got to a piece of woods, when Hughes got out, stood a minute, asked Russell for some money, and Russell gave him some, though he said he hadn't much. He went to the woods. The people were coming on after us, and I drove on, with Russell. Saw Hughes next at the Fountain House, after he was arrested. When last I saw Hughes before he was arrested, he was running in the woods on the right hand side of the road. The man Russell also was called Maj. Hanson or Hampson. Hughes told me to call him so. When we left the Franklin House the morning of the murder Hughes appeared very well; at Krum's he appeared as usual, and also when we left the grocery to go back to Bedford. Nothing attracted my attention in his manner while we were going to Bedford. While in the grocery Hughes' conduct did not differ from that on the night previous. He didn't seem drunk. Couldn't see that the ale effected any of the party.

Almeda Eddy. Live at Warrensville, at the Plank Road House. About two weeks before Tamzen's death Hughes staid at our house that night, retiring early. He got up about seven o'clock and took breakfast. Ellen Van Allen, Ellen Eddy and myself were present while he ate. He asked me if I had seen Tamzen Parsons lately. Told him she was at our house to hire Margaret Tier to work for her sister at Oil Creek. Said, "She has been shot at lately." He asked who done it? "We don't know," I answered. "The ball went through her parasol." He said. "It's a pity it didn't blow her brains out; it would have saved me the trouble, some time." He left, going towards Bedford, after breakfast. Saw him next the forenoon of the day he killed her, at a grocery opposite our house. He came into our bar room and washed himself and combed his hair. Saw them drive toward Bedford, his face was very red, eyes shone, walked straight, his voice was firm as usual.

Ella Van Allen. Live in Bedford village; saw Dr. Hughes at the breakfast table at the Plank Road House once. Mrs. Eddy the Doctor, and Ellen Eddy were there. Mrs. Eddy wanted to know of Dr. Hughes if he knew that Tamzen had been shot at.

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He said, "no I didn't, who shot her?" Mrs. Eddy said the ball went through here parasol. He said "it was a pity it had not blown her brains out, and saved him the trouble some time." Mrs. Eddy said, "Why, Doctor, do you intend to kill her?" He said, "Oh, no."

Ellen Eddy. Saw Hughes at our house about two weeks before the death of Tamzen. Doctor asked mother if she had seen Tamzen lately. She said, "Yes, she was up here the other day to hire a girl to work for her sister Libbie." Mother said, "She's been shot at lately." He made the answer that mother has just related.

Vial Salisbury. Live in Bedford village. The latter part of July, met Dr. Hughes in the door of the Franklin House in the morning. He asked me if I had seen Tamzen lately, or knew where she was. He said, "he must come down soon and look her up, for if she wouldn't live with him he was going to kill her."

J. S. Ely. Live in Newburgh. Keep the Cataract House. About eleven o'clock the night before Tamzen was shot, Dr. Hughes and Russell came to my house in a carriage with a driver. They went into the bar room, drank, smoked. They spoke of going up in the country to see a patient; the Doctor had a limb to amputate. Next saw Dr. H. about four o'clock the next afternoon. He went in the wash room of my hotel, washed, combed his hair, and had something to drink. Looked as if he had been drinking a good deal the day previous.

Vincent Salisbury. Kept the Franklin House in Bedford last July and August. Was at home the day Tamzen Parsons was shot. Dr. Hughes staid at my house a part of the night previous, arriving there between midnight and two o'clock in the morning. Saw the party, Hughes, Russell and Carr to speak to them about seven o'clock the next morning, when they came into the bar room from taking breakfast. Knew only Dr. Hughes. He introduced Russell as Major Hansom. He said he had been to Independence to amputate a limb. Asked him how business was? He said, "good enough for ten more like myself." They drank whisky twice after breakfast, and one of them, I think Dr. Hughes, had his flask filled with whisky.

Sophia Stanbridge. Live opposite the Plank Road House. Dr. Hughes was at my house the forenoon before Tamzen was shot. Party of three came at eleven o'clock and were drinking "present use" ale at my house. They drank all I had, but my husband came from Cleveland with more, a little after twelve o'clock. Dr. Hughes brought the half barrel into the grocery. He had no difficulty in standing on the barrel. The Doctor quit drinking before he left the house. He would drink a little and throw the rest on the floor, and I saw him put down two or three glasses behind the scales. Noticed that Dr. H.'s face was very red and the Major put flour on it. Noticed nothing unusual in his manner. Seemed to walk straight.

Francis Powell. Live in Bedford. I was working in my lot when Tamzen was shot. Mr. Christian lived on that lot. The

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house is about thirty feet back from the front fence. I was about ten or twelve feet west of the spot where the murder occurred. Saw Tamzen in the yard, walking rapidly toward the house, and Dr. Hughes was following her very closely. She tried to get into the house, but before she reached it, Dr. H. overhauled her, took hold of her dress and shot her. Asked Dr. H. what he had done. He faced me, and said, "he had shot her dead." He stood half a moment, turned round and went up to the girl, turned her head around and examined the wound. He said, "Yes, she's dead." Was looking towards them when he fired. He set the pistol right in her neck, taking hold of her dress near the shoulders, with his left hand. While he was examing the wound, I jumped over the fence and ran down town and alarmed the people. Saw him next going down Columbus street. John Price had hold of his arm as they walked down together. They went clear down to the corner, when Hughes jerked Price off. Saw the carriage come from the tavern. Russell opened the carriage, and Hughes got in, followed by Russell, when they drove off toward Cleveland.

Amos Lamson. Live in Bedford. Was at my house when I saw a crowd gather about the corners. Saw Price catch hold of a man, who jerked away from him. Saw Price catch hold of him again, and once more he jerked away. Saw this man (Hughes) go to the carriage and get in. Heard a cry of "Stop the carriage!" and a cry of "Murder!". Went where the girl was shot, and saw her body in the yard. Two of us got into a buggy and started in pursuit of the carriage. On the Independence road, met the carriage coming back. Hughes had taken to the woods. Some six or eight of us crossed the fields several times, but we couldn't find him —searched along the railroad track. Hughes was ahead of us in some bushes close to the track. Six or eight of us went up to him. He said he was willing to give himself up. Mr. Wells searched him and we started him towards Bedford. Found a common knife, a few small cartridges and a small pistol on his person. On the way to the village, Hughes talked some—told him that all I could do or say would not make him any better or worse—think I proposed hanging him on the spot. He said, "I would as soon you hang me here on a tree as anywhere. I knew the penalty before I did it. I bought the revolver or pistol on purpose to shoot her, and have done it." He said, "I have not done it under any excitement or impulse of the moment, but had studied the thing over"—I think he said for two weeks. He drew a flask out of his pocket, took a drink, when I told the men not to let him drink, for he probably had poison in the flask. His manner did not differ from that which I have always seen in him. He showed no excitement.

E. S. Libbey. When the alarm was given saw a man coming down Columbus street, men having hold of his arms. As this man reached Columbus street, he jerked away from the men holding him, drew a revolver, told

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the crowd to keep off, got into the carriage and ordered the driver to go on. The driver started, hesitated when called on to stop but finally drove off, as though afraid to stop. Saw the carriage come back with Russell and Carr; they were locked up, and I took a double-barrelled shot gun, got in the carriage with others, and started in pursuit. Hughes was found in a little ditch, covered by an oak bush just large enough for a man to hide under. I discovered him, lying down with his coat off. Heard him say, "Gentlemen, you can do what you please with me —hang me up to the first pole if you choose. I came out here with that intention, and I've done it." As some of them were afterwards firing off their guns he said, "Gentlemen, you can't scare me—I've been under fire before —I'm not at all alarmed." I also understood him to say, "I'm a murderer," when he first spoke, but I'm not positive. He was cool and unconcerned.

Cross-examined. Several of the crowd said, "Hang him!" "Shoot him!" Saw him take out a flask and drink. Think it was three hours from the time he left the village in the carriage till we found him. We were searching the field about three-fourths of an hour.

Dr. D. G. Streeter. Am a physician living in Bedford. I saw Tamzen Parsons' body about half an hour after she was shot. It was still warm. Saw a wound in the back of the neck, just below the base of the brain, and in the center of the neck. Next day I made an examination, the body being in a vault. Found that the wound was caused by a small ball, entering the neck just below the base of the brain. The ball passed through the vertebra of the neck into the very upper portion of the spinal marrow. The ball went upwards. About three inches from that, above and back of the right ear, there was a mark about an inch long—don't think that which produced the first wound could have produced the second. My opinion is, that the mark was occasioned by a pistol ball striking there and glancing off. A ball striking as the first did, and penetrating the upper portion of the spinal marrow, or *medulla oblongata,* would cause instant death.

Susan Parsons. Am the mother of Tamzen. Tamzen and I started blackberrying between five and six o'clock in the morning, the day she was shot. On our way back we noticed a city carriage coming. Tamzen called my attention to it. We passed and looked in and saw Dr. Hughes. I said, "Why, Tamzen, there's the Doctor." Dr. H. said, "Mrs. Parsons!". We made no reply. Then he spoke again, when Tamzen told him to go along; we didn't want him. He next called to me, saying, "Mrs. Parsons, it's you I want." On looking around, he was out of the carriage. He said he wanted to talk with me. I told him not to come nearer than he was. He said he wanted to talk with me and have Tamzen give him a paper that she would not trouble him any more. I told him, "There is no paper needed; she isn't your wife, and you have no claim on her." He said he had Major Hanson with him in

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the carriage; that he had come to give him (Hughes) a situation in Cincinnati, and he (Hughes) wanted to give Tamzen a check on the bank to get some money. I told him, "We don't want you or your money. All we ask of you is to keep away and leave us alone." About an hour after reaching the house we started for Bedford. Got out of the wagon near the junction of the roads in Bedford. I went with Tamzen to the house of Joseph Haynes. Staid there ten minutes or so, when Tamzen started for Mrs. Christian's house. She went out of the house alone, but turned to me while in the yard, and said, "The carriage has come back." I went to the gate to her, and saw another carriage at the Fountain House, but did not see the Doctor. Next saw her on the sidewalk, and Hughes a piece behind. Went back into Mr. Haynes' house, took my bonnet and started out. Got up a little way on that street, when the Doctor came down on the other side of the road, buttoning up his coat. Saw Mr. Powell coming, who said, "O Mrs. Parsons, the Doctor has shot your daughter dead." Went to the yard as quick as I could; was the first one there. Mrs. Christian opened her front door just as I got into the front yard. Tamzen's body was lying in the yard.

John Price. Was working with Mr. Powell in Christian's yard, digging a trench, the day Tamzen Parsons was shot. Heard a pistol shot and a scraem. I turned around and saw the girl fall. Jumped out of the trench and saw Dr. Hughes step about three steps from the girl toward the gate, when he walked back, stooped down and put his finger in the wound, saying, "You are a dead girl." He then walked out to the gate, down street. Went to the body and saw the blood flowing down her face. Followed him and caught hold of his right arm, about four yards from where the murder was committed, and led him down to the junction of the roads. He said, "What are you agoing to do with me?" Told him I would let him know when we got down to the corner. Nothing more was said till we got down to the corner. When there, he pulled away, drew his revolver and said, "No man touch me." Saw his carriage coming up, containing Russell and a driver. He got in, Russell helping him, when they tried to start away from the crowd. Mr. Golden and I stepped up to drag Hughes out. Russell sat on the front seat, Dr. H. on the back. Laid my hand on Hughes' shoulder, when Russell pulled his revolver and putting it near my face, said, "let go of that man or I'll blow your brains out." Heard Russell holler to the driver to drive on. Went back to the yard, and found the body still lying there.

Amelia Christian. Am daughter of Wm. Christian and thirteen years old. Came down to Bedford with Mr. Thomas Parsons' people the day of Tamzen's death. Saw Tamzen. She was in the road, and Dr. Hughes was just stepping off the sidewalk on the opposite side of the road. When he got nearly to the gate at the side of the road, he pulled out his pistol, pushed the gate open, and when he got

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to her, put his hand on her shoulder and shot her. After he had shot her the first time he cocked his pistol and shot her again. She screamed and fell down. Mother was standing by me. Mother said to Dr. H., "how could you do it? the poor girl is dead." We then went in and shut the door. Stood at the front window and looked out. Saw Dr. H. go down near the gate when he came back. He looked at her a while, when he went away. Dr. H. said nothing when my mother spoke to him. He was looking at her at the time.

Mathew O. Christian. Am a son of Mr. Christian, and sixteen years old. Between one or two o'clock, on the day of the murder, saw Tamzen coming toward our gate, and Dr. Hughes after her. When opposite our house she turned her head and said to Dr. H., "No, I won't stop." Then she turned across the street toward our gate. Ran and opened the gate, she passed through and I let the gate go to. The Doctor crossed the road, and when near the gate took a pistol from his pocket, cocked it and went through the gate. When about ten feet from the door he caught hold of her, put his left hand on her shoulder, and said, "you won't stop, will you?" and put the pistol to the back of her head and fired. She dropped her head a little and said, "O dear!" when he cocked his pistol again, fired, and she dropped. My mother was standing in the front door, and said, "O Doctor, how could you do so," or something like that. He said nothing. Mr. Powell standing in the ditch said, "You old villain, what have you done?" He said, "She is shot dead," and turned toward the gate. Saw him go down the street, followed by Mr. Price. Tamzen seemed to be scared when she went through the gate, and in a great hurry.

W. M. Heston. The day of the murder, when the alarm was raised, heard Hughes say he had done what he had intended to do if she would not be willing to consent to go with him; that she was his lawful wife. He was explaining to Wells where he intened to shoot her; he put his finger up to Wells' head and used some medical term I don't know. Hughes took a flask from his pocket, held it up and shook it, drank the contents and gave the flask to Mr. Strong. He then gave the pistol or revolver to Mr. Wells. Hughes said he had been from the highest circles of Europe to the lowest of this country; had been in the Crimean war and had been in service in this country; that half his life was spent in that manner, and now the balance would end in a love tragedy. Handed the pistol to Hughes, and he took it apart and showed us the inside, and handed it back to Mr. Wells. He said he had replaced the cartridges he had fired from his pistol, and thought at one time he would put it to his mouth and blow his brains out; then thought he would lie down and take a nap. I said he took it very cool. He said in response that he was no coward.

A. O. Strong. Was present when Hughes was arrested. I said to him, "Doctor, you might as well give yourself up—there are too many of us." He said

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he would. Said he bought that revolver for the purpose of doing the deed he did if she didn't comply with his wishes. Said he had relieved his mind of a great load, and that he would meet her on the other side of the great water. Spoke of sending his first wife to the Isle of Man for the purpose of getting this girl to live with him; that the first time he saw her he set his affections on her. Said he was willing to give his life for hers; that they could do what they chose with him, hang him, or what they chose. Said he meant that no other man should ever possess Tamzen. Asked Hughes if he would have shot Joe Haynes if he had seen him. Said he might have done it at the time his excitement raged so high; that he wouldn't wish to harm anybody else. He said some might think he was deranged, but he was not; he was in his right mind. His manner was not excited.

William Christian. On the day of the murder Hughes came to my shop about one o'clock; asked me if I had seen Miss Parsons that day. Told him I had not. He asked me where my wife was. Told him she had gone to Mr. Parsons' house some hours ago and I had not seen her since. He then said, "My friend, you have been too busy in my affairs of late," and related what a good friend he had been to me and my family. At this time Cornelius Haynes entered, and said he wanted me to measure him for a pair of pants. The Doctor lowered his tone then, and I could not hear all he said, but it seemed to be something of a threatening character. In fifteen or twenty minutes after he left, I heard of Tamzen being shot. Never saw Hughes intoxicated.

A. J. Wells. On the way to Cleveland, Hughes said he came out there for the purpose of killing the girl, as she didn't comply with his wishes. Asked him what reason he had, and he replied that he didn't want anybody else to possess her; that she should not become anybody else's wife. He said he had bought the pistol for the express purpose of killing her; that he had sent his wife home to the Island, and he wanted to live with her (Tamzen); that he understood she was going to marry somebody. He put his finger on my head and showed the place he shot her. He wanted to kill her instantly so that she would not suffer. He crossed his fingers in explaining how he shot her, and said a shot given as he indicated would be instant death. He said he shot twice, and the last time he had his left hand on her shoulder. Asked him if he would have shot any of us that were in pursuit of him, and he said no one except Joe Haynes. Asked him why he would have shot Haynes, and he said Haynes had caused all this trouble. He said he had not slept well for some time back, but he could sleep well to-night; that he had been thinking over this matter. He gave me the pistol to remember him by; said it would probably have to come into court as evidence, and after they got through with it I could have it. His manner was cool and calm.

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WITNESSES FOR THE DEFENSE.

Thomas Lowe. Have known Dr. Hughes two years and a half, making his acquaintance in Warrensville. He left my house in January, 1864, and went to Bedford to live and practice medicine. About a month after he went into the army. Saw Dr. H. at my house in Warrensville after he returned from the army. He came to my house in the same cutter, Miss Tamzen Parsons with him. They occupied the public sitting room after dinner. Occupied no other room together that I know of. They left about five o'clock going toward Cleveland; talked with them about half an hour, they seemed to be on friendly terms. Have seen Dr. H. under the influence of liquor. Never saw him so affected that his walk was not good. His face would then assume a purple color. He was nervous the next day, but not when "tight." Was always very easily excited when drunk, and looked wild with his eyes. Have seen him in that condition several days, and even a week on a stretch. This excitement would increase as he continued drunk. Once he acted so bad, fighting with his wife, etc., that I ordered him to leave the house. Have seen him reel a few times when he was far gone with drink; but he usually carried himself well.

Mrs. Kate Owens. Reside in Cleveland. Have known Dr. H. between three and four years. Was at his office on the sixth and seventh of August. He was there on Sunday the sixth, but not on the seventh. Word was left on his slate that he would be back in a little while. That was his habit. On Monday evening before the murder I found this entry, "I will be back in a few moments." Dr. H. had been my family physician off and on, about three years.

Oscar Russell. Have known Hughes about two years. Was with him the day of the murder, and all the night before. Met him at the St. Nicholas saloon, about eight or nine o'clock that evening. We drank there, don't know what, for I was drunk. I don't know that Hughes was drunk. We stayed there five or ten minutes and then went to several drinking places. Went to Carr's carriage, and Hughes asked him what he would charge to take us riding all night, and come back in the morning. Saw a pistol lying in Hughes' trunk, in his office, when we were there. I said, "That's a nice shooter you have." Hughes said, "Yes, I'll put it in my pocket." He also took a flask and had it filled down stairs. When the driver said he could not find some women he had been looking for to go with us, Dr. H. said he could find some in the country, and we started. At Newburgh, Hughes engaged rooms at the Cataract House, and said we would be back and stay there all night. I was asleep on the way to Newburgh, and also when going from Newburgh to Bedford. At Bedford we were to be called at seven in the morning. Hughes said we had better get home and attend to business. In the morning we

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drank whisky several times, both before and after breakfast. We started home, and I asked Hughes where the women were he was going to see, and he said he would show them to me on the road home. At the grocery opposite the Plank Road House, Hughes and I drank ale about twenty-five times. At Krum's house Hughes proposed to me to go to Parsons' house, introduce myself as Major Hanson, tell them he was out there, and they would send out for him, which I refused to do. While going back to Bedford from Krum's, I was asleep. Was sitting in the bar-room of the Fountain House, Hughes having gone out, when the driver, Carr, came in and told me there was a muss. Ran out and saw Hughes coming around the corner, keeping all off him with a revolver in his hand. He came to me just at the carriage, and told me to get in, which I did. He got in and pointed the revolver at the driver, and told him to drive on, saying, "Drive or I'll shoot." Got out then, and climbed up to the driver. I never told any man to let Hughes alone or I'd blow his brains out. I hadn't anything to blow anybody's brains out with. When Hughes came up to me at the carriage, his face was red as fire, his eyes just as if popping out, and he was mightily excited; told the driver to drive, or we would both be shot, and he drove as fast as he knew how. Don't remember of giving Hughes any money after the shooting. Hughes boarded with me from July 14, 1865, till the time of his shooting; saw Hughes drunk once before this affair; his face was very red, and he talked a great deal; saw him only once deep in liquor. He talked fast, his face was very red, and he told me of his troubles. "I came near going to the penitentiary," he said. I asked why. "For having two wives," he replied.

J. D. Keegan. Have known Hughes since the spring of 1862. Am a druggist. Have seen Hughes quite frequently under the influence of liquor. The effect of liquor on him was always very marked; it made him very reckless; he seemed to have no regard for his character and to be indifferent as to what he might do while in that condition. When drunk he seemed utterly demented and senseless. Was always much flushed then, eyes bloodshot, talkative and so offensive in what he said that I forbade him coming to my store. Didn't affect his walk much. When sober he was very gentlemanly.

Paul McGuire. Keep a grocery on Ontario street. Hughes was in my place between eight and nine o'clock, with Russell, the evening they went to Bedford. They drank something then. Dr. Hughes got a half pint flask filled with whiskey there. Was going into the country, he said, to see a patient. Have seen Hughes in liquor. When drunk his face was red. Never knew him to stagger any, no matter how much intoxicated. He was ugly at such times.

James Brown. Keep a saloon in this city, Bolivar and Pittsburgh streets. Dr. Hughes was in my saloon the night before the murder, with Russell and a hack driver, about nine o'clock. They drank there. Saw nothing out of the way in them.

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T. J. Quinlan. Have known Dr. Hughes three or four years. He opened an office opposite my place last summer. Saw him the evening before the murder, in my store; said he was sleepy and tired and was going home to bed. Have seen him under the influence of liquor. His face would get red, when drunk, and his eyes grow larger, but his walk was steady. Very few would ever know he was drunk.

Edward Nichols. Am fourteen years old. Know Dr. Hughes. Was in his employ two weeks and three days. The engagement ended on the arrest of Dr. Hughes. Ran errands, made his bed, etc. Saw the pistol under his pillow every morning when I made the bed.

Alfred Eastwood. Am not acquainted with Dr. Hughes. Saw him last at a grocery near Plank Road House, the day Tamzen Parsons was shot. He and the rest were pretty well set up when I went in.

John Cubbon. Have lived in this city twenty-three years. Born in the Isle of Man. Knew Hughes there when a boy, and his parents; was brought up in Hughes' father's house from time I was ten years old till I came to this country. His grandmother Jane Kenwitch was insane and committed suicide about a year after her husband's death. Other members of the family on the grandmother's side were insane; one, and, I think, two, committed suicide. The conduct of Hughes when he is sober is gentlemanly and proper.

Mr. Castle. What effect had drink upon the prisoner's father?

The question was objected to by the State, and the COURT ruled that it was not relevant.

Mr. Andrews. Know Hughes; saw him on the day of the murder, after his arrest. He looked like a man that had been drinking considerably. His face was red, his eyes looked very wild. Have seen Hughes drink several times, but never saw him stagger; he is very slow in speech when drunk; have never seen him excited.

Jas. Tear. Have known Hughes since he has been in Ohio and knew his father and grandfather. His grandfather committed suicide when insane. It was common talk that an uncle of his committed suicide in Demararra, but I don't know of it positively.

Edward B. Campbell. Have known Hughes for five years. Saw Hughes when a member of the Fifth Dragoon Guards in the English army, during the Crimean war. Also saw him when he was Assistant Surgeon of the Eighty-fifth Regimental Corps d'Afrique in the Federal army at Vicksburg, in charge of a marine hospital. Have never seen him stagger when drunk, and a person not acquainted with him would not discover that he was drunk.

I. S. Ely. Have known Hughes about two years; saw him at my home on the day of the murder, after his arrest. He did not seem to be intoxicated, but his face was very red and his eyes wild and excited. Saw him the night before, and judged he had been drinking a great deal.

William Lewis. Knew Hughes when he was a boy at school, and when he lived at Warrensville. Knew nothing bad of his general character.

Charlotte Parsons. Have known Hughes two or three

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years. Am sister-in-law to Tamzen Parsons' father. Was at Hughes' office the day before his trial at Justice Porter's. He engaged to come to my house on Sunday to treat my ears. At Tamzen's house, I told her that Dr. Hughes was going to operate on my ears at my house, and asked her when she was coming. She said she wanted to come the worst way, but mother was up to Haynes', and, she said, "You know I musn't say any more." I told Tamzen Hughes was coming up Sunday, and asked her if she wasn't coming up. She replied as before stated.

Mrs. Harriet Robinson. Live in Bedford. Know Hughes by sight, not personally. Was well acquainted with Tamzen Parsons. She was at my house twice after Hughes' arrest for assault. She called at my house to get a carriage to attend the trial. I said, "Tamzen, I should think you would be afraid to be out at night, for fear you will be disturbed." She replied she thought he would not injure her, or hurt a hair of her head. She told me what had happened the night he was at her house, and said next morning she was going to withdraw the suit.

O. B. Judd. Have known Hughes since 1861. His reputation was that of a quiet, gentlemanly man. Saw him once intoxicated; he was apparently wild and did not know what he was about.

John Burke. Knew Dr. Hughes in Warrensville. His reputation was that of a good moral man, when attending to his business. Until the affair with Tamzen his reputation was good.

William Krum (recalled). At the grocery near the Plank Road House, Hughes said to me he wanted to see Miss Parsons; that he wanted to have a talk with her. He said he had met them on the road, but "Suzie (Mrs. P.) was so full of hell he could not talk to her." He said he wanted to make provision for her support, so she could draw her money every three or six months, or year; or if she got married he would give her a check for $500 on a bank. Said he had word from Gov. Brough to go to Nashville and take charge of a general hospital.

P. Roeder. Am physician of the county jail; was called to see Hughes next morning after his arrest, about nine o'clock; he labored under great mental excitement, and showed some of the symptoms of delirium tremens; his face was flushed, eyes protruding and his pulse was frequent and weak; his tongue was coated and feverish; I ordered whiskey; did not visit him again until next day, and continued to call frequently. The symptoms of delirium are those I have described.

Dr. P. Thayer. Am physician. Have known Hughes since his arrival in Warrensville. Saw him under the influence of intoxicating liquors frequently. Could always notice by his face if he had been drinking. At one time in July last I saw him perform an operation when he had been drinking; he was nervous but he performed the operation; during the time I saw no muscular effect of liquor.

Sheriff Nicola. Am Sheriff of Cuyahoga county; saw Hughes at the door when he was brought in, the night of his arrest. Next

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morning between eight and nine o'clock Hughes appeared to be under great nervous excitement; was advised to give him whiskey, which I refused unless advised by the jail physicians, who were called and gave him as before stated; was present at all interviews between the prisoner and others. I had no conversation the first night, but about ten o'clock he begged for liquor, saying "For God's sake give me some beer."

H. S. Smith. Am jailor of the county jail. Saw Dr. Hughes the first time when he was brought in after his arrest; should judge he was pretty drunk; his face was very red and he had a wild look on his countenance; next morning he had the shakes; called Dr. Roeder who ordered me to give him whiskey and laudanum, in doses of about twenty-five drops of laudanum with a drink of whiskey three or four times a day for about a week. Also gave him valerian three or four times a day. While giving him the medicine his appearance was one of being troubled with the delirium tremens; his appearance and conduct since then has been good.

Dr. Strong. Am a physician and surgeon—have treated cases of delirium tremens to the nnmber of over one hundred. The higher and greater the development of the brain, the greater the excitement produced. Have known Hughes four or five years. Have seen him intoxicated. His face was florid, language very intemperate, but when sober, found him to be a perfect gentleman. Think that the effect of liquor on him would be that of excessive excitement. He was when intoxicated inclined to be quarrelsome, but did not stagger.

Dr. D. G. Streeter. Know Hughes. I boarded with him at the Franklin House. Have seen him intoxicated three or four days at a time. Liquor seemed to increase his muscular power. Saw him once after several days excessive drinking start to see a patient to perform an amputation. He asked me if I would not go; had with him a mechanic's saw and a butcher knife; he said that a French surgeon had recommended them in a case of emergency. He was going to use them. Think he had surgery on the brain.

Eliza Krum. Remember the night Dr. Hughes was at Parsons' house, in July last. Saw his buggy in the road, searched it and found a bottle of liquor in it. Took it home with me. It would hold near a quart. Should think it was either cherry or blackberry brandy.

Thomas McKinstry. Am policeman. Remember the day in August of the arrest of Hughes. Left in pursuance of a dispatch received from Bedford to make the arrest. Just before getting there, met the carriage with Hughes in it, he having been arrested; got into the carriage and came to the jail. Hughes looked to me like a man who had been on a long drunk. That was his general appearance. He is evidently a man who can stand a great deal of liquor. His walk was not affected, but his face and talk revealed the fact of intoxication. Have known him four or five years. His face was bloated a good deal, and of purple color, his eyes very much bloodshot. He was very nervous; was close by him in the hotel,

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and when combing his hair his hands showed that his nerves were all unstrung. He talked in a bravado manner, rather boasting of what he had done. After he washed, the Doctor went to the bar and drank a glass of ale. Think he drank two glasses. Have frequently seen Dr. Hughes intoxicated. When in liquor he was foolish, and did not seem to care what he did. When intoxicated he would talk foolishly and incoherently, and do foolish things. He seemed to know perfectly well what was going on around him when I saw him in the carriage. He recognized me and spoke to me. He conversed freely and coolly about the transaction.

Mary Quillman. Lived in Hughes' family three years ago, about five weeks; have seen him under the influence of drink. He appeared very sullen, his eyes were glassy, his face very red, seemed very nervous, and sometimes got very much excited. His walk was never noticeably different when drunk. Saw him once when very ugly. He had been away all night. He came to me in the kitchen. I asked him what he wanted. He took hold of me with both hands, and I had to defend myself. I had the stove handle in my hand; struck him across the arm with it, when he let go. Have seen him drunk several times since I left his house.

An affidavit of the defendant, made to support a motion for continuance of the case, was here read by his *counsel.* It alleged that the defendant was unable to procure the attendance of J. J. Patterson and Geo. S. Kimball, medical officers of the United States army, well acquainted with defendant, who would swear they have often seen him intoxicated, and in this state very singularly affected, suffering under total aberration of mind, while his muscular system was unaffected; that it was essentially necessary to arrest him often to prevent injury to himself and best friends; and that this effect was, in their opinion, entirely due to the influence of liquor, but was involuntary. The motion for continuance having been disallowed, the allegations of the affidavit were admitted as testimony.

THE SPEECHES OF COUNSEL.

Mr. Slade. Gentlemen of the Jury: After a long and patient examination of this extraordinary case we are now drawing our labors to a close. This is a case involving the highest consequences, not only to the prisoner, but to the community.

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Subsequent developments have fully sustained the position taken by the prosecutor at the opening. Against the prisoner at the bar we can have no personal feeling, but we must deal with him as a criminal who has committed the highest crime known to law. The prisoner has had every lenity shown him by the Court; eminent counsel has been assigned him, and nothing has been left undone to extenuate his great offense. But while every man is presumed to be innocent till proven to be guilty, when once shown to have violated the law, then to waver in conviction is treason to duty. The highest sanction is necessary to protect life. For the frightful increase of murder, robbery, and other high crimes there must be some cause. What is it? It is because when crimes are detected there is so much uncertainty of punishment. There is even admiration for the great criminal, after the momentary excitement has passed away. The people everywhere are asking if a man can be convicted of murder in the first degree in Ohio.

Now what is the crime alleged against the defendant? The learned prosecutor has stated that it is the highest crime known to the law of the State. Let us now turn to and examine and review the law and evidence in the case.

What is the crime of murder? In the common law of England, murder was the taking of life by man in his right mind, with malice, etc. In our statutes, discrimination is made. Murder in the first and second degrees and manslaughter are recognized. Murder in the first degree is the taking of the life of another with deliberation and premeditated malice. Murder in the second degree is the taking of life purposely and maliciously, but without premeditated malice. To constitute murder in the first degree under our statutes, the act must be done purposely, deliberately, premeditately and with malice.

"Purpose" means intention, the making up of the mind to commit an act.

The second element to be considered is deliberation. Premeditation may be ranked with deliberation. It means to

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weigh, consider, revolve in mind, an act before its accomplishment.

The third ingredient is malice. There are two kinds—expressed and implied. In the first there is a lying in wait to commit the act, and the committing of it with sedate, deliberate mind, and with a formal design. The evidence is circumstantial. In the second the act may be perpetrated or consummated while the person is doing another unlawful act.

This will suffice for the statement of the law in the case. Of the fact of murder by this defendant there is no question. Let us now turn to review the evidence in the case, by way of refreshing our memories.

Mr. Slade then reviewed the history of the affair, commencing with the seduction of Tamzen Parsons, an unsophisticated country girl, whose youth and ignorance made her the easy victim of this cool, calculating man. He narrated the flight to Pittsburgh, the marriage, the pursuit of Haynes, the discovery by Tamzen that her husband was a bigamist; his arrest and trial; his incarceration and her return home; his sudden appearance four or five months later, and immediate attentions to Tamzen, telling her he had sent away his first wife that he might take her to live with him in Cleveland. He detailed his subsequent actions; his breaking into Mr. Parsons' house on the night of the twenty-fifth of July; his visit to Dr. Wray at Warrensville, the next day, asked him if he had a pistol, and saying, on Wray's asking him what he wanted of it, "If that d—d bitch don't stop calling herself Mrs. Hughes, I'll shoot her;" his stay at the Plank Road House that night, and his remarks to Mrs. Eddy at breakfast the next morning, Wednesday, the 16th. "Pity it hadn't blown her d—d brains out and saved me the trouble some time," in response to Mrs. E's telling him that Tamzen had a ball recently pass through her parasol; his drive to Bedford that morning and statement to Mr. Salisbury, that "he must hunt up Tamzen, and if she won't live with me, I'll kill her," his trial before Justice Porter the

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next Saturday, for the crime of house breaking, his settlement of the difficulty with Tamzen, through the mediation of Mr. Henry Parsons, and Hughes' solemn promise never to have more to do with or to say to this girl; his violation of this promise within two weeks, all this going to show the thread of the intention in Hughes' mind to kill this girl as an alternative. He was not intoxicated when he made these statements to Mrs. Eddy and Mr. Salisbury, and from them we can see the latent purpose, the absorbing thought of Tamzen, the desire to have her live with him, and his deepening intention to slay her if she refuses to comply. The precision with which Hughes fired, aiming at the vital point; his taking money from Russell as he left the carriage in flight, and his run to the woods to reach the cars, his coolness after the capture, and the statements of intention by the defendant on the ride to the city, show that he was in his right mind, that the murder was a deliberate, rational act. There is nothing to show that he was in a frenzy and in such a mental state as to make him irresponsible for his act.

Mr. Slade then entered on the consideration, how far the question of drunkenness should enter into the palliation or mitigation of crime. If a man has formed the purpose to commit murder, it makes no difference if he became drunk before committing the deed. Voluntary drunkenness is no excuse for crime committed in that state of intoxication, though it reduces a man to a state of temporary insanity, it is no defense of crime. It would not shield a man if he was sane before he became drunk. A drunken malice is as dangerous and quite as wicked as a sober one. Intoxication must be considered, like any other fact, to discover the status of a man's mind. If counterfeit money is found on the person of a man so drunk that he knows nothing of it, the fact of drunkenness refutes the evidence of crime. But if he had it before he became intoxicated, the fact of intoxication should have no weight. And precisely the same application must be made in this case.

It makes no difference whether Hughes formed the pur-

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pose to kill Tamzen Parsons two weeks or two months before the deed was committed. He is as guilty in one case as in the other. Nor does it matter how much liquor he may have drunk, if he knew what he was about at the time of the murder.

Gentlemen, let us for a moment pass in review of this case, bloodiest in the annals of crime. The facts cannot be denied. The defendant himself boasted over the ruin he had wrought, "that he should meet the murdered one across the great waters." It seems to me even now and here he might see her, "wandering by, a shadow like an angel, with bright hair, dabbled in blood."

Tamzen Parsons died in defense of her virtue. When the seducer came in the person of a man of pleasing address and finished education, with a forged decree of divorce in his hand, he found her a mere child yet at school. She yielded to his machinations and was lured from home and friends. The forger became the bigamist and wrote on his forehead the horrid crime of adultery. Her friends followed, she learned of his deception and was rescued from the jaws of a remorseless prostitution. Anon the forger, the bigamist, the adulterer was doomed to confinement for a year within the walls of a prison. After four months, we find his poor wife, the mother of his child, true to her womanly instincts, wending her way to our city procuring signatures for his pardon. She obtained it. What promises he makes we know not. Does he come to her with contrition and gratitude? No! He banishes her and his child. For what? That he may again set his snares for the young and unsuspecting Tamzen, that he may lead her into a life of prostitution to end her days with those fallen ones who are bought with a price.

The forger, the bigamist, the adulterer, seeks again his prey, plies his arts. The mother of the child hovers near. Tamzen says: "You have deceived me once, you can not again." He will not desist—counts upon his strong control. He is mistaken, she will not yield. She seeks the house of

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refuge given by a Christian woman—nearly entered—he sees all is lost, he cannot possess her—he draws—takes deadly aim—fires, and Tamzen dies to live in Heaven. The forger, the bigamist, the adulterer, John W. Hughes, walks forth a murderer.

Let a monument be raised in memory of fallen virtue, which the young and fair can look upon when we are dead and gone.

From this sad tragedy we learn

> "The triumphs that on vice attend,
> Shall ever in confusion end;
> The good man suffers but to gain,
> And every virtue springs from pain.
> As aromatic plants bestow
> No spicy fragrance while they grow,
> But crushed or trodden to the ground,
> Diffuse their balmy sweets around."

Gentlemen, we throw upon you the burden of this case. It rests with you. You have solemnly sworn to decide this issue, according to the law and the evidence. Mercy rests not with you, not with the judge, but with the Governor of the Chair of State. You are to do justice—nothing more, nothing less. I ask you in the name of that community so cruelly outraged, that waits patiently to see whether under any circumstances, the highest penalty can be enforced; I ask you in the name of violated chastity everywhere; I ask you in the name of God whose image has been so cruelly defaced, and finally, I ask you in the name of the very law itself, to this day mark by your verdict your estimate of the protection which shall be given to the poor man's child.

Mr. Knight. Gentlemen of the Jury: The business here committed to your charge is one of the most important that ever arises in the affairs of men. The inquest that you now hold is one that involves the life of the unfortunate prisoner at the bar. And in a matter of such great importance it is of the utmost importance to the faithful discharge of that duty, that you look well to yourselves to see that in making up your judgment you shall be uninfluenced in any degree by pre-

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judice or passion, and that your deliberations shall be entirely free from, and your conclusions totally unaffected by, either passion or prejudice. A man of great uniformity of temper and strong predispositions to vice, after hours of drunken revelry and dissipation and in an unfortunate moment when madness, like a destroying angel, had usurped the dominion of his mind and subverted reason from her seat, committed what the prosecution and the populace see fit to characterize as murder. And hence there has arisen a powerful prejudice against the defendant. I ask you in behalf of justice, in the name of liberty, which it is your duty to shield and protect, that you shall remain unaffected by it. Let its storms wail as wildly, madly and furiously as they may around this temple, and gather and beat until it shall rock upon its foundations, still no breath should enter here.

I pass now, gentlemen, to a consideration of the law as applicable to this case.

The defendant is charged with murder in the first degree. To make that out the State have to establish five things: First, the killing; second, that it was malicious; third, that it was purposely done; fourth, that it was done with deliberation; and fifth, that it was done with premeditation. What now are we to understand by these several elements which constitute murder? It is a rule of interpretation, that we are to give effect to each of the words of the statute or of an instrument which we wish to interpret.

Mr. Knight cited various authorities to thow the meaning of the several words above named, and the general conclusion deduced that the meaning of the first section of the Crime's Act containing the above words, and under which the defendant is charged, is that the killing must be done in pursuance of an intention or design to kill, which intention must have been formed before the party attempted to execute that design, and that he must have stopped to consider, to weigh in his mind that design; that if the act was committed whilst the defendant was in a fit of anger or of rage induced by the deceased, he would not be guilty of the charge; that if the

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intention to kill was formed whilst the defendant was subject to any passion which disqualified him for deliberation, and that intention was executed whilst still under the influence of that passion, he would not be guilty; that the intent to kill, although not essential to constitute murder at the common law, is by the first section of the Crime's Act made an ingredient of that crime. That deliberation and premeditation, although not an essential element of murder at common law, is by the same section made an element of that crime; that the presumption of law arising from proof of killing alone is that it was murder in the second degree and not murder in the first degree; that the jury have in addition to the finding of a homicide, to find expressly and from the proof, an additional element of deliberation and premeditation; that no extent of proof of malice simply will warrant the finding of deliberation and premeditation, but that, in addition to the proof of malice, there must be proof of deliberation and premeditation as distinct facts and elements of crime; that drunkenness is competent in a charge of murder in the first degree to be proved to the jury for the purpose of showing that the defendant did not at the time of committing the act have sufficient understanding to intend the act, and that drunkenness is competent in all cases where the intention is an element of the crime.

Now, gentlemen, this much with regard to the law for the present. I wish to call your attention to a few facts which have been given you in proof, and, first, I wish to invite your attention to a startling fact disclosed in this investigation in regard to the peculiarity of the defendant's troubles and the melancholy results, and the troubles of his ancestors and their equally unfortunate results. You cannot fail to remark it as an impressive coincidence, that the kind of trouble which led his ancestor (his grandmother) to commit suicide, was the deep grief that gathered and settled upon her heart at the loss of her husband. Thus she became at once subject to fearful visits of awful madness, and in a few months after her loss, in one of her fits of insanity, she terminated her life.

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So when the defendant realized the fact that she, whom he most loved, had forsaken him, he, like his unfortunate ancestor, became suddenly wild, a maniac, and in its awful visitation, he took the life of Tamzen Parsons and contemplated taking his own. It is a singular coincidence that the same character of trouble should befall him as befell his ancestor, and it is equally singular that it should fall with such fearful and yet singular effect upon each. It certainly indicates clearly that some infirmity, defect or predisposition on the part of his ancestors, has been transmitted to him as the hereditary accumulation of the morbid predispositions of his ancestors for generations, exalted and intensified in the organization of the defendant. And it is also a singular coincidence, that the same character of trouble which led his grandmother to commit suicide, led him to contemplate the same melancholy purpose. Nothing is better settled than that predispositions to insanity are transmissible from parent to offspring. Nay, more, I cite you the authority of Wharton and Stelle, Medical Jurisprudence, to the fact that predispositions to lying, cheating, drunkenness, theft and all other moral vices are as transmissible as gout, consumption, deafness, blindness and almost all other constitutional diseases. And if that be so, and it is so, then I can clearly understand how the unfortunate defendant comes to be possessed of peculiarities of temper and mental tendencies and susceptibilities which characterized his ancestors, and you then have also the key to the fact that the effect of a great disappointment on him would be like the same on his ancestor.

This doctrine of hereditary insanity is comparatively new. Not long ago insanity in all its forms was simply believed to be a visitation of God, on which we might look with wonder and grief, but to which it was our duty to bow submissively. It was not thought that it was a condition of the mind, which might be traced to a proper and adequate cause, either growing out of some hereditary defect or developed by the circumstances of habits of its unfortunate subject. But now it has come to be well understood that insanity is attributable, like

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any disease of the body, to causes which operate to its development. And now in the light of recent investigations, the origin and causes of insanity have been searched out, and the great truth established that insanity is transmissible by inheritance. The birthright of my unfortunate client was a powerful tendency to insanity, derived from his ancestors generations ago.

In the early part of the present century, insanity was not permitted to be given in defense of crime, but as its origin and extent were gradually studied and understood, its claim to a hearing in excuse for crime came to be recognized and adopted, and now not only the insanity of the defendant himself, but the insanity of his ancestors may be shown in his defense.

Man is a peculiar being, and strangely compounded of different natures marvelously mixed. On the one hand, in the nobility of his reason and the infinity of his faculties, he is allied to angels and to God; and on the other, in his passions and necessities, he is linked by an inevitable fatality to the beasts of the field.

> "How poor, how rich, how abject, how august,
> How complicate, how wonderful is man!"

It was the full realization of the marvelous mixing up of large extremes, which led the poet in astonishment to exclaim:

> "Oh what a miracle to man is man!"

My client was subject to a wild and foolish infatuation in affairs of love, but he is not the first or only one who has become the deluded victim of infatuation. They have existed in all ages of the world. But sometimes this infatuation takes one hue, and sometimes another. It has manifested itself in one person in a morbid and overruling desire for money. Midas, for some service that was rendered by him to Bacchus, was told he should have whatever he wished. And so absorbing was his desire for gold that he wished that whatever he

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touched might be turned into gold. And from those mythological times until now there have been these whose whole being has been absorbed and overshadowed by this ruling passion.

Sometimes it manifests itself in dreams of ambition and glory. A diadem casts its maddening gleams into the eyes of ambitious men, and they long for that giddy elevation, and are ready to "wade through slaughter to the throne." Every desire is for that end, and every thought is how they can gain it.

Sometimes it takes a religious turn, and from the time when Peter the Hermit went back from Asia to Europe, and kindled a fire of enthusiasm which lighted up all Europe, and which led to the famous Crusades, until today, there have been religious enthusiasts who, in the wilderness and blindness of their enthusiasm, have looked on a martyr's death with indifference.

Again, it takes the more tender form of love. Paris stole the Grecian Helen and fled with her to Troy, and this illicit love led to the siege and utter destruction of Troy. Mark Antony, the greatest of Rome, gave up the world for Cleopatra. Leander swam the Hellespont for his love. Henry VIII, of England, under the influence of this passion, threw off the power of the Church of Rome in England, and established himself as the head of both Church and State, and thus led the way for the emancipation of the English people from the fearful tyrannous grasp and authority of the Roman Church.

And so all through the world's history, both in ancient fable, and in ancient and modern history, we find numberless examples of those over whom the tender passion held complete control. My unfortunate client is one of the latter class. Love is the ruling passion with him. It absorbs all others. It rises out of his temperament as natural as perfume issues from the rose. To this peculiar tendency of his temperament he adds the morbid predisposition in the same direction which he inherited from his ancestor. And to both of these he superadds the stimulating and exciting effect of in-

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toxication. These tendencies of temperament and hereditary morbid predisposition, excited and intensified by intoxication, give that passion a supreme and absolute control over him. And the whole strength and current of his being sets in that direction, and makes the object of his love everything to him.

But the prosecution say, and truly, too, that the defendant is a person of extraordinary intellect and of rare learning. We admit it. But is a great genius proof against vice and temptation? By no means. The power to control our actions lies not in the greatness of our intellect or the power and activity of our moral force. If the intellect alone is the power which exercises moral control over any individual, then the most intellectual men would be the best. But is such the case? No, gentlemen. Lord Bacon, one of the most intellectual of men, on account of his vice and crime has been characterized as the "brightest, wisest, meanest of mankind." And it was in a felon's cell that he gave birth to those wonderful lucubrations which fell on the earth like an apocalypse of nature, and from which arose the "exhaltations of a new intellectual morning" that has arisen into a still increasing day, the genial sun of which has warmed into life a giant brood of useful arts and a still more giant brood of useful sciences, and which rolled back that cloud of darkness which enveloped the earth for a thousand years.

Our safety from vice cannot be found in the strength of intellect, but alone in the complete ascendancy of the moral nature. The great intellect and attainments of defendant could have no force in restraining the wild, morbid and overpowering passions which were his inheritance.

With a weak nature the defendant was possessed of a most powerful, passionate nature, which, where it found an object meeting its fancy, made him become wildly and madly attached thereto; Tamzen Parsons, the deceased, was that object; he loved her madly and blindly, and when he found the object of that love had forsaken him and turned away from him, the awful passion of love was disappointed, and

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he, under the influence of disappointment, became insane, and when that fearful cloud and paroxysm crossed his mind his intellect became eclipsed, and, failing in self-control and judgment, perpetrated the fearful deed.

We ask you when you retire for deliberation, to so decide that when you shall separate from your labors here and return home again, you may say in your devotions and prayers to God,

"That mercy I to others show,
That mercy show to me."

Mr. Castle discussed the evidence taken by the State, reviewing it generally and with analysis and criticism, and putting upon it such construction as he claimed was warranted by fact or proof, in the light of reason. He worked his way through this mountain of evidence, with industry, persistency, and endurance. His argument abounded with passages of eloquence, pathos, invective, satire, and impassioned appeal.

His theory of the case, by the evidence, was, that Tamzen Parsons was not a mere child, as represented, but a person come to responsible womanhood; that there was a mutually reciprocal passion burning in the hearts of her and Hughes; that she knew he was a married man; that the claimed forged bill of divorce must have been executed in Pittsburgh after the elopement and with her knowledge; that she never gave over her love for him, albeit she listened to the solicitations of her friends and returned home,—for, on the night of the twenty-fourth of July last she testified her willingness and even desire to keep his company when her father had gone to Bedford for an officer to arrest Hughes for house-breaking and assault, and by holding an interview of two hours' duration with him at the yard fence; that at no subsequent time did she manifest the slightest ill will toward him; that he loved her with a wild idolatry albeit it was an illicit love; that all his day was but a thought of her, and she his dreams by night, so that life was nothing to him without her; that,

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when baffled by the opposition of her friends, and set on fire of hell by excessive drink, with his predispositions, while intoxicated, to insanity, reason forsook her seat as Tamzen flitted across his path on that dark day when he slew her; that the murder was the sudden impulse of a brain crazed by drink, and no deliberate, malicious act.

Mr. Castle devoted much time to the ventilation of the alleged threats made by Hughes to take Tamzen's life; viz., that to Dr. Wray, on the twenty-fifth of July, when he said that if she did not stop calling herself Mrs. Hughes he would kill her; that to Mrs. Eddy, the next morning, at breakfast at the Plank Road House, in response to her informing him that a bullet had been fired through her parasol: "Pity it hadn't gone a little lower and blown her d—d brains out, and saved me the trouble some day"; and that to Vial Salisbury, at Bedford, the same day: "I must hunt her (Tamzen) up, and if she won't live with me, I'll kill her." He dwelt long and loud on the essential absurdity and improbability of his making such statements when his love for her is considered, his desires and efforts to get her to live with him. It is inconceivable that, if he meditated her murder, or desired to take her life, that he should thus drum up witnesses of the contemplated deed, and so plan things as to make his conviction fatally sure. It was the poison he had swallowed in copious draughts which killed Tamzen Parsons —not John W. Hughes.

Mr. Palmer. Gentlemen of the Jury: I stand before you for the last time in the discharge of the responsible duties connected with the investigation of this important case, not to measure rhetorical blades with my friend who opened for the defense, in the shadowy region of metaphysical and theoretical speculation, in which for the greater part of his address he roamed, nor to test pinions with my other friend who closed for the defense, who has so long delighted us by his adventurous flights of eloquence. The business of the hour requires of me to render such aid as I may in elucidating the truth from the testimony rehearsed in your hearing,

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and to that task, impressed with the solemnity of the duty I have to discharge, I now address myself. It is truth which is at issue here. I shall show you that we have established every point made in our opening statement.

This is a complete drama, with a beginning, all the consecutive stages of development, and a tragedy for a fitting conclusion. One year ago this defendant was brought before the Mayor of Pittsburgh charged with bigamy. All this tragedy has been developed in one short year. Let us review it. The curtain rises in the quiet village of Bedford, and two characters came upon the stage, a little over one year ago. Who are they? One has been before you for the last two weeks, a mature man of the world, educated and polished; the other, an unsuspecting country maiden, seventeen years of age, inexperienced, confiding, who now sleeps quietly in the cemetery at Bedford. This man sought that virtuous, artless maiden in her secluded home, at a time when she was deprived of her mother's watchful care, and plied the arts and fascinations at the command of a cultivated, experienced man of the world. His honeyed words meant lust. Love! Forgotten by him were all the lessons of childhood, solemn marriage vows, the pleadings of his innocent boy, who claimed from him the legacy of a fair name.

On Monday, December 19, 1864, the parties leave Bedford for Pittsburgh. The mother of Tamzen hears of the flight on the same day, and sends her son-in-law in pursuit, on the twentieth. Lured thither by the tempter, he prevailed over this unsuspecting maiden's heart and induced her to take this step by the exhibition of a bill of divorce, which he had forged for that purpose. They had been married. On the twenty-first he was arrested on the charge of bigamy, and flung into jail to await trial, and she, bitterly deceived, returned to her father's house. And the curtan falls upon a felon's cell, its inmate leprous with lust, a forger, a bigamist and an adulterer.

In January he was convicted and sentenced to the peniten-

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tiary of Pennsylvania. During those four or five months of imprisonment what was passing in his mind? This imperious nature brooded over his failure to carry out his designs. He could not brook it. He would show Tamzen Parsons, when he got out, that he would accomplish his purpose. His will becomes more relentless and determined, and he makes a resolve not to be foiled again. For, accepting, in early summer, the boon of liberty from the hands of his devoted wife, whom he treated with equal cruelty and meanness, he was no sooner released from the penitentiary than he makes his appearance here in July last, and sets about completing his foiled purpose. He sends away his wife and child to his native Isle of Man, that they may offer no impediment. Three several times the defendant himself expressly said that he sent them away in order that he might get Tamzen to live with him. He will live with her.

On the night of the twenty-fouth of July these characters come upon the stage again. He enters her father's house late at night, seeking an interview with Tamzen. For four long hours he exercises all his powers of fascination and persuasion, in vain. "You have deceived me once, and you shall never do it again," she reiterates in answer to his passionate urgings and entreaties. He drives off, foiled again, and by this young girl, towards Warrensville. That imperious will has once more been balked, and his spirit chafes and rages at the result of the interview. He sees Dr. Wray at the Warrensville House, on the morning of the twenty-fifth, and in conversation with him the feelings of Dr. Hughes' heart are shown and his purpose vaguely expressed. He is provoked, angry, and the first sparks of a kindling revenge show themselves. He asks Dr. Wray if he had a pistol. "No; why?" "That d—d ——— (Tamzen) is calling herself Mrs. Hughes, and if she doesn't stop I'll blow her brains out." He indulges freely in drink, and when he arrives that night at the Plank Road House he is drunk. His purpose is more distinctly stated before Mrs. Eddy, at breakfast on the morning of the twenty-sixth, when, in response to her information

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that a ball recently passed through Tamzen's parasol, he said, "Pity it hadn't gone a little lower and blown her brains out, and saved me the trouble some time." He is still brooding over his disappointment, the thwarting of his darling purpose, and in these statements we get glimpses of the state of his mind toward the girl. A few hours later he meets Vial Salisbury, and the expression of his purpose is no longer vague or even indistinct. "If she will not live with me, I'll kill her." He is arrested on Thursday on the charge of house-breaking, examined on Saturday before Justice Porter in this city, Tamzen herself making an affidavit against him. That act of hers makes his failure all the more apparent, and his prospect of success now seems hopeless. He buys the pistol that day, the pistol with which two weeks later he shot her.

He meets Henry Parsons that evening, who advises him to settle that difficulty, and offers himself as a mediator. Here is a gleam of hope to Dr. Hughes' mind. If she can be reconciled unto him, he thinks, he may still win her with his charms. They go to her house the next day, Sunday, where Henry Parsons, after a four hours' interview with Tamzen, gains her consent to stay the prosecution, but on the proviso that the Doctor shall solemnly promise to molest her no more. He was maddened by reason of the length of time taken to settle, even on these terms.

The settlement was made, the promise given. Here was a new hope for the successful issue of another effort. That strong will, never yet balked, was not willing to acknowledge itself conquered by a village maiden. He awaited an opportunity, and on Tuesday evening, August eighth, it occured. He met Russell; they drank; Russell proposed a drive; the defendant engaged for a ride to Bedford. Here is a twin villain who will aid him, perchance. If they meet Tamzen, and she refuses to go with him, they may kidnap her. The pistol and flask of whiskey are taken by Hughes. They are necessary attendants in all purposes and deeds of violence and blood. They start with the double lie of calling Russell,

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Major Hanson and that their errand is the amputation of a limb. Hughes was not drunk. He gave all the directions on the road. Arriving at the cross roads near Bedford, Hughes ordered the driver to stop. Why? He was debating whether it were better to go there that night or wait until morning. He had failed in one nocturnal visitation. He would try his fortune in daylight. They stop at the hotel. It is not corroborated that Hughes drinks much the next morning. They set out, see Mr. Christian in the street. Hughes sends for him, with the remark, "That man cost me $50." It was he, her warm personal friend who brought Tamzen into the city to file an affidavit against the Doctor. It shows that he was brooding over this matter. He evidently wished to learn where Tamzen was, whether at his house in the village or at her father's, so as not to lose his journey. They drove on, Hughes ordering the driver to turn to the left, on the road where Mr. Parsons lived. He sought a private interview, believing it in his power to revive her love for him. He meets Mrs. Christian at Mrs. Parsons' house, and learns that Tamzen and her mother have gone blackberrying. When she tells him not to trouble himself, for Tamzen had set her affections elsewhere, he looked "venomous," and drove off toward the Plank Road House. Soon meeting the object of his search, Hughes orders the driver to stop. The women would not stop, but he followed on, overtook them and parleyed about matters of receiving papers, giving checks on the bank, as a ruse to throw Mrs. Parsons off her guard, and gain a private talk with Tamzen. It is refused. Robinson comes along in a wagon, and will take the women home. Hughes parleys, the interview is refused, he tells Tamzen he will live with her if he has to hang for it. No one else shall have her if has to swing for it. She still denies him an interview; he puts his hand to the pocket where his pistol was, but catches Robinson's eye, drops his hand, and as they drive on walks back to his carriage, and thence to the Plank Road House. He needs stimulus, he falters in his purpose. They drink and post back to Krum's

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opposite Parsons' house, ask for Parsons' family, and, learning that they have gone to Bedford, Hughes says drive on to Bedford. He goes first to Christian's shop. Why? To find out where Tamzen is, whether at his house, having rode to town with his wife, or at Joseph Haynes'. He accosts Mr. Parsons and asks him to drink. Why? To find out where Tamzen is. Just then he spies her going to Christian's house, and gives pursuit. She was alone. Here and now, or never, was opportunity to see her alone. If he fail now, his final avowed purpose must be executed. She flies, he pursues, she says, "No, I will not stop," rushes through the gate, opened by the boy, Christian, which is then by him closed. Hughes draws his revolver, cocks it ere he reaches the gate, opens it, speeds up the walk, and within ten feet of Mrs. Christian's open door, lays violent hand on Tamzen's shoulder and fires. She utters a cry so piteous, it would have melted a heart other than adamant. He fires again, and Tamzen's spirit soars to where the wicked cease from troubling and the weary are at rest.

Now what crime has been committed? Has any? We admit and accept the burden of proof as to deliberation and premeditation of this act. By five different declarations, four of which were made when sober, viz. to Wray, Mrs. Eddy, Messrs. Salisbury, Parsons and Robinson, we establish that deliberation. We have shown it by the circumstances of the act, and by the declarations of the defendant after his capture.

Now, what is the defense? It is hard to tell. Is it insanity? No one swears to it. But it was uncontrollable impulse, say the defense—to what, love? They cite Othello's love. But the love of the noble Moor was an honest love. He never committed forgery. Was it drunkenness? That was no excuse in the eye of the law, the purpose to kill her having been proven to have been formed two weeks before. If drunk, as claimed, he wrought himself into a frenzy by drink as a means to an end. But nobody swears that he was drunk. He was cool, collected, deliberate. The fact of intoxication, not the amount of liquor drank, must be proven.

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We must proceed to consider what were the mental states of the defendant, what inspired his acts, and named desire for an object, disappointment, anger, jealousy and revenge as springs of action, and their power, natural operations, effects, consequences, etc., thus showing by his exercise of these, as well as by a consciousness of the act in all its bearings, his full memory of all the details, that the defendant acted like a rational, not an insane being; and this view is supported by his prior preparations and conduct, as well as subsequent action. Did he know what he was about? Was he mistaken when he told why he had done the deed?

I will not stop to speak of the flimsy fabric reared on his appearance the morning after his arrest, and talk about delirium tremens. He was excited, it is claimed; he trembled and looked wild. Ah! We can imagine what the horrors of that night would be to his guilty soul. We can imagine in his dreams, if he could sleep at all, the ghost of his murdered victim passing before him, as did the visions of his murdered victims before the guilty Richard on the eve of Bosworth Field, and, like him, in terror he started in his fitful sleep, exclaiming:

"Oh coward conscience how thou dost afflict me!
It is now dead midnight—
Cold, fearful drops stand on my trembling flesh.
What do I fear? Myself? There's none else by:

* * * * *

Is there a murderer here? No—yes; I am;

* * * * *

My conscience hath a thousand several tongues,
And every tongue brings in a several tale,
And every tale condemns me for a villain.
Perjury, perjury in the highest degree;
Murder, stern murder in the dir'st degree;
All several sins, all used in each degree,
Throng to the bar, crying all—Guilty! Guilty!"

Pray, gentlemen, what will make murder in the first degree? What, by your verdict, will you say? That two weeks'

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deliberation, five declarations of fell purpose, the purchase of a pistol for the avowed purpose, declaring motives and doing all ordinary acts resulting from such motive, exhibiting motive, reason, deliberation, will, consciousness, and, after the deed, clear memory, describing the act with coolness—if all this be not murder in the first degree, pray, what is it? Is there such a crime possible?

Gentlemen of the Jury, my duty is done. I fully appreciate the solemnity of the issues that crowd thickly as I entrust this case to you for the performance of your duty. The consciousness of having so done will be an abiding consolation. The serenest reflection you can have in after years, on recalling the scenes of this memorable trial, will be the conviction that you here did your duty, responsive to the solemn obligations of your oath to render a verdict according to law and the testimony. And when these walls have crumbled, when judge and jury, counsel and spectators, are gathered to meet the dread arbitrament of the future, may you, each, be able to say, in reference to this case, as I now can, I did my duty.

THE CHARGE TO THE JURY.

JUDGE COFFENBERRY. The prisoner at the bar stands charged by the indictment, with the wilful, deliberate, and malicious murder of Tamzen Parsons, in the county of Cuyahoga, and State of Ohio, on the ninth day of August, 1865, by shooting her in the back of the neck with a pistol ball.

To this indictment a plea of not guilty has been entered on behalf of the prisoner, and this constitutes the issue which you are impannelled and sworn to try.

The State asserts that he is guilty, as charged in the indictment; this he denies; and the burden of the proof rests upon the State, and it is incumbent upon the prosecution to prove his guilt beyond a reasonable doubt, of some of the offenses, of which it is possible to convict under this indict-

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ment; and if it has failed to make such proof it becomes your duty to return a verdict of not guilty.

It is proper that I should commence my charge as to the law governing the case, by calling your attention to some of the distinctions between the rules of evidence and the measure of proof which obtain in civil and criminal cases. In a civil case the mind of each juror should be as a sheet of white paper, or clean slate, without any presumption for or against either party. But in a criminal case, such as this, it is the duty of the jury to presume the defendant to be innocent until he is proven by the evidence to be guilty. In civil cases when a party has made out his case by a preponderance of all the evidence in the case, or by the weight of the evidence, as it is sometimes termed, he is entitled to a verdict in his favor. But in criminal cases the State is not entitled to a verdict of guilty upon a mere preponderance of evidence, but to warrant a conviction the evidence must establish the guilt of the defendant beyond a reasonable doubt.

Applying these rules to the case in hand, it becomes your duty upon taking your seats as jurors to presume that the prisoner at the bar was innocent of the crime charged against him in this prosecution, and this presumption of innocence you are to adhere to and entertain until it should be overcome or rebutted by evidence tending to prove guilt. And so long as there is reasonable doubt of guilt in your minds, you are to give him the benefit of that doubt. The doubt, however, which should work an acquittal of the defendant, should be a reasonable, actual and substantial one; not a merely speculative or possible doubt, for which no reason can be assigned.

If, after you have carefully and impartially weighed and considered all the evidence, and all the circumstances of the case, as they have been given in evidence, you do not feel an abiding conviction, a moral assurance of the prisoner's guilt, your verdict should be not guilty. But, upon the other hand, if you are assured from the evidence that the defendant is guilty as charged in the indictment, or that he is guilty of murder in the second degree, or of manslaughter, no senti-

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ment of tenderness or sympathy with the defendant should prevent you from rendering a verdict in strict accordance with your honest convictions and judgment in the premises.

Under this indictment the defendant may, upon proper evidence, be convicted of either "murder in the first degree, murder in the second degree, or of manslaughter," as the charge for the higher or greater crime embraces charges for both the lower or minor grades of homicide. The better to apprehend the sense and meaning of either of these crimes, it will be well to give your attention to a brief analysis of each.

The first section of the Crimes Act defines the crime of murder in the first degree as follows: "If any person shall purposely and of deliberate and premeditated malice, (or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done) kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death."

The second section, defining the crime of murder in the second degree, provides "that if any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor during life."

The third section, defining manslaughter, provides "that if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than ten years, nor less than one year."

Murder in the first degree under our statute embraces two classes of cases:

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First. Killing purposely and of deliberate and premeditated malice.

Second. Killing purposely in the perpetration or attempt to perpetrate a rape, arson, robbery or burglary, or by administering poison, or causing the same to be done.

As it is not claimed in this case that the prisoner was perpetrating, or attempting to perpetrate, either of the crimes named in the second class of cases mentioned in the statute, it is not necessary to ask your attention further to this class of cases.

The ingredients of the crime of murder in the first degree in the class of cases with which we have to do, are:

First. The killing of one human being by another.

Second. The purpose or intention to kill.

Third. That the killing be done of deliberate and premeditated malice.

Murder in the second degree is when one person kills another purposely and maliciously but without deliberation and premeditation.

Manslaughter is the intentional killing of another without malice upon a sudden quarrel, or the unintentional killing of another while the slayer is in the commission of some unlawful act.

The first subject for investigation in prosecution for murder or manslaughter usually is whether one person has been killed by another, but in this case it is admitted that Tamzen Parsons was killed by the prisoner at the bar, on the ninth day of August last. This being admitted, you will proceed to the consideration of the circumstances preceding and attending the homicide, and determine from them whether the defendant is guilty of any crime, and if of any, of what crime he is guilty.

Intention.—You have seen from the reading of the statute that to justify a conviction for murder in the first degree you must find from the evidence that the prisoner intended to kill the deceased, Tamzen Parsons; and to justify a conviction of murder in the second degree, you must be satisfied

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from the evidence that he intended to kill some human being, and did, in fact, kill Tamzen Parsons.

The purpose or intention to kill can only be directly shown by the declarations of the prisoner previous to or at the time of the act, or by his subsequent confessions.

But whilst this is the direct means of proof, it is not by any means the only evidence by which the intention or purpose to kill can be proven. The manner and purpose of the killing may afford as satisfactory and conclusive evidence of a purpose to kill, as the voluntary confession of the party.

If a rational person voluntarily shoots another through the brain or heart, or other vital part with a pistol, musket or rifle ball, or stabs another with a sword or dagger in a vital place, or cleaves the skull with an axe or heavy iron bar, it is almost impossible to avoid the conviction that the perpetrator of such an act of deadly violence intended to kill. The relation between such acts and the intention or motive which prompts them is well recognized, and the law implies or presumes the purpose from the act. In the language of the books, the law presumes that every man intends the natural and probable consequences of his own voluntary acts. And this legal presumption but expresses the sense and judgment of every intelligent mind.

If, therefore, you should find from the evidence in this case, that the prisoner at the bar voluntarily used such a kind and degree of violence towards Tamzen Parsons as would necessarily or in all probability result in her death, you will be justified in presuming and finding by your verdict that he intended to kill her.

You will take into consideration all the facts and circumstances of the case which go to show the intention or purpose of the defendant in doing the act which resulted in the death of Tamzen Parsons at the time and place charged, and if in your judgment they prove beyond a reasonable doubt that the defendant then and there intended to kill her, the State has made out this element of the crime of murder in either the first or second degree; but if the intention to kill

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is not proved, the prisoner is entitled to a verdict of not guilty.

In order to constitute a homicide, or the killing of one human being by another, murder in the first degree in this class of cases, there must not only be clear and satisfactory proof of an intentional killing, but the evidence must show that it was done of deliberate and premeditated malice.

Deliberation and premeditation are acts of the mind, requiring the exercise of reason, reflection, judgment and decision, and these cannot exist in any case where the faculties of the mind are deranged, or destroyed to such an extent as to deprive the party of his free agency and render him incapable of understanding the nature and consequences of the act he was doing, or about to do, or of discriminating between right and wrong.

Although deliberation and premeditation are necessary ingredients in the crime of murder in the first degree, it is not necessary that it should have been meditated and deliberated on for any particular length of time. It is sufficient if the intention or purpose to commit the crime has been distinctly formed in the mind before its execution, and it is immaterial as to the length of time which transpires between the forming of the design or purpose and its execution. A moment's reflection upon it, and entertaining the purpose intention for any perceptible period of time is all the deliberation and premeditation which the law requires. The mind must conceive the design to kill, reason must perceive the nature and consequences of the act and judgment elect to do it. When all these concur they constitute all the deliberation and premeditation requisite to make a killing murder in the first degree.

To constitute homicide, or killing, murder in the first degree, there must be an intentional killing, with deliberation and premeditated malice.

The distinction made by our statute between murder in the first and second degrees is this: In murder in the first degree the killing must be done purposely and of deliberate

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and premeditated malice. In murder in the second degree, the killing must be done purposely and maliciously, but without deliberation and premeditation. In murder in the first degree, the malice goes before or precedes the act of killing, whilst to constitute murder in the second degree, the malice goes with or accompanies the act of killing.

We will now ask your attention to the technical meaning of the term, malice, as used in the statutory definition of murder.

As used here, malice includes not only hatred, ill will and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards any one or more individuals, but it is evidenced by an action proceeding from a wicked and corrupt motive. To justify a conviction for murder, it is not necessary to show that the slayer entertained a malicious sentiment, or spite and ill-will especially towards the person slain—but it is sufficient if the evidence proves a general malignity, a depraved inclination to dangerous and deadly mischief, fall where it may, or a reckless disregard of the lives and safety of others. In the language of another, it means that general malignity, that disregard of the lives and safety of others which proceeds from a heart void of a just sense of social duty, and fatally bent on mischief.

This legal malice may be promoted as well by motives of avarice, bigotry or jealousy, as by hatred, revenge or cruelty. If one human being voluntarily and unlawfully takes the life of another from any unlawful and improper motive, it is done, in legal contemplation, maliciously.

Malice may also be express or implied. Express malice is where one person kills another with a sedate, deliberate mind and formed design—which formed design is usually evidenced by external circumstances, discovering or indicating that inward purpose.

This kind of malice is usually shown by lying in wait, antecedent threats or menaces, evidence of formed grudges, concocting schemes, or providing means or weapons to compass the death of the party slain. Seeking one with a view to kill

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him, or by an unusual degree of cruelty, deliberation and precision attending the act of killing. This is the kind or degree of malice which must be proven to make the case of murder in the first degree.

Implied or constructive malice is where there have been no previous threats, menaces or preparation, but where there are such circumstances attending the act of killing as are the ordinary indications of a wicked, malicious and bloodthirsty spirit, as when one person kills another suddenly, without provocation, or without any considerable provocation, or when a person in a sudden affray, without necessity, makes use of a deadly weapon and kills an adversary therewith, from the proof of such circumstances the law implies that kind of malice which is a necessary ingredient in the crime of murder in the second degree.

When malice is once shown to exist toward the person killed, it is presumed to have continued down to the perpetration of the meditated act, unless there is evidence or some circumstance in the case repelling or overcoming such presumption.

Evidence tending to prove that the prisoner and Tamzen Parsons were found together in Pittsburgh, and of the statements and conduct of the prisoner whilst there, has been given by the prosecution, and also evidence of the arrest of the defendant in this city for some alleged offense, or some indignity to her family after his return to this city.

But, gentlemen, this evidence was not admitted as tending to prove the defendant guilty of bigamy, forgery, adultery, assault and battery, or immorality, and you have no right to entertain it or consider it for any such purpose; nor should it in the least affect the general character of the defendant in your deliberations, serving and accepting so much of it as was called out by the State in cross examination of witnesses who were called in behalf of the prisoner, to testify to his character as a peacable, law-abiding citizen.

That evidence was permitted to be given for the sole purpose of enabling you to judge of the relations between the prisoner

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and Tamzen Parsons, that you may the better understand their relations to each other, and the history of their intimacy, and as affording you the means to judge of the intentions, motives and sentiments of the defendant toward her, as affecting his guilt or innocence of the crime charged against him in this indictment and you are not at liberty to use it for any other conceivable purpose.

The defense of insanity is interposed in behalf of the prisoner, and if this defense is clearly made out, to the satisfaction of the jury, by the weight of the evidence, or, in other words, by a preponderance of the evidence in the case, it is a perfect bar to a conviction for any crime whatever under this indictment.

But in reference to this defense it is met upon the threshold with a legal presumption that the accused is of sound mind, that his mind is not so diseased or alienated as to exonerate him from punishment for the commission of a criminal act. This legal presumption of sanity you are not at liberty to disregard. It is essential to justice and to the safety of society, that you should entertain this presumption of sanity and act upon it, until you become satisfied from the testimony and circumstances of the case that the defendant was of unsound mind at the time of the killing, and therefore not responsible for his conduct.

It is not necessary, however, that insanity be established beyond a reasonable doubt; it is sufficient if it is shown by clear and satisfactory evidence; by a preponderence of the proof that he was in fact insane at the time of the commission of the act.

But it is not sufficient to show that possibly the prisoner's mind was so far diseased or alienated as to render him incapable of committing crime. Nor is it sufficient, if the evidence merely shows that it is probable that his mind was in such a condition; but to make evidence of insanity available as a defense, it must be such as to reasonably satisfy your minds that the defendant was in fact insane at the time of the commission of the act. Nevertheless, evidence of drunk-

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enness, anger, jealousy, morbid conditions and nervous excitement is admissible as affecting the question of intention, deliberation and premeditation.

For the purpose of proving the condition of the defendant's mind at the time of the commission of the act, it is competent for the prisoner to call witnesses who are familiar with his peculiar mental characteristics under the influence of intoxication, and also to call physicians and others, whose professions and associations in life are such as to have made them familiar with the faculties and operations of his mind, and these persons may testify to matters of opinion or science in reference to the probable condition of his mind at the time of the commission of the act.

Such testimony is legitimate, and when used for its true and proper purpose, that of affording you assistance in determining the condition of the prisoner's mind, it may be of the first importance. But after all much of it is frequently merely a matter of opinion, and should be received and acted upon by a jury with great caution, and should there be a great conflict, or manifest and irreconcilable inconsistency in their testimony, or if in your judgment it is not sustained by reason and facts you are not bound to adopt their opinions.

You are not to be intimidated by your homage and respect for the learning and intelligence of professional witnesses, from determining the question of sanity and drunkenness for yourselves, as well as every other question of fact in the case. The question of sanity or insanity, is for you and you only to determine, and the fact that scientific men may regard the accused as sane or insane, drunk or morbid, does not relieve you of the responsibility of deciding for yourselves. It is both your right and duty to hear their evidence, to consider it carefully, and to give it all the credence and influence it may seem to deserve, but the question after all is left to your own good sense and judgment, and you are to determine it according to the preponderance of all the evidence and circumstances of the case.

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This leads to the consideration of the degree or species of insanity or mental misrule and alienation, which absolves a party from legal suit and punishment for crime.

The rule of law, as I understand it to be on this subject, is this: That a man is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense he had capacity and reason sufficient to enable him to distinguish between right and wrong in reference to the particular act he is doing or is about to do, and understands the act and his relation to the party injured. If he has not a knowledge or consciousness that the act he is doing is contrary to the dictates of justice and right, injurious to others and in violation of the dictates of duty, he is not amenable to punishment for his act.

But although his mind may be morbid and laboring under partial insanity, still, if he understands the nature and character of his act and its consequence, and that it is wrong and criminal for him to do it, such partial insanity is not sufficient to exempt him from responsibility.

If it is proved to your satisfaction that the defendant's mind was in a diseased and unsound state, and that for the time being, his mental disease was such, that in reference to this mental act, it overwhelmed his reason, conscience and judgment, and that in committing it he acted from an irresistable and uncontrollable impulse, and not as a voluntary agent, he was not answerable to the law and should be acquitted.

With reference to insanity from drunkenness, the law discriminates between criminal acts which are the immediate results of a fit of drunkenness, and which are committed while the party is yet intoxicated, and such acts are the result of a settled, permanent, or intermittent insanity, which has been remotely produced by previous habits of intemperance.

When the mind has become diseased by a habit of intemperance, and is so far alienated as to be unable to discriminate between right and wrong, and to comprehend the nature

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and consequences of a criminal act, the party is no more amenable to the penalty of the law than if his insanity were the act of God. And so it is if the act was committed during an attack of the delirium tremens, which rendered him insane for the time being, and which delirium was the result of a previous habit of intemperance, or of long continued drunkenness.

But when the crime is committed by a drunken man whilst intoxicated under the influence of drunken frenzy or madness, and who is not insane when sober, his drunkenness and the temporary insanity or madness produced by it is no excuse or palliation whatever. The law will not permit him to screen himself from punishment for his criminal acts by proving his own gross vice and misconduct.

A settled fixed insanity, however caused, is a good defense. Drunkenness is no excuse whatever. The frenzy, passion and madness of voluntary drunkenness is not that species of insanity which excuses crime.

But that settled insanity or delirium, which is caused by previous habits of intemperance or long continued drunkenness, is a good defense, notwithstanding the fact that the party have lucid intervals. But if the act were committed during a sane or lucid interval, the fact that a party is subject to intermittant insanity is no excuse.

One reason for this discrimination is, that men voluntarily get drunk, and sometimes for the very purpose of bracing their nerves and inflaming their passions to the commission of crimes which they have meditated when sober, but which they then lack the nerve, courage or disposition to perpetrate. But no man voluntarily becomes permanently insane, or seeks to bring on a fit of delirium tremens; and if it even were done for the sole purpose of committing violence upon another, the delirium would be more likely to defeat than to accomplish such purpose.

But if a person were made drunk by the machinations of others, without any intention or fault upon his part, and should injure or kill another during the fit of intoxication,

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and whilst his mind was so disordered as to be unable to comcomprehend the nature of his act, or to distinguish between right and wrong, he would not be amenable to punishment.

It is also competent for the defense to prove that the prisoner was drunk at the time of the killing, as leading to show whether the act was done with deliberattion and premeditation.

But if the evidence shows that the purpose to kill was formed before he became drunk, or if he got drunk to brace his nerves and harden his mind for the act of killing, then, however delirious he may have been at the time of the act, it can avail him nothing by way of defense or mitigation, and the drunkenness would not reduce the offense to murder in the second degree. Let me illustrate the idea I wish to convey by showing the application of this principle to another class of cases. A person charged with passing counterfeit bank notes cannot palliate or excuse his crime by showing that he was drunk at the time of passing them. But inasmuch as a knowledge of the base and counterfeit character of the bills passed is a necessary ingredient of the crime of uttering and publishing counterfeit bank bills, he may prove that he was drunk as tending to show that he did not possess this guilty knowledge of their true character. As it requires some degree of skill and judgment to determine whether a bill is genuine or counterfeit, and as experience teaches that one whose senses are steeped in intoxicating liquors is not so capable of exercising the skill and judgment as the same person would be when sober, it is proper that his condition as to his intoxication should be shown, that the jury may be better able to judge of his capacity to distinguish the true character of the bills he had passed.

So in this case, if the prisoner is guilty of murder in either degree, drunkenness is no excuse or mitigation of the crime, but evidence of his condition as to intoxication is received as tending to show of what crime he is guilty.

In all cases where it becomes material to know, as it does in this case, whether the act of killing was done of deliberate

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and premeditated malice, which constitutes murder in the first degree, or whether it was done maliciously, but without deliberation and premeditation, making it murder in the first degree, the fact of drunkenness may be proved.

The experience of mankind proves that as a general rule a drunken man acts with less judgment and circumspection, and more from sudden impulse and passion, than he would when sober, and as deliberation and premeditation are acts of the mind requiring some degree of sedateness and reflection, it is competent for the defendant to show what was his condition as to intoxication, as tending to prove that at the time of the commission of the act he was incapable of deliberation and premeditation, or if he was capable of them, that in consequence of drunkenness he was less likely to have meditated and deliberated upon the act than he would have been if sober.

But if you should find, from the evidence in the case, that the defendant meditated the act when sober; that he prepared means and sought opportunities for its commission; that he determined that in case he should not be able to induce her to live with him, or submit herself to his pleasure, he would take her life, and that he finally killed her in pursuance of that purpose, such killing would be murder in the first degree, however insane or frenzied he may have been at the time from drunkenness.

In passing upon the subject of deliberation and premeditation, you should carefully consider the means and the manner of the killing, the demeanor and conduct of the defendant at the time and immediately subsequent to the act, as well as that tending to show his condition before the act.

The defendant has offered evidence tending to show insanity in one or more of his lineal ancestors, and that his own mind has been frequently affected in a singular and extraordinary manner as a consequence of intemperance. Upon this subject you have as well the evidence of witnesses here in court, as the statements of the defendant as set forth in the affidavit made for the continuance of the case, which are

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to be received and treated by you in all respects as if Drs. Patterson and Kemble had appeared in open court and testified to those statements before you; that while his gait was unaffected and his physical powers apparently unimpaired, his reason was clouded and destroyed to such a degree that it became necessary to put him under restraint to prevent him doing deadly harm to himself and his friends; that such condition was not what is usually known as delirium tremens, but that it was a peculiar temporary condition, which some of the witnesses cannot ascribe wholly to intoxication. This evidence, it is claimed, in connection with evidence tending to prove that the defendant was intoxicated and delirious from anger, jealousy and disappointment at the time of the commission of the act, exonerates him from responsibility before the law.

If, gentlemen of the jury, you should find from the evidence that this temporary condition did not in fact exist, but that it was the direct result and effect of voluntary drunkenness, intensified by some peculiar taint or morbid condition of the defendant's mind or temperament, not amounting to insanity or delirium until roused to activity by the excessive use of ardent spirits, and that he knew that intoxication would produce this mental condition, and, knowing it, became drunk and committed the act under drunken frenzy, such temporary madness is no excuse for the crime, although it may have been aggravated by such peculiarities of temperament and morbid mental condition.

But this evidence, like evidence of mere drunkenness, is admissible as affecting the question of intention, deliberation and premeditation.

The law in its humanity makes all proper allowance for the infirmities of our weak human nature, but it cannot and does not bend to suit all the morbid conditions, tempers and idiosyncrasies of individual citizens. It rather seeks to control our tendencies to evil, so that they shall not endanger the peace and safety of society—it is a rule of conduct, which we are not at liberty to disregard. In the language of an

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eminent judge, "we are in a court of law, not in a school of science; our action must therefore be governed by legal adjudication, and not by the theories and speculations of the schools.

The State has offered evidence of statements and declarations alleged to have been made by the accused, before the death of Tamzen Parsons, as well as the alleged confessions of the prisoner after she was killed. The evidence is competent as tending to prove deliberate and premeditated malice, and tending to rebut the claim of the defense that the prisoner at the bar was incapacitated at the time of the commission of the act to deliberate and meditate upon the deed. But it is my duty to admonish you that evidence of threats, or declarations indicating malice, and evidence of verbal confessions of guilt, are to be received and acted upon with great caution, for, besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the accused to express his own meaning and the infirmity of the human memory, it is to be remembered that they are frequently made without reflection, whilst the mind is laboring under depression, agitation or intoxication. It therefore becomes your duty to scrutinize them closely, examine well the circumstances under which they were uttered, and the appearance, manner and apparent intelligence, candor and consistency of the witnesses who testify to them. But if you find, in the exercise of such care and scrutiny, that declarations or threats indicating malice and a purpose to take life have been deliberately made, or confessions of guilt after the act, you should give them all proper weight and influence in your deliberations, for whilst this kind of evidence is to be received with careful scrutiny, it is at the same time recognized as one of the most effectual means of proof known to the criminal law.

But the value of such deliberations and confessions depends upon the supposition that they are deliberately and voluntarily made, and upon the presumption that a rational being will not make admissions prejudicial to his interests

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and safety unless compelled to it by the promptings of truth and conscience.

The prisoner has called witnesses for the purpose of proving good character. In this case it was competent for the defendant to call witnesses to speak of his character as a peaceable, law-abiding citizen. It is sometimes argued that the evidence of good character is only to be considered by the jury in doubtful cases, and that its only office is to resolve doubts in favor of the innocence of the accused. This construction of the law would render such evidence of but little utility in most cases. It is the duty of all criminal courts to charge the jury that the prosecution must prove guilt beyond a reasonable doubt, and that if they have a reasonable doubt of the defendant's guilt they should resolve such doubt in favor of innocence. So that in a really doubtful case the defendant needs no evidence of good character, as he is entitled to a verdict of acquittal without. But in my judgment the effect of evidence of good character should not be confined to such narrow limits. It is competent to offer it for the purpose of rendering the guilt of the accused doubtful under circumstances when it might not be considered doubtful in the absence of such proof.

There may be cases in which the evidence of guilt is so conclusive and overwhelming that no evidence of good character can make it doubtful. But there may be other cases in which the evidence given against a person without character, would leave a conviction in which the proof of a high and unblemished character might properly produce a reasonable doubt of guilt.

The general office of such evidence is to disprove guilt, but it is also admissible in a case of murder to aid the jury in ascertaining the probable grade of the offense, to-wit: whether the killing constitutes murder in the first or second degree.

You will then consider the evidence touching the defendant's character, recall what the witnesses said of it, as well upon cross-examination as upon the examination in chief, and if you are satisfied from it that the defendant had previously

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and down to the commission of this act been a peaceable, law-abiding man, of a mild and pacific character, one not likely to contemplate the commission of murder, it may aid you in determining whether the killing was done of deliberate and premeditated malice, making it murder in the first degree, or whether it was done purposely and maliciously without premeditation and deliberation, making it murder in the second degree, or whether it was committed at a time when the defendant was so insane as to be incapable of comprehending the nature and consequences of his act, and not amenable to the penalty of the law.

The purpose for which you are empanneled is to ascertain, and by your verdict declare the truth in reference to the issue joined between the State of Ohio and the prisoner at the bar.

Your verdict is to be made up from the law and evidence as they have been given you here in court. You are to know nothing and care nothing for popular sentiment, prejudice or clamor, if they exist. You are lifted above outside pressure, if any there be, and set apart from it. It must never invade the seats you occupy. They are sacred to truth and justice. This temple is dedicated to justice, and we are unworthy the seats we occupy if we conscientiously permit sympathy, prejudice, or fear of public sentiment, to exercise the slightest control over our judgment or conduct.

It is proper and right in view of the consequences to the prisoner, of a verdict of guilty of murder in the first degree, that you should most carefully, patiently and impartially consider the evidence you have heard, and see to it that your verdict shall correspond with and be justified by the proofs; but no considerations of mercy, and no weeak shrinking from responsibility, must be permitted to repress or stifle the honest convictions of your judgment.

Upon the other hand, no zeal for the public service, or the safety or well being of society should influence you to bring in a verdict of guilty against the defendant of murder in the first degree, unless you are convinced beyond a reason-

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able doubt, that the killing was done by the defendant purposely, and of deliberate and premeditated malice.

And so in reference to a conviction of murder in the second degree, you should not consent to a verdict of guilty unless you are satisfied beyond a reasonable doubt that the killing was done purposely and maliciously, but without premeditation and deliberation. Nor can you convict of manslaughter until the State has proved beyond a reasonable doubt the intentional killing without malice upon a sudden quarrel, or that he unintentionally killed her while engaged in the commission of some unlawful act.

If you find the defendant guilty of murder in the first degree, your verdict should be, "We find the defendant guilty of murder in the first degree." If you should find him guilty of murder in the second degree, your verdict should be, "We find him guilty of murder in the second degree only."

If you find him guilty of manslaughter, your verdict should be, "We find the defendant guilty of manslaughter only."

If you find him not guilty by reason of a failure of proof on the part of the State, your verdict should be, "Not guilty."

But if you find the defendant was insane at the time of the commission of the act, and acquit him for that reason alone, your verdict should be, "We find that the defendant was insane at the time of the commission of the act, and therefore find him not guilty."

THE VERDICT AND SENTENCE.

The *Jury* at once retired and the COURT adjourned for four hours. At two o'clock the COURT resumed its sittings, a great crowd filling the room. The *Prisoner* had been brought in with irons on his wrists. At three o'clock the *Jury* was led in by the Sheriff and the roll was called.

JUDGE COFFENBERRY. Gentlemen of the Jury, have you agreed upon your verdict?

The Foreman. We have.

JUDGE COFFENBERRY. What verdict do you return?

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The Foreman. Guilty of Murder in the First Degree.

Mr. Castle made a motion for a new trial, which was filed, and afterwards overruled.

December 30.

The announcement that Dr. Hughes would be sentenced today drew an immense crowd to the court room. Long before the hour named the spacious room was densely packed. The spectators clambered on the backs of seats and on windows to gain a view of the proceedings. A few minutes before nine o'clock the prisoner was brought into court. He looked well, was dressed neatly and presented a very gentlemanly appearance. His manner was cool, collected and deliberate. His overcoat and the manacles having been removed, he stood several moments conversing with his counsel. At nine o'clock Judge Coffenberry commanded the Sheriff to open court. The prisoner was conducted to a chair near the Sheriff's stand, and sat down among his counsel.

Prosecuting Attorney *Palmer* mover the COURT that the sentence of the law be pronounced in the case of the State of Ohio against John W. Hughes.

The COURT asked counsel for the defendant if there were any objections.

Mr. Castle. None, Your Honor.

JUDGE COFFENBERRY. John W. Hughes, have you anything to say why the sentence of the law should not be passed against you?

The *Prisoner* said he would like to make a statement, and to read the following paper:

Your Honor, Ladies and Gentlemen: I have no reason to give against the sentence of the extreme penalty of the law being passed upon me; for though it chills my life's blood to anticipate the fearful moments of such an ignominious execution, yet when I recall the overwhelming testimony of my folly, the powerful evidence of my crime, with the consciousness of my guilt which has accumulated in weightiest crimination during the trying ordeal of my trial, sober, sensible, and truthful as I now am, I must admit the verdict of the jury, just; the sentence of the law, inevitable. To your Honor I offer most sincere thanks for the true magnanimity you have evinced in procuring me counsel, and for the unbiased deliberation

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and attention you have devoted to the trying requirements of such a long and tedious investigation as mine has been. And I wish you at your earliest convenience to assure the gentlemen of the jury, who so earnestly and faithfully sat day after day to listen and deliberate over the fearful amount of testimony and protracted arguments brought before them, that instead, as some may suppose, I have prejudiced myself against them, I respect them for their impartiality, and honor them for the faithfulness with which they have done their duty. Sheriff Nicola is a man of tender feelings, yet very strict in the discharge of his duty. While furthering the ends of justice he does not forget the requirements of the prisoner. Impartial, just, not tyrannical, he tempers his authority with mercy. His gentlemanly demeanor gains him the deserved respect of all. I am much indebted to him for the kindness, courtesy and forbearance which he has shown me during my incarceration. To Mr. Palmer and Mr. Slade, who have prosecuted the case with such earnestness, I must say, that while I admire the ability and talent with which they have portrayed the thrilling incidents of the fearful drama, I cannot but acknowledge that they also have done the duty which an incensed community required of them. To Mr. Castle and Mr. Knight, who have so ably defended me, I must now publicly tender the heartfelt acknowledgments of unbounded gratitude for the untiring zeal with which they exerted themselves, day and night for weeks, to search out every mitigation for my crime, and for the touching eloquence with which they brought the resources of their acknowledged talent, learning and ability, to bear in every conceivable form, to rebut if possible the crushing weight of the prosecution they contended with, and if possible to avert the awful fate which now awaits me. And Mr. Kerruish, I cannot find expression to justify your claims on my gratitude—while those I thought to be my friends joined in the well deserved denunciations, wildly and madly thrown on me, the perpetrator of such an outrage—even then you did not forsake me —for you know my failings. In this as in all my troubles you have been my truest friend. You know my domestic difficulties—you advised me. Oh! that I had but heeded your counsel, this fearful fate would never have befallen me. If the ties of nearest kindred bound us, you could have done no more. You have indeed been a faithful brother. May God bless you.

If I am permitted, I wish to give a brief sketch of the unhappy circumstances of my past life since the time an unfortunate matrimonial alliance caused me to seek relief in visiting foreign lands and finally drove me to enlist in the army. While in the army I passed through the various positions from a private up to orderly sergeant, and then, having passed an examination, I received a commission as surgeon. I returned to my home after a long absence, expecting to find a welcome and a happy home. But such a scene as met me there was enough to drive the most callous person in the world to forsake such a home. I rushed from the house, and formed a determination never to return. I knew not which way I was going. I drove out to the country. I attended a party, and

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while there some one told me that Harry Parsons, a cousin of Tamzen Parsons was present and very anxious to see me. I had been drinking very heavily that day. I drove to Mr. Parsons' house that night, but what occurred there I do not know. I awoke in the morning filled with shame and remorse, for I was awakened by a tender hand. I asked, "Who are you?" and she told me it was Tamzen. She said, "Doctor, why do you drink so?" I saw in that look sympathy and pity that filled my whole soul, and I saw my feeling was reciprocated. While in that condition a wild mad love took possession of me, such an one as I had never experienced before, an illicit love, one which led to an illicit intercourse, and which love I have until this day cherished.

But it was not all passion. Love destroys all baser passion. I went to Pittsburgh, and the next day Tamzen asked me to marry her, and, insane as I was, I did so. I went to the Mayor of the city, and the principal minister of the city married us, and it was my intention to seek some retired spot, and settle down, and live in quiet. And the next day when I was making arrangements to find a place to reside, I was arrested and brought before the Mayor, on a charge of bigamy. I made an offer to Mr. Haynes, which, had he accepted it, would have prevented all exposure and the unfortunate events that have since happened. But Mr. Haynes, for some reason which he best knows, refused; whether it was from a virtuous determination to vindicate the character of his family, I do not know. I was tried. I did not bring one word of testimony for my defense in that trial. I was brought in guilty of adultery and bigamy. Immediately after my trial Tamzen came to the jail, and there occurred a scene I shall never forget. But I parted with her forever, as I then supposed. After she left I wrote her a letter explaining the whole matter and told her it was best that we should not meet again.

Meanwhile I was kept in jail till March, having been sentenced for a year. Meanwhile a reconciliation had taken place between me and my wife, and I was pardoned. I returned to this city and opened an office on Ontario street. My former patrons returned to me. I was doing well. I practiced faithfully, and during all my practice I have never betrayed the confidence of my profession.

My means were so limited I could not furnish a home, and I obtained a little furniture and fitted up a suite of rooms. In the midst of these preparations I received information that my wife's passage had been paid to return to the Isle of Man. It has been said that I sent her. But I did not. I thought of returning with her. However, I had not the means necessary, and concluded I would not go with her. My wife left, and in all this there was no thought of Tamzen Parsons till nearly a week after my wife had gone. Then I received a letter from Tamzen, reproaching me for my neglect of her, and asking me to come and see her since there was now no obstacle in the way. While considering the matter, I received another letter from Tamzen. I still fought against it. Then at that instant an individual of my acquaintance

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came in to see me. It was Mr. Campbell, who had been an old companion of mine in the Crimean war. He asked me to take a drink with him, and I indulged in that vice which has been my ruin. In the morning I went with him to Newburgh, and while there we drank heavily. The events of the night of July 24th, when I entered Mr. Parsons' house, have been fully revealed. But Tamzen Parsons never said to me she did not want anything to do with me; that I "had deceived her once, and should never do it again." On the contrary, she said she would go with me to the end of the world. It was just after this interview that I met Dr. Wray, and had some conversation with him, and I might have made some such assertion as he testified that I made. But if I said it, it was only a ruse. The next day I went to the Plank Road House, and what happened there, or what I said, I don't know. I returned to the city on the following day, and was arrested for an assault and battery by Tamzen's father. It was not till I saw Tamzen and talked over the circumstances with her that I thought she had been playing false with me, and the next day Mr. Parsons, the druggist, went with me and we settled the matter up. The next night was a restless one for me. I had been drinking a good deal, and what dreadful determination might have entered my mind I do not know.

In the joy I felt because a settlement had been effected, I might have made such threats as I am said to have made. But I came to the city fully determined never again to have anything to do with Tamzen Parsons. I devoted myself to my business. On the evening of the eighth of August, having been busily employed in my office all day, and being very tired, I met my friend Russell in a saloon and we drank several times, when I proposed to go home. On account of some quarrel he said he would not go home, and he proposed to go to another saloon and drink; and we went from place to place, and drank, and I became very much intoxicated, and Russell proposed a ride to Rocky River. Went around town on a very unholy mission, and visited many places, but did not succeed in getting any companion, and on going to my room Russell asked to see my pistol. But there was no thought at that time of going to Bedford, nor any thought of the murder of any human being. It was not till we went to Newburgh that any thought entered my mind of Bedford. Nor then did I think of such a dreadful tragedy as this would occur. We went to Bedford, and in the morning I wished to return home, but Russell then taunted me bitterly about the girl, and I told the driver to take the right hand road and I went to Mr. Parsons' house but did not find the family at home. After leaving the house we met Tamzen with her mother on the road. The old lady was very angry, but Tamzen never uttered an unkind word.

We were both very drunk from the effects of ale and whiskey, and we became mad and reckless. We returned to go the Twelve Mile Lock and Rocky River, and on the way Mrs. Krum rushed out of the house and told us Tamzen Parsons had gone to town to have me arrested. Arrived at the village, the old man Parsons happened

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to pass with the wagon, and I got out of the carriage to speak with him; and at that moment Tamzen came toward the carriage, and I rushed after her and asked where she was going. I don't know what reply she made. It has been said here that I went there with the intention of committing the dreadful deed, but that is not true. From the moment she passed the carriage, I do not remember the particulars of that dreadful tragedy. It must have been a legion of devils had taken hold of me, for it is contrary to my nature to be cruel. There never was in all my life a feeling of revenge to take the life of any person.

From that moment I don't know what occurred till I found myself in jail. When I learned what I had done, if ever a man felt the torments of hell, I did. For two or three weeks, and while the effects of intoxication were passing off, when I think what I suffered, I wonder I have any reason left. It was then, when I thought there was neither hope in heaven or on earth for me, I threw my all upon my Maker; and it was then that I received assurance that to all such sinners as I had been, there was mercy. Earnestly I struggled, and I received that assurance. It has been said that I am a "man of iron." But that power of self-command has been given me from some greater source than I have within me.

I am resigned. I have reviewed the whole matter and I know that I deserve death. But I never deliberated or premeditated the murder of Tamzen Parsons. Poor girl! My worst fault was I loved her too well. But I must submit. I deserve it. I hope that this may be an example to all to keep free from the terrible vice, the curse that has ruined the families and destroyed the hearts of millions. I hope, indeed, that the example may be a lasting one.

I feel prepared. Sometimes an hour comes when I remember and think of the old church yard at home, and its long range of tombstones where my ancestors sleep. When I think of the annals of my little native island, there are many recollections of the good services of my kindred. When I think of these things I sometimes think I would wish to be saved from this fearful disgrace; and my poor boy—this is an awful legacy to leave him, an awful legacy. For that reason, and for that reason only, I would wish this cup might pass. But God's will be done. I am resigned.

JUDGE COFFENBERRY. John W. Hughes, you stand convicted of the wilful, deliberate and premeditated murder of Tamzen Parsons, in the village of Bedford, on the ninth day of August last. You were tried by an honest jury, and defended by the ablest counsel whose services could be procured for you by the Court. Your counsel labored faithfully in your behalf, literally exhausting themselves in the effort to secure your acquittal, or to reduce your offense to murder in the second degree. But your conduct was indefensible, your

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case was utterly hopeless. The evidences of deliberate and premeditated malice were such as to close every avenue of escape from a conviction for murder in the first degree. Your counsel labored without hope, and, although many pity you, your best friends must acknowledge the righteousness of that verdict which condemned you to expiate your fearful crime upon the scaffold. I would not discourage any effort your friends may make to secure a commutation of your sentence, but in view of its apparent hopelessness, I do most earnestly entreat you to make your peace with God.

It is the sentence of the law, that you, John W. Hughes, be taken from the bar of this court to the jail of Cuyahoga County, that you be there safely kept until the time of execution, and that on the ninth day of February, in the year of our Lord one thousand eight hundred and sixty-six, between the hours of ten o'clock of the forenoon and two o'clock of the afternoon of said ninth day of February, you be, by the Sheriff of Cuyahoga County, hanged by the neck until you are dead.

THE EXECUTION.

A petition was afterwards presented to Governor Cox asking that the sentence be commuted to life imprisonment, on the grounds of the strong evidence of insanity presented at the trial and that the prisoner had served the country faithfully as surgeon in the Civil War. But the Governor refused to interfere. Hughes passed the time in prison reading religious books, writing verses,[4] and letters, and receiving the

[4] One of his poems was subsequently published, as follows:

DR. HUGHES TO HIS FRIENDS.

Of trifles the world is composed,
  Like minutes that grow into years;
So friendship, in pity reposed,
  Allays our most troublesome fears.
Away from all comforts at home,
  From all the desires of my heart,
Not building on pleasures to come,
  With feelings of hope I must part.

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calls of friends. He conducted himself with such perfect propriety in jail, that he received many privileges which he could not otherwise have enjoyed. He frequently addressed his fellow prisoners, and they all held him in the highest respect.

A few days before the day set for his execution he swallowed a dose of morphine, which had been smuggled into him by some of his friends. It was, however, an overdose. A fit of violent vomiting was induced, by which the drug was expelled. His wrists were then manacled, and his arms tied behind him, as a preventive of further self destruction.

On February 9th, at half past twelve, he was led to the scaffold by Sheriff Nicola and his deputies and attended by the Rev. J. A. Thome, when he made the following speech to the spectators:

My Friends: This is indeed a sad fate. I would wish you to remember it, not as an example, but as the acme of human justice. Do you suppose that I think for a moment that the law of man is just in taking my life? No. Men's law is but the law of a murderer like me, who made that law, Moses. And who was he? The great-

A moment of phrenzy, unthought,
A second of madness defined—
What change in the creature is wrought.
The soul in such horror entwined!
To review the dear scenes of the past,
Is but a renewal of strife
To a mind so constant o'ercast
In weighing the issues of life.
Grateful thanks is all I can give
For mercies which others deny.
Oh! that I were destined to live
To recompense you bye and bye.
Your efforts are sadly in vain;
The plea was a day or two late.
Remonstrance its malice to rain
Had hopelessly finished my fate.
Yet your prayers shall be to my death
Like the hidden treasure of leaven,
My spirit to raise by their breath
To waft it to Jesus in heaven.
I pray, and I never forget
To ask of my best friend above,
For blessings on those in whose debt
I am bound by their pitying love.

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est murderer we ever heard of. Look in the second chapted of Numbers and you will find some examples of murders with premeditation, and purpose, and deliberation, in Moses taking the life of an Egyptian, and then he comes and proclaims himself a priest, prophet and king, and by his law I suffer, and every other murderer. I would admit that life is dear to all, and ought to be protected; but if a man takes the life of another, it is the greatest madness to retaliate upon him in this manner. If the people of Bedford had taken my life at the time I committed that deed, I would have said that is nature's law and comes from the heart; but when after six months of preparation and deliberation over the matter by those in official position, I say then they murder—they murder, gentlemen! What is the advantage to society to take my life, or any man's, in comparison to employing him for the rest of his days in some useful employment? and if J. W. Hughes has any ability for anything, then keep him in confinement and employ him in useful labor and make a good man of him, and turn him out a reformed man, and give him an opportunity to atone for all the evil he may have done society.

This death penalty is ridiculous, and if you will consider over it you will find it is wrong. One life is as good as another. What advantage is it to take my life? None! It is not an example to deter others from crime. Did I remember this in that wild fit of drunkenness, did I remember pointing that pistol? No, I don't remember it this hour.

Yet it is the law and we must abide by it—the law of man but not of God. I am convinced of it. For six months I have had every sect of religion to visit me, and they came in to tell me which is the way to heaven. Do I believe them? No! What is man's way to heaven? The same as his way on earth. Do unto others as we wish to be done to. I have thought it all over fully and conscientiously and have come to the conclusion that my life in another world will be the same as in this with the exception that there all will be pure. I have considered this over for six months, and intended to give my own life up to my exit out of this world. I intended to take my own life, but did not succeed. I took enough to take me out of the world, but it is the great Spirit's will that I should not, and I have not done it. (Turning to the sheriff.) My brother! Gentlemen, this man has treated me like a brother from the first to the last, and Mr. Thome, my spiritual adviser, is my dearest friend. I respect him as my father. I never had a father. Gentlemen, I never knew what a father was. He is my father, and I love him as a father, and feel my whole heart borne up to him as a father. And if I could, I would thank him for all his principles and doctrines. But his are not my ideas. Since I have been in this prison I have had every sect of religion visit me. You cannot tell me of one that I have not had to talk to me. I argued with them on all their opinions and learned all the secrets of their hearts on the matters of salvation, and dare I deny them? No. I have talked with my spiritual adviser not because I believe as he does. I love him as a father, but at the same time my mind is not his

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mind. I don't believe today—God forgive me if I say anything wrong—that Jesus Christ was the son of God. My anatomical knowledge and everything says that the immaculate conception is not right. It is against nature and philosophy. It is against human nature. I believe that no purer spirit, no better man ever lived on earth than Jesus Christ and that in the spirit world he is next to the great Creator himself—as far as we know. At the same time I will tell my experience, tell what I know in my own soul. I know from experience that there is communication with those who have departed from this life. I am today about to suffer the extreme penalty of the law, but at the same time am sure I shall be with you after the execution as I am now. I don't believe in spiritualism particularly, because I have never seen any mediums, nor have I ever seen the indications of this. At the same time every creature, I don't care who he is, will know that at some time in his life he has been influenced by some peculiar idea or sentiment he never would have thought of himself. So far as I know, I believe the doctrines of spiritualism. I thank my spiritual adviser who has spoken to me in relation to heaven and the sufferings of Jesus Christ and I believe in him as a mediator, but I don't believe in his miraculous birth. I believe in him as being the purest man, the purest spirit that ever ascended on high. And I have taken the advice and counsel of Mr. Thome as a friend and father. He came here in a moral way to reform every one, and he laid such a foundation in my name that I have finally taken the belief I now have given. If I thought for a moment that I was going to brimstone and hell and that kind of thing for eternity, I should fear, or did I think I was going to heaven and sit there for all eternity, and do nothing but sing, I should be a fool. They can kill this body but they cannot kill this soul. This soul soars aloft to the great Being that gave it being. It has its work to do and I believe this moment that I shall be as much here after this execution as now before it, I believe I am here.

I will say just in conclusion, the Sheriff has been a brother to me. The jailor, Mr. Smith, has been a father to me. If I were his own son he could not have done more than he has done for me. God bless him. Good bye Mr. Smith.

He commenced his speech at 12:45 and closed at one o'clock. The Sheriff then informed him that it was his painful duty to inflict on him the extreme penalty of the law. Deputy Sheriff Ridgway fastened the irons on his wrists, and, with the aid of the turnkeys pinioned his elbows and knees. Hughes tore off his collar and coat, and tossed them below, with a smile. During the proceeding, he said to the spectators, "Good-bye." And again he exclaimed, "O Grave! where is thy victory? and O Death! where is thy sting?"

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Before the rope was adjusted he called: "Mr. Kerruish! Good-bye!"[5] The rope was then put around his neck and the black cap drawn over his face. The Sheriff touched the arm of the lever, and the trap instantly fell at seven minutes past one o'clock. The neck was instantaneously broken. There was no indication of pain, and not a perceptible tremor. The body swayed to and fro, and did not come to rest until the pulse had ceased to throb.[6]

[5] See *ante*, p. 718.

[6] The following farewell letter to his wife and child was written a few days before his execution:

County Jail, Cleveland, Ohio, U. S. A., February 5, 1866.—My Dearest Wife and Son: I have received yours of the fourth of January, and as my time is drawing to a close, I must be brief. I have already sent you the whole particulars of my trial. By all accounts there never was a trial in this section of the country that created so much excitement and interest as my unfortunate one did. The whole community was moved. Crowds attended the whole proceedings; and, indeed, it required (as the papers called me) a man of iron, to bear the staring of the crowd—the self-debasing evidence of my own folly and crime—day after day. But enough. I am thankful I did behave as ably as any man ever did under such fearful circumstances. I was found guilty, and must give my life as the penalty. Since the sentence there has been a total change of feeling—all in my favor. The trial showed the whole matter (as criminal as it was) in some degree palliating, so that public sympathy was directed to save, instead of take, my life. Judge Ranney and Mr. Kerruish drew up a petition, founded on fact, in reference to surroundings, influences, etc., which propelled the insane act. Applications were immediately made by Professor Thayer, Mr. Black, his son Willie, Russell, Mrs. Dr. Halliwell, Mrs. Col. Crane, and fifteen others for copies and in about ten days there were over two thousand signatures of the most influential citizens, male and female. The clergy, physicians and the ladies had separate appeals. Every hope was entertained of a commutation. Mr. Thome, formerly a professor in Oberlin College, is my spiritual adviser, and most sincere friend. He, being an intimate friend of the Governor, was directed to convey the public request, which he did, and, as I have every reason to believe, plead for me as a father for a son. He started for Columbus a week ago today. After a long consultation, the Governor said he would be obliged to consider the matter for a few days. The professor returned in great hopes; but alas! only to be thwarted.

Joe Haines and his Bedford friends hired Palmer, the prosecutor, to draw up a remonstrance, which he did, privately. He then proceeded to Columbus, several days before Mr. Thome was ready, and

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so biased the Governor's mind that my fate was sealed. There is a great indignation against those interested in the remonstrance. I have more friends today than I ever had, as you will see from the enclosed notes from sympathizing friends. I have written a poem on the "Evils of Intemperance," which has been published in all the papers here, and is considered somewhat of a literary curiosity—giving as it does, my opinions of the administration of justice in this State, as also the folly of the death penalty. There is so much truth in it that some are offended; but those few conscientious ones are much impressed by the argument. Such is the law, however, and I must abide by it. On Friday next, the 9th of February, my life will be sacrificed for the one gone. Only four days from eternity! It is indeed fearful to anticipate the dreadful change from life to death, yet I have had many warnings to abstain from intoxication. I have made many resolves, only to return to the dreadful vice that has driven me to commit the act, and give you so much sorrow and misery. Earnestly and constantly have I prayed for forgiveness by the Father of Spirits through the mediation of our blessed Saviour.

It is not for the poor pleasures of this transient dwelling place that I have wished to live. Oh no! they are all vanity. I wished, had it been the Father's will, to live to atone, by being a good and useful servant of His, all my days; and, above all, if ever restored to you again, to make up for my neglect to you, by being the best of husbands; to live with you; a good example and a true parent to my boy. But He knows best, He works all things for the best. If I was imprisoned for life, the distance would only be increased. I go home, soon to be forgotten by the world. The protector of the fatherless and the widow will provide for you here, and bring us all together around His throne in peace and joy, to worship and to serve Him evermore. And now let me give you my best advice: A life for a life is the decree. When mine is given the debt is paid. In that country the public are not acquainted with, and as a general rule, are too superstitious to weigh the extenuating circumstances of my sad case. The consequence—the disgrace will constantly be alluded to and by the too many ignorant will be a constant source of humiliating remembrance to hurt your feelings. Here, on the contrary, the whole people sympathize with you already, and after the penalty of crime is disbursed, they will do all to help you. Americans have been my best friends, they are too forgiving to let you suffer for what I have done; too hospitable to see you unprotected. Several have already promised to assist you. The Rev. Mr. Thome has given me his worthy care for Johnny, and he is a man of his word. From all I have heard and know of him, there is not another man on earth I would sooner leave the charge of my son to in preference to him. He will be a better guardian than I ever could be and having been a professor of one of our celebrated colleges, he, above all others, is able to train him up in the way he should go; and as a servant of God himself, will bring up my dear boy in the nurture and admonition of the Lord, to follow

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the example of our Saviour, which is my most anxious prayer. Mr. Cubbon, his two daughters, and Eddy, were to see me today. He says (and you have enjoyed it before), that while he has a home you are welcome to it. Others, too, have said the same. Therefore, I beg you to lose no time, to mortgage or sell the cottages—they are of no use to you—and come, come to dear ones, right to this free noble country. You will be protected and provided for, and Johnny may be an honor to it, and with such an opportunity as he is here offered, may, by his virtues wipe out the stain which his unfortunate father's crime has given to the family. Come, then, at once. You will be near my remains, and, if the Great Father of Spirits allows those of the departed to visit those below, I will be near you.

My dear wife! you say that you forgive me, and that your heart still warms to me. That has been a great plea to God for His forgiveness. I feel that He has forgiven me, and that He will bless you both. Therefore, do not despair. Put your constant trust in Him. Be resigned, be sober, virtuous, cheerful in the performance of the duties He will give you to perform, and He will never forsake you.

JOHN W. HUGHES.

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THE TRIAL OF ALFRED S. PELL FOR ASSAULT AND BATTERY, NEW YORK CITY, 1818

THE NARRATIVE.

A New York gentleman and his wife stopped one evening at a public garden where they sat down at a table and ordered refreshments. When the waiter brought them, he likewise brought a lamp, which the customer told him to take back. He returned with it and the proprietor, who informed him that it was a rule of the garden that a light should be kept up when strangers were in the garden. This made the customer wroth; he abused the proprietor, telling him that he was a gentleman of consequence and that the lady was his wife, and he ended by throwing the beer in his face. Brought before the Court for assault and battery, he pleaded that the proposal of the proprietor was an insult; that such a regulation was unknown anywhere else. But the Court decided that it was a proper regulation, and even if not, it was not a justification for the assault.

THE TRIAL.[1]

In the Court of General Sessions, New York City, September, 1818.

HON. CADWALLADER D. COLDEN,[2] *Mayor.*
ANTHONY UNDERHILL, JOHN MORRIS, } *Aldermen.*

August 3.

The defendant was indicted for an assault and battery committed on James Heaton on June 15, 1818.

Pierre C. Van Wyck, District Attorney, for the People.

Mr. Anthon,[3] for the Defendant.

[1] *Bibliography*—New York City Hall Recorder, 1 Am. St. Tr. 60.
[2] See 1 Am. St. Tr. 4.
[3] ANTHON, John (1784-1863). Born in Detroit, Mich. Graduated Columbia Coll. 1801. A leader of the New York Bar from

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THE WITNESS.

James Heaton. Am keeper of a public garden at No. 316 Broadway. On the evening of June fifteen, by reason of a heavy rain during the day, the garden was not open, nor lighted up. It was a regulation which I had adopted ever since I kept the garden, to have it lighted in the evening whenever company was admitted. I considered the rule reasonable and proper; for, among some of the many strangers of both sexes resorting there, the want of such precaution might have invited acts which would have had a tendency to bring discredit on my establishment. About eleven o'clock in the evening, defendant, in company with a woman, came through the house into the garden, and called for some beer, which was brought by my servant; on ascertaining that a man and woman were in the garden, I sent a light by the servant to be placed in the usual place near them. Defendant sent back the servant with the light; I again sent the light, which was again sent back. I then took the light myself and carried it to defendant and his companion, and informed them of the regulation. He replied with abruptness, that neither myself nor his light was wanted; that the woman was his wife, and that he was a gentleman of consequence; I insisted that, as they were strangers to me, the light should be kept in the garden, in pursuance of the rule, which I endeavoured to convince him was reasonable and proper. But after bestowing abusing epithets on me, he cast the glass with its contents of beer at me—the liquor wet me, but the glass did not touch me. Afterwards, defendant made a pass at me with an umbrella and threatened to run me through; but the thrust was parred off by a bystander. The watch was called, and defendant sent to the watch-house.

The defense was that, as defendant was in a public garden with his wife, Heaton was guilty of insult and impertinence towards them by requiring the light to be kept there contrary to their wishes, in pursuance of a pretended regulation which no other keeper of a public garden in this city had adopted; the counsel for the defendant called on witnesses, stated to be keepers of public gardens, to prove that no such regulation existed among them.

The COURT rejected the evidence offered.

COLDEN, Mayor (to the jury). The keeper of a public house and of a public garden are invested with equal rights; and

1820 to his death. Author of numerous law books and founder of the New York Law Institute. Brother of Dr. Charles Anthon the classical scholar.

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in my opinion the prosecutor had a right, and it was his duty, to establish such regulations as were calculated to prevent acts of disorder and licentiousness; for it would be manifestly unjust and inconsistent, for this Court to punish the keepers of public places of amusement or entertainment, for the occurrence of such acts in their establishments, and at the same time decide against their right of preventing disorder. Heaton, on this occasion, required nothing unreasonable. Defendant was an utter stranger, whom the proprietor could not be presumed to know as a man of consequence; and he was bound to submit to a regulation, salutary in itself, and which ought to be, if it had not been, adopted by the keeper of every public garden in this city.[4] But suppose that Heaton acted entirely wrong in requiring the light to be placed in the garden; still, this could afford no justification to the defendant for the assault and battery.

The jury returned a verdict of *Guilty;* the COURT fined the defendant fifty dollars and costs.

[4] Note by the Reporter: "A garden in the country is considered a small piece of ground set apart from the farm for the purpose of raising vegetables; but in the city the public gardens, referred to in this case, are pieces of ground through which there is a walk, on each side of which there is a number of small roofed apartments, separated from each other by a railing calculated for the free admission of air; and many of them are otherwise shaded with woodbine or other vines. These apartments contain each a table and benches, that several persons in the same company may be seated. During the warm season, in the evening, the gardens are usually lighted up with lamps on each side of the walk; and small companies frequently resort to these places and call on the keeper for mead, beer, cakes, or other refreshments."

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THE TRIAL OF DAVID F. MAYBERRY FOR THE MURDER OF ANDREW ALGER, WISCONSIN, 1855

THE NARRATIVE.

In the early days of the State of Wisconsin a man named Mayberry, who had been a Mormon at Nauvoo, afterwards a horse-stealer, a convict, and a cooper, was working for a man named McComb, in Rockford, Illinois. Learning in some way or other that a lumber dealer, one Alger, had sold a raft of lumber in Rockford and was to get his money at Beloit, Wisconsin, he set out for that place and, being familiar with the road Alger would go to reach his home after he was paid, he bought a hatchet and waited on that road for him. When Alger appeared driving in a wagon, he asked him for a ride, which request Alger granted, inviting him to get into the wagon. Going through the woods he killed Alger with the hatchet, appropriated his money, papers and clothing and rode the horse to Rockford. The next day while drunk he told the whole story to McComb, who at once notified the police, who arrested him, and he was turned over to the Wisconsin authorities. Tried for the murder of Alger, his only defense was that he was drunk when he talked to McComb and that the whole story was false. But the evidence of his guilt was overwhelming and he was promptly convicted.

The interest of this sordid case is, however, not in the story, but in the sequel. Wisconsin had abolished the death penalty for murder. Alger had for years carried on the business of rafting in Rock River, near the town of Janesville, where the trial took place. He had become well known among the raftsmen, who esteemed him as a kind, upright man, and who, when they learned that the only punishment for his inhuman and revolting crime—the murder of their friend while he was suspicious of no danger, and while he was doing an act of

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kindness to the murderer—was imprisonment in the penitentiary, they determined to avenge the crime themselves, and their desire was doubtless increased by the words of the Prosecuting Attorney in opening the case to the jury on the trial. At any rate, after the Judge had sentenced Mayberry to imprisonment for life and he was being taken from the court house back to the jail, he was seized by a great mob, which filled the streets, and hanged until he was dead to an adjoining tree!

THE TRIAL.[1]

In the Circuit Court, Rock County, Wisconsin (Janesville), July, 1855.

HON. JAMES R. DOOLITTLE,[2] *Judge.*

July 10.

The prisoner having been previously indicted for the murder of Andrew Alger, and the trial having been set for today, an immense concourse of people from all parts of the County

[1] *Bibliography*—*"Trial of David F. Mayberry for the murder of Andrew Alger, before the Rock County Circuit Court, Judge Doolittle, presiding, July 10th and 11th, 1855. Containing the arguments of the attorneys and a full and correct account of his death by the Mob. Reported by Ira C. Jenks, Esq., Janesville. Messrs. Baker, Bennett & Hall, Printers and Publishers, 1855."

The pamphlet gives a brief account of Mayberry's life. He was a native of Tennessee, about thirty years of age. At twenty-one, with his wife and parents, he joined the Mormons and was living at Nauvoo, when Joseph Smith was killed. After this he left Nauvoo, joined a party of horse-thieves, was arrested for horse-stealing and sent to the Alton pententiary for seven years. His parents had meanwhile moved to Salt Lake City, and his wife, hearing he was dead, had married again. After leaving prison he worked at Rockford, at the cooper's trade which he had learned in prison, and became acquainted with the McComb family. In stature he was six feet high, with a muscular frame; his complexion was fair; his eyes were gray and small, and his nose long and sharp.

[2] DOOLITTLE, James Rood (1815-1897). Born in Hampton, New Jersey. Graduated Hobart College, 1834. Admitted to Bar 1837. Moved to Racine, Wisconsin, in 1851. Circuit Judge 1852-1856. United States Senator 1857-1863.

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and State assembled to see the prisoner. For hours before the opening of the court, not only the Court House, but the hill between it and the jail was literally alive with human beings. There was no great excitement, but every countenance bespoke a determination to see that justice should not be stayed until it had fully avenged the foul deed.

The COURT had ordered an additional number of jurors to be summoned and forty answered to their names. At half-past eight the Clerk commenced drawing the names and at ten o'clock the following jurors had been selected and sworn: George Patchin, A. C. Randall, C. M. Messer, Levi St. John, Daniel O. Rayner, George Sherman, Uriah Schutt, John Alexander, F. A. Hemphrey, Ira Fish, H. Stafford, Samuel Cadwalder.

George B. Ely, District Attorney, and *David Noggle*[3] for the State.

James L. Loop and *A. Hyatt Smith*[4] for the Prisoner.

By request of *counsel for the prisoner,* the witnesses on the part of the prosecution were excluded from the court room while others were examined, and their testimony taken.

Mr. Loop stated to the Court that he had lately received a letter from his associate counsel, saying that he had been obliged to go to the State of Vermont on business of importance, and would not be able to be in attendance upon the trial of the prisoner. *Mr. Loop* asked to have *A. Hyatt Smith* assigned by the Court as associate counsel.

Mr. Smith. I can hardly call myself an attorney of this

[3] NOGGLE, David (1809-1878). Born in Franklin, Pa. Early went to Ohio, then to Illinois, where he studied law, and was admitted to the Bar in 1838. Went to Wisconsin in 1839, where he soon acquired a large practice. Served in the Wisconsin Assembly 1857. Judge Circuit Court 1858-1866. Chief Justice of Idaho Territory 1874. "He was a man of great natural capacity and of uncommon force and will of character and a powerful advocate before a jury."

[4] SMITH, A. Hyatt (1814-1892). Born in New York City. Admitted to New York Bar 1835. Removed to Janesville, Wisconsin, 1842. Elected to State Constitutional Convention 1847. Attorney-General 1847. United States District Attorney 1848.

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court, having hardly been in the court room during the last three years; but if I can be of any service to Mr. Loop I will cheerfully accept to become his associate in this trial.

He was then assigned as associate counsel by the Court.

Mr. Ely (to the jury). This is the first time in a long period that the public prosecutor has been called upon in this county to prosecute a criminal for the crime of murder. It is the first time in a long period that the Court has been obliged to sit upon a trial like the one which he is called on to sit today. *Mr. Ely* stated the fact of the prisoner being in the penitentiary of Illinois—of his being released and going to the house of John G. McComb, near Rockford, that he left McComb on or about the sixteenth day of June last for this State—that he was seen in Janesville, and afterward in company with the deceased in a wagon going toward Milton; that the same night he was seen in Janesville with the horse and wagon belonging to the deceased; that the prisoner was afterward seen by McComb and his two sons, with the horse and wagon, a large quantity of money, articles of clothing, etc., which he confessed to Mr. McComb and his two sons, to have taken from the person of the murdered man. We shall show beyond a reasonable doubt, by the confessions of the prisoner, and an abundance of corroborating testimony, that the deceased came to his death by the hands of Mayberry.

The indictment I will not read at length. It charges, that on the sixteenth day of June last, in the town of Harmony, in the County of Rock, one David F. Mayberry made an assault on one Andrew Alger, with malice aforethought, with intent to kill him, and did kill and murder him.

I understand that the counsel on the part of the defense intend to show if possible that the prisoner, at the time he made the confession to McComb, was disqualified by intoxication, from making a deliberate and voluntary confession. But, gentlemen of the jury, how much it is in accordance with human nature, that after having stained his hands in the blood of his fellow man, and with that enormous weight

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of guilt upon his conscience, he would seek some person to whom he could open his bosom, and by a full confession of his guilt, be relieved from the burden which was then crushing him to earth.

Mr. Loop. Gentlemen of the jury, it is incumbent on the part of the prosecution to prove the prisoner guilty of the offense charged against him, and until he is proved to be guilty, you must suppose him to be innocent. The State claims that the defendant has made certain confessions, or statements, upon which they intend to rely, and upon which they tell us their case is based. But, gentlemen, we shall endeavor to show to you that these statements claimed to have been made to McComb are unreasonable in themselves, and if made at all, were made by the defendant while in a state of intoxication, which would render him incapable to make a deliberate and voluntary statement. It is unreasonable to suppose this man, in his drunken frenzy, should give such a description of the place and the exact spot where the body of the murdered man could be found, that McComb, or any other person, could come to the place without difficulty, and point it out to those with him. It is too unnatural to be true.

We know that we come to this trial under very unfavorable auspices. There is not a man in this court room whose mind is not biased by prejudice or sympathy. The newspapers have heralded through the country the fact of a cruel and cold-blooded murder having been committed here in your midst, and this man has been pointed out as the murderer. The infection has been spread throughout the whole country, until it has reached every home and fireside. The very air we breathe is filled with it. We know that you would wish to give the prisoner a fair and unbiased trial; but, gentlemen, before you can do it, you will have to relieve your minds of every prejudice or sympathy, and come here as you would if you had heard nothing of this murder.

We do not intend to allow the statements made to McComb

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to come back to you on this trial; and if they do come before you it must be by an order of this Court, and I do not believe, gentlemen, that this Court will allow it. They have brought men here to swear that they saw this man on the road near Rockford with a horse and buggy. But gentlemen, there is not a man in this court room who could here recognize a stranger he may have met on his way here. They have brought a man here who saw some person on the road leading to Rockford with a horse and wagon. He has been to the jail in Rockford and says that the prisoner is the same man he saw on the road. And it was just as easy for him to see the same man in the jail that he saw on the road as it is to see a "nigger in the fence while you are looking for one." Whether this prisoner is innocent or guilty I do not know. I must believe him to be innocent—at least, he has ever protested his innocence to me and to every person who has conversed with him except, perhaps, the McCombs. What our defense will be, or whether we shall introduce any evidence, remains to be shown.

THE WITNESSES FOR THE STATE.

John G. McComb. Reside in Winnebago county, Illinois; know the prisoner; became acquainted with the person the last of October or the first of November, 1854. He boarded with me occasionally during the winter; a part of the time he was in Rockford. He usually deposited his money with me for safe keeping. He came to my house about the first of June and left Tuesday before the sixteenth of June. He worked for me during that time; he left my house and said he was going to Janesville; I saw him next on Sunday following at my house.

Mr. Ely. Did you at that time have any conversation with the prisoner, and if so, will you go on and state what the conversation was?

Mr. Loop asked leave to examine the witness as to the condition of the prisoner, and whether when he made these statements he was not in a state of intoxication, which request was granted.

John G. McComb. He came to my house about eleven o'clock on Sunday. He was not drunk but his face was redder than usual. I cannot say that he drank at my house until after supper. I put questions to him which induced him to make the statements to me. I did not promise that if he would make the statements he should be protected. My two sons and Mr.

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Weatherby were at my house at that time.

Mr. Loop objected to the testimony of McComb being received in evidence, on the ground that the prisoner was disqualified by intoxication from making a deliberate and voluntary confession, which would be necessary to allow a confession to be given in evidence.

The COURT ruled that the matter was one to be commented upon by the counsel in summing up the cause to the jury, leaving it to them to say how much weight should be attached to it.

John G. McComb. The first conversation I had with the prisoner was between four and five, Sunday afternoon. Asked him where he staid the night before, and he said at Menzies, at Rockford. He arrived at my house between two and three in the afternoon. We were in the garden together when Mayberry said to me, look here, and held out a handful of papers. Asked what he was going to do with them, and he said he was going to burn them. Asked him where he got them, and he said he got them from a lumberman. He then took out a woolen sock in which there was something about as large as my fist—(sock showed witness.) That is the sock but I think there is not as much in it. We then went into supper. After supper he wanted me to go to the river with him. We went down to an old house near the river. He asked me to go down to the brick kiln and see a little horse he had down there. Asked where he got the horse, and he said he got him of a lumberman. Asked what the name of the man was, and he said he did not know. He said he got in with a lumberman above Janesville, and rode with him till they came to the woods, and when they got in the woods on the road leading from Janesville to Milton, he struck him—said he gave him some liquor to drink about one hundred rods before they came to the woods. I asked how he managed when he struck him, and he said that he rose up in the wagon and struck the man, that the horse sprung, when he caught up the reins and drove off into the woods; that after they got into the woods he struck him three times with a hatchet and kicked him out of the wagon, and then drove off and tied the horse. He said that he then went back to where he first struck the man and got his hat, which fell off when he was struck. He told me that he stripped off all the clothes except his shirt and drawers, that he searched his pockets, and took all the money, two or three wallets, two watches, a knife; that there was $120 in paper money and the rest in gold. He did not show me the wallets, but he did show me the watch. We then arrived at the horse and wagon, which was about three-fourths of a mile down the road from the old house. He was quite intoxicated while we were at the wagon. Asked him to describe the road upon which he killed him, and he said after he had left Janesville on the road to Milton, he passed a little piece of timber, then crossed a prairie and came to another piece of woods, then went down a little hill, and there was the place he killed him. He said that he left the man lying on his back. He

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said it was done on Saturday preceding the day which he told me. He said he bought the hatchet at Beloit, because his cane was not sufficient to kill the old cuss. In speaking of the man he killed he always called him "the old cuss." He said he came back with the old man's horse and wagon to Janesville, there he bought a new suit of clothes, from there he started for Rockford, but lost his way in the night and came out near Sugar river where he staid all night. We arrived at the wagon about dark and came out of the woods about eleven o'clock at night. There was a hatchet, a pair of shoes, and a bottle of liquor in the wagon, (the shoes and hatchet showed witness) those are the shoes and this is the hatchet I saw in the wagon. When we returned there was no one at my house except my wife and family. Soon after about a dozen men came in and arrested Mayberry. I then went with Mr. Brown, and Mr. Miller to the wagon and they took the hatchet and shoes from the wagon. The sheriff took the knife from Mayberry at my house. Mayberry said that he struck the old man with the hatchet, and that the hat he had was the old man's hat.

Cross-examined by Mr. Loop. Mayberry came to my house about noon, Sunday. We had the first conversation about five o'clock in the afternoon. The first thing he said was to look here, and held out some papers. Asked him what he was going to do with them, and he said burn them. He then turned partly around and took out the sock and shook it and said, I got that. We then went into the house and took supper. After supper we went down to the old house. He then asked me to go down and see what a fine little horse and buggy he had got down there. Told him I didn't want to go. Had not before heard that he had a horse and wagon. Went and watered my cows and returned to the house, when I found Mayberry was there. He touched me on the leg and said come out here, and went out into the yard —followed him out and asked him if he wanted anything of me, and he said he did. We then went down past the old house, and took the river road and went to the horse and wagon. There we drank some liquor; conversed with him about the murder. After we went to the old house and before we went into the woods, I went to Mr. Miller's and told him the circumstances, and he said he would go right off for the sheriff at Rockford. Do not think I told Mr. Miller, Mayberry was drunk when he came down to my house; can't say that I have told anyone he was drunk when he came to my house. Think I made him drunk myself. We were lost in the woods and I got him to drink every time we turned around; can't say that I was intoxicated. I have lived at the place twelve years; I saw seven twenty dollar gold pieces; I do not positively know how much money Mayberry had when he left my house. I do not know that he received $100 from Mr. Munger; I paid him $34.50 when he left beside the money he had deposited with me. It all amounted to $65; do not know that I told Mr. Plato that he

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was beastly drunk. If I did it was not true. Don't think I was intoxicated; was anxious to get him drunk; my object was to get him so drunk that I would be safe while alone with him in the woods. The horse and wagon I deposited with Mr. Howland in this place.

E. A. Howland. Two weeks ago today, Mr. McComb deposited a horse and wagon with me. It was a dark horse; have shown the horse and wagon to Mr. Peck.

Erastus McComb. Became acquainted with prisoner two or three weeks before he left. He left Tuesday morning and came back Sunday following; saw him when he returned; I should not consider him drunk; asked him what luck he had on his voyage; he said very good; he pulled off the hat he had on his head, and said, you can see by this what kind of luck I have had; I killed a man for it; asked him if that was all he got; he said no; he pulled out five $20 gold pieces; asked if he killed him for that; he said no; he then pulled out a stocking with notes in it; asked him what was the name of the man he killed; said he did not ask him what his name was; then asked what kind of a man he was; he said he was a pinery bug; said he killed him between Janesville and Milton, with a weapon he had; asked him where it was; he said it was in the buggy in the woods; he then showed a knife, and said he finished him with that—it was the old cuss' knife; asked him what he done with the man; he said he left him in the brush; he showed me two watches, the knife, pocket-book and stocking; this was about two o'clock in the afternoon.

Cross-examined. Have known Mayberry three or four weeks; have been in the habit of visiting my father's every day; live close by him; am the son of John G. McComb; when I asked him what kind of luck he had had, I supposed he had been stealing horses; had some conversation with him about stealing horses; have never been engaged in that business myself; if I had I have sense enough to keep it to myself; did not notice that he was intoxicated that night; I was not in the house at the time he was arrested.

Halsey McComb. Shall be twenty next April; McComb is my father I suppose; live at home; saw Mayberry on the seventeenth of June; he left father's on the twelfth of June; he said he had been to Milton and Janesville; said he killed a man between Milton and Janesville; said he asked him to ride, and after he had rode a piece he rose up in the wagon to put on his coat and took a hatchet out of his sleeve, where he had it concealed, and struck him three times and killed him. Said he then kicked him out of the wagon and took his clothes and money; said the old man said, "O Lord have mercy," two or three times, and he told him if he did not shut his d———d head he would cut his throat. Said he laid down and waited an hour and a half; remember that Mayberry said it was done on the sixteenth, because he said it would be in the papers, that it was done on the sixteenth. He said that he was not to be trifled with; said he had been to Milton and picked

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out the place before. He showed me the clothes. (Witness identifies them.) Said he came to Rockford with the horse and wagon; that he met a man on the road near some cattle; that he saw Smith Collier, but did not think Smith knew him. This watch is the one I bought of Mayberry. Took the watch home and hung it up. Have seen all the things on the table with Mayberry. He showed me the money; it was principally gold. He said he got the knife of the man he killed.

Cross-examined. Was out to the barn about noon, when someone said, Mayberry is coming; father was in the barn with me; don't know how the conversation commenced; he showed me some money and said he harnessed a pinery man for it; he did not say at the house where he got the money; went with him down into the woods and we had most of our conversation there; while we were going down into the woods he took the knife out of a stump, and said he killed a man and that was his knife; he said the man was small sized; went down where the horse and buggy was and saw the shoes there; have seen other shoes like these but am certain these are the shoes he showed me; he said the holes in the hat were made on the man's head; he showed me the stocking; am very sure that this is the same stocking; bought the watch of Mayberry and gave him a trunk; did not know when I bought it that he killed a man for it; went down into the woods only once; don't remember meeting a man; did not go fishing that day; the wagon was about three-fourths of a mile down the river; think Mayberry went down three times that day—first with me; then alone, and afterward with father; saw him talking with father in the garden; I did not think he was drunk until about ten or eleven o'clock at night; think he was drunk when he came back with father; know from his looks and talk.

John F. Taylor. Am sheriff of Winnebago county, Illinois; I have seen Mayberry before; saw him in December last at Rockford; since that time he has been at work there at the cooper's trade; saw him on the seventeenth of June; some man came to my house and said that Mayberry had murdered a man; I got a warrant for his arrest and went to the house of McComb; was told that he was in the woods; I went in the cellar and staid until he came from the woods, about twelve o'clock; went into the house, told him I had a warrant for him, and put the irons on him; told Mr. Miller to search his pockets; the things taken from his pockets were handed to me; took from his pockets two pocket-books—one containing $176 in bills; there was five $20 gold pieces loose in his pockets; the knife was found in the pockets of some of the clothes; after searching his pockets I told him to bring forward his clothes; these clothes were brought forward loose; told Mayberry to select his clothes and we would take them along; he said they were all his; he has since told me that they belonged to McComb; prisoner said the money was his; that the red wallet he never saw until I showed it to him; I stayed at McComb's until the horse and buggy came;

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at least they told me it had come; I did not see it; he claimed the shoes being his. In the jail he denied the clothes being his.

William Brown. Reside at Rockford; am State Attorney for Fourteenth Judicial District of Illinois. Saw the prisoner three weeks ago last Sabbath evening; he was at McComb's; went down in company with the sheriff and several others; to arrest him; about nine o'clock in the evening, Mr. Taylor said to the prisoner that he had a warrant for him, and immediately put the irons upon him; Miller and myself searched his pockets; someone asked where he got the money, and he said he worked for it; went with the others into the woods, and after considerable difficulty we found the horse and wagon; the hatchet and shoes were handed to me from the wagon; don't know whether he had the hat on or not; next day came with McComb and others to Janesville to search for the body; we went in a northeasterly direction from Janesville about four miles, when we came to a piece of woods, where we found a number of persons searching. We continued to search and found a large quantity of blood and five or six rods from that we found a man lying on his back with his throat cut from ear to ear—three wounds on the head from which the brain protruded, and three cuts in the back and side; the body was nearly naked, with no clothes except a shirt and part of a pair of drawers; the body was taken up and put into a double wagon and taken to Janesville. Mr. McComb, the sheriff of Rock county, a constable from Janesville and a number of others were there when the body was found.

Wm. Spaulding. Was called upon by Sheriff Hoskins to take the body of a man which had been found in the woods to Janesville; brought the body to Janesville and deposited it in the court house. An inquest was held by Justice Bates.

Dr. O. P. Robinson. Am practicing physician, residing in this city; was called upon eighteenth June last to examine the body of a man in a room directly below where I sit; there were three wounds upon the head, two upon the forehead breaking through the frontal bone; the fracture was about three inches long and one and one-fourth inches wide—appeared to have been made by some blunt instrument; should think that they might have been made with the head of a hatchet. There was a severe wound in the neck, severing the arteries; another wound an inch and one-fourth in width upon the left side between the ninth and tenth rib, entering the lung; another wound similar in size passing through the fifth and sixth rib; another wound was made upon the side which was larger, and penetrated no farther than the tenth rib; the wounds upon the head would have caused death; either of the two wounds upon the back or the one on the neck were mortal; the wound on the side might have been made by a hatchet; the body had been preyed upon by vermin, and the muscles about the wounds considerably contracted; the wounds upon the back were made with a knife at least an inch in breadth; they

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were made before the one in the neck; I judge from the coagulated blood which surrounded them; Mr. Conrad was present at the examination.

A. G. Allen. Reside in Janesville; am in the clothing business with M. S. Smith on Main street; have seen the prisoner before; saw him on the sixteenth of June last; he came into the clothing store about nine o'clock in the evening to buy a suit of clothes; I sold a suit of clothes to him. (Witness recognized a pair of pants he sold Mayberry.) Prisoner said he was going to Milton, said he lived and worked at Milton.

Cross-examined. I had never seen prisoner before that night; Mr. McIntyre was in the store; these pants I think are the ones I sold him; they have our mark upon them; seldom sell clothes to strangers; recognize the prisoner by his general appearance; generally recognize persons to whom I sell goods; would have recognized the prisoner without knowing he was arrested.

Mr. McIntyre. The prisoner is the man to whom Allen sold the clothes.

Dr. R. B. Treat. Am a practicing physician. Made a post-mortem examination of deceased. He was a small sized man; had no clothing on except a red shirt; the body had a healthy appearance; the principal wounds were upon the head, neck and back; I could not tell with what kind of an instrument it was done; perhaps two blows with the head of a hatchet might have done it; the skull was fractured and the integument over the fracture cut in two places; it looked as if it was done with some blunt instrument; the wound upon the neck was severe, severing the arteries and extending back to the spinal column; it must have been done with an instrument about an inch wide; there were marks of a knife or some sharp instrument apparent upon the surface; there must have been several strokes with a knife to have made the wound; there were two wounds upon the back, probably made with the same instrument as the wound on the neck; the instrument passed through between the ninth and ten rib and penetrated the pleuri; either of these wounds would have been fatal. There were also two wounds upon the side which were very probably made by the same broad instruments; the wounds upon the back appeared to have been made prior to the wound on the neck. The blood had coagulated around the wounds on the back quite extensively. The wound upon the neck would have produced death in one or two minutes. The wound upon the neck might have been made before those on the back. I do not think there is blood on the knife. There is blood on the coat, and I think there is on the handle of the hatchet.

Chas. H. Conrad. Was well acquainted with the deceased. Identified the body as that of Andrew Alger. Would have known it if it had been found anywhere.

E. G. Fifield. Was personally acquainted with Andrew Alger, recognized the body as his; had a conversation about some lumber with Alger in this city, on the sixteenth day of June last, while Alger was on his way

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home. I took the body home to his friends in Jefferson county, after the inquest was held.

Josiah Alger. Reside in Farmington, Jefferson county; am the son of Andrew Alger, the deceased; last saw father in Beloit, on Wednesday prior to his death. He had been to Rockford with square lumber; he had $580 when I left him; principally gold; (a number of papers shown witness with signatures of deceased and a knife was shown witness) that knife I have ate many a meal of victuals with; it is one which belonged to father, and which he usually carried with him; the pocketbook I have seen many times; saw it last at Beloit on Wednesday prior to father's death; he had it and gave me some money from it; the portmonie was father's; saw it last in Rockford; father put some gold in it; the watch I never saw; that coat is father's; know by a hole burned in the neck; last saw it on him at Beloit; he had the pants on at Beloit, and a pair of over-alls over them; think the hat is the one he bought in Beloit, while I was with him; never saw the linen coat before; the coffin was opened after it came home, but I could not recognize the features; it looked awful; I could not stand it, to look at it.

Cross-examined. Father was in the habit of being away from home, sometimes stay longer than he said he should; but never longer than a week to my knowledge.

Emery Nash. Am clerk in hardware store in this city; prisoner came into the store in the fore part of the week and inquired for cooper's tools.

Azro Stoddard. Am clerk in Pixley & Kimball's hardware store; sold a hatchet that week; do not recognize the prisoner; can't see our mark on the hatchet; it is similar to those we have in the store.

Charles Bell. Know the deceased and recognize his clothing and knife.

S. W. Peck. Reside in Beloit; saw Andrew Alger at that place on the sixteenth day of June last; bought a raft of poles of him and turned out a horse and wagon, and a watch in part payment; for balance gave him a check on the Bank of Beloit; have seen the horse and wagon at Mr. Howland's barn; it is the one I sold Alger; he left Beloit with the horse and wagon half past eleven; he started off towards Janesville and said he was going home; the check was for $366.

Orville Bennett. Saw Alger in Beloit on the sixteenth of June; kept Alger's money the night previous; asked him if he expected anyone would rob him, and he said he mistrusted two or three; counted his money; there was $580. He did not give me the names of any one he suspected.

R. E. Hiney. Reside at Beloit; am in the clothing business; was acquainted with Andrew Alger; last saw him the sixteenth of June; sold him a linen coat that day; it was peculiarly made; should recognize it if I could see it, (coat shown) that is the coat I sold him; Alger took off his old coat and put on the one I sold him; the wallet here is similar to the one I saw him have; he gave me a bill like those in the wallet; he left my store about nine o'clock Saturday morning.

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John W. Williams. Reside in Utica, Winnebago county, Wis.; went to Beloit on the road by the way of Milton and Janesville; stopped at Ft. Atkinson Friday night, June fifteenth; took dinner the sixteenth, with a farmer between here and Milton; saw the prisoner on the sixteenth of June; on the road between here and the woods near Mr. Spaulding's; it was between two and three o'clock Saturday afternoon; when I first saw him he was standing still, but when I came up he was walking north; sometimes I could not tell whether he was going north or south; he acted as if he was waiting for someone; looked at him particularly and know that the prisoner is the same man. Know Andrew Alger; I met him just before I got into Janesville, going towards Milton on the road where I saw the prisoner; spoke to Mr. Alger as I passed him, and said "how do you do."

Cross-examined. Met the prisoner about two or three o'clock; think it was one and one-half to two miles from Janesville; he had a coat on his arm but none on.

R. B. Tracy. The prisoner came to my house about twelve o'clock Saturday night, and wanted to stay all night. Went away in the morning before any of the family were up.

Benjamin Allen. Reside in Winnebago county; saw a man that looked like prisoner on the road; he was going towards Rockford, about eight miles from Rockford; had a conversation with him; he was on foot near the buggy when I first saw him; by the time I had got to where he was he had got into the buggy; the horse looked tired.

Cross-examined. Prisoner was close to the buggy when I saw him; he came from towards some cattle; afterwards examined the cattle; two of them were cut on the shoulder; I think I had seen the prisoner before; the cattle were John Atkinson's; did not mistrust the prisoner until after I saw the cattle were cut; afterwards saw him in the Rockford jail; it was about eight o'clock in the morning when I saw him on the prairie.

Smith Clothier. Met the prisoner with a horse and wagon on the road between the place where Allen saw him and McComb's house.

Mrs. Tubbs. I reside in this city, on the road to the depot; have seen the prisoner at my house; he came there first on Wednesday before the murder; on Thursday he came to stay all night; he said he lived at Rockford; this was Friday morning; he left on Friday about eight o'clock; have not seen him since; he did not remain but a few minutes on Wednesday; he inquired for Madison.

Levi Rexford. Reside in Beloit; saw prisoner at Beloit three weeks ago last Friday night; he overtook me half mile this side of Beloit; staid over night with me; he had a hatchet with him; think the hatchet before me was the hatchet.

Cross-examined. Live on the west side of the river at Beloit; had been north of Beloit. I was on the Beloit and Janesville road when prisoner overtook me; it was near sundown; prisoner was on foot; he left about eight o'clock Saturday morning; he had a hatchet which he said he found in the road; he showed me

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a knife; it was not like the knife here in court; prisoner had on a black hat.

James Albert. Reside in Rockford; am deputy sheriff; had a conversation with prisoner after he was arrested; he said he staid with a man at Beloit, on Friday and Saturday nights.

James W. Redman. Reside in Rock county, town of Harmony; found a coat in the woods above Mr. Spaulding's, on the east side of the road; it was a yellowish linen coat. (The witness examined the linen coat and identified it as the coat he found). It was rolled up when I found it and covered with leaves. I found it on Tuesday, next day after the body was found; the coat was about half way from where the body laid to the road.

Cross-examined. The coat was under some leaves in thick bushes; went with one of my neighbors to see where the body was found, when I found the coat; found the coat near a place that looked as if a horse had been hitched; in the town of Harmony, Rock county.

The COURT. Gentlemen, the case is with you.

Mr. Smith. If the Court please, I make this proposition, which, upon examination, I find has been supported a number of times on trials of this kind—that if the defendant should not introduce any evidence on his part, that the counsel for the defendant have the opening and closing argument.

The COURT. I do not think, Mr. Smith, that rule could be enforced in this state, and I must deny the proposition.

Mr. Smith. Then we rest our case without offering any witnesses, but we then ask that the cause be submitted to the jury without argument.

Mr. Noggle. I am assured that persons have come here expecting the Prosecuting Attorney to make some remarks upon the testimony and to hold the prisoner up in his true character, but I am willing as associate counsel to submit the case to the jury, after the Court shall have charged them.

Mr. Smith. I did not suppose when I made the proposition that it would open the door to a speech. I withdraw the proposition.

THE SPEECHES OF COUNSEL.

Mr. Ely. May it please the Court. Gentlemen of the Jury. The tragedy of painful interest which has detained you for the past two or three days will soon be terminated. The

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drama which commenced in blood must find its end with your verdict. You, gentlemen, who have sat upon your seats and heard the awful and sickening developments; you, who have seen the blood-dyed garments of Andrew Alger brought here and placed before you, and who heard the volumes of testimony coming from the side of the prosecution and fastening itself upon the prisoner without a word of evasion or denial, can hardly ask for more conclusive evidence of guilt, or a more open and deliberate confession that he who sits before you is the wretch who stained his hands in the blood of his murdered victim, Andrew Alger.

The law has wisely provided that no man shall be put upon his trial until he has first been presented by a Grand Jury; and it is also provided that no man shall be tried for any crime, unless by twelve good and lawful men of his country. The accused is also entitled to have his accusers appear, and confront him face to face. In this trial, all the forms and requirements have been fulfilled, and the case has come down to you, to pass upon the guilt or innocence of the prisoner.

Gentlemen, I might and was inclined to follow the suggestion of the counsel for the prisoner to submit the case to you without argument, but for some reason the counsel have seen fit to withdraw their offer and insist upon the argument—and that they may have a fair chance, I will give you the facts which we think are established by the evidence and leave the argument to those who will follow me. The statute of our State at chapter 133, page 688, provides that whoever shall kill a human being with a premeditated design to effect the death of the person killed (whether it be done by treason, shooting, stabbing or any other means or manner) shall be guilty of murder in the first degree; and by a law since passed, shall be punished by imprisonment in the State prison during life. Whether the law as it now stands making the punishment for the greatest crime known to our laws, the same as that of a thief, or any other felon, (except perhaps in the period of duration) is such an one as is most needed

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and would be the best protection to the lives of the people, is not for me to say. You, gentlemen, must follow and enforce the law as it appears upon our Statute books, and this you have bound yourselves by your oaths to do, however much it might conflict with your own personal feelings.

It was said, prior to the enactment of our laws, by a power higher than all "that whoso sheddeth man's blood, by man shall his blood be shed." For hundreds of years it has been a fixed rule of the common law. Those states which surround us, with hardly an exception have adhered to the same rule. But in these days of cavil and selfish intriguing, men have in their legislation deemed that the law thundered from Sinai's top was no longer binding upon them. They have, and do by their acts say, "we are above all law except our own—away with a higher law." However much I might wish that our law at this time was different, as an ardent lover of good order and society, I shall feel it my duty to abide by it until experience shall teach our Legislature that chains and prisons are but idle mockery to the man, who will, for the glittering dust of earth, take the life of his fellow man. The prisoner before you has confessed to be guilty of one of the foulest murders that ever blackened the pages of history, one in which justice dealt out by human hands must fall short of an aggregate punishment. We are not here for the purpose of revenge. There is another power which has said, "Vengeance is mine, and I will repay," saith the Lord God of Israel. We come here for the protection of society, our families and ourselves.

Mr. Ely read the substance of the several counts in the indictment, and cited several authorities where persons had been convicted upon circumstantial evidence, without any direct corroborating testimony, also that drunkenness was not an excuse for committing crime; and closed with a brief statement of the facts claimed to have been proved.

Mr. Loop. Gentlemen of the Jury: When we determined that we would introduce no testimony on the part of the prisoner, we expected to submit this cause to you on the

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charge of the Court; but the remarks of one of the gentlemen engaged in the prosecution, in according our proposition so to submit the cause were of that character which forbid that we should do so, and, accordingly, that proposition on our part was withdrawn.

We are not unaware, gentlemen, that there is a vast amount of testimony in this case tending to prove the prisoner guilty, and we enter upon the argument of the questions involved with full knowledge of the fact that from the time of the discovery of the dead body in your county, bearing evidence that death had been produced by violence, and the connection of the prisoner's name with the supposed murder, his case was pre-judged in the public mind, and his guilt proclaimed by the almost universal voice; and we cannot suppose, gentlemen, that you have kept yourself entirely secluded from the out-door world, and from the knowledge of passing events, as to be unmindful of public sentiment; or that you are so unlike the rest of mankind as to be entirely uneffected by the reports which have appeared in the public journals and been proclaimed and discussed by every gathering of men, women or children, since this community was thrilled and electrified by this supposed horrid murder. But, gentlemen, these facts have not inspired in our bosoms any feeling of distrust, or cause us to waiver in our faith that you will, in the verdict which you shall render, honestly and intelligently consider the evidence adduced, in all its bearings, and decide as impartial justice and the rules of law demand.

The prisoner comes before you a marked man. The human mind is so constituted that it is almost impossible to disconnect the name of the man charged with this heinous crime of murder from the fact of the murder with which he is charged. Your own citizens have seen, and in their testimony have described in not too startling and sickening terms, the body of the murdered man, and the testimony of three witnesses before you tend to show that the prisoner confessed that his was the hand which had perpetrated the

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dreadful deed and whether true or false, whether the confession was made, or is a mere fabrication of the witnesses, the effect is the same in marking him as the man and fixing in the mind the impression of guilt.

We enter, therefore, gentlemen, upon the discussion of the question involved in this case, and upon an examination of the evidence by which it is contended on the part of the State that the prisoner's guilt is established, with no false notion of the task which duty assigns us. We feel and duly appreciate the fact, that when the prisoner was arraigned in this case, that salutary rule of law which declares that the accused shall be presumed to be innocent, was reversed, or regarded as mere fiction, and that the deep seated impression of guilt is one of the things which we must remove; that independent of the circumstances tending to show guilt in which he is enveloped; the fact of the association of his name with so great a crime fosters suspicion upon the mind which is almost equal to proof.

We are not, then, gentlemen, entering upon this argument with any mistaken notion of our position, or of the necessity which imposes itself upon us of enforcing upon you, so far as we are able, the great importance in justice to the prisoner, and in justice to ourselves, and in justice to the law which you are aiding in administering of divesting from your minds every bias, prejudice, or preconceived opinion or impression, and giving to the evidence its legitimate force and effect, and nothing more.

Of what does the evidence consist? First, of pretended confessions and second of circumstances, there being no direct proof of the fact of murder.

The indictment charges the prisoner with the murder of Andrew Alger. The first great fact to be proved on the part of the State is that Andrew Alger is dead, that the dead body found in the thicket was in fact and in truth the body of Andrew Alger. That fact must be established beyond a reasonable doubt, or this prosecution cannot be sustained. The body must be identified, and it must be proven, in such

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a manner as to exclude the possibility of a doubt in regard to his death, and in such a manner to satisfy the mind, beyond question, that the dead body is the body of the person charged to have been murdered. The identification must be of that conclusive character which will exclude every other possible hypothesis. It must be such as to fasten conviction upon the mind—not mere suspicion. It must be such as excludes the possibility that the person alleged to be dead is alive. There is no one thing, gentlemen, which is apparently so easy, and yet so difficult, as personal identification of even the living, and how vastly the difficulty is increased in the attempt to identify the dead. It is in life that we meet and recognize our fellow men, when the eye has its living lustre, and the features their accustomed play; when the expression which life gives is the great mark of distinction which separates and individualizes the great family of man. When Death stamps the individual with his pallid seal the great change is effected, and that which you had known animated, alive, expressive, joyous with life, is changed to an inanimate mass. The life has departed—the soul has fled, and that expression which evidenced, in life, the individuality of the man, has departed with the life which gave it. The countenance on which you gaze with admiration and pleasure in life, by the great change, is made frightful to behold. This is true of those who die by what is called natural causes—old age or disease; and your own observation has taught you that, when you have seen one of your neighbors, or intimate acquaintances, wrapped in death's slumber even in his own house, you look, and look in vain, for a natural feature, such as distinguished the deceased before the great leveler laid him low.

The descriptions which the witnesses have given you of the body found, and which is alleged to be that of Andrew Alger, are sickening in their minuteness, and show in too strong light to admit of doubt, the utter impossibility of the supposed identification. Ghastly wounds are upon the body, there is no clothing to distinguish it; the vermin have com-

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menced the work of destruction and putrifaction is blending in one common mass of decay the whole loathsome mass of what had been the physical organization of a man. Add to these the fact that the head was nearly severed from the body by the cut across the throat; the skull was smashed in at the forehead; that the wounds, the eyes, the nose, ears and mouth, were filled with fly blows and worms. I repeat, it is utterly impossible that the witnesses, with the acquaintance they had with Alger in his life time, could have recognized that putrid mass, and identified it as his body.

That the witnesses honestly believed that the body was that of Alger; that they honestly believed from what they could discern, they recognized both the form and feature of Alger, I have no doubt; but their belief, gentlemen, is no evidence of the existence of the fact which they believe, no matter how honestly that belief may have been produced. It is the duty of the witnesses to detail to the jury facts and circumstances; to give you a description of the man in life, and the appearance and description of the dead body, and from such description, and all the circumstances which are adduced in evidence, it is the duty of the jury to draw conclusions and not the witnesses. The expression of belief, cannot, legitimately, produce conviction in your minds. The object in calling in the aid of the jury in criminal prosecutions is the ascertainment of facts, not suspicions; and to avoid as far as possible, the great danger of hasty convictions upon insufficient evidence. Twelve men—twelve individual minds, are to be convinced, each for himself, and each individually responsible for the verdict which the aggregate render.

The responsibility on each, in a case of this magnitude, is sufficient to cause the boldest an anxious throb. Test well the facts and circumstances which come to your knowledge by the evidence of the witnesses, but remember that the belief, or opinion of a witness can furnish no justification to you, individually or collectively, for a verdict. Test the testimony of the identifying witnesses by their means of knowledge,

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and the circumstances under which this body was searched for, and its appearance when found, and then tell me whether either of those witnesses, had he never been informed of the supposed murder of Alger, and had come accidently across the body where it was found in the woods, would ever have recognized it as his. The witness who tells you that he would immediately have recognized the body had he thus found it in New York, talks boldly, but whether discreetly, you must judge.

I have said, gentlemen, that the identification of the dead is much more difficult than that of the living; and in this case the prosecution are bound to do both—they must identify the murdered man, and also the living murderer. They bring to the aid of the witnesses who attempt to identify the body of Alger, certain articles of clothing, a horse and buggy, a watch, a pocket knife, some pocket books containing money, a blue stocking containing gold, and a memorandum book containing some papers shown to have been in the possession of Alger. The son of the deceased swears to many of the articles, as having belonged to his father, and as having been in his possession when the witnesses left him at Beloit. Of all the evidence, that part identifying the memorandum book is the strongest, and the most satisfactory. The knife, and the pocket book, and the watch, are but individual members of the great families to which they respectively belong. They have no name or names marked upon them, or any other mark by which they can be identified, or distinguished from any others out of similar packages which have been worn and used as much as they. But the memorandum book contains the hand writing of Mr. Alger, and also of his son, the witness. How did he part with it? That is the question, gentlemen, which we are not bound to answer, and circumstances which we cannot be required to explain. He may have lost it, or it may have been stolen from him, or he may have parted with it in any of a thousand ways in which men divest themselves of their goods, without the crime of murder having been perpetrated to obtain it. In whose possession was

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this book found? The knife and two of the wallets containing money, and the stocking were found upon the person of the prisoner, when arrested and searched by the Sheriff of Winnebago county, but not an article of the clothing, unless it be the white hat exhibited here, nor his memorandum book, nor his watch and one wallet, were found on him, in fact, not an article which has been satisfactorily identified as the property of Alger was found in his possession.

The witness, McComb, takes the clothing from a box under the stoop on the outside of the house, and hands it to the Sheriff, and he directs the Sheriff to get the memorandum book from the pocket of an overcoat on the table in his house. Whose overcoat contained that pocket book? Not the prisoner's, gentlemen, or that fact would have appeared. In whose possession was the third pocket book found? Not in the prisoner's, but after the officers had left the house they are followed and that wallet is handed to the sheriff by one of the McCombs.

By whom were this horse and buggy, which are clearly identified as the same purchased by Mr. Alger, in Beloit, and the clothing and the memorandum book, etc., taken to McComb's? The person who drove the horse, passed Mr. Clothier and some others, when they were on the road side, not far from the Ford, on Rock river, near McComb's house. Mr. Clothier had known the prisoner in that neighborhood some months, he passed him in broad daylight, and although he says he thought at the time that it was some person he had seen before, he did not think of its being the prisoner, and cannot now be induced, by any form of question, to even say he thinks it was him. To precisely the same effect is the testimony of another witness who was on the road, and nearer the Ford than Mr. Clothier. He passed the Ford soon after the horse and buggy passed, and saw the track leading up to the place where they were found.

Mr. Williams says he saw the prisoner on the road from Janesville to Milton, on Saturday afternoon, acting as if in wait for someone. He had never seen him before, knew

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nothing of or about him, but from merely passing him in the road he is prepared to come here and swear positively that the prisoner is the man.

Mr. Allen, residing south of Harmony, on the road to Rockford, says he met the prisoner with the horse and buggy, and tells us in addition the strange story of the cutting of the cattle; and he says that he had never seen or heard of him before, but that he knows him and can identify him as easy as he can me, and that he has known me many years.

Another gentleman tells you, that about midnight, of Saturday, during a severe thunder storm, the prisoner stopped at his house between here and Beloit, and stayed until the storm abated, and he knows the prisoner is the man. Now, each of these familiar recognitions are to my mind at least singular instances of wonderful powers of recognition—singular instances in retentive memory, and close observation. The two gentlemen who were acquainted with the prisoner failed to recognize in the man who drove the horse across the ford, the prisoner. But these gentlemen who had never seen him, can identify him without the least inconvenience, and with a positiveness that admits of no question. The books containing the history of Criminal Jurisprudence are filled, gentlemen, with deplorable instances of such positive evidence of identification, followed by the fatal consequences of reliance being placed upon it. Innocent blood has been too often shed by reason of such testimony to allow of it being received and relied upon as sufficient to justify conviction. Who among this vast multitude can remember a stranger that he met on the road coming here today? I venture to say, no one. How does it happen that these gentlemen, whose honesty in the matter is not questioned, can thus pretend to, and believe that they really remember and recognize the prisoner? The true answer is easily made. When Mr. Allen heard that a man was arrested, and in jail, for murder, he heard at the same time the story of McComb about the confession and in it was ingeniously blended the story of the cutting of the cattle; and he went to jail on

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purpose to find the prisoner the same man, and all he remembers of the man he met on the prairie, is what he has seen of the prisoner since his arrest; but he fixed him firmly in his mind, and honestly believes he is the same. Just so with the other two witnesses.

The story told by McComb is what produces before you the identification, such as it is, of the body of Alger, and also of the person of the prisoner. It is that story which has brought together this immense multitude of your citizens, and which has been told and retold until the very atmosphere we breathe has become tainted with the smell of blood.

The newspapers informed us, as part of McComb's story, that the prisoner came to his house on Sunday in a state of beastly intoxication, and before he was allowed to tell his story to you, by permission of the Court we examined the witness as to the condition of the prisoner at the time when he pretended the confession was made. He failed to show that he was much intoxicated until after a part of the confession had been made, and we insisted upon the right to call other witnesses to show preliminarily that the prisoner was drunk with the view of excluding the whole pretended story. We contended then, as we do now, that the confessions of a man made in a state of intoxication, when the mind is not in tune, when the party is not in condition to deliberate, and is not capable of appreciating danger, or capable of forming a deliberate opinion; when the tongue but gives utterance to the ravings of a crazed, drunken brain, are not admissible in evidence against him. The confessions of a man in his cool, sober moments; in possession of all his faculties of mind and body, are excluded from the jury, if they are obtained from him either by threats or promises of favor—because such confessions, the law declares, are not voluntary. With how much greater force of reason can the objection we urged against this supposed confession be insisted upon, to its exclusion, if the fact is made to appear. The Court decided the point against the prisoner, holding, we doubt not, correctly, that it was a question for the jury, and that it de-

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pended upon the degree of drunkenness in which the confession was made, and that the Court could not undertake to decide what the prisoner's condition was at the time of the supposed confession. But, gentlemen of the jury, you are constituted judges of both the law and the fact, and you are to regard such testimony as is legal, and to exclude from your minds, in your deliberations, that which is illegal or improper. Mr. McComb tells you that when the prisoner first came to his house on Monday he was red in the face; and that was unusual for him, but he did not consider him drunk, and that he was not drunk, according to his understanding of the meaning of the term, until in the evening. Well, Mr. McComb may have some peculiar notions about when a party is in that condition. I once heard a witness testify that he didn't consider a man drunk until he lay upon his back and felt upward for the ground; and it is possible that McComb may entertain the same liberal views on the subject. The old gentleman tells us he was very drunk in the evening before his arrest, and the son (Erastus) says he was no more drunk at any time than when he first came there that day.

According to the story of Halsey McComb, immediately after the prisoner came to their house, when washing himself by the door on the outside, while Halsey himself was standing in full sight of several persons in the house, not members of the family, the prisoner exhibited to him a handful of gold, and informed him that he had plenty more; that they went upstairs and traded the stolen watch for a trunk, with Halsey, and that they went to the river, and the whole story was told. And each of the family enjoyed the same blessing. Each one had his solitary walk with their interesting friend, and each heard in full the same horrible details of murder and robbery, and of the delightful journey which their pleasant companion enjoyed, traveling from the scene of the murder to the residence of his friends—not omitting in any instance, the highly intellectual sport in which he indulged of cutting the cattle on the Prairie with his murder-

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ous hatchet. Now, gentlemen, was this story ever told? If ever told by the prisoner, and if true when told, if you look upon him, you look upon a man insane—one, in the labyrinth of whose brain reason has lost her sway. And whether such insanity is caused by drunkenness, or whether constitutional, it makes no difference. It is the fact of insanity, not its cause, which places a party without the pale of accountability for his acts, and renders his words of confession powerless as evidence against him. One of two things, in my judgment, is certain: that the prisoner was bereft of reason, or that the story of the confession is a sheer fabrication. No man in his senses would even have loaded himself with the evidences to convict him of murder as this story loads the prisoner—taking the old clothes from the body of his victim, and which were not worth picking up in the road; taking the horse and buggy, and pursuing his devious way through all the towns and cities in the day time and in the night; reaching the house of McComb soon after noon, and taking the family one by one to listen to his story, and count over the fruits of his awful crime.

The story is too improbable, to unnatural for belief. And whether it is in fact the truly reported conduct and ravings of a maniac, or an entire fabrication, it is equally improper, inefficient and powerless as evidence.

Confessions at the best, are the most unreliable, and dangerous of all species of evidence known to law; and the pages of judicial history are stained with the blood of innocent victims sacrificed by means of confessions honestly reported which were untrue, and by pretended confessions, the fabrication of witnesses. Every writer on the subject raises his warning voice against relying upon them; and every page of the history of the administration of criminal law shows the danger, and disastrous consequences of relying upon them.

We have now, gentlemen, briefly adverted to the evidence in this case, and have very frankly given our views of its legitimate right, and we roll the responsibility off from our

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shoulders on yours. We know that you must feel the outside pressure of an indignant public, and we have no fault to find with the great public for any demonstration of indignation which it has manifested; but, while you may feel as you ought, indignation against the murderer, justice requires that he shall be ascertained, and his identity fixed beyond a possible question—and when so ascertained, and the guilt is established on anyone, beyond a reasonable doubt, let your verdict proclaim the fact, and let him suffer the penalty prescribed by your laws. With these remarks, gentlemen, I have done.

Mr. Noggle. May it please the Court and you, gentlemen of the Jury—What shall I say in closing this solemn narration? What is left for me to say in relation to this horrid affair? Are there questions of doubt hanging around this case, demanding explanation or susceptible of being strengthened by argument? Who doubts that a murderer is in our midst? What juror in your box, what man, woman, or child, within the hearing of my voice doubts that Andrew Alger, an old and worthy settler of Jefferson County, a husband and father, was, on the sixteenth day of June last, in the town of Harmony, in the County of Rock, most cruelly and brutally murdered by some cold-blooded villain, and that David F. Mayberry, the prisoner at the bar, is the heartless, guilty wretch? When a case is so overwhelmingly plain and so exceedingly clear of doubt, what can be added, or what should be said, after so much has been said, and well said, by both my associate, the Prosecuting Attorney, and by brother Loop, the able and ingenious counsel for the defendant, and, gentlemen, he is able and ingenious, and no man in this State knows better, or more highly appreciates his powers, as an advocate or as a counsellor, than I do, and throughout his able and ingenious argument in behalf of this poor, miserable, unfortunate prisoner, it seemed to me, and I think you gentlemen must have been heavily impressed with his entire success in fully confirming you and all who heard him, in the indisputable certainty

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of the guilt of his client. As he proceeded, sentence by sentence, and word by word, the little darkening vapor he had during the trial so industriously endeavored to surround this case with, gradually continued to disappear, until the close of his argument completed the transparency of the defendant's guilt. How could it be otherwise? What counsel is so able or so learned that he could comment upon the irresistible proofs in this case, without brightening and strengthening the truth? The guilt of this defendant, gentlemen of the jury, is so apparent, and the evidence so conclusive, that I can hardly justify myself in detaining you one moment. In most cases, it is only necessary for the State to present the testimony and the case to the jury in a plain, legal manner, that the jury may safely and properly judge of the guilt or innocence of the defendant. In other words, it is necessary and proper for the State to prosecute, but not to persecute. In this case I am at a loss to know what could amount to a persecution, or what could amount to a more effectual prosecution, than the evidence as detailed by the witnesses, without comment. And was there nothing in this case but the mere question of guilty or not guilty as may be determined by your verdict; and was I left free to consult only my own inclinations in relation to the argument of this case, I should even now cheerfully leave the case with you, notwithstanding the able effort of the defendant's counsel. But it is useless to attempt to disguise the fact that the indignation of this community, fanned into flames by the recollection and continuing vision of the murdered and mangled body of the poor, helpless Andrew Alger, as he was found in the brush by the wayside, in the town of Harmony, fixed and riveted beyond the possibility of a doubt by the incontrovertible evidence in this case, that the cold-blooded, unblushing scoundrel at the bar is the assassin, unprovoked and inexcusable, of that harmless and innocent man, demand at least that the character of this miserable brute be as far as possible held up to public view as a monument of terror hereafter to all evil-disposed persons; and what I have said,

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and am about to say, is more in response to that demand than the necessities of the case.

The learned counsel for the defendant makes two points in his defense. First: That the indictment charges that Andrew Alger was murdered, and notwithstanding he admits a most horrible and brutal murder has been committed upon the body of some person and by the hand of some villain, nevertheless he insists there is no evidence that the murdered man is Andrew Alger. And, second: That the evidence that tends to implicate the defendant is inconsistent, and not to be relied upon, that if true it is not evidence of guilt but of insanity.

Can it be possible there remains even a shadow of doubt as to the identity of the deceased? We have proved by almost innumerable witnesses the residence and business of Andrew Alger; that for the last fifteen years, during the winter and spring seasons of the year, he had pursued the labor of getting out timber, poles, and lumber, and rafting down the river, which made him generally, and I am gratified to learn, favorably known to all, or most of the business men from Jefferson to Rockford. They usually dealt with him more or less, and it seems, esteemed him highly. He left his home, his wife and his little children, in the town of Farmington, Jefferson county, taking with him his eldest son, early in June, for the purpose of rafting down the river, a large quantity of timber, poles, and lumber to market. Some of his raft was left by the way, a portion at Beloit, but the principal portion was taken to Rockford, there he detained his son and his other hands several days, getting his raft in condition to sell. He finally made a favorable sale, and on Monday, the eleventh day of June, he sent his son and the other hands home, and he remained for the purpose of settling and getting his money. His son and other witnesses tell you he wore at the time, the pantaloons, vest, and coat, cotton over-alls, hat and shoes, that have been produced upon the trial, also, that he at the time his son left him in Rockford, had in his pocket the

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knife, memorandum book, wallet and portmonie of the deceased here produced. He closed his business at Rockford and went to Beloit, on Wednesday the thirteenth of June, there he had some sales to make, and some settlements to attend to, there also he wore the same hat and other clothing, and still had in his possession the same knife, wallet and portmonie, in addition to which he then purchases of a merchant tailor, Mr. Hiney, who knew Mr. Alger well, a linen coat of a peculiar kind, and particularly identified by the witness; and also, on the morning of the sixteenth he purchased of Mr. Peck, a horse and buggy—with all of which property, clothing, etc., Mr. Peck saw him leave the farm of Mr. P. Cogswell, (this side of Beloit) for Janesville. And Mr. Orville Bennett tells us he left Beloit with about $580, in money; he left Beloit a little before noon, on the same day he dined at the Stage house, kept by J. M. Burgess, in this city, at the same table with the witness, E. G. Fifield, and was seen here by a large number of other persons, still wearing the hat and clothing before described, and having in his possession the identical horse and buggy purchased of the witness, Peck. We have proved to you, gentlemen, that he left Janesville with his horse and buggy, stating that he was going to his home in Jefferson county, between two and three o'clock in the afternoon of that day, doubtless with all that feverish anxiety of husband and father, after a long and laborious absence, to once more reach the happy circle of his own domestic fireside.

Oh! Poor deluded, innocent soul, little did he know that this vile monster lay in his path, little did poor Alger know that that day was to make a widow of his wife, and rob his children of a father; little did he know, that before the sun should set again he must be numbered with the dead, little did he think when he was fleeting over the beautiful Rock Prairie, his heart no doubt light and joyous, and his spirits buoyant with the thought of home, that his eternal exit was to be taken that hour in the beautiful Grove, then

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full in sight. Oh! Little did he suppose when he stopped his horse, in mercy as he doubtless supposed to a poor weary traveler, and took into his buggy this villainous wretch, that he was administering kindness and humanity to his own destroyer; that he was bartering away his own life with kindness; that by that act of humanity he had forever bid farewell to his home, to his family, and his friends.

We have the further evidence that the bloody coat here produced is the identical linen coat sold to the deceased by the witness Hiney, at Beloit, and that it was found within a few feet of the place where the mangled body of Alger was found. Again nearly everything in the possession of Alger when he was last seen is here produced and identified; to which add the positive and irresistible evidence of Chas. H. Conrad, and Elbridge G. Fifield, witnesses, who have known Alger for more than twelve years; and who doubts the identification of the body—the counsel may, but you gentlemen of the jury cannot. If there should be one among you in the least disposed to doubt, just ask him where Alger is, and why is it that no other information, trace, or intelligence has been received concerning him since he was seen by the witness, Williams, crossing the prairie the day he was murdered?

We will now devote a few moments to the examination of the defense, viz: that the stories told by the witnesses are inconsistent, and only evidences of insanity. On the part of the State, we think that the various facts and circumstances related by the witnesses harmonize in all respects most remarkably. His confession to the McCombs, the counsel think false or evidence of insanity. We can see no evidence whatever of insanity in this case, that there may be some evidence of a daredevil indiscretion, I admit, but that is fully accounted for when the fact is known that relations of intimacy in the state prison at Alton between him and a son of the witness, John J. McComb, which doubtless caused him (not very much to the credit of Mc-

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Comb,) to seek his house as a home, and the father and sons of his old friend at Alton, his confidentials, and it is not at all strange that he very confidentially supposed the family were all like his Alton companion, and in all probability he felt safe in opening his bosom to them, and he doubtless was so elated with his success, that he felt like boasting of it to such as he supposed were his compeers in crime. The prisoner had left McComb's house the Thursday before, avowing his intention to go north, Janesville and Wisconsin were both mentioned. He doubtless got his eye upon poor Alger at Rockford, inquired him out, and then set himself about looking out the ground upon which to strike the fatal blow. We next hear of him at Janesville, at the house of the witness, Mrs. Tubbs, on Wednesday afternoon; he again returns to her house and stays all night, Thursday night; left about 8 o'clock next morning, said he lived at Rockford. Friday night we find him at the house of the witness, Rexford, at Beloit, and a new hatchet in his possession looked like the one here shown, which he says he found. But we have evidence from the clerks of one of the hardware stores that this defendant inquired for, and looked at some hatchets in their store, about that time, but said they would not answer his purpose, they were too large. A clerk of another store tells you he sold a hatchet to a stranger, about that time. It is true he can't swear that this defendant is that stranger, but when you recollect he told McComb that he bought the hatchet with which he murdered his victim, in Janesville, who can doubt but that he is that stranger. He is next seen by the witness, Williams, on the road between Janesville and Milton between the north side of the prairie, and near the crossing of the Hume's bridge road, there he seems to be loitering leisurely along apparently waiting for some one. He is on foot with his coat upon his arm, after three o'clock on Saturday. The witness, Williams, notices him and identifies him particularly and is positive that this defendant is the man he thus saw on that day; the witness

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also, in passing on to this city met the unfortunate Alger, just on the top of the hill going towards Milton from this city. About nine o'clock that evening the prisoner purchased of the witnesses, Allen and McIntyre, at the clothing store of M. C. Smith & Co., a coat, vest, and pants. He then had on his head, Alger's white hat, and when asked if he did not want a black hat to go with his new black clothes, he replied that he had a black hat in his buggy at the door, and after putting on the new pants, found with him at McComb's by Sheriff Taylor, of Rockford, and here produced, on which is still remaining the private mark of M. C. Smith & Co. The coat and vest the witnesses say he now has on. About twelve o'clock the same evening, he is driven into the house of Mr. Tracy, about three miles south of this city by a frightful storm, giving as a reason, that it lightened so that his horse would not keep the road, he there represents that he came from Madison and was going to Beloit. He had a horse and buggy with him, hitched his horse in the yard and laid down on the floor, and left at some time in the night unknown by the witness. We next hear of him this side of Rockford, in Illinois, going towards Rockford with the same identical horse and buggy, sold by Beck to Alger, the day before. Mr. Allen says he saw the prisoner on Sunday, the seventeenth of June, on the prairie going from some cattle near where a horse and buggy was, and where the horse appeared to be grazing. Mr. Allen says he spoke to the defendant and knows he is the same man; when defendant was going from the cattle towards the buggy, he appeared to have something in his hand which he threw into the buggy. When the witness turned to go from where the prisoner was, he saw that some of the cattle were badly cut, and it appeared to have been done with an axe or hatchet.

This, the counsel says, is evidence of insanity, but far from that, it is evidence of the same cold blooded, wicked, malicious and depraved heart, that has characterized the character and conduct of this miserable defendant, through-

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out. In all probability when the besmeared and bespattered murderer anchored himself among the quiet herds of cattle upon the broad green prairies, that he might perhaps in that way rest and refresh the wearied horse, unnoticed and undiscovered by any human eye; but imagine his wrath and rage, when he found his wagon suddenly surrounded by scores of dumb brutes, the very lowing of which told this assassin that he was detected as the murderer of poor Alger. Yes, well did he know that even the beasts of the field had found upon him the blood of the murdered man, and that they too had detected and were endeavoring to proclaim that he was the bloody villain! Then it was that he dealt out to the dumb brutes violence, with the same instrument with which he took the life of Alger. Very little evidence of insanity, but great evidence of a heartless, cold-blooded villain! ! The witness is confident that the horse and buggy seen by him on the prairies, are the same shown him at Mr. Howland's, and the same testified to by the witness, Peck. He is next seen by the witness, Smith Clothier, three or four miles below Rockford, with a horse and buggy, going towards McComb's, about noon of the same day. William Blackman also saw him about four miles below Rockford, going towards McComb's, after noon of that day; he arrived at McComb's about two or three o'clock of that day, then he prowled about until about five p. m., when he found McComb in the garden; he showed McComb a handful of papers, said he was going to burn them; they were the memorandum book and other papers, taken from him by Sheriff Taylor, and here produced; he said he got them of a lumberman; he then took from his pocket a stocking and shook it (with a large quantity of gold in it) saying, "see that." The witness, Alger, identifies the stocking to be his father's. Defendant then requested the witness to go with him down into the woods and see the horse and buggy he had down there, that he had taken from a lumberman, he said he did not know his name, but that he got into the buggy to ride with him,

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about one mile north of Janesville on the prairie towards Milton, he said he gave the old man some whiskey and he took a good horn, and when he had got to the place he had looked out for that purpose, he raised up, stating that he was chilly and would put on his coat, and while he was then standing up in the buggy pretending to be putting on his coat, he took from the sleeve the hatchet found in his possession and here produced, which he said he purchased in Janesville for that purpose—and dealt the deceased a deadly blow on the head, which knocked him senseless, that the horse jumped, and he seized the lines and drove the horse and buggy into the woods ten or fifteen rods, into the thick bushes and then struck him two or three times more upon the head with the hatchet, and then—brute like—kicked the poor dying man out of his own buggy, his poor helpless victim groaning out in a strangely deathly manner, "Good Lord, Good Lord," to which this miserable wretch could cruelly and coldly reply, "shut your d——d noise or I will cut your throat," and then took from Alger's pocket the knife he had long used to serve up his meals in the woods, and on the river, (and his son tells you he has ate many a meal with that knife) and stabbed him in the back and sides, and then cut his throat from ear to ear, stripped him of his clothes, robbed him of his money, and with the same dare devil, cold blooded indifference, that the wolf, the bear, or the panther would, lay down by the side of their prey in the forest—he, this defendant, cooly laid himself down by the murdered body in open daylight, for an hour and a half, waiting for the night to come so he could slip away unnoticed in the dark, sane enough, to prefer darkness rather than light.

Such feats performed by such a creature, were too much to be kept by him alone. He must rush with lightning speed to some haven or repose where he could freely unbosom himself to some safe and secure friends; he was either overburthened with a consciousness of his guilt seeking an outlet or demanding relief, or he was vainly proud

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of his success, and was eager to go where he might boast of his crime to at least approving friends. Which, gentlemen, do you think was the motive which actuated him; the latter, no doubt. He who can be detected, arrested, and brought to the bar of justice, assumingly as has this man, at every step meeting full in his face unmistakable evidence of his guilt; the man who can face the Court and Jury, and the overwhelming proof of his guilt, unchanged, unmoved, presenting a human form and a human face as determined, and unchangeably fixed as the polish marble tombstone stationed in the grave yard. Look, gentlemen, at that face, see the cold brassy defiance which was so plainly seen at the opening of the case. Has a muscle moved, or the countenance changed in the least, at any time? No, gentlemen, dying groans and supplications, widow's shrieks or orphan's cries would only be music in his ear.

He though McComb would also be delighted with his narration, but thank Heaven he mistook his man, and whatever may be said of the son of McComb, we have upon this trial the most reliable evidence of McComb's honesty, and he is entitled to the thanks of this community for the vigilant manner in which he has brought this dark and disgraceful crime to light. And the people of this state are under great obligations to Mr. Brown, the State's Attorney for the Northwest District in Illinois, and to Sheriff Taylor, of Rockford for their well directed efforts in bringing this defendant to justice; and we owe a debt of gratitude to all the witnesses from Illinois, which we shall never be able to pay (and I hope we shall never have the opportunity to pay in like services,) for their prompt attendance here as witnesses. They were beyond our reach—our Court had no power to compel their attendance; yet they came—they are here, and now will you vindicate them, by your verdict, from the insinuations cast at them by the defendant's counsel, or will you override the truth and uphold the defendant in his crime?

The effect of punishment depends entirely upon its cer-

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tainty and not upon its severity. I have no doubt that you will convict this defendant, and there is no doubt that he ought to be, and when convicted I have no doubt that the sentence of the Court will satisfy all that his punishment will be far greater than the gallows with all its terrors. I have heard it intimated that in this case the people were so enraged that they were determined on vengeance—that they would take the execution of his sentence and the administration of punishment into their own hands—that this defendant should never reach Waupun. This cannot be; it must not be; the courts of justice are our only reliable safeguard in this country, and they must be sustained; the law must be executed as it is. I should be sorry to believe for one instant that there was any such design. What! Is there a man on earth who would be willing to stain his hands in the blood of that poor miserable object of pity? I hope not. Such an act would disgrace our State, our county, and would be an endless disgrace to our city; besides it would have a tendency to repeal the law we now have, which, in my humble opinion, is the best law in the land, and it would probably have the tendency to re-enact that law which is befitting the dark ages and barbarous nations—a law that has hung scores of innocent men, and a law that would do more to clear the guilty than could possibly be done by all the lawyers in Wisconsin. Here is a book that is full of cases of murdering innocent men according to law, and there are volumes written in the few words of the counsel's speech in which he stated to you that he wished to God that the punishment in this State was capital, because he should then have strong hopes of clearing this defendant—even this defendant. He says that when the penalty is death, the jury ever reluctantly find the defendant guilty. Gentlemen, he never said a truer thing. The death penalty hangs poor, penniless men, guilty or innocent; and it sets free and turns at large the wealthy and the influential, whether they be guilty or innocent; and every good citizen should abhor and depre-

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ciate a law that works so alarmingly unequal. Our law as it stands affords greater punishment than the death penalty, save only the harrowing thoughts of death by legal murder. And all must admit that as the law now stands, the certainty of punishment is greatly increased. But I will not take up the time of this Court and Jury in discussing the policy of the law; that belongs more particularly to the legislature; in the meanwhile let us sustain and live by the laws as we find them. If the laws are wrong, change and reform them, but don't rebel against the action of our courts of justice.

This case is so plain that speech or utterance find nothing upon which to play. You must be satisfied beyond the possibility of a doubt, that Andrew Alger was, on the sixteenth day of June, most cruelly and brutally murdered by some one, in the town of Harmony, in this county; and can there be the shadow of a doubt that the brazen faced prisoner at the bar is the murderer? Independent of the evidence of the McComb family, there can be no doubt of the defendant's guilt. He was seen waiting on the road where poor Alger must pass; he was on foot with his coat on his arm, and in less than twenty-four hours after he is at McComb's, near forty miles south, in Illinois, with Alger's horse and buggy, his money, clothing, papers, pocket-books and knife, in his possession. When arrested he gave a false account of the possession—that he had earned the money and bought the knife in St. Louis. He wore a black hat north and traveled on foot, and the same night wore a white hat south and declared that he had with him in his buggy a black hat; he pretended that he lived and was at work at Milton, and was going there, when he was in fact on his way to Rockford with a horse and buggy. He gave a false account of his business to Allen, McIntyre and Tracy. He snatched from McIntyre the pantaloons in which he carried the money, and when McIntyre said to him, you seem to have a large supply of legal tender, he replied that all he had in the world was in those pantaloons. He told

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Tracy that he had been at Madison and was going to Beloit. Is all this enough?

I again confess, gentlemen that this case is too clear for argument, and it is too cruel to even talk about. Many feel that this miserable prisoner at the bar ought to be hung. I do not think so. He deserves punishment that will more effectually remind him of his crime. I am decidedly opposed to hanging in any case. I believe it to be morally wrong and productive of bad results; but if there ever was a case where hanging could be justified under a death penalty law, this is that case. Gentlemen, the interest of the State is in your hands—my duty is ended, yours will soon begin, and I leave the defendant in your hands. In mercy to the family and friends of poor Alger, don't forget to do justice to this defendant.

THE JUDGE'S CHARGE.

JUDGE DOOLITTLE. Gentlemen of the Jury: The prisoner at the bar stands charged with the highest crime known to our laws, with the deliberate murder of Andrew Alger, from a premeditated design, or in the language of the common law, "with malice afore-thought." And if the defendant is guilty as charged, and as the evidence in the case tends to show, justice compels me to say that he is guilty of murder in the first degree, committed under circumstances of such cold-blooded atrocity, that we can hardly find a parallel in the history of crime.

But gentlemen, however atrocious the deed by which this county has been shocked and electrified, and however desirous every good citizen may be to bring the real offender to justice, yet courts and juries should not for a moment lose sight of the rules of law which are established to govern the administration of criminal law, and which are the safeguards of the rights and liberties of every individual. It will be borne in mind that the accused, when put upon trial, charged with any offense, is presumed to be innocent until proved to be guilty. The burden of the proof is upon

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the prosecution, and the State must convince you beyond any reasonable doubt of the defendant's guilt, before you are authorized to convict. You are to start with the presumption of innocence, and step by step, and inch by inch, the public prosecutor must lead your minds by the force of the testimony given by him, until every other supposition or reasonable hypothesis is excluded, except the hypothesis of the defendant's guilt.

To establish the guilt of the prisoner, three things are necessary: First to show that a murder has been committed by somebody. The *corpus delicti* or body of the crime must be clearly established, and by a weight of testimony, which is, in a moral sense, irresistible; that is to say, it must be shown to a moral certainty. To establish that fact, the prosecution rely upon the situation of the body at the time when found, with the throat cut from ear to ear; with the skull broken through to the brain; with a mortal wound in the side, another in the back, wounds which it is insisted could by no possibility be inflicted by his own hands, or any other than a human hand. The testimony of the medical witnesses is relied upon to show that, from the coagulated blood found about the wounds in the back, those wounds must have been received before the arteries of the neck were severed, and that therefore those wounds were the cause of the death, and not wounds wantonly made by some person after he came to his death. Upon these facts the prosecution insist that, beyond all possibility of doubt, a murder has been committed by some human being upon the person of another.

In the second place the prosecution must show beyond any reasonable doubt, that the person murdered is the same person named in the indictment—in short, that the body found in the town of Harmony is the body of Andrew Alger. To establish that fact, the prosecution rely upon the fact that the body is identified by two witnesses, Mr. Conrad and Mr. Fifield—that a large number of witnesses, with more or less positive assurance, identify the clothing of

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Andrew Alger, found with the prisoner; and especially the fact that the white linen coat, the coat which he was seen to put on at Beloit when he left that town with the horse and buggy, was found near the place where the body was found, covered with blood and concealed under some leaves; and from the fact that Alger, since last seen on his way home between Janesville and Milton, has nowhere been seen, unless the body in question is the body of Andrew Alger.

Third. If you are satisfied beyond all reasonable doubt that this was the body of Andrew Alger, you will next inquire—and perhaps that may be the main inquiry—is the prisoner at the bar guilty of that crime.

To establish that fact, the prosecution relies upon two species of evidence: First—circumstantial. Second—positive testimony, by the defendant's confessions, and third—the combined weight of both.

Independent of the testimony of McComb and his two sons, Halsey and Erastus, the prosecution insist that the circumstances in evidence would leave no room to doubt the defendant's guilt. The circumstances relied on are mainly these: That the defendant was seen waiting upon the road where Alger was to pass, and within twenty-four hours after he is found with the horse and buggy of Alger, on the premises of McComb, in the county of Winnebago, State of Illinois, and upon being searched, in his pockets were found the papers and wallets of Alger; that the defendant gave a false account of the money in his possession; that the knife of Alger, identified by his son and others, was found in his possession; that he gave a false account of it; that when he left Mr. Rexford's, in Beloit, he had on a black hat, and the next day had on a white hat, identified with more or less assurance, as the one worn by Alger when he left Beloit; the fact that he said he lived and worked at Milton, and was going to Milton, when he was on his way to Rockford, and was living there; the fact that he left on foot and returned with a horse and buggy; that he

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left with one hat and returned with his own black hat as he said in the buggy, and a white hat like that of Alger's, on his head, when seen at nine o'clock in the store at Janesville; the false account given of his business to Allen, and another false account given to Tracy the same night, that he had been to Madison and was going to Beloit; and the prosecution insists that these facts are enough of themselves to satisfy the jury beyond all reasonable doubt of the defendant's guilt, though the evidence of McComb and his two sons were stricken from the case.

In the next place, gentlemen, you will inquire as to what weight should be given to the three witnesses to whom the defendant is said to have confessed his guilt. The confessions of a party are always to be weighed with great scrutiny. On the one hand it is of all other evidence the most liable to be mistaken, and the most easy to be manufactured, while on the other, if such a confession be clearly proved to have been voluntarily made, by a party in his right mind, it is evidence of very great weight. The counsel for the defendant insists that the confessions made to McComb are so unreasonable, so contrary to the impulses of human nature, that you should wholly disregard their testimony; and further, that when these confessions were made by the defendant, he was so far intoxicated that the confessions, if made, should have no weight whatever. That, gentlemen, is a question for the jury—whether that confession was in fact made, whether it is wholly irrational and unnatural, or whether it accords with the facts truly, whether it was made with the expectations of being sheltered and secreted by McComb (with one of whose sons he is said to have been imprisoned at Alton) when he would be pursued, or whether it was the result in fact of his being influenced by intoxicating drinks, or whether it was the result of both—or whether, as insisted by the District Attorney, it was the confession of a soul overburdened with a sense of guilt, stained with a brother's blood, driven almost to a frenzy; the confessions of a soul whose terrible

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secrets it could no longer keep, which has already become his master, which in spite of itself "rises to the throat and demands utterance." All these are questions for the jury, as well as the degree of weight to be given to them.

If the defendant was in fact intoxicated when he made these confessions, they are not entitled to anything like the same degree of weight as if made while in full possession of his mind.

But the counsel for the defendant, while he admits that there are many strong circumstances tending to prove the prisoner's guilt insists that they are not sufficiently strong to satisfy you, beyond all reasonable doubt, by evidence so strong as to exclude every other hypothesis except that of guilt.

The defendant's counsel has correctly stated the law upon the subject. You must be satisfied of his guilt to a moral certainty. You should extend to the defendant the benefit of every reasonable doubt, upon the humane principle that ninety and nine guilty persons should escape, rather than one innocent man should suffer.

In the administration of criminal law, high, responsible, and sometimes very painful duties rest upon Courts and Juries. A responsibility in bearing which the head grows weary and the heart sometimes grows faint; but it is a responsibility which must be borne. We could not withdraw from it if we would, and should not if we could. We should extend to this defendant, as to all others charged with crime, the whole charities of the law, and all the presumptions of innocence, but if, upon the evidence, the mind is convinced beyond a reasonable doubt that he is guilty of this crime, it is your duty to the oaths you have taken, the country in which you live, by all that is sacred to the lives and peace of your community, and I may add, your duty to the defendant, painful though it may be, to declare him guilty. It is a duty in administering justice to remember mercy but while remembering mercy, not to forget to administer justice.

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It would be indeed a mistaken sympathy, if this defendant is clearly found guilty beyond any reasonable doubt, to acquit him and suffer him to go at large. The great master of poetry, I believe it is, has said that "mercy murders pardoning crime;" and the great philosopher, Sully, once said to the Emperor of France, when about to pardon a great murderer, "remember," said he, "the guilt of the murder which he has already perpetrated, is his; if you pardon him the guilt of the next murder will be yours."

The case is with the jury who are the judges of the law and the fact. Upon the one hand you are to extend to the prisoner every reasonable presumption of innocence—the benefit of every reasonable doubt; but upon the other if satisfied beyond a reasonable doubt of his guilt, public justice demands a conviction at your hands.

THE VERDICT AND SENTENCE.

After an absence of about twenty minutes the Jury returned with a verdict of *guilty*, and the court adjourned to eight o'clock, July 12, to which time the sentence of the prisoner was deferred.

July 12.

At eight o'clock on Thursday morning the prisoner was brought into court and received the following sentence: That he should be imprisoned at hard labor in the penitentiary at Waupun during the period of his natural life—the first twenty days in each year, commencing with his imprisonment, and the first five days in each of the months, from October up to the first five days in June, in each year, in solitary confinement.

THE LYNCHING.

After Mayberry's arrest in Rockland, Illinois, he was brought to Janesville by the Sheriff on a requisition by the Governor of Wisconsin to the Governor of Illinois and confined in jail there. The Grand Jury being in session,

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a true bill was at once found against him and the trial began in a very few days, yet in this short interval a mob collected three times with the intention of hanging him, but was each time persuaded to abandon the attempt. The treacherous character of the crime, his victim being murdered while suspicious of no danger and while doing an act of kindness to the murderer had thrilled the neighborhood with indignation and revenge which was increased after his conviction by Mayberry's indifferent attitude during the trial. And on the night of his conviction, on his return to the jail, he laughed from his cell window at the crowd outside, made signs of defiance to them, and then ate his supper calmly and with a good appetite. But it was when they heard the sentence, viz., that his only punishment was to be confinement in a comfortable penitentiary for life with the chance of freedom in a few years should a sentimentalist chance to occupy the Governor's chair, that the public anger became uncontrollable—increased certainly by the criticism of the State Attorney in his speech to the jury on the Wisconsin law abolishing capital punishment.

On the evening of the eleventh, while Mayberry was passing from the court house to the jail, after his conviction, a crowd filled the streets, and a man threw a noose over the prisoner's head. By a quick motion of his hand aided by one of the constables, he flung aside the rope and Sheriff Hoskins managed to land him safely in jail. The crowd was exasperated at the rescue and many voices cried: "Break in the Jail." After a conference, a committee went to the jail with a written demand on the Sheriff for the prisoner, which that officer promptly refused. Mayor Dimock and both of the State's Counsel addressed the mob, but without avail; they refused to disperse, and the Sheriff's force and a number of special policemen were on guard all night.

On the morning of the twelfth when the prisoner was brought into Court to receive his sentence, the mob was

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around the court house in great force and its determination to take his life was very apparent. A large number of the people were armed and they seemed to have their chosen leaders. The whole town seemed to be on one side, and it was difficult for the Sheriff to procure any volunteers to aid him in maintaining the law. Judge Doolittle and Mr. Noggle addressed the crowd, but the speeches did not change its purpose, and two attempts were made to storm the court house, which were however repulsed. At two in the afternoon, the officers believing that the mob had retired, determined to take Mayberry to the jail, which was only a hundred yards away, and started, headed by Judge Doolittle. But no sooner had they left the court house doors than on a signal the people appeared before and around them, the officers were overpowered, the Judge carefully, but forcibly carried on one side, and the prisoner seized and dragged away. Mayberry fought hard, but he was knocked down and his clothes almost stripped from him, and a rope was then put around his neck, thrown over a bough of a tree, and he was hauled up by the crowd, where he hung until he was dead. The mob then dispersed, and the body was taken back to the court house.

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THE TRIAL OF DIANA SELLICK FOR THE MURDER OF HETTY JOHNSON, NEW YORK CITY, 1816

THE NARRATIVE.

Diana Sellick was a slave in the state of New York in 1816. She had been for some time practically free, her master having liberated her informally, though not legally[1] and she was a servant in a New York family. She had a child which she kept at the house of Hetty Johnson, a free negress. One day in January Diana came to this house with some liquid in a bowl, which she said was gin, and which she wanted Hetty to partake of, but the latter refused, saying, "You know I never drink any such thing." She replied, "If you won't, I'll drink it myself and give some to the children." She put the bowl to her mouth and then poured some out into a glass, and though Hetty called out to her not to do so, she gave two tea-spoonfuls to the Johnson child, who was also named Hetty. She then left the house and almost immediately both children began to vomit. Diana returned in a little while and Hetty said, "You have made the children drunk," and was advised by Diana to go for the doctor. She did so, and while she was absent Diana gave some more stuff to Hetty's child.[2]

The physicians, on examination, having decided that the child had been poisoned, Diana confessed that she had purchased some poison, adding, "I meant it for you (Hetty). I was possessed of the devil." The child, Hetty, died four days later. Diana, indicted for the murder of the child, was convicted and sentenced to be hanged, though a plea of insanity was put forward, and there seemed to be no possible motive for the crime.

Two incidents in the trial are worthy of comment. A

[1] Mr. Hone, p. 845.

[2] Hetty Johnson, p. 842.

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juror asked to be excused on the ground that he was conscientiously opposed to capital punishment and would, under no circumstances, render a verdict of guilty when the punishment was death. He was challenged by the People. The prisoner's counsel agreed that the only statutory ground for a challenge of this kind was that the juror was a Quaker, which the present one was not. But the Court appointed the first two jurors sworn as triers, and the juror having testified that he would never agree to find the prisoner guilty, no matter what the evidence was, the triers after argument by counsel, and a charge from the Judge found that the juror was not indifferent and the Judge sustained the challenge.[3] And in the course of the trial a black was called as a witness; but it appearing that he was born a slave, (though he had considered himself free for many years and had no master that he knew of or ever had claimed him,) he was held to be incompetent to testify.

THE TRIAL.[4]

In the Court of Oyer and Terminer, City of New York, December, 1816.

WILLIAM W. VAN NESS,[5] *Judge.*
JACOB RATCLIFF,[6] *Mayor.*
JONAS MAPES, } *Aldermen.*
WILLIAM AL. BURTIS, }

December 19.

The prisoner was indicted for wilful murder, committed on Hetty Johnson, on the fourteenth day of January, 1816,

[3] This is still the method of passing on the competency of a juror in England. See Criminal Procedure in England, 1 American Journal of Criminal Law and Criminology, p. 700. But in the United States to-day the usual practice is for the Judge to decide such questions.

[4] *Bibliography.*—*The New York City Hall Recorder. See 1 Am. St. Tr. p. 61.

[5] See 1 Am. St. Tr., p. 780.

[6] See 1 Am. St. Tr., p. 61.

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by mixing "a certain poisonous substance, commonly called white arsenic, with gin, and giving the same to the said Hetty Johnson, with intent her the said Hetty Johnson to kill, murder and destroy, and that after the said poison was so administered, the said Hetty Johnson died by reason of taking such poison."

The prisoner, a black woman, was brought into the court wrapped in a blanket, trembling, and unable to support herself standing. She pleaded not guilty.

Mr. Maxwell[7] for the People; *Mr. Price* and *Mr. Emmett*[8] for the Prisoner.

James Palmer, on being called as a juror, said: May it please the Court, I object to serving on this jury. My objection rests on conscientious grounds.

The COURT. Mr. Palmer, do you belong to the Society of Friends? No, may it please the Court.

The COURT. Mr. Palmer this is a question that is to be determined by the law of the land. There is no exception in the statute which embraces your case: you are not exempt by law.

Mr. Palmer. I may be forced on this jury; I may be imprisoned; but I shall never do a thing against the dictates of my own conscience. I have long considered the subject and, according to my own construction and belief of the New Testament, I think that no earthly tribunal has a right to take away the life of a human being. The more I have read the Scriptures the more is this opinion confirmed; and I have long determined, and shall firmly adhere to that determination, that, however clear and positive the testimony might be, on behalf of the prosecution, I never would, and never will agree to a verdict, the consequence of which would be the death of a fellow being.

Mr. Maxwell. I think it my duty, as public prosecutor, to interpose a challenge to this juror for cause.

[7] See 1 Am. St. Tr., p. 62.
[8] See 1 Am. St. Tr., p. 63.

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The COURT. This challenge must be tried by the two first jurors, called and sworn. The oath is, "You shall well and truly try the matter of challenge, whether James Palmer stands indifferent between the People of the State of New York and Diana Sellick, the prisoner at the bar, and a true verdict given according to evidence."

The first two jurors were accordingly sworn as triers, and James Palmer was sworn, and testified in substance before the triers, to the same matters which formed the ground of objection against himself; declaring further, that even in this case, had the prisoner made a full and ample confession of her guilt, he never would agree to find her guilty.

Mr. Maxwell. On general principles, the juror called can not be considered as indifferent between the people and the prisoner, and ought, therefore, to be set aside. Since the ancient doctrine of attaint has become obsolete, no person was responsible for the verdict which he might render; and the inevitable consequence of suffering this juror to sit in this case, would be the acquittal of the prisoner.

Mr. Price. The ground of objection to this juror was novel, and very extraordinary. The Court and jurors will perceive that the juror has set up his own private opinion against the law of the land; and should the objection be held valid by the triers, the consequence might be, that every man called as a juror, in case of life and death, would have it in his power to claim an exemption not warranted by law. An objection founded on individual prejudice, which has not been made the subject of statutory exemption or regulation ought not to prevail. The legislature had exempted one society of people only from serving as jurors in case of life and death[9]; and the triers could not assume the cognizance of extending that exemption to an individual, which was denied him by the provisions of law.

[9] Quakers.

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The COURT (to the triers). Gentlemen, James Palmer has been called as a juror on this occasion, and on being sworn has stated, that in no case, however clear and positive the testimony might be, would he render a verdict, the consequence of which would be the death of a human being. This opinion, he states, is founded on conscientious scruples arising from his construction of the New Testament.

Mr. Palmer has appeared before you, and appears to be a sincere, respectable man; and there is no reason before us to induce the belief, that he has resorted to this as a pretense. On this state of facts, the question arises for your determination, whether the evidence before you is such as satisfies your minds that Mr. Palmer stands indifferent between the government and the prisoner at the bar. The counsel for the prisoner have argued that this juror is not exempted by law from serving on this jury, and that an objection professedly founded on the private opinion of an individual, not recognized by any statutory provision, ought not to be held valid. There is, I must confess, some force in this argument, but I am unable to see how it can effect the sole question which you are to try, to which I have called your attention. Were this an objection on behalf of the juror, merely, then the argument would be conclusive; but on this occasion, the government has interposed a challenge, and the right of challenge to the favor, as between the government and the prisoner, is reciprocal. I think that, although this juror is not exempted by law from serving, yet, regarding the right of the government, the reason why he should not serve is as strong as if he, in truth, belonged to the society of Friends. I will put a case for illustration: Suppose a civil cause was to be tried, in which the sole defense was usury; and a juror should be called, who should declare, on oath, that, considering the statute of usury inexpedient and wrong, on principle, he had firmly determined never to render a verdict in favor of the provisions of that statute, however clear and positive the testimony of usury might be.

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Though the law had not exempted such juror from serving, yet ought not a challenge for favor, made by the defendant, who sought, in that trial, to set aside an usurious contract or transaction, be sufficient to prevail? I therefore think that the challenge on behalf of the prosecution is valid, and ought to prevail.

It is unfortunate, gentlemen, that such an opinion as that entertained by Mr. Palmer, on this subject, should exist in the mind of any person in the community. That is not my opinion. I believe that every government has a right to protect the community against the murderer, by inflicting the punishment of death. Nay, I believe it strictly conformable to the law of God. This is not my opinion merely, but that of a large majority of mankind, and many of the ablest jurists.

The Triers retired, and in a few minutes returned with a verdict in favor of the challenge. *Palmer* was thereupon set aside as a juror.

Mr. Maxwell opened the case for the prosecution. He stated that he expected to show, by positive testimony, and by the confession of the prisoner, regularly taken in police, that she committed the murder by the means laid in the indictment.

WITNESSES FOR THE PEOPLE.

Hetty Johnson (a black woman). In January last, Diana Sellick lived with Mrs. Baily, of Doyer street; and Diana had put her child with me to board on Christmas before. On Thursday, fifth of January, prisoner came to my house with some liquor in a white bowl, which she said was gin, and asked me to drink; told her I did not want any, and she said she would put some sugar in it, which would make it better. She offered it to me again, and I refused to drink, saying to her, you know I never drink any such thing. She then said, if you will not drink it, I will drink it myself, and give it to the children. She put the liquor to her own mouth, and turning some out in a glass; gave some from the glass to her own child; how much either of them drank, I cannot say, as I was about my work. My child, then about a year old, was at the door, and I charged the prisoner not to give my child any of the liquor: but she took out two tea-spoonfulls from the bottom and gave to my child. Prisoner then went out to go to Mrs. Baily's, and while she

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was gone her own child was first taken sick, and fell into an empty kettle; I took it up in my lap, and it vomited very much. My child was also taken sick a short time afterwards; and when prisoner came back, I told her she had come in a good time, for both the children were drunk. Prisoner told me to go for Dr. Fowler. Went to my husband, and told him to go for Dr. Walters. When I got back to the house, found the prisoner there; took my child in my lap, and wiped its mouth, and round the mouth saw something was dry, which the prisoner had given her while I was gone.

The COURT. You must state nothing but what you know yourself. How do you know the prisoner had given the child anything while you was absent?

Johnson. She must have given the child poison while I was gone; no grown person besides was left there: I looked into the fire, and saw the remains or shadow of a paper which had been burned; I looked on the mantel-piece, and saw some white stuff scattered, which came out of the paper when she mixed it.

The COURT. How long after you returned did you see the white stuff on the mantel-piece?

Johnson. About half an hour; but before this, I asked her what she had given the child, and she answered nothing. Dr. Walters came, and seeing both the children sick, said they were poisoned. In the morning I told prisoner that the poison must have been in the liquor which she gave the children; she said it must have been in the measure in which the liquor was drawn at Mr. Disbrow's. My husband then went to Disbrow's, and when he returned he told prisoner that Disbrow's measures were clean; and she then told him that she must have made a mistake in the bowl which she got at Mrs. Baily's, as she had one standing with ratsbane, mixed to kill rats. My husband then went to Mrs. Baily's, and was directed by her to go to Dr. Walters, and make inquiry whether the prisoner had not purchased poison at his store, and when he returned he told her that Dr. Walters had said that she purchased poison at his store. The prisoner then confessed that she had bought six pence worth of ratsbane at Dr. Walters for me. She said to me, "I meant it for you; I was possessed with the devil." She threw her arms around my neck, and begged me to go down with her to the police, and clear her; to which I answered, that I could do no such thing.

The COURT. What was the situation of your child?

Johnson. Very sick, and puked almost continually. Its only cry was for water: the roof of the mouth was much eaten by the poison, and it lay in this dreadful condition until Monday morning, when it died.

Cross-examined. Was married to Johnson in June or July last. The child that died was between two and three years old; have had five children; but was never married before I married Johnson. When the prisoner came at the time she brought the bowl of poison, she had her clothes, which she had brought from Mrs. Baily's, and said, "Mrs. Baily and myself have cleared out."

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The COURT. How much gin was there in the bowl at the time she brought it to your house? Do not know, certain; think there was about a gill; it was a half pint bowl

The COURT. Are you certain that she gave the liquor to her own child out of the glass? Am pretty sure that she did, and then to mine in a teaspoon. First her child was much sicker than mine. On the day the poison was given prisoner told me that she was sick at her stomach and went out of doors, as she said, and vomited; never had a quarrel or any difficulty with the prisoner, and she always appeared to me very fond of her child. Had been in the habit of taking small children to board, which was the reason that I took hers. She used often to come to my house to see her child.

James Seaman. Cannot say that I ever saw the prisoner before; but remember that sometime after New Years, in the middle of the day, a black woman came into an apothecary's store in which I was concerned, and asked a young lad who attended the store, for three cents worth of ratsbane or arsenic. The lad told her that was a smaller quantity than we were accustomed to sell; and she then asked for sixpence worth, which was put up and delivered to her. No questions were asked of her.

Dr. D. D. Walters. Some time about a year ago, on a Thursday, I was crossing Dover street, when Johnson requested me to go to his house to see two children who were sick; went to the house, and found two women, one of whom was called Johnson's wife, and two children, both of which were retching and vomiting; suspected that they had been taking something of a poisonous nature; inquired, and Johnson's wife told me they had only been taking a gin sling. Every appearance and symptom indicated that they had taken arsenic; thought I discovered in the matter voided from the stomach of Johnson's child, that she had taken arsenic not in a state of solution. Arsenic is a white powder, and will operate in twenty, sometimes in ten minutes. Vomiting and retching are some of the most obvious symptoms; told them that the children had taken poison, and prescribed something; being too unwell to attend, told them that they had better get someone else to attend, and left them.

Benjamin Johnson (a black).

Mr. Emmett. Have you ever been a slave? Yes, but I am now free.

Mr. Emmett. How did you become free? Mrs. Alexander purchased me of Mr. Curtis, and I lived with this lady after her marriage with Mr. Jaques. She always told me that after her death I should be free, and that Mr. Jaques had nothing to do with me. After her death I became free, and left the house. I have often seen Mr. Jaques since, and he spoke very friendly to me, and has never made any claim of me.

Mr. Emmett. Have you any manumission paper? I have not.

Mr. Emmett. May it please the Court, we object to the testimony of Johnson: he is the slave of Jaques.

The COURT. Mr. Maxwell, you had better go on with other tes-

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timony, and let this witness stand aside for the present.

James Warner. Am a police magistrate. This prisoner's testimony was taken before me in the police office, on the fifth day of January last. She was in custody when she came there. The examination was perfectly voluntary on her, and she appeared rational.

Mr. Maxwell proposed to read the examination.

Mr. Emmett. Can the examination be read before it is shown on behalf of the prosecution, that the killing was occasioned by the means laid in the indictment? It appears that the child languished four days, and then died; but whether by means of the poison is not shown. In a prosecution for this offense, before the examination is read, a regular foundation should be laid.

The COURT. I think in this case, that a sufficient foundation has been laid to entitle the public prosecutor to read the examination. The child was well on Thursday; was taken sick, and every symptom attending taking poison, and died on the Monday following.

The examination was then read in evidence, and contained a full and ample confession of the murder; stating that the prisoner being in liquor, and possessed by the devil, went to a druggist, and got sixpence worth of arsenic, which she mixed with gin in a bowl; that she knew not what she did.

Sarah Baily. Prisoner lived with me as a servant in the beginning of January last; turned her away, for she was intemperate; saw her about two hours after she had given ratsbane to the child, and she then denied that she had given the child anything. She told me that she had taken a bowl out of my kitchen in which to get gin. About three or four weeks before she came to my house I had some ratsbane in my house, which I mixed in meal, and put in the cellar for rats. Am sure during the time she was there, there was no ratsbane used in my house for rats. Never discovered anything, either in the conduct or conversation of the prisoner, while in my house, to induce me to suspect her of being insane.

The COURT. Mr. Maxwell, I have considered the matter, and am not inclined, in a case of life and death, to admit the testimony of Benjamin Johnson. Mrs. Alexander, while she was the wife of Jaques, owned, and had possession of the black man, promising him that on her decease he should be free. She died, and the slave then assumed his freedom, and Jaques, since that time, has not claimed the services of the black man. He has no manumission paper. Though, in effect, he may be free, yet, in contemplation of law, during coverture, the personal property of the wife vests in the husband. He has a right to dispose of this property, and exercise the right of ownership over the same. On her decease this right still survives; and, in this case, though he hath not claimed, he hath still the right to claim the services of Johnson.

Mr. Hone. Legally, I suppose prisoner is my slave; purchased her in 1807, and told her that in 1819 I would free her. Though

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she was an excellent servant at times, and particularly fond of children, yet she was restless and unsteady; she was, at times, flighty, which became a subject of serious conversation in the family. I liberated and discharged her; and when she went away, the understanding was, that she was to work in other families, and pay for her time; but I never calculated that she would pay anything, and had never any idea of claiming her services. After she had left the family some time she returned, but we refused to receive her; have long since relinquished all claim, and am willing to execute a formal manumission.

A paper for this purpose was then drawn up by *Price*, and executed by Hone.

Dr. Walters (recalled). Arsenic is sold for one shilling and sixpence an ounce, and one-third of that quantity could not be dissolved in a gill of gin, that would not dissolve more than one drachm of arsenic, which is difficult to dissolve in that liquor. One grain of arsenic will prove fatal; believe that two teaspoonfuls of the liquor, containing merely that proportion of the quantity of arsenic which could be dissolved in a gill of gin, would produce death.

Hetty Johnson (recalled). The prisoner gave my child two teaspoonfulls of that which I thought to be sugar from the bottom.

Mr. Emmett. I submit the question, whether, in the absence of all testimony on behalf of the prisoner; when she has not called a single witness, whether the public prosecutor has a right to sum up evidence to the jury. This has been, and I think is now, the practice in England.[10]

The COURT. Mr. Emmett, a different practice has prevailed in this state, ever since I can remember.

WITNESSES FOR THE DEFENSE.

Nehemiah Allen. Prisoner's child recovered after taking the poison; it used to be brought to its mother at Bridewell, of which I was keeper. She appeared to be very fond of the child.

THE JUDGE'S CHARGE.

VAN NESS, J. Gentlemen of the Jury: The prisoner at the bar is on trial before you for one of the highest crimes in our law. Should she be found guilty, she must be sentenced to suffer the punishment of death; but whether she will actually be executed or not, is not the business of the present inquiry. The grand inquiry to which every other

[10] And seems to be today. Criminal Procedure in England. 1 Journal Crim. Law and Criminology, 749.

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question in the case is merely subordinate, is, did the prisoner commit the murder? I am aware of the feelings which pervade the bosoms of men of sensibility, sworn as jurors to decide a case of this nature, according to the evidence before them. The juror, penetrated with those benign sentiments of humanity, cherished in our enlightened age, and which dignify our criminal code, approaches to the discharge of his duty with a trembling solicitude. He feels that the life of a fellow being awaits the result of his determination; and he therefore proceeds with doubt, and hesitation and fear. But whatever may be your feelings on this occasion, it is my duty to charge you to summon all your fortitude, and boldly march forward to the discharge of that duty which has devolved upon you. Where murder has been committed, a public justice imperiously requires satisfaction at your hands. The first preliminary fact in the case, to which I shall call your attention, and of which you must be perfectly satisfied before you can find the prisoner guilty, is, that the child died by means of the poison administered. This forms a substantial part of the case on behalf of the prosecution, the proof of which should be clear and unequivocal. It has been contended by the counsel for the prisoner, that no apparent motive existed in the mind of the prisoner to commit the act; and that there is no evidence on behalf of the prosecution, that the commission of the act was the result of premeditation.

It is true, gentlemen, you must not only be satisfied the prisoner committed the act, but that it was done with malice aforethought. On this head, therefore, I shall briefly explain the nature of this malice, which the law requires, as one of the principal ingredients to constitute murder. Malice, as applicable to this crime, is either express or implied in the law: express, when antecedent grudges, or menaces of vengeance, made by a prisoner, have preceded the perpetration of a murder, conclusively proved, and brought home to him; implied, where a homicide is committed by a man with a deadly weapon, and without

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any assignable or known motive. In such case the implication of malice necessarily flows from the act.

In this case, it is true, we are unable to discover any apparent motive which operated on the mind of the prisoner, to induce the commission of murder. But should you, nevertheless, be satisfied, from the evidence, that she administered the poison, and that the child died by reason thereof, in the mode stated in the indictment, you will be justified in finding her guilty in the absence of all motive.

The evidence in the case, applicable to this branch of the subject, is, that the child was well on Thursday, when she took the poison, when she had all the symptoms incident to those who take the species of poison administered: she continued languishing in that situation until Monday morning, when she died. The prisoner purchased the arsenic; and you have her confession as to the mode in which it was administered. Dr. Walters, in his testimony, tells you, that the quantity given was sufficient to produce the effect which followed, even had that quantity contained in the spoon, consisted merely of the proportion of the arsenic dissolved. On this state of facts, the true question is, can you believe the child died by any other means than those laid in the indictment? In human tribunals, to judge and determine, we must, necessarily, be governed by human testimony. I declare, that on this point, the evidence in this case has produced an entire conviction in my mind; but still, gentlemen, you must decide this question for yourselves.

Should you believe that the death of the child was occasioned by the poison, the next question for your consideration is, whether the killing was perpetrated wilfully; or, in other words, whether the act of poisoning the child was the result of insanity. This ground of defense has been assumed by the counsel for the prisoner, and strenously urged in her behalf. They have urged to the jury, that in the absence of motive for committing this offense,

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the jurors might, and ought to attribute the act to insanity, from the evidence before them.

With regard to this ground of defense, gentlemen, I must speak my mind freely, and impart to you my honest conviction.

Insanity is a defense often resorted to, and in most cases, when every other ground of defense has failed. From its nature, it ought to be received in all cases by the jurors with the greatest degree of caution and circumspection. But in a case where poison has been administered—poison, which is of that insidious nature, that the domicil of the citizen can afford no security against its introduction by servants and domestics, the evidence of insanity should not only be conclusive but overwhelming. In my view, such a defense, in such a case, ought to be scrutinized by the jury with no ordinary degree of caution. It does not follow by any legitimate rule of reasoning, that because we are unable to penetrate the motive which induced the act, that we are therefore to attribute the act to insanity. In her examination she says she was possessed of the devil, and knew not what she did. Can we reasonably look for any other motive than that laid in the indictment?

The positive testimony in the case, independent of the examination, is that of Hester Johnson. She appeared before you, and from her own statement concerning herself, it appears that her conduct has been immoral. Standing alone, unsupported by other testimony, I should say that the testimony of such a witness, in a case like the present, would be insufficient to produce a conviction. Still, if upon examination, it should be found that her relation is consistent within itself, and fortified by the testimony of others, then it is entitled to credit. This witness has not sworn to a single material fact, which is not testified to by other witnesses, or confessed by the prisoner. There is a striking coincidence between the testimony of this woman, and the examination of the prisoner, concerning the mode in which the poison was administered. The only difference between

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the testimony of Hester Johnson and the examination is, that the witness states that the poison was given by the prisoner to her own child in the glass, but the examination states it to have been given in a spoon. This difference, in my opinion, is rather an evidence of the correctness of the testimony, than otherwise; because had the coincidence been complete, there might have been room left to suspect that the witness had been guided in her testimony rather by the instruction of others, from whom she had learnt the story, than from her own knowledge of the circumstances. Besides there is a strong reason in the case to induce the belief that in this point Hester Johnson is correct. For should we suppose, as the complexion of the case, I think, will justly warrant, that the prisoner, on this occasion, resorted to an artifice, by taking the liquor herself, and giving it to her own child, to induce the other woman to partake; the prisoner would naturally give her own child the liquor in that state from which the least danger could be apprehended. There is one circumstance, wherein there is a striking coincidence between the examination and the testimony of this witness. The witness states that on her return, after she had sent her husband for the doctor, she saw in the fire the remains or shadow of a paper which had been burned; and the prisoner states, that when she mixed the poison, she threw the paper into the fire place.

Mrs. Baily's testimony is of little bearing in the case, except, as far as it goes, it repels every idea that the prisoner was insane. This ground of defense, gentlemen, I must confess, appears to me utterly untenable.

On the whole, gentlemen, if after a patient deliberation, you can bring your minds to a rational doubt on the question, whether the death of the child was occasioned by the poison; or should you be fully convinced, from the testimony before you, that at the time the prisoner committed the act, she was insane, it will, in either case, be your duty to acquit. But if, on the other hand, after carefully examining and weighing all the facts and circumstances of the case,

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you should believe that the prisoner wilfully and wickedly perpetrated this act, and that the death was the effect of the poison administered, you are bound to pronounce the prisoner guilty.

THE VERDICT AND SENTENCE.

The *Jury* returned a verdict of *Guilty*.

VAN NESS, J. From the evidence in the cause, there remains not a doubt of your guilt. You have been assisted by able counsel, who faithfully discharged their duty; but after the most minute and patient investigation, it appears, satisfactorily, from all the facts and circumstances in the case, that your conduct, in administering the poison, was the result of a cunning artifice. Having addressed you so far as a magistrate, I shall speak to you now as a man.

I exhort you earnestly to prepare for a never ending eternity. Your only remaining hope is in and through the merits and intercession of Jesus Christ, to whom you should apply for pardon. During your short stay in this life, you shall, I promise you, be visited by divines, to counsel and instruct you concerning your eternal welfare.

The sentence of the law is that you be taken from hence to the prison, and on Friday the eighteenth of April next, from thence to the place of execution, where you shall be hanged by the neck until dead.

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THE TRIAL OF CHARLES GILL FOR OPENING ANOTHER PERSON'S LETTER, NEW YORK CITY, 1818

THE NARRATIVE

Charles Gill living in New York City had a creditor in England who was pursuing him. Anxious to know what proceedings were going to be taken against him, Gill intercepts the correspondence between the Englishman and his American agent, gets hold of the letters, breaks the seals, reads them and then boasts to his friends that he has outwitted his creditor. He was convicted of a misdemeanor, the judge telling the jury that breaking a seal and opening a private letter is an offense not to be tolerated. His counsel on the trial vainly endeavored to show the Court that it was not a matter for the state courts to handle, but belonged exclusively to the United States Court.

THE TRIAL.[1]

In the Court of General Sessions for the City of New York, May, 1818.

HON. CADWALLADER D. COLDEN,[2] *Mayor.*
Hon. RICHARD RIKER,[3] *Recorder.*
A. L. UNDERHILL, } *Aldermen.*
ARTHUR BERTIS, }

May 4.

During the last term defendant was indicted for a misdemeanor at common law. The indictment consisted of six counts, the two first of which alleged, in effect, that the de-

[1] *Bibliography.*—New York City Hall Recorder. See 1 Am. St. Tr. 61.
[2] See 1 Am. St. Tr., p. 4.
[3] See 1 Am. St. Tr., p. 361.

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fendant, being an evil disposed and mischief-making person, and the interceptor of other people's letters, and intending to vex and impoverish one Charles Rumley, and to pry into his private affairs, and to disclose his private correspondence, on the first day of October, 1817, at the city and county of New York, did assume the name of Rumley, for the purpose of obtaining from the clerk of the general post-office in said city, a certain private sealed letter, written by some person, to the jurors unknown, and directed to Rumley—that by means of such device the defendant obtained such letter, broke its seal, and read and disclosed the contents, to the great damage, etc.

The second count was for personating Rumley, and by that means obtaining such letter. The third and fourth counts charged the defendant with having assumed the name of one William Tappling, and personating him, with the intent of prying into his private correspondence by letter with one William Shepherd; and by that means obtaining from the post-office, a certain letter written by Shepherd to Tappling, directed to the said care of said Charles Rumley.

Hugh Maxwell,[4] District Attorney, for the People; *Mr. Price* for the Defendant.

Mr. Price. This is a Federal and not a State offense. Section 8 of the Constitution of the United States, delegates to Congress, power of establishing "Post-offices and Post-roads," and authorizes that body "To make all laws which shall be necessary and proper for carrying into execution the aforesaid powers, and all other powers vested in the government of the United States." Congress by virtue of the powers so delegated to them, had passed an act, rendering it penal to commit the offense set forth in this indictment. It has assumed a jurisdiction over the subject matter, and that jurisdiction is exclusive. Should the defendant be convicted on this indictment, he could not plead this in bar to a subsequent prosecution under the laws of the United States.

[4] See 1 Am. St. Tr., p. 62.

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In cases of patents and in treason, the federal courts have an exclusive jurisdiction which the state courts have never assumed.

Mr. Maxwell. We admitted that the courts of the United States, by the provisions of the statute, had jurisdiction over offenses of the nature set forth in this indictment: but contend that it does not follow that their jurisdiction is exclusive. This was an offense at common law, and existed prior to the passing of the act. As such this court had a right to maintain cognizance thereof. Congress has a right, by the Constitution, to pass laws in relation to the public securities and coin of the United States; and yet a prosecution for the forgery of bank bills of the United States, or for counterfeiting their coin, may be maintained in the state courts. So also a nuisance maintained on public post roads may be removed, through the interposition of any court having cognizance of common law offenses.

There is a law of the United States against sinking a ship at sea, and yet a prosecution in this court was maintained for a conspiracy to effect that object.[5] But it is questionable whether the statute of the United States, contemplates the offense set forth in this indictment. The charge is that defendant assumed the name and personated another, for the purpose of prying into his business—an offense clearly cognizable by the common law, and not within the statute of the United States. It cannot be denied but that the prosecutor, for an injury of this nature, if he had suffered damage, might maintain a civil action; but if the United States have exclusive criminal jurisdiction over the offense, for a stronger reason their jurisdiction ought to be exclusive in a civil point of view, which is absurd.

The RECORDER adverted to several cases, concerning which the Constitution had delegated to congress the power of passing laws, but over which the state courts, notwithstanding, had jurisdiction. Congress had a right to establish a national

[5] Roget's case, 2 N. Y. City Hall. Rec., p. 61.

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bank, and yet a forgery, committed in relation to United State's paper, was punishable in the state courts. This had been decided in the Supreme Court. The offense laid in this indictment is a misdemeanor at common law: and the judgment of the Court on this plea, is that the defendant answer.

May 6.

The *Prisoner* having pleaded *not guilty,* the cause came on for trial today before a jury.

Mr. Maxwell. The defendant formerly resided in London, and having become embarrased in his affairs, embarked for this country, leaving his family, consisting of a wife and three children, in England. Thomas Shepherd, of London, was one of the creditors of the defendant to a considerable amount and, before he removed, was on very intimate terms with defendant, insomuch, that in the absence of each other they were in the habit of opening and reading each other's letters. To what period, prior to the removal of the defendant to this country, this intimacy continued, did not appear, but, from the tenor and complexion of one of the letters written by Shepherd, directed to the care of Rumley, it appeared that the feelings of Shepherd were decidedly hostile towards defendant. On August 12th, 1817, Shepherd wrote a letter to William Tappling in this country, directed on the back "Mr. William Tappling, Mr. Charles Rumley, Leather Japanner, near the Horse Ferry, Brooklyn, near New York, America." The letter having been put on board a ship, was brought to this city, and the post-office—the postmark being 17th October. In the letter, the writer informed Tappling, that he had written Charles by the Venus but fearing the letter might miscarry, he, Shepherd, writes to inform Tappling of his, Gill's, tricks. The writer further states, that he had written in his former letter to Tappling, by no means to inform Gill of the writer's intention of coming out to America; as, in that case, Gill would be off to prevent seeing him. The writer proceeds to inform his correspondent that Gill has wronged him out of nearly £1000 previous to his re-

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moval from England, under the pretense of sending him the money from this country, but that Gill had not, in any of his letters, even mentioned the writer's name. The writer then advises his correspondent to behave to Gill as if he, Tappling, had not received that letter—and also, if possible, to get in Gill's debt about £200, because, by reason of some bills, for the payment of which Tappling was responsible, and which the writer had endorsed before he left England, for the benefit of Gill, he would owe Tappling that sum. This letter was otherwise written with considerable acrimony against Gill; and in several places the writer calls him a thief. These letters were in October last taken by the defendant out of the post-office, carried by him to the battery, the seals broke and read by him. He had alluded to the taking and was much elated at his exploit, and said he had outgeneralled them.

THE WITNESSES.

Charles Rumley. In the month of March last, I ascertained the above facts, in substance, about the letter from Germany, a postoffice clerk called on defendant and accused him of intercepting the letters. He at first denied it, but afterwards admitted the fact, but refused to deliver the letters, one of which he acknowledged he had sent back to Shepherd. At the time of the reception of the letters, I resided in Babylon, on Long Island, a fact with which the defendant was acquainted.

Allen Peacock. I was present when Gill brought the letters from the postoffice, when he said of Rumley, "Oh! the rascal—I've found him out."

The defense was principally put on the ground that on the twenty-seventh of July, 1817, Gill's family embarked on board a ship for this country; that the vessel did not arrive in this city, until the twenty-seventh of October following, and that being very solicitous for the fate of his family, and knowing of the arrival of these letters from his friend Shepherd, he intercepted them, under the expectation that they contained information touching his family.

The RECORDER (to the jury). The breaking a seal and opening a private letter, is an offense which ought never to

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be tolerated in this country, except in some very peculiar cases. A confidential clerk, intrusted with the business of his principal in his absence might be supposed, in breaking open his letters, to act under an actual or implied license. In cases of war, or other public calamity, letters may be intercepted for the purpose of detecting and defeating the designs of an enemy. Or, even in times of peace, the police may cause private letters to be broken open. The principal ground of defense, which has been stated to you, is no excuse; inasmuch as Gill neglected, and afterwards, when called on by Rumley, refused to deliver the letter, having returned the other to Shepherd.

Defendant, according to the evidence, stands before the Court and jury without excuse, and the offense of which he is charged, strikes at the root, as well of the most important concerns, as of the most endearing relations in society.

The *Jury* returned a verdict of GUILTY and the prisoner was fined fifty dollars and costs.

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THE TRIAL OF THADDEUS P. FRENCH FOR LARCENY, BOSTON, MASSACHUSETTS, 1827

THE NARRATIVE

A boy of thirteen was tried in a Boston court for stealing a watch from the proprietor of a "pie shop" in that city. But it appeared on the trial that the owner and proprietor had sold him and his companion, a boy about the same age, not only cakes and cigars, but likewise a concoction quite intoxicating, known as "Tom and Jerry," The judge told the jury that while in the case of adults indulgence in strong drink was an aggravation rather than an excuse for crime committed under its influence, in the case of a youth it might very well produce temporary insanity. They took this view and the youth was acquitted.

THE TRIAL.[1]

In the Municipal Court of Boston, March, 1827.

HON. PETER O. THACHER,[2] *Judge.*

[1] *Bibliography.*—*"Reports of Criminal Cases tried in the Municipal Court of the City of Boston, before Peter Oxenbridge Thacher. Edited by Horatio Woodman, of the Suffolk Bar. Boston. Charles C. Little and James Brown, 1845."

The preface says: "The Municipal Court was established in the year 1799, on account of the great delays and expenses in administering justice in the town of Boston. The jurisdiction was at first very limited. In 1812, it was extended, concurrently with the jurisdiction of the Supreme Judicial Court, to all criminal cases in the county of Suffolk, not capital. Appeals to the Supreme Court were originally allowed generally, afterwards much limited, and by the statute of 1839, c. 161, were abolished, except on questions of law, to be carried up by exceptions filed of record. The court had jurisdiction also of cases of lunatics to be sent to the Worcester State Asylum, and cases of additional sentences to be imposed on second and third comers to the State Prison, convicted in any of the courts of the Commonwealth. The first judge of the court was George Richards Minot, who held the office from its establishment to his death in 1802. Thomas Dawes was then appointed, and presided

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March 5

The prisoner was indicted for stealing from the shop of one McClenathan, a watch belonging to him. He pleaded not guilty.

Mr. Austin[3] for the Commonwealth; *Mr. A. Moore* for the Prisoner.

THE EVIDENCE.

Harvey McClenathan. Prisoner and a boy named Curtis Wilder, both about 13 years old came to my shop on Purchase street two times. It was Saturday evening, February 17th. I keep a pie shop. The second time French bought a cigar and Wilder a cake of gingerbread. While they were there I looked at my watch and hung it over my desk near the door. The boys went out and in a little while Wilder came back for another cake. He did not come further than the door. A little after I missed the watch and suspected the boys; went to French's home and charged him with stealing it. He denied the fact. Next morning French told me that Alfred Johnson, another lad, had, and Johnson was taken with the watch, and he, French and Wilder were carried before the police court, where, upon examination, Johnson and Wilder were discharged, and French was committed for trial.

Curtis Wilder. Knew nothing of the taking of the watch till French showed it to me as we were going from McClenathan's shop that evening to a book auction, in Broad street. Alfred

from that time to the year 1822, when he resigned. Josiah Quincy was the next judge, and held the office from January, 1822, to his resignation in May, 1823."

[2] THACHER, Peter Oxenbridge. Judge of the Boston Municipal Court. "When he was commissioned in 1823 he was forty-six years of age. He had commenced the practice of the law in 1802, and in the year 1807 was chosen 'town advocate,' for the town of Boston, which office he held during eight months of that year, and again, upon a subsequent election, from 1809 to 1811. That officer was at first annually elected by the people of Boston, and was the prosecuting officer in the Municipal Court. Judge Thacher continued in the constant performance of his duties as the judge of that court from his appointment until his death on the 22nd day of February, 1843. During this time he was distinguished for his earnest study and thorough knowledge of the criminal law and its practical application, and for entire fidelity and devotion to the arduous duties of his office; and in the many cases which were tried before him, important in themselves and exciting to the community, his course was eminently marked by integrity and firmness of purpose, and a conscientious and fearless administration of justice." *Id.* See 1 Am. St. Tr., 44.

[3] See 1 Am. St. Tr., 44.

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Johnson, French and myself came Saturday evening to a cellar where I was, French took me aside and told me that he had taken the watch. Advised him to return it to the owner, he got it into his own possession, with the intention of returning it to the owner the next morning.

Mary Miriam. Resided in the family of the father of prisoner; the evening it occurred, Thaddeus appeared to be intoxicated with liquor, and under a derangement of his intellect, which I imputed to liquor.

Harvey McClenathan (recalled.) When the boys first came to my shop, I sold them three cents worth of Tom and Jerry, which they drank there.

Mr. Moore. What was the composition of that drink? I don't want to say. It is my secret.

THACHER J. It is a proper question, witness, and you must answer it.

Harvey McClenathan. The liquor was composed of eggs and sugar, beaten together with allspice, nutmeg and salæratus, to which was added a portion of rum and brandy.[4] I sold this composition to all who wanted it, children as well as men; it is usually sold in shops similar to my own..

THACHER J. (To the jury.) If you believe that the prisoner had been put into a state of mental derangement, by drinking the noxious liquors and smoking the cigar which the prosecutor sold to him at the time, and committed the act while in this condition, it will be you duty to acquit him of the charge. It is an immoral act in the prosecutor to sell to these children such a vile composition, and it might well

[4] This is the actual recipe which the witness did not desire to make public:

Twelve fresh eggs,

One-half small beer-glass each of Jamaica or Santa Cruz Rum and Brandy,

One and one-half tea-spoonful of ground Cinnamon,

One-half tea-spoonful of ground Cloves,

One-half tea-spoonful of ground Allspice.

Beat the whites of the eggs to a stiff froth, and the yolks until they are as thin as water, then mix together and add the spice and rum, stir up thoroughly, and thicken with sugar until the mixture attains the consistency of a light batter. A larger or smaller quantity of this mixture may be made by increasing or diminishing the proportions of the above ingredients. N. B.—A tea-spoonful of cream of tartar, or about as much carbonate of soda as you can get on a dime, will prevent the sugar from settling to the bottom of the mixture. To serve Tom and Jerry, take a small tumbler and put in it one table-spoonful of the mixture, fill the glass with boiling water, grate a little nutmeg on top, and serve with a spoon.

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have happened that the combined influence of the liquor and cigar, on a child of so tender years, would produce a temporary insanity. This case essentially differs from that where a crime is committed by a person who, by a free indulgence of strong liquors, has at the time voluntarily deprived himself of his reason. By the policy of the law this rather enhances the offense. It was, however, an excuse constantly offered by offenders, and it is certainly true, that but few crimes are committed by persons who are habitually temperate in the use of ardent spirits.

The *Jury* returned a verdict of acquittal, and after an admonition from the COURT the prisoner was discharged.

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THE TRIAL OF ALEXANDER ARBUTHNOT FOR INCITING INDIANS TO WAR, FLORIDA, 1818

THE NARRATIVE

The Seminoles were a Nation of Florida Indians, implacable enemies of the United States, who, during the War of 1812 with Great Britain, aided our enemy in their Southern operations. Even after the conclusion of peace, they with a band of runaway negroes from Georgia and South Carolina harassed the American Settlers on the borders of Florida (which belonged to Spain) which culminated in a massacre of settlers and soldiers at Fort Scott. News of the act reaching Washington, General Andrew Jackson was ordered to the front to take command of our forces. Jackson, with his habitual promptness, energy and self reliance, marched at once to the scene, entered the Spanish territory, and after hanging two Indian chiefs who fell into his hands, marched from St. Marks to Suwanee, the town of the Seminole Chief, Boleck, or Bowlegs, over a hundred miles distant, and reached only by a toilsome march through a swampy country. But when he reached there, he found that the foe had by some means been forewarned, and had conveyed their women and children to a place of safety; and the braves disappeared into the forest as the American troops appeared on the scene. Their escape angered Old Hickory greatly, and he returned to St. Marks, disappointed at being cheated of his prey, and in a state of mind by no means amiable. Jackson found in the town two Englishmen, Alexander Arbuthnot and Robert C. Ambrister. Arbuthnot was of Scotch origin, seventy years old; a cool, reticent man, who had been a trader among the Indians for many years; had established friendly relations with them for his own security and advantage in trade, and had exerted himself in their behalf in many quarters. Ambrister was thirty-three, a nephew of the British Governor of New Providence, an ex-lieutenant of British

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marines, had formerly been in this country's service in Florida, and was now a sort of free lance, and a friend of the Indians. Jackson at once ordered the two Englishmen before a Court Martial, presided over by General Gaines.

Arbuthnot was tried first on three charges: (1) Inciting the Indians to war against the United States. (2) Being a spy and aiding the enemy. (3) Inciting the Indians to murder two white men. The evidence against him was that he had written one of the Indian Chiefs, insisting that they were entitled by the Treaty of Ghent, to the same territory they had before the war,[1] and had warned the Indians of Jackson's approach.[2] Copies of letters from him were also produced, one of them containing an application to Bagot, the British Minister, for his official interference in behalf of these late allies of the Crown; another, a power of attorney to act for the Indians; and a discharged clerk testified that Arbuthnot had supplied the Indians with powder.[3] On the third charge there was no evidence. And the old trader was at once acquitted of the charge of being a spy, and it was withdrawn, but two-thirds of the Court declared him guilty of stirring up the Indians to war with the United States, and furnishing material aid, and sentenced him to be hanged,[4] which sentence was promptly approved by General Jackson.

[1] "A position quite untenable, and probably taken from interested motives hostile to the United States." 3 Schouler History U. S. 71. But "his business in Florida was open and obvious. He had always advised the Indians to peace." Sumner "Andrew Jackson," 59.

[2] "When he heard of Jackson's advance, he had written to his son, who was his agent at Boleck's village, to carry the goods across the river. Through the letter the Indians got warning in time to cross the river and effect their escape . . . His letter was not open to censure. Can traders be executed, if their information, not transmitted through the lines, frustrate military purposes?" Sumner, 59.

[3] This testimony was probably perjured. 3 Schouler 71.

[4] "The general impression to be derived from all the proofs is that Arbuthnot was probably guilty, but that a reasonable doubt of his guilt nevertheless existed, such as should prevent a conviction under the familiar rules of our criminal law." 3 Schouler 71.

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He was accordingly hanged the next morning (April 29th) from the yard arm of his own schooner, The Chance. He met his death with composure, declaring on the scaffold that his country would avenge his death.

THE TRIAL[5]

Before a Special Court Martial, Fort St. Mark, Florida, April, 1818.

MAJOR GENERAL E. P. GAINES.[6]
COLONEL KING, Fourth Inf.
COLONEL WILLIAMS, Ten. Vol.
LIEUTENANT COLONEL GIBSON, Ten. Vol.
MAJOR MUHLENBERG, Fourth Inf.
MAJOR MONTGOMERY, Seventh Inf.
CAPTAIN VASHON, Seventh Inf.
COLONEL DYER, Ten. Vol.
LIEUTENANT COLONEL LINDSAY, Cor. A'y.
LIEUTENANT COLONEL ELLIOTT, Ten. Vol.
MAJOR FANNING, Cor. A'y.
MAJOR MINTON, Geo. Militia.
CAPTAIN CRITTENDEN, Ky. Vol.
LIEUTENANT J. M. GLASSELL, Seventh Infantry, Recorder.

April 26.

Early in the morning of this day by an order from the office of the Adjutant General (Robert Butler) issued by

[5] *Bibliography.*—* "The trials of A. Arbuthnot and R. C. Ambrister, charged with Exciting the Seminole Indians to War against the Unites States of America, From the Official Documents which were laid by the President before Congress. London. Printed for James Ridgway, Piccadilly, 1819."

[6] GAINES, Edmund Pendleton. (1777-1849.) Born Culpepper County, Va. Appointed 2nd Lieutenant U. S. Infantry 1799; captain 1807; resigned 1811, intending to practice law, but returned to the army at the beginning of the War of 1812; Colonel 1813; Brigadier General 1814; afterwards made Major General for distinguished services; General under Jackson in the War with the Seminoles.

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Major General Andrew Jackson,[7] the above officers were directed to assemble at noon and to sit without regard to hours "for the purpose of investigating charges exhibited against A. Arbuthnot, Robert Christie Ambrister, and such others, who are similarly situate, as may be brought before it. The Court will record all the documents and testimony in the several cases, and their opinion as to the guilt or innocence of the prisoners, and what punishment, if any, should be inflicted."

The COURT convened pursuant to the foregoing order, and were duly sworn. The *Prisoner* being asked if he had any objections to any member thereof, replied in the negative. The following charges and specifications were read, viz:

Charge I. Exciting and stirring up the Creek Indians to war against the United States and her citizens; he (A. Arbuthnot) being a subject of Great Britain, with whom the United States are at peace. *Specification.* That the said A. Arbuthnot, between the months of April and July, or some time in June, 1817, wrote a letter to the Little Prince, exhorting and advising him not to comply with the treaty of Fort Jackson, stating, that the citizens of the United States were infringing on the treaty of Ghent, and, as he believed, without the knowledge of the chief magistrate of the United States; and advising the Upper and Lower Creeks to unite and be friendly, stating that W. Hambly was the cause of their disputes; also advising the Little Prince to write to the Governor of New Providence, who would write to his Royal Highness the Prince Regent, through whom the United States would be called to a compliance with the treaty of Ghent; and advising them not to give up their lands under the treaty of Fort Jackson, for that the American citizens would be compelled to give up to them all their lands under the treaty of Ghent.

[7] JACKSON, Andrew. (1767-1845.) Born North Carolina. Studied law 1784, Public Prosecutor Nashville, Tenn., 1788; Member Constitutional Convention of Tennessee 1796; Member of Congress 1796; United States Senator 1798; Judge Supreme Court Tennessee 1798-1804. Nothing is known of his conduct in this position. "No records or decisions of the court from that period remain." Sumner's "Andrew Jackson" 14. Major General Volunteers 1801. Trustee Nashville Academy 1793; private citizen, planter and storekeeper 1804-1811. General in War against the Creek Indians 1813; victor over British in Battle of New Orleans 1815, victor in Seminole War 1818. Governor of Florida 1821; defeated by Adams for President of the United States 1825; elected President of the United States 1828; re-elected 1832.

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Charge II. Acting as a spy, and aiding, abetting, and comforting the enemy, supplying them with the means of war. *Specification 1st.* In writing a letter from the fort of St. Mark, dated second of April, 1818, to his son John, at Suwany (marked A), detailing the advance of the army under General Jackson, stating their force, probable movements, and intentions, to be communicated to Bowlegs, the Chief of the Suwany towns, for his government. *Specification 2nd.* In writing the letters marked B, without date, and C, with enclosures, twenty-seventh January, 1818, and D, called "A Note of Indian Talks," and E, without date; applying to the British Government, through Governor Cameron, for munitions of war, and assistance for our enemies; making false representations; and also applying to Mr. Bagot, British ambassador, for his interference, with a statement, on the back of one of the letters, of munitions of war for the enemy.

Charge III. Exciting the Indians to murder and destroy William Hambly and Edmund Doyle, and causing their arrest, with a view to their condemnation to death and the seizure of their property, on account of their active and zealous exertions to maintain peace between Spain, the United States, and the Indians, they being citizens of the Spanish Government. *Specification.* In writing the letters marked F, dated twenty-sixth August, 1817; G, dated thirteenth May, 1817; and H, threatening them with death, alleging against them false and infamous charges, and using every means in his power to procure their arrest. All which writings and sayings excited, and had a tendency to excite, the Negroes and Indians to acts of hostility against the United States.

The *Prisoner* pleaded *Not Guilty.*

THE EVIDENCE.

John Winslett. Some time before last July, the Little Prince received a letter, signed by a Mr. Arbuthnot, advising the upper part of the nation to unite with the lower Chiefs in amity; and stating the best mode to repossess themselves of their lands would be to write to him (Arbuthnot), and he would send their complaints to the Governor of Providence, whence it would be forwarded to his Britannic Majesty, and he would have the terms of the treaty of Ghent attended to. He also said that the encroachments on the Indian lands were unknown to the President of the United States. I identify the signature of the Prisoner in a letter to his son, marked A, referred to in the first specification in the second charge, as the same with that sent to the Little Prince. This letter said that the British Government, on application, would cause to be restored to them their lands they held in 1811, agreeably to the terms of the treaty of Ghent.

(*To the Prisoner.*) The Little Prince is known by the name of Tustenukke Hopin, and is the second Chief of the nation. The letter was in the possession of Little Prince when I last saw it.

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Do you not swear, that the letter was addressed to the Little Prince? It was presented to me by the Little Prince to read and interpret for him, which I did. Am certain that the letter stated, that the Chief Magistrate of the United States could have no knowledge of settlements made on Indian lands, or injuries committed.

John Lewis Phenix. Being at Suwany, about the sixth or seventh of April, I was awakened in the morning by Mr. Ambrister's receiving, by the hands of a Negro, who got it from an Indian, a letter from St. Marks, at that time stated by Ambrister to be from the Prisoner.

(*To the Prisoner.*) Did not see the letter, or hear it read?

A member of the COURT raised a question as to the jurisdiction on the third charge and its specification. The doors were closed, and, after deliberation, it was decided, that the COURT was incompetent to take cognizance of the offenses alleged in that charge and specification.

Peter P. Cook. Was clerk to the Prisoner. About December last, Prisoner had a large quantity of powder and lead brought to Suwany in his vessel, which he sold to the Indians and Negroes. Later Ambrister brought for the Prisoner, in his (the Prisoner's) vessel, nine kegs of powder and a large quantity of lead, which was taken possession of by the Negroes. I identify the following letters, referred to in the foregoing charges and specification, marked A, B, C, D, E, F, G, and H, as being the prisoner's handwriting; also the power of attorney, No. I, granted by the Indians to A. Arbuthnot. I also identify as in the handwriting of the prisoner No. II, granting him full power to act in all cases for the Indians, as recorded before; also a letter without signature, to the government of St. Augustine, numbered II; a letter without date, to Mr. Mitchell, the Indian Agent, numbered III; an unsigned petition of the Chiefs of the Lower Creek nation, to Governor Cameron, praying his aid in men and munitions of war, numbered IV.[8]

[8]A.

From A. Arbuthnot to his Son, John Arbuthnot, dated Fort St. Mark, second April, 1818, 9 o'clock in the morning.

Dear Son—As I am ill able to write a long letter it is necessary to be brief. Before my arrival here the commandant had received an express from the Governor of Pensacola, informing him of a large embarkation of troops, etc., under the immediate command of General Jackson; and the boat that brought the dispatch reckoned eighteen sail of vessels off Appalaegicola. By a deserter that was brought here by the Indians, the commandant

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was informed that three thousand men, under the orders of General Jackson, one thousand foot and one thousand six hundred horse, under General Gaines, five hundred under another General, were at Prospect Bluff, where they are rebuilding the burnt fort: that one thousand Indians, of different nations, were at Spanish Bluff, building another fort, under the direction of American officers; that so soon as these forts were built they intended to march. They have commenced. Yesterday morning advice was received that they had appeared near————, and taken two of the sons of M'Queen and an Indian. Late in the afternoon three schooners came to anchor at the mouth of the river, and this morning the American flag is seen flying on the largest.

I am blockaded here; no Indian will come with me, and I am now suffering from the fatigue of coming here alone.

The main drift of the Americans is to destroy the black population of Suwany. Tell my friend Bowlegs, that it is throwing away his people to attempt to resist such a powerful force as will be down on Sahwahnee; and as the troops advance by land, so will the vessels by sea. Endeavor to get all the goods over the river in a place of security; as also the skins of all sorts; the corn must be left to its fate. So soon as the Sahwahnee is destroyed, I expect the Americans will be satisfied and retire: this is only my opinion, but I think it is conformable to the demand made by General Gaines to King Hachy some months since: in fact, do all you can to save all you can save, the books particularly. It is probable the commandant will receive some communication from the vessels today, when he will know more what are their motives in coming off the fort. I think it is only to shut up the passage to the Indians. Twenty canoes went down yesterday, and were forced to return. The road between this and Miekasucky is said to be stopped. Hillisajo and Himathlo Mico were here last night, to hear what vessels: they will remove all their cattle and effects across St. Mark's river this morning, and, perhaps, wait near thereto for the event.

I have been as brief as I can to give you the substance of what appear facts that cannot be doubted; to enter into details in the present moment is useless. If the schooner is returned, get all the goods on board of her, and let her start off for Mounater Creek, in the bottom of Cedar key Bay. You will there only have the skins to hide away. But no delay must take place, as the vessels will no doubt follow the land army, and perhaps even now some have gone round. I pray your strictest attention; for the more that is saved will be eventually more to your interest. Let the bearer have as much calico as will make him two shirts, for his trouble; he has promised to deliver this in three, but I give him four, days.

I am yours, affectionately,

A. Arbuthnot.

B.

From A. Arbuthnot to Charles Cameron, Governor of Bahamas.

Sir—Being empowered by the Chiefs of the Lower Creek nation to represent the state of their nation to your Excellency, that you

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may be pleased to forward the same for the information of his Majesty's Government, to whom alone they look for protection against the aggressions and encroachments of the Americans, I beg leave to submit to your Excellency the enclosed representations, humbly praying that your Excellency will be pleased to take an early opportunity of forwarding the same to Great Britain.

I am instructed by Bowlegs, Chief of the Sahwahnee, to make the demand herein inclosed, he never having had any share of the presents distributed at Prospect Bluff, though he rendered equally essential services as any of the other Chiefs to the British cause while at war with America, and was at New Orleans with a part of his warriors. His frontiers being more exposed to the predatory incursions of the back Georgians, who enter his territory and drive off his cattle, he is obliged to have large parties out to watch their motions, and prevent their plundering; and being now deficient in ammunition, he prays your Excellency will grant his small demand, humbly submitting the same.

I have the honour to be, etc.,

A. A.

The Humble Representation of the Chiefs of the Creek Nation to his Excellency Governor Cameron.

We beg leave to represent, that Edmund Doyle and William Hambly, lately clerks at Prospect Bluff, to Messrs. Forbes, etc., and who still reside on the Appalachicola river, we consider as the principal cause of our present troubles and uneasiness. Hambly was the instrumental cause of the fort at Prospect Bluff being destroyed by the Americans, by which we lost the supplies intended for our future wars. Since then both these men have kept their emissaries among us, tending to harrass and disturb our repose, and that of our brethren of the middle and upper nations; they spread among us reports that the Cowetas, aided by the Americans, are descending to drive us off our land; they equally propagate other falsehoods.

C.

From A. Arbuthnot to Benjamin Moodie Esq. inclosing Letters to Charles Bagot, Esq. British Minister at Washington.

Sahwahnee, in the Creek Nation, seventh January, 1812.

Sir—The enclosed containing matter of serious moment, and demanding the immediate attention of his Excellency the British ambassador, I trust he will for this time forgive the trifling expense of postage, which I have endeavoured to prevent as much as possible, by compressing much matter in one sheet of paper. Should you, Sir, be put to any trouble or expense, by this trouble I give

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you, by being made acquainted with the same, I will instruct Bain, Dunshee, and Co. to order payment of the same.

I have the honour, to be, Sir,

Your most obedient Humble Servant,

A. Arbuthnot.

From A. Arbuthnot to the Honourable Charles Bagot.

Sir—It is with pain I again obtrude myself upon your Excellency's notice; but the pressing solicitations of the Chiefs of the Creek nation, and the deplorable situation in which they are placed by the wanton aggressions of the Americans, I trust your Excellency will take as a sufficient apology for the present intrusion.

In August last, the head Chief of the Seminole Indians received a letter from General Gaines, of which I have taken the liberty of annexing your Excellency the contents, as delivered me by the Chief's head English interpreter, with King Hachy's reply thereto.

This letter appears to have been intended to sound the disposition of the Chief, and ascertain the force necessary to overrun the nation; for from then until the actual attack was made on Fowl Town, the same General, with General Jackson, seem to have been collecting troops and settling in various quarters.

If your Excellency desires to have farther information respecting the situation of this country and its inhabitants, I can, from time to time, inform your Excellency of such facts and circumstances as are stated to me by Chiefs of known veracity, or which may come under my own observation; and your Excellency's order, addressed to me at New Providence, will either find me there or be forwarded me to this country.

With great respect, I have the honour to be

Your Excellency's most obedient Servant,

A. A.

The following memorandum was on the back of the foregoing letter:

King Hachy one thousand, Bowlegs one thousand five hundred, Oso Hatjo Choctawhachy five hundred, Himashy Miso Chattichichy six hundred, at present with Hillisajo. At present under arms, one thousand and more; and attacking those Americans who have made inroads on their territory.

A quantity of gunpowder, lead, muskets, and flints, sufficient to arm one thousand or two thousand men; muskets one thousand, arms smaller if possible; ten thousand flints, a proportion for rifle, put up separate; 50 casks of gunpowder, a proportion for rifle; two thousand knives, six to nine inch blade, good quality; one thousand tomahawks; one hundred pounds vermillion; two thousand pounds lead, independent of ball for musket.

(Signed) King Hachy.
(Signed) Bowlegs.

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From General Gaines to the Seminoly Chief.

To the Seminoly Chief—Your Seminolys are very bad people; I don't say whom. You have murdered many of my people, and stolen my cattle, and many good horses, that cost me money; and many good houses, that cost me money, you have burnt for me; and now that you see my writing, you'll think I have spoken right. I know it is so; you know it is so; for now you may say, I will go upon you at random; but just give me the murderers, and I will show them my law, and when that is finished and past, if you will come about any of my people, you will see your friends, and if you see me you will see your friend. But there is something out in the sea, a bird, with a forked tongue: whip him back before he lands, for he will be the ruin of you yet. Perhaps you do not know who or what I mean . . . I mean the name of Englishman.

I tell you this, that if you do not give me up the murderers who have murdered my people, I say I have got good strong warriors, with scalping knives and tomahawks. You harbor a great many of my black people among you, at Sahwahnee. If you give me leave to go by you against them, I shall not hurt anything belonging to you.

(Signed) General Gaines.

From King Hachy to General Gaines, in answer to the foregoing.

To General Gaines—You charge me with killing your people, stealing your cattle, and burning your houses. It is I that have cause to complain of the Americans. While one American has been justly killed, while in the act of stealing cattle, more than four Indians have been murdered, while hunting, by these lawless free-booters. I harbor no Negroes. When the Englishmen were at war with America, some took shelter among them, and it is for you, white people, to settle those things among yourselves, and not trouble us with what we know nothing about. I shall use force to stop any armed Americans from passing my towns or my lands.

(Signed) King Hachy.

D.

NOTE OF INDIAN TALKS.

In August, Capp had a letter from General Gaines, in substance as annexed, No. I, and returned the answer as by No. II. Nothing farther was said on either side. The end of October, a party of Americans, from a fort on Flint river, surrounded Fowl Town during the night, and began burning it. The Indians then in it fled to the swamps, and in their flight had three persons killed by fire from the Americans: they rallied their people and forced the Americans to retire some distance, but not before they had two more persons killed. The Americans built a block-house or fort, where they had fallen back to, and immediately sent to the fort up the country for assistance, stating the Indians were the aggressors;

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and also settled with Inhemocklo for the loss his people had suffered; at the same time sending a talk to King Hachy, by a head man (Apiny), that he would put things in such a train as to prevent further encroachments, and get those Americans to leave the fort. But no sooner was the good talk given, and before the bearer of it returned home, than hundreds of the Americans came pouring down on the Indians; rousing them to a sense of their own danger; they flew to arms, and have been compelled to support them ever since. It is not alone from the country, but by vessels entering Appalachicola river, in vessels with troops; and settlers are pouring into the Indian territory. These proceedings are not countenanced by the American Government, but originate with men devoid of principle, who set laws and instructions at defiance, and stick at no cruelty and oppressions to obtain their ends. Against such oppressions the American Government must use not only all their influence, but, if necessary, force; or their names will be handed down to posterity as a nation more cruel and savage to the unfortunate aboriginees of this country, than ever were the Spaniards, in more dark ages, to the nations of South America.

The English Government, as the special protectors of the Indian nations, and on whom alone they rely for assistance, ought to step forward and save those unfortunate people from ruin; and as you, Sir, are appointed to watch over their interests, it is my duty as an Englishman, and the only one in this part of the Indian nation, to instruct you of the talks the Chiefs bring me for your information; and I sincerely trust, Sir, you will use the powers you are vested with, for the service and protection of the unfortunate people, who look up to you as their saviour. I have written General Mitchell, who, I hear, is an excellent man; and, as he acts as Indian agent, I hope his influence will stop the torrent of innovation, and give peace and quietness to the Creek nation.

I pray your Excellency will pardon this intrusion, which nothing but the urgency of the case would have induced me to make.

I have the honour to be

Your Excellency's most obedient Servant,

A. A.

E.

From Cappiahimicco and Bowlegs to Governor Cameron.

To His Excellency Governor Cameron—It is with pain we are again obliged to obtrude ourselves on your Excellency's notice, in consequence of the cruel war we have been forced into by the irruptions of the Americans into the heart of our lands. It will be first necessary to state to your Excellency, that one head Chief (Kinhijah) received a letter from General Gaines, in August last, a copy of which is enclosed, with the answer returned thereto. This letter only appears to have been a prelude to plans determined on by the said General and General Jackson, to bring on troops and settlers, to drive us from our lands, and take possession of them; for, in the

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end of October, a party of Americans surrounded Fowl Town during the night, and in the morning began setting fire to it; making the unfortunate inhabitants fly to the swamps, and who in their flight had three persons killed by the fire of the Americans. Our Indians, rallying, drove the Americans from the town, but in their exertions had two more of their people killed. The Americans retired some distance, and built a fort or block house to protect themselves, until the assistance they had sent for to the fort up the country should arrive. A letter falling into the hands of General Mitchell, the Indian agent, which states the Indians to have been the aggressors, he suspected its truth, and on inquiry found it was the reverse; in consequence, he made satisfaction to Inhermocklo, the Chief of the Fowl Town, and his people, for the injuries they had sustained; at the same time desired a talk to be sent to our head Chief, stating his wish to see all the Indian friends, and that in twenty days he would send and get the Americans to retire from the forts. But this had no effect on the lawless invaders of our soil; for, before the bearer of our talks could return home, he met hundreds of Americans descending on us. Thus, seeing no end to those inroads, necessity compels us to have recourse to arms, and our brethren are now fighting for the lands they inherit from their forefathers, for their families and friends. But what will our nations do without assistance? Our sinews of war are almost spent; and harrassed as we have been for years, we have not been able to lay by the means for our extraordinary wants; and to whom can we look up for protection and support, but to those friends who have, at all former times, held forth their hands to uphold us, and who have sworn, in their late treaty with the Americans, to see our just rights and privileges respected and protected from insult and aggression? We now call on your Excellency, as the representative of our good father King George, to send us such aid, in ammunition, as we are absolutely in want of; and as our brother Chief Hillisajo was informed, when in England, that when ammunition was wanted, to enable us to protect our rights, your Excellency would supply us with what was necessary. We have applied to the Spanish officer at the fort of St. Marks, but his small supply prevented his being able to assist us, and we have only on your Excellency to depend. We likewise pray your Excellency would be pleased to send an officer or person to lead us right, and to apportion the supplies you may be pleased to send us, agreeably to our proper wants.

In praying your Excellency will lend an ear to our demand, and dispatch it without delay, we remain your Excellency's faithful and most obedient friends and Servants,

(Signed) Cappiahimicco.
(Signed) Bowlegs.

For ourselves and all the other Chiefs of the Lower Creek Nation.

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F.

Letter from A. Arbuthnot to Colonel Edward Nichols.

Nassau, N. P., twenty-sixth August, 1817.

Lieutenant Colonel Edward Nichols—Sir; especially authorized by the Chiefs of the Lower Creek nation, whose names I affix to the present, I am desired to address you, that you may lay their complaints before his Majesty's Government. They desire it to be made known, that they have implicitly followed your advice, in living friendly with the Americans, who are their neighbors, and nowise attempt to molest them, though they have seen the Americans encroach on their territory, burning their towns, and making fields where their houses stood. Rather than make resistance, they have retired lower in the Peninsula. The town Eachallaway, where Olis Micco was Chief, is one instance of the encroachments of the Americans. This town is situated under the guns of Fort Gaines, and Micco was desired to submit to the Americans, or his town would be blown to atoms; rather than do so he retired, and is now living in the Lower Nation; and his fields, and even where the town stood, is plowed up by the Americans. They complain of the English Government neglecting them, after having drawn them into a war with America; that you, Sir, have not kept your promise in sending people to reside among them; and that if they have not some person or persons resident in the nation to watch over their interest, they will soon be driven to the extremity of the Peninsula. You left Mr. Hambly to watch over the Creek nation; but you hardly left the nation when he turned traitor, and was led by Forbes to take the part of the Americans. His letter to me, of which I annex you a copy, will show you what lengths he could go if he had the means. It is Hambly and Doyle who give the Indians all the trouble they experience. They send their emissaries among the Lower Creeks, and make them believe the Cowetas, aided by the Americans, are coming to destroy them; thus both are put in fear, and their fields are neglected, and hunting is not thought of. I have endeavored to do away this fear by writing to the Chief of the Coweta towns, that they ought to live on friendly terms with their brethren of the Lower Nation, whose wishes were to be on good terms with them, and not listen to any bad talks, but to chase those that give them from among them. My letter was answered from them rather favorably; and I hope that the talk that was sent to the Big Warrior last June, will heal the difference between them.

Hillisajo arrived in my schooner, Ocklocknee Sound, last June, and was well received by all the Chiefs and others who came to welcome him home; in consequence of his arrival a talk was held, the substance of which was put on paper, for them, and it was sent, with a pipe of peace, to the other nations. Hillisajo wished to return to Nassau with me, but I prevailed on him to stay in the nation, and to keep them at peace. I regret, Sir, to notice this poor man's affairs, though by his desire. It appeared that he arrived at

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Nassau a short time after I had left it in January, and Capt. W. being here took charge of him, his goods, and money, prevailing on the Governor to let him stay with him, until he went down to the nation, which was his intention to do. Of the money received of Governor Cameron, he had only given him eighty dollars, by Captain W., a barrel of sugar, a bag of coffee, and a small keg of rum; and the interpreter Thugart informed me, that when Hillisajo asked for an account, Captain W. refused it, saying, it would be useless to a man who could not read. He also misses two cases, one of which, he thinks, contains crockery. I have made inquiry of his Majesty's ordnance storekeeper, and he informs me, the whole were delivered to Captain W. They are therefore lost to Hillisajo.

I am desired to return Hillisajo's warmest acknowledgments, for the very handsome manner you treated him in England, and he begs his prayer may be laid at the foot of his Royal Highness the Prince Regent. I left him and all his family well, on the 20th of June. Old Cappachimicco desires me to send his best respects, and requests that you will send out some people to live among them, and all the land they took from Forbes shall be theirs. At all events, they must have an agent among them, to see that the Americans adhere to the treaty, and permit them to live unmolested on the lands. This agent should be authorized by his Majesty's Government, or he will not be attended to by the Americans. In the Gazettes of Georgia, the Americans report the Seminoly Indians are continually committing murders on their borders, and making incursions into the state. These are fabrications tending to irritate the American Government; for during the time I was in the nation, there was only one American killed, and he, with two others, were in the act of driving off cattle belonging to Bowlegs, Chief of Suwany; whereas three men and a boy were killed last June, by a party of American cattle stealers, while in their hunting camps. The boy they scalped, and one of Bowleg's head men was killed in St. John's river, in July. The backwood Georgians, and those resident on the borders of the Indian nation, are continually entering it, and driving off cattle. They have in some instances made settlements, and particularly on the Choctohachy river, where a considerable number have descended.

By the treaty with Great Britain, the Americans were to give up to the Indians all the lands that may have been taken from them during the war, and place them on the same footing they were in 1811. It appears they have not done so; that Fort Gaines, on the Chatahoochy, and Camp Crawford on the Flint river, are both of Indian territory, that was not in possession of America in 1811. They are fearful that, before any aid is given by the English government, they will no longer be in possession of any territory.

I wrote last January to his Excellency the Honorable Charles Bagot, respecting the encroachments of the Americans; as I was informed by the copy of a letter from the Right Honorable Earl Bathurst, handed me by his Excellency Governor Cameron, that his

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Majesty's Ambassador had received orders to watch over the interest of the Indians. Since my return here, I have received of Mr. Moodie, of Charleston, an extract of a letter from the Honorable Charles Bagot, that the expense of postage is so considerable, any farther communications of the same nature must be sent by private hands. Now, Sir, as no person goes from this direct to Washington, how am I to be able to comply with his desire? Thus he will be kept ignorant of the situation of the poor Indians, and the encroachments daily made on their lands by American settlers; while he may be told by the American Government that no encroachments have been made, and that the forts they still hold are necessary to check the unruly Seminoles. Thus, the person appointed to watch over the interest of the Indians, having no other means of information than from the parties interested in their destruction, and seeing, from time to time, in the American Gazette, accounts of cruel murders, etc., committed by the Indians on the frontier settlements of the United States, he apprehends the Indians merit all the Americans do to them.

But let his Majesty's Government appoint an agent, with full powers to correspond with his Majesty's Ambassador at Washington, and his eyes will then be opened as to the motives that influenced American individuals, as well as the Government, in villifying the Indians.

The power given me, and the instructions, were to memorialize his Majesty's Government, as well as the Governor General of Havannah; but if you will be pleased to lay this letter before his Majesty's Secretary of State, it will save the necessity of the first, and I fear that a memorial to the Governor General would be of no use.

Referring you to the answer, I am, most respectfully, your obedient servant,

A. Arbuthnot.

From A. Arbuthnot to William Hambly.

Ocklocknee Sound, May 3, 1817.

Sir—On my return home this day I received a letter signed by you, and dated twenty-third March. As you therein take the liberty of advising me, *as you say*, by order of the Chiefs of the Creek nation, I am glad of, and shall embrace this opening you give me, and reply to you at some length—and, Sir, let me premise, that when you lived at Prospect Bluff, a clerk to Messrs. Forbes & Co., you did not consider Cappachmiccho, M'Queen, or any other of the Chiefs of the Lower Creek nation, as outlaws, nor have they been considered as such by the English Government, who are the special protectors of the Indian nations; and it ill becomes Mr. Hambly to call Cappachimicco an outlaw—that man, who has ever been his friend, and by his authority has prolonged his life. Yes, Sir, the young Chiefs and warriors of the Creek nation, consider-

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ing you as the chief cause of all their troubles, would have long ere this had possession of you, and perhaps with your life made you pay the forfeit for the injuries heaped on them, had not that man, who has been your friend from your early youth, stepped in as your protector. Yes, this is the man whom Mr. Hambly presumes to call an outlaw. A pardoned villain, when going to the gallows, would bless the hand that saved his life; but Mr. Hambly blasphemes his saviour.

As Mr. Hambly's generous friend is the principal cause of my being in this country, as an honest man I shall endeavor to fulfill my promise to him and to the other Chiefs. The guilty alone have fear—an honest and upright man dreads no dangers, fears no evil, as he commits no ill; and your arm of justice ought to be applied where it would rightly fall, on the heads of the really guilty. Your mean and vile insinuations, that I have been the cause of thefts and murders, come ill from him who has been the cause of the murder of hundreds. Though your usage was made villainous at the fort, yet your revenge was too savage and sanguinary. If your conduct, Sir, to the Indians, were guided by as pure motives as mine, it would endeavor to influence them to respect each other as brothers, and live in harmony and friendship, cultivating their lands in summer, and taking their diversions of hunting in winter, respecting their neighbors, and making themselves respected by them. If thus, Sir, you would act (and by your knowledge of their language, you have much more in your power than any other man), you would then be the true friend of the Indians. Were I an instigator of theft and murder, would I hold the language I have done to the Chiefs and other who have called on me? Ask the Lieutenant commanding at Fort Gaines if my letter to him breathed the strains of a murderer? Ask Opy Hatch, or Dany, his interpreter, if the recommendatory note I sent him by order of Apiny, could be written by an instigator of murder? Ask Apiny himself if my language to him was that of a murderer? Ask Mappalitchy, a Chief residing among the Americans on the Oakmulgee, if my language and advice to him favored that of a murderer? All those, and every Indian who have heard my talks, will contradict your vile assertions.

But Mappalitchy has given me a clue by which I can unravel whence the aspersion comes. Not from Apiny, Hatchy, or any of the Chiefs of the upper towns, but from he who endeavors to lead them to mischief and quarrels with each other. Did not the Chiefs hear my note read with respect, and perfectly according to my sentiments of being all as brethren uniting with bonds of friendship and love? Did not they agree to smoke the pipe of peace with their brethren of the lower nation, and live in future as brothers? What made some of them alter their minds afterwards? The interference of a humane man, who counsels them to write to me, demanding my removal from a band of outlaws, and which letter is signed *"William Hambly."*

I shall only make one more observation, and that will show from

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whence I came, and whether I am amongst the Indians as a revenger, or as the friend of peace and harmony.

In the spring of 1816, W. Hambly sent Governor Cameron a letter, containing talks of the Chiefs of the Indian tribes; they are forwarded to England, and his Excellency handed me, on my leaving Providence, an answer thereto, from the Right Honorable Earl Bathurst, one of his Majesty's Chief Secretaries of State, that I might make the same known to the Chiefs on my arrival in the nation. What will Governor Cameron think of the man who, in 1816, could write against the encroachments of the American on the Indian nation, and in the spring of 1817, call the Chiefs of that nation, for whom he more especially wrote, outlaws? Mr. Hambly may sell his services to America; but no man can expatriate himself from that allegiance due to his native country; and a Government may call on a friendly nation to give up a subject that has seriously wronged her.

I recommend Mr. Hambly to be content with the *douceur* he may have received, and permit the unlettered Indian to live quietly and peaceably on his native land.

I shall send a copy of this letter, with the one from you, to be read by the Chiefs of this nation, and shall, at the same time, take an opportunity of expressing myself more fully than I did in the note sent by Apiny. Wishing you a speedy recantation of your errors, and a return to your former way of thinking, I am your obedient servant,

A. Arbuthnot.

Letter from A. Arbuthont to the Governor of Havannah.

To his Excellency Don, Governor General, etc.—The Chiefs of the Creek nation, whose names are hereunto annexed, beg leave to approach your Excellency, and represent their complaints. Long imposed on by the persons keeping stores in this country, in charging us exorbitant prices for their goods, while they only allow us a very trifling one for our peltry, we have found it necessary to look out for a person that will deal fairly with us, and we wish to establish a store for him on Appalachi River; we have made application to the Commander of St. Marks, and he refers us to your Excellency. It is not alone the impositions that have been practiced upon us that has made us presume to address your Excellency; we have complaints of a more serious nature against the persons employed by the only house that has been established among us. In the first place, some years back, under false pretences, they attempted to rob us of a very large portion of our best lands, and we the more readily acceded to it from the faithful promise given us, that they would get English people to settle and live among us; but far from doing this, Mr. Forbes attempted to sell it to the American Government, and settle it with Americans. Thus finding ourselves deceived and imposed on, we withdrew our grant about three years since; which, from the stipulations contained therein not being fulfilled on the part of Mr. Forbes, we conceived we had

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a right to do. Secondly, Mr. Doyle and Mr. Hambly, the two persons left in the nation to carry on Mr. Forbes' business, have for more than two years been endeavoring to influence us to join the Americans; and finding that fair means would not sever us from our attachment to our ancient friends the English, they have recently had recourse to threats of bringing the Americans down upon us; and that people only want a pretext to attack us, which the said Doyle and Hambly attempt to give them, by spreading false reports of our murdering the Americans, stealing their cattle, and preparing for war against them; while, in fact, it is the Americans who murder our red brethren, and steal our cattle by hundreds at a time, and are daily encroaching on our lands, and maintaining the settlers in their ill-gotten possessions by armed force.

On the Choctawhatchy river, there are a large body of Americans forming settlements, and more are joining them. As this river is far within that line marked out by your Excellency's government and the Americans some years since (though that line was unknown to us until very lately, and we never gave our sanction, nor, in fact, knew of any sale of our lands made to the Americans), we trust your Excellency will give orders to displace them within the line, and send them back to their own country. Our delaying to address your Excellency, to represent the aforementioned grievances, has been owing to the want of a person to attend to our talks, and put them in writing for us. The Commander of the fort of St. Marks has heard all of our talks and complaints. He approves of what we have done, and what we are doing; and it is by his recommendation we have thus presumed to address your Excellency.

We have the honor to be, Your Excellency's most obedient and very humble Servant,

A. Arbuthnot.

No. I.

Power of Attorney for the Indian Chiefs to A. Arbuthnot. Know all men by these presents, That we, Chiefs of the Creek nation, whose names are affixed to this power, having full faith and confidence in A. Arbuthnot, of New Providence, who, knowing all our talks, is fully acquainted with our intentions and wishes, do hereby, by these presents, constitute and appoint him, the said Alexander Arbuthnot, our attorney and agent, with full power and authority to act for us, and in our names, in all affairs relating to our nation, and also to write such letters and papers as to him may appear necessary and proper, for our benefit, and that of the Creek nation.

Given at Ocklockee Sound, in the Creek nation, this seventeenth day of June, 1817.

1. Cappachimaco, his X mark.
2. Inlemohtlo, his X mark.
3. Charles Tuctonoky, his X mark.

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4. Otus Mico, his X mark.
5. Ocnacone Tustonoky, his X mark.
6. Imatchlacle, his X mark.
7. Inhimatchucle, his X mark.
8. Lohoe Itamatchly, his X mark.
9. Howrathle, his X mark.
10. Hillisajo, his X mark.
11. Tamuchas Haho, his X mark.
12. Oparthlomico, his X mark.

Certified explanation of names and towns to which the foregoing Chiefs belong, agreeably to the numbers set opposite thereto.

William Hambly.

1. Kinhigee, Chief of Mickasuky.
2. Inhimarthlo, Chief of Fowl Town.
3. Charles Tustonoky, second Chief of Ockmulgee Town.
4. Chief of the Conholoway, below Fort Gaines.
5. Opony, Chief of Oakmulgee Towns.
6. Chief of the Atlapalgas.
7. Chief of Pallaichucoley.
8. Chief of the Chehaws.
9. Chief of the Red Sticks.
10. Francis (the Prophet).
11. Peter M'Queen, Chief of the Tallahassos (an old Red Stick).
12. A Red Stick, created Chief of the Lower Towns.

No. II.

Supposed to be for Bowlegs to the Governor of St. Augustine.

To his Excellency Don Jose Coppinger.

To His Excellency James Green, Governor of St. Augustine.

Sir I had the honor of receiving your letter of September, but the impossibility of finding a person to write an answer to the same is the cause of this apparent neglect.

I shall be very happy to keep up a good understanding and correspondence with you, and hope you will, when occasion offers, advise me of such things as may be of service to myself and people. My warriors and others that go to St. Augustine return with false reports, tending to harrass and distress my people, and preventing them from attending to their usual avocations. At one time the Americans and Upper Indians, supported by a force of about eight thousand men, were running lines far within the Indian territory; another time, are collecting a force at Fort Mitchell, in the forks of Flint and Chatanoochy rivers, to fall on the towns below. Now, Sir, we know of no reason the Americans can have to attack us, an inoffensive and unoffending people. We have none of their slaves; we have taken none of their property since the Americans made peace with our good King George. We have followed the orders of his officer, that was with us, Lieutenant Colonel Edward Nichols, and in no wise molested the Americans, though we daily

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see them encroaching on our territory, stealing our cattle, and murdering and carrying off our people.

The same officer also told us, we, allies to the Great King, our father, were included in the treaty of peace between our good father and the Americans, and that the latter were to give up all the territory that had been taken from us before and during the war. Yet, so far from complying with the ninth article of that treaty, they are daily making encroachments on our land, getting persons, who are not known to the Chiefs, and without any power or authority, to grant and sign over lands to them. Thus they deceive the world, and make our very friends believe we are in league with them.

The principal Chiefs of the nation, with the head warriors, assembled at my town on the eighth instant, and came to the resolution of informing the British Minister at Washington, of the conduct of the Americans, and the officers of their government, towards us; it has been done accordingly, and copies sent to England. We demand of the King, our father, to fix some of his people among us, who may inform him, from time to time, of what is passing, and see the Americans do not extend themselves on our lands. The Spanish subjects in Floridas are too much in the interest of the Americans to be our friends. For the Governors I shall always entertain the greatest regard; but, for the people, they do not act so as to merit any esteem and protection. You desire I would chase those marauders, who steal my cattle; my people have lately driven some Americans from Lahhoway, and I have no doubt the Americans will hold off this as a pretext to make war on us, as they have before done, in stating we harbor their runaway slaves.

III.

General Mitchell, Agent for Indian Affairs.

King Hatchy, the Head Chief of the Lower Creek Nation, has called on me to request I would represent to you the cruel and oppressive conduct of the American people, living on the borders of the Indian nation, and which, he was in hopes, from a talk you were pleased to send him some weeks since, would have put a stop to, and restored peace between the Indians and American people. But far from any stop being put to their inroads and encroachments, they are pouring in by hundreds at a time; not only from the land side; but ascending the Appalachicola in vessel loads: thus the Indians have been compelled to take up arms to defend their homes from a set of lawless invaders. Your known philanthropy and good will to the Indians induces the head Chiefs to hope, that you will lose no time in using your influence to put a stop to those invasions of their lands, and order that those, who have already presumed to seize our fields, may retire therefrom.

The Indians have seized two persons they think have been greatly instrumental in bringing the Americans upon them, and they are now in their possession as prisoners. It is even reported they have made sales of Indian lands without the knowledge, consent, or ap-

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probation of the Chiefs of the nation: and, from their long residence in the nation, and the great influence that one of those people formerly enjoyed among the Chiefs as their Chief, there is some reason to believe that he has been guilty of improper conduct to the Indian nation.

No. IV.

Petition of the Chiefs of the Lower Creek Nation, to Governor Cameron.

We, the undersigned, are deputed by the Creek nation to wait on your Excellency, and lay before you their heavy complaints. To the English we have always looked up as friends, as protectors, and on them we now call to aid us in repelling the approaches of the Americans, who, regardless of treaties, are daily seizing our lands and robbing our people; they have already built seven forts on our lands; they are making roads and running lines into the very heart of our country, and, without the interference of the English, we shall soon be driven from the land we inherited from our forefathers.

The Americans tell us the English will regard us no more, and we had better submit to them; but we can not submit to their shackles, and will rather die in defense of our country.

When peace was made between the English and the Americans, we were told by Lieutenant Colonel Nichols, that the Americans were to give up our lands they had taken, and we were desired to live quietly and peaceably, in no wise molesting the Americans. We have strictly followed those orders; but the Americans have not complied with the treaty. Colonel Nichols left Mr. Hambly in charge of the fort at Prospect Bluff, with orders to hear us, if any cause of complaint, and represent the same to the British Government; but he turned traitor, and brought the Americans down on the fort, which was blown up, and many of our Red brethren destroyed in it. The ammunition stores, intended for our use, were either destroyed or taken off by the Americans. We have sent several messages to inform your Excellency of the proceedings of the Americans, but they have never returned to us with an answer. Three of our Red brethren have lately been killed by the Americans, while hunting on our lands, and they threaten to attack the towns of Mackasuky and Sahwahnee, the only two large towns left us in the Creek nation, and, without aid from your Excellency, we can not repel their attack. We are, therefore, deputed to demand of your Excellency the assistance of troops and ammunition, that we may be able effectually to repel the attack of the Americans, and prevent their farther encroachments; and, if we return without assistance, the Americans, who have their spies among us, will the more quickly come upon us.

We most humbly pray your Excellency will send us such a force as will be respected and make us respectable.

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(The following endorsed on the foregoing.)

Charles Cameron, Esq., Governor, Commander in Chief, etc., etc. I beg leave to represent to your Excellency the necessity of my again returning to the Indian nation, with the deputies from the Chiefs; and as my trouble and expense can only be defrayed by permission to take goods to dispose of amongst them, I pray your Excellency will be pleased to grant me such a letter, or license, as will prevent me from being captured, in case of meeting any Spanish cruiser on the the coast of Florida.

The PRESIDENT. Have you at any time, within the last twelve months, heard any conversation between the Prisoner and the Chief called Bowlegs, relating to the war between the United States and the Seminoles? Heard the Prisoner tell Bowlegs that he had sent letters to the Prince Regent, and expected soon to have an answer. Some time afterwards, some of the Negroes doubted his carrying those letters, when the Prisoner stated that he had; but, the distance being great, it would take some time to receive an answer. First saw the letter signed A. Arbuthnot, dated April 2, 1818, referred to in the first specification and the second charge, about the sixth of April, when a black man, who said he had received it from an Indian, gave it to Mr. Ambrister, whom I saw reading it. It was conveyed to Suwany by an Indian, who was sent from Fort St. Mark. Do not know who paid the Indian for carrying it.

The PRESIDENT. What steps were taken by the Negroes and Indians upon the receipt of the letter? They first believed the bearer to be an enemy, and confined him; but, learning the contrary, began to prepare for the enemy, and the removal of their families and effects across the river; the Indians lived on the opposite side. The Indians and Negroes did not act together in the performance of military duty; but they always said they would fight together. Nero commanded the Blacks, and was owned and commanded by Bowlegs; but there were some Negro Captains, who obeyed none but Nero.

The ammunition, which was sold by the Prisoner to the Indians and Negroes, was brought to Suwany by the schooner Chance, now lying at this wharf; she is a foretopsail vessel, belonging to the Prisoner.

April 28.

Peter B. Cook. (*To the Prisoner.*) Have been acquainted with the Settlements on the Sahwahnee between six and seven months.

(To the PRESIDENT.) I engaged to live with the Prisoner. For no stated period; I was taken by the year. He told me he had no farther use for me, after I had written the letters to Providence. After I was discharged, I stayed in a small house belonging to a boy called St. John, under the protection of Nero. After being refused by the Prisoner a small venture to Providence, I wrote my friends for the means to trade by myself. Don't believe the Prisoner had knowledge of the ventures being on board the

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schooner; it was small and in my trunk. Do not know that Ambrister was the agent of the Prisoner.

The PRESIDENT. Do you think, that the powder and lead shipped would more than supply the Indian and Negro hunters? Did not see the powder and lead myself, but was told by Bowlegs that he had a great quantity he had there keeping to fight with. The Indians resided on the east side of the river.

The PRESIDENT. You were asked if the Negroes and Indians, when the letter marked A was communicated, did not take up arms: had they received information of the defeat of the Indians at Miekasuky prior to that time? It was afterwards, I believe, they received the information. Bowlegs had other powder than that got from the prisoner. He had some he had got from the Bluff, which was nearly done; he said, his hunters were always bothering about powder. At the time Ambrister ascended the river, there was no other vessel at the mouth of the river.

The PRESIDENT. There is a letter A spoken of; how do you know that the son of the Prisoner had that letter in his possession? I saw him with it, which he dropped, and a boy, called John, picked up and gave to me.

The PRESIDENT. You stated, that the Indians and Negroes doubted the fidelity of the Prisoner in sending letters to the Prince Regent; do you think the Prisoner would have been punished by them had he not complied with their wishes? I do not know. Do not believe the Prisoner was compelled to write the Indian communications.

William Hambly. I heard the Chiefs say—

The *Prisoner* objected to hearsay evidence of that kind.

The COURT after consideration decided, that the *Prisoner's* objection was not valid.

William Hambly. Fifteen or twenty days after the Prisoner arrived at Ocklocknee, the Seminole Indians began to steal horses from the United States' settlements, and committed murders on the Satilla river, which, I was informed by them, was at the instigation of the Prisoner. The Chiefs of the little villages in my neighborhood then desired me to write a few lines to the Prisoner, stating those reports, and that I did not know that those Indians he was exciting had long been outlawed, and cautioned him against such proceedings, or he might be involved in their ruin. This I did; when the Prisoner wrote me a long and insulting letter, which was lost, upbraiding me for calling those Indians outlaws, and accusing me of exciting the Indians to cruel war. I was told by the Chiefs and Indians, who had seen the Prisoner, that he advised them to go to war with the United States, if they did not surrender them the lands, which had been taken from them, and that the British Government would support them in it. The Indians, who took me and a Mr. Doyle prisoners, on the thirteenth of December last, told us that it was by the Prisoner's order. On our arrival at Miekasuky (as prisoners), King Hijah, and all his Chiefs, told us, it was by the Prisoner's orders we were taken and robbed. On our arrival at Suwany, we were told by the Indians and

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Negro Chiefs, who sat in council over us that the Prisoner had advised that I should be given up to five or six Choctaw Indians, who were saved from the Negro Fort, who would revenge themselves for the loss of their Friends at that place. On our return from Suwany, the Chief, King Hijah, told us, that he had got the Prisoner to write several letters for him; one to the Governor of Providence, one to the British Minister at Washington, one to the Secretary of State in London, and one to the American agent for Indian affairs, protesting against the proceedings of the officer at Fort Scott. While I was at Suwany, the Indian Chiefs told me that the Prisoner had arrived at that place with ten kegs of powder on board his vessel; and whilst at Fort St. Marks, some time in March, Hillisajo, or Francis, brought an order from the Prisoner to the Commandant for two kegs of powder, with other articles, which were in his possession.

The PRESIDENT. Were any murders or depredations committed on white settlements, by the Indians, previous to the Prisoner's arrival at Ocklocknee? None, except one at Fort Gaines, which was before or about the time of the Prisoner's arrival. Have resided among the Indians fourteen years, and have understood the language twelve years. Do not believe the Seminoles would have commenced the business of murder and depredations on the white settlements, had it not been at the instigation of the Prisoner, and a promise on his part of the British protection. The different Chiefs always represented him to me as an authorized agent of the British Government. I recognized the letter marked G, and signed A. Arbuthnot, as being a copy of the one alluded to in my testimony as lost.

(*To the Prisoner.*) I have seen Prisoner's handwriting, but cannot say I am acquainted with it. The letter marked G looks to be his handwriting, but I cannot say positively. The Indian Chiefs told me the Prisoner had reported himself to them as an English agent. When we were taken prisoners, the Indians told us, that he had gone over to Providence, but was expected back by the time we should arrive at Suwany. I requested King Hijah to prevail upon the Prisoner to give me a passage in his schooner to Providence, but was told the Prisoner refused it, stating that, if we were forced upon him, he would blindfold us, and make us walk overboard. King Hijah stated, that the Prisoner was fearful of meeting with an American vessel, where we should be taken out, and he thereby lose his schooner.

Kimund Doyle. I know nothing, that would substantiate the charges against the Prisoner except from common report.

William Fulton. The copy of the letters from A. Arbuthnot to General Mitchell, agent for Indian affairs, dated Suwany, January 19, 1818, and marked No. VI, were acknowledged by the Prisoner to be the same in substance as one written by himself at that time.[9]

[9] No. VI.

Extract from a letter written by A. Arbuthnot to General Mitchell,

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(*To the Prisoner.*) The Prisoner acknowledged the letter just read to be a copy of one written by himself. In the encampment before this place, about the sixth or seventh inst, while he was a prisoner, I heard a gentleman say, that those, who excited the Indians to the murder of the unoffending, should feel the keenest edge of the scalping knife; but, as well as I recollect, that observation was not made until after the repeated acknowledgments by you of having written the letter.

(To the COURT.) The confession of the Prisoner to this letter was made voluntarily, and without any constraint whatever.

The *Prisoner* asked to call as a witness, Robert C. Ambrister, against whom criminal charges had been filed, and who was in custody on account thereof. The *Judge Advocate* objecting, the COURT was cleared when it was decided, that Robert C. Ambrister, in custody for similar offenses with the Prisoner, could not be examined as evidence before the Court.

THE EVIDENCE FOR THE PRISONER.

John Lewis Phenix (recalled). There were other vessel at the mouth of the Sahwahnee River, when Ambrister seized my vessel. It was a sloop, and I understand Ambrister came in her and that he came on board of his own accord.

The PRESIDENT. Have you, since you commanded the Prisoner's vessel, ever brought any arms to that part of the country? No: I brought a quantity of lead, and ten kegs of powder, in the last trip.

John Winslett (recalled). As to the letter, which I said was written by the Prisoner to the Little Prince. After reading it, I returned it to him, and believe it to be still in his possession, as Indians seldom destroy papers of that kind.

American Agent for the Creek Nation of Indians, dated Sahwahnee, January 19, 1818.

In taking this liberty of addressing you, Sir, in behalf of the unfortunate Indians, believe me, I have no wish but to see an end put to a war, which, if persisted in, I foresee must eventually be their ruin, and as they were not the aggressors, if in the height of their rage they committed any excesses, that you will overlook them as the just ebullitions of an indignant sprit against an invading foe.

I have the honor to be, etc.,

A. Arbuthnot.

By order of King Hijah and Bowlegs, acting for themselves and the other Chiefs.

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The *Prisoner* requesting some time to make up his defense, the COURT adjourned until tomorrow at four o'clock.

April 28.

The *Recorder* having read over the proceedings of the Court with closed doors, the prisoner was recalled into Court, and asked to make his defense.

Mr. Arbuthnot. May it please this honorable Court. The prisoner arraigned before you is sensible of the indulgence granted by this honorable Court, in the examination of the case now before them. It is not the wish of the prisoner, in making his defense, to try the patience of the Court, by a minute reference to the voluminous documents and papers, or to recapitulate the whole of the testimony which has come before the honorable Court, in the course of this investigation. Nor is it the intention of the prisoner to waste the invaluable time of this Court, by appeals to their feelings or sympathy, though I am persuaded that sympathy nowhere more abounds than in a generous American breast. My only appeal is to the sound and impartial judgment of this honorable Court, the purity and uprightness of their hearts, that they will, dispassionately and patiently, weigh the evidence they have before them, apply the law, and on these, and these alone, pronounce their judgment.

If this honorable Court please, I shall now proceed to examine the law and the evidence that is relied on, by this honorable Court, in support of the first charge and specification.

Winslett, a witness on the part of the prosecution, says the Little Prince showed him a letter written in June last, signed A. Arbuthnot, requesting his friendship with the Lower nations of Indians. The same witness stated, that he believed the letter now to be in the possession of the Little Prince. Here, may it please this honorable Court, I will call their attention to the law relating to evidence. First, presuming that the rules of evidence are the same, whether in civil or military tribunals—McComb (96). This point

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being conceded, the next inquiry is—what are the rules of evidence with respect to the admission of letters or papers of private correspondence, in a court of criminal jurisdiction? May it please this honorable Court, must you not produce the original letters and papers, if they are not lost, or mislaid, so that they can not be obtained; and in case they are lost, proof must be made of the handwriting being the same as that of the original, before they can be received as evidence? McComb on Courts Martial; Peake's Evidence; Gilbert's Law of Evidence. No instance can be cited where the copy of a letter was read as evidence, when the original could be obtained, much less the giving in evidence the contents of such letter from bare recollection. The only proof, that this honorable Court has of the existence of such letter being in the hands of any person, or its contents being known, is the vagrant memory of a vagrant individual. Make this rule of evidence, and I ask you when would implication, construction, and invention stop? Whose property, whose reputation, and whose life would be safe? Here I would beg leave to mention a remark made by the President of this Court, in the course of this investigation, which was, that notwithstanding the letter was proved by the witness to be in the possession of the Little Prince, that this Court could not notice this circumstance, because there was no means by which it could be obtained. I would ask the honorable Court, what means they have adopted, or what exertions have they made to procure this letter? If the honorable Court please, I shall here close the defense of the first charge and specification, believing that they are neither supported by law or evidence.

May it please the honorable Court, I will now come to the second charge and specification of that charge. In support of this charge and specification, the evidence is a letter written to my son. If the Court please, this letter was written in consequence of my property at Sahwahnee, and the large debts that were due to me from Bowlegs and his

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people. Nothing I believe of inflammatory nature can be found on reading the document marked A, authorizing the opinion that I was prompting the Indians to war. On the contrary, if the honorable Court will examine the document marked A, they will see that I wished to lull their fears, by informing them that it was the Negroes, and not the Indians, the Americans were principally moving against. If the honorable Court please, I will make a few remarks upon the second specification, and here close my defense. In proof of this charge, the Court have before them the evidence of Hambly, Cook, and sundry letters, purporting to be written by myself to different individuals. May it please the Court, what does Cook prove? Why, that I had ten kegs of powder at Sahwahnee; let me appeal to the experience of this Court, if they think this quantity of powder would supply one thousand Indians and an equal number of blacks more than two months for hunting? As to the letters named in this specification may it please the Court, the rules of evidence laid down in the first part of this defense will apply with equal force in the present case.

It remains now, may it please the Court, to say something as to Hambly's testimony; and, may it please this honorable Court, the rule laid down in this case, as to hearsay evidence, will be found without a precedent. A strong case was stated by an intelligent member of this Court, on the examination of this part of the evidence: that is, would you receive as testimony what a third person had said, whom, if present, you would reject as incompetent? Apply this principle to the present case. Could an Indian be examined on oath in our courts of judicature? If, then, the testimony of savages is inadmissible, Hambly proves nothing.

Here, may it please this honorable Court, I close my reply to the charges and specifications preferred against me, being fully persuaded that, should there be cause of censure, my judges will, in the language of the law, lean to the side of mercy.

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THE VERDICT AND SENTENCE.

The doors were then closed, and after much deliberation on the evidence adduced, the COURT returned and announced that they found the prisoner, Alexander Arbuthnot, guilty of the first specification to the first charge, and guilty of the first charge—Guilty of the second specification of the second charge, and guilty of the second charge, leaving out the words "acting as a spy." They therefore sentenced the prisoner, Alexander Arbuthnot, to be suspended by the neck until he is dead; two-thirds of the Court concurring.

The judgment and sentence were communicated to the general commanding, Major General JACKSON and approved by him, who ordered "that Brevet Major A. C. Fanning of the corps of artillery will have between the hours of eight and nine o'clock a. m., A. Arbuthnot suspended by the neck with a rope until he is dead agreeably to the sentence of the Court."

April 29.

Today at daylight the prisoner was hanged from the yard arm of his schooner, The Chance.

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THE TRIAL OF ROBERT C. AMBRISTER FOR INCITING INDIANS TO WAR, FLORIDA, 1818

THE NARRATIVE.

The trial of Lieutenant Ambrister followed immediately that of the Scotch trader, Arbuthnot. He was charged with inciting the Indians, and with levying war. His case was different from that of Arbuthnot. He was an adventurer and had no ostensible business in Florida. He pleaded guilty, threw himself on the mercy of the Court, and was condemned to be shot. His youth and prepossessing appearance pleaded so strongly in his favor that the Court, on the appeal of one of its members, reconsidered its judgment, and commuted the sentence to fifty stripes on the bare back, and confinement at hard labor, with a ball and chain for twelve months. But General Jackson disapproved the reconsideration, restored the first sentence, and ordered it to be carried out. And on the same morning that Arbuthnot was hanged from the yard arm of the Chance, Ambrister was shot by a detail of troops, without shift or appeal, betraying no little sorrow at being brought to so ignominious a death at the hands of a civilized captor.[1]

Great was the indignation against Jackson in England when the news reached there. He was denounced as a murderer all over the country. But Jackson's position, in his order confirming the sentence: "it is an established principle of the law of nations that any individual of a nation making war against the citizens of any other nation, they being at peace, forfeits his allegiance and becomes an outlaw or a pirate" could not be gainsayed; and so the British Government took no steps in relation to the execution beyond an inquiry into the facts of their alleged complicity

[1] Sumner, 60.

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in the war.[2] A British statesman said, a little later, that if the British ministry had but raised a finger, all England would have rushed to arms.[3]

General Jackson's troubles, however, were not over, for he had many enemies in Washington; there were several secret cabinet meetings, at which his conduct was discussed, and a majority of the members were in favor of bringing him to book both for his invasion of the Territory of Spain, and for his action in relation to the Englishmen. Congress too took up the matter. A motion was made in the House to censure him for his execution of Arbuthnot and Ambrister, and it was debated for weeks, much to the chagrin of the administration, for President Monroe had already settled the matter and England demanded nothing.[4] The war was now over, and Old Hickory came to Washington and remained there all through the debate. He was acquitted, and set out for a tour of the north, being received everywhere with the highest enthusiasm. On Washington's birthday, 1819, a great banquet was given him in New York City, and on that very day a treaty was signed, conveying Florida from Spain to the United States. Nine years later General Jackson was elected President of the United States by a great popular majority. But in his campaign and also when he was a candidate for re-election four years later, he was denounced by his opponents all over the country as the "murderer of the two Englishmen."

THE TRIAL.[5]

Before a Special Court Martial, Fort St. Mark, Florida, April, 1818.

MAJOR GENERAL E. P. GAINES,[6] *President.*[7]

[2] Sumner 62.
[3] 3 Elson Hist. U. S. 67; 2 Parton, 486, 488.
[4] 4 McMaster U. S. 451.
[5] *Bibliography;* see *ante,* p. 864.
[6] See *ante,* p. 864.
[7] The other members of the Court were the same as on the trial of Arbuthnot (see *ante,* p. 864) with the addition of Captain Allison of the Seventh Infantry.

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April 27.

The COURT proceeded to the trial of Robert C. Ambrister, a British subject, who being asked if he had any objections to any one of the members of the Court, and replying in the negative, he was arraigned on the following charges and specifications: viz.

Charge I. Aiding, abetting, and comforting the enemy, supplying them with means of war, he being a subject of Great Britain, at peace with the United States, and lately an officer in the British Colonial Marines. Specification first. That the said Robert C. Ambrister did give intelligence of the movements and operations of the American army between the first and twentieth day of March, 1818, and did excite them (the Negroes and Indians) to war against the army of the United States, by sending their warriors to meet and fight the American army—whose government was at peace and friendship with the United States and all her citizens.

Charge II. Leading and commanding the Lower Creeks in carrying on a war against the United States. Specification first. That the said Robert C. Ambrister, a subject of Great Britain, which Government was in peace and amity with the United States and all her citizens, did, between the first of February and the twentieth of March, 1818, levy war against the United States, by assuming a command of the Indians in hostility and open war with the United States, and ordering a party of them to meet the army of the United States and give them battle, as will appear by his letters to Governor Cameron of New Providence, dated March 20, 1818, which are marked A, B, C, and D, and the testimony of Mr. Peter B. Cook and Captain Lewis, of the schooner Chance.

To which charges and specifications, he pleaded as follows: viz. To the first charge and specification—Not Guilty. To the second charge and specification—Guilty and justification.

THE WITNESSES.

April 28.

John Lewis Phenix. About the fifth or sixth of April, 1818 my vessel, and myself having been captured by the Prisoner, I was brought to Suwany as a prisoner. There was an alarm among the Negroes and Indians, over some news from Mickasucky. The Prisoner appeared active in sending orders and sending a detachment to meet the American army. He appeared to have authority among the Negro leaders, and gave orders for their preparation for war, providing ammunition, etc.; the leaders came to him for orders. He furnished them with

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powder and lead, and recommended to them the making of ball, etc. very quickly. He occasionally dressed in uniform, with his sword: and on the first alarm, which I understood was from Mickasucky by a Negro woman, he put on the uniform. Some time about the twentieth March, 1818, Prisoner, with an armed body of Negroes (twenty-four in number), came on board my vessel, and ordered me to pilot them to Fort St. Marks, which, he said, he intended to capture before the Americans could get there, threatening to hang me if I did not obey. Do not know by whose authority, and for what purpose, accused came into the country, but I have frequently heard him say he came to attend to Mr. Woodbine's business at the Bay of Tamper.

The *Prisoner.* Did I not tell you, when I came on board the Schooner Chance, I wished you to pilot me to St. Marks, as I was informed that two Americans, of the names of Hambly and Doyle, were confined there, and I wished to have them relieved from their confinement? You stated that you wanted to get Hambly and Doyle from St. Marks, I do not know what was your intention in so doing. Did I not tell you that I expected the Indians would fire upon me when arriving at St. Marks? You did not; you stated that you intended to take the fort in the night, by suprise. Did you see me give ammunition to the Negroes and Indians; and if so, how much, and at what time? I saw you give powder and lead to the Negroes when you came on board, and advised them to make balls; and I saw you give liquor and paint to the Indians. Have you not often heard me say, between the first and twentieth of April, that I would not have anything to do with the Negroes and Indians; in exciting them to war with the United States? About the fifteenth of April, I heard you say you would not have a thing to do with the Negroes and Indians; I heard nothing about exciting them to war. Can you read writing? Not English writing. Did you hear me say, when arriving at Suwany, that I wished to be off immediately for Providence? I did not; after the alarm, you said you wished to be off for Tamper. Did you not say to me, you wished to visit Mr. Arbuthnot, at his store on Suwany, and get provisions for yourself? I did not; I stated I wanted provisions. Did I send or command any Indians to go and fight the Americans? I did not exactly know that you sent them; the Indians and Negroes were crowding before your door, and you were dividing the paint, etc. among them, and I understood a party was going to march. Did I not give up the schooner to you in charge, as captain? After our return from Suwany town, you directed me to take charge of her to go to Tamper.

John I. Arbuthnot. About the twenty-third of March Prisoner came, with a body of Negroes, partly armed, to my father's store on the Suwany River, and told me then that he had come to do justice to the country, by taking the goods and distributing them among the Negroes and Indians—which I saw the Prisoner do. He told me, that

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he had come to the country on Woodbine's business, to see the Negroes righted. Prisoner gave orders to the Negroes, and at his suggestion, a party was sent from Suwany to meet the Americans, to give them battle; which party returned on meeting the Mickasuky Indians in their flight. The letter, marked A, and referred to in the specification of the second charge, is the writing of the Prisoner.[8]

The *Prisoner.* Did you hear me say, that I came on Woodbine's business? I did. Were not the Negroes alluded to at Arbuthnot's store before I arrived? No, you came with them.

Peter B. Cook. Never heard the Prisoner give any orders to Negroes or Indians; the Prisoner distributed Arbuthnot's goods, and also paint to the Negroes and Indians. Some powder was brought

[8] A.

Robert C. Ambrister to Governor Cameron.

Sahwahnee, near St. Mark's Fort, March 20th, 1818.

Sir—I am requested particularly, by all our Indian Chiefs, to acquaint your Excellency, that the Americans have commenced hostilities with them two years ago, and have advanced some considerable distance in this country, and are now making daily progress. They say they sent a number of letters to your Excellency, but have never received one answer, which makes them believe that he never delivered them, and will oblige them much if you will let me know whether he did or not. The purport of the letters were, begging your Excellency to be kind enough to send them down some gunpowder, musket balls, lead, cannon, etc. as they are now completely out of those articles. The Americans may march through the whole territory in a month, and without arms, etc. they must surrender. Hillisajo, or Francis, the Indian Chief, the one that was in England, tells me to let your Excellency know, that the Prince Regent told him that whenever he wanted ammunition, your Excellency would supply him with as much as he wanted. They beg me to press upon your Excellency's mind to send the above-mentioned articles down by the vessel that brings this to you, as she will sail for this place immediately; and let the Prince Regent know of their situation. Any letters that your Excellency may send down, be good enough to direct to me, as they have great dependence in my writing. Any news, that your Excellency may have respecting them and Americans, will be doing me a great favor to let me know, that I may send among them.

There is now a very large body of Americans and Indians, who I expect will attack us every day, and God only knows how it will be decided. But I must only say, this will be the last effort with us. There has been a body of Indians gone to meet them, and I have sent another party. I hope your Excellency will be pleased to grant the favor they request.

I have nothing farther to add, but am, Sir, with due respect, your obedient humble servant,

Robert C. Ambrister.

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from the vessel to Suwany by the Prisoner, and distributed among the Negroes by Nero. Some time in March the Prisoner took Arbuthnot's schooner, and with an armed party of Negroes, twenty-four in number, set out for St. Mark's for the purpose of taking Arbuthnot's goods at that place, and stated that he would compel the commandant to deliver them up. On hearing of the approach of the American army, Prisoner told the Negroes it was useless to run, if they ran any farther they would be driven into the sea. Prisoner told me that he had been a lieutenant in the British army, under Colonel Nichols. Said he was sent by Woodbine to Tamper, to see about those Negroes he had left there. That he had written a letter to Governor Cameron, for ammunition for the Indians, some time in March; that he had a commission in the Patriot army, under M'Gregor, and that he had expected a captaincy.

The letters marked A, B, C, D, and referred to in the specification to the second charge, are in the handwriting of the prisoner, and one marked E.[9]

[9] B.

From Robert C. Ambrister to Major Edward Nichols.

Suwany, near River Appalachicola.

Dear Sir—Francis, and all the Indian Chiefs, have requested me particularly to acquaint you, that the Americans have commenced hostilities with them these two years past, and are making daily progress in their territory, and say they will proceed. That you are the only friend they have in that part of the world, and hope that you will exert yourself in their behalf, and ask for as much assistance as can be had. That the Americans are at the forks of the river Appalachicola. They have written a number of times to England and Providence, but have never received one answer; they expect the man never delivered the letters, but they have full hopes in my writing. They request you would make the Prince Regent acquainted with their deplorable situation. The Americans have been very cruel since they commenced, and I hope you will lose not a single moment in forwarding their views. They say they will be extremely happy to see you; nothing would give them greater pleasure than to see you out at this time. If they should not see you, to send them in all news and directions, that they may be guided by it.

There are about three hundred blacks at this place, a few of our Bluff people. They beg me to say, they depend on your promises, and expect you are on the way out. They have stuck to the *cause*, and will always believe in the faith of you; and any directions you may send to me at this place, and I will do what I can.

And remain, my dear Sir, most truly yours,

Robert C. Ambrister.

N. B. Francis says that you must bring the horses when you come out that you promised, and that his house has been burnt down and burnt his uniform clothes. R. A.

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The *Prisoner.* Did you not frequently hear me say that I would have nothing to do with the Indians in exciting them to war with the United States? I do not recollect. Are you acquainted with Lewis Phenix, and have you not heard him express ill-will against me, in consequence of my wishing him to pilot me to St. Mark's? I never did. Do you know of my sending troops at any time to fight against the United States, and have I not been constantly with you, so that you would have an opportunity of knowing, if there had been any sent by me? I have not; they might have been sent without my knowledge.

Jacob Harrison. Some time in March, or first of April, Prisoner took possession of the schooner Chance, with an armed party of Negroes, and stated his intention of taking St. Mark's. On his way thither, going ashore, he learned from some Indians that Arbuthnot had gone to St. Mark's, which induced him to return. While the Prisoner was on board, he had complete command of the Negroes, who considered him their captain. Prisoner took the cargo of the vessel up towards Suwany, which consisted of, with other articles, nine kegs of powder, and five hundred pounds of lead.

C.

From Robert C. Ambrister to Governor Cameron.

March 20, 1818.

Sir—I am requested particularly by the Indian Chiefs to acquaint your Excellency, that the Americans have commenced hostilities with them a long time since, and have advanced some distance in their territory, and are still continuing to advance. That they (the Chiefs of Florida) have sent repeatedly to your Excellency, and have never received one answer. They suspect Mr. Arbuthnot has never delivered the papers to your Excellency. They wish me to state to you, that they are completely out of ammunition, muskets, etc. begging your Excellency will be pleased to send them the articles above-mentioned, with a few cannon, as the Americans build their boats so strong, that their rifle balls can not penetrate their sides. The captain of the vessel, who will come down again, I have given orders to make your Excellency acquainted what time the vessel will sail for this place. Your Excellency will, I hope, be good enough to make the Prince Regent acquainted with their situation, and ask for assistance; which they have pressed me very hard to press upon your Excellency's mind, and likewise to send them down what news may be respecting them and the country, which will be a great satisfaction to them.

I have the honor to be, etc,

Robert C. Ambrister.

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The evidence being closed, the *Prisoner* was allowed until five o'clock this evening to make his defense.

The time having expired, he was brought before the Court, and said:

The *Prisoner*. Being arraigned before a special court

D.

From Robert C. Ambrister to Governor Cameron.

Sahwahnee, twentieth March, 1818, near Fort St. Mark's.

Sir—I am requested by Francis and all the Indian Chiefs, to acquaint your Excellency, that they are at war with the Americans, and have been for some time back. That they are in great distress for want of ammunition, balls, arms, etc. and have wrote by Mr. Arbuthnot several times, but they suppose he never delivers them to your Excellency. You will oblige them much to let them know whether he did or did not.

I expect the Americans and Indians will attack us daily. I have sent a party of men to oppose them. They beg on me to press on your Excellency's mind to lay the situation of the country before the Prince Regent, and ask for assistance.

All news respecting them your Excellency will do a favor to let us know by the first opportunity, that I may make them acquainted. I have given directions to the captain to let your Excellency know when the vessel will sail for this place. I hope your Excellency will be pleased to send them ammunition; I expect, if they do not procure some very shortly, that the Americans will march through the country. I have nothing farther to add. I am dear Sir,

Your most obedient humble servant,

Robert C. Ambrister.

E.

From Robert C. Ambrister to Peter B. Cook.

Mouth of the River.

D'r Cook—The boat arrived here about three o'clock on Thursday; the wind has been a-head ever since I have been down. The rudder of the vessel is in a bad condition, but I will manage to have it done to-night. The wind, I am in hopes, will be fair in the morning, when I will get under weigh, and make all possible despatch. I will make old Lewis pilot me safe. If those Indians don't conduct themselves straight, I will use rigorous means with them. Beware of Mr. Jreey; I found him on board when I came. Keep a good look out. I have sent two kegs of powder, and one bar of lead.

Your's, etc., R. A.

Tuesday, 3 o'clock.

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martial, upon the following charges, to wit: Charge I. Aiding and abetting, and comforting the Indians; supplying them with the means of war; he being a subject of Great Britain, at peace with the United States, and lately an officer in the British Colonial Marines. Charge II. Leading and commanding the Lower Creek Indians, in carrying on a war against the United States.

To the first charge, the prisoner at the bar pleads not guilty; and as to the second charge, he pleads guilty, and justification. The prisoner at the bar feels grateful to this honorable Court for their goodness in giving him sufficient time to deliberate and arrange his defense on the above charges. The prisoner at the bar here avails himself of the opportunity of stating to this Court, that, inasmuch as the testimony which was introduced in this case was very explicit, and went to every point the prisoner could wish, he has nothing farther to offer in his defense, but puts himself on the mercy of the honorable Court.

The COURT was cleared and the proceedings read over to the members by the Recorder. After due deliberation the COURT finds the prisoner, Robert C. Ambrister, guilty of so much of the specification to the first charge, as follows, viz. "and did incite them to war with the United States, by sending their warriors to meet and fight the American army, he being a subject of Great Britain, which government was at peace and friendship with the United States, and all her citizens;" but not guilty of the other part of the specification; guilty of the first charge. Guilty of the specification of the second charge, and guilty of the second charge. And they sentence the prisoner, Robert C. Ambrister, to suffer death, by being shot, two-thirds of the Court concurring therein.

One of the members of the COURT moved re-consideration of his vote on the sentence, and his motion was in the affirmative. A second vote was taken, and the COURT changed the sentence from death to one that the prisoner receive fifty stripes on his bare back, and be confined with a ball and chain to hard labor, for twelve calendar months.

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The commanding general, Major General Jackson, approved the finding and first sentence of the Court in the case of Robert C. Ambrister, and disapproved the reconsideration of the sentence of the Court saying: "It appears from the evidence and pleading of the prisoner, that he did lead and command, within the territory of Spain (being a subject of Great Britain), the Indians in war against the United States, these nations being at peace. It is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace forfeits his allegiance, and becomes an outlaw and pirate. This is the case of Robert C. Ambrister, clearly shown by the evidence adduced. The Commanding General orders, that Brevet Major A. C. W. Fanning, of the corps of artillery, will have, between the hours of eight and nine o'clock a. m., Robert C. Ambrister to be shot to death, agreeably to the sentence of the Court.

John James Arbuthnot will be furnished with a passage to Pensacola by the first vessel."

April 29.

Today at daylight, the prisoner was shot by a detail of troops.

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THE ACTION OF PETER DUFFIE AGAINST GEORGE E. MATTHEWSON AND OTHERS, FOR ASSAULT AND BATTERY, NEW YORK CITY, 1816

THE NARRATIVE.

It was an old custom of the sea that whenever a vessel arrived on the Equator, where the raw hands and passengers on board have not been before, the seamen, according to the old usage, would proceed to the ceremony of "shaving," which is thus performed: One of the crew, the oldest, is habited in a fantastic manner, and with a speaking trumpet in his hand personates Father Neptune. He goes forward to the bow of the vessel, while those who are to be shaved, are kept below, and descends until he reaches the water, and from thence ascends on deck, pretending to have emerged from the ocean. He hails the crew with his trumpet; answer is made, and mutual congratulations pass between his godship and the old seamen. He proceeds to order the requisite apparatus for shaving, which generally consists of a piece of iron hoop, a composition for lather made of slush and other offensive matter, and a tub of water. The persons who are to be shaved, are then brought on deck, one by one, blindfolded. He demands money or rum as his rightful tax on all those who have never crossed the line. If they pay they are let go, but if they refuse they are not. Those who are quiet are shaved light, while those who are refractory are shaved hard. After shaving, Neptune proceeds to swear the novice to divers singular observances, one of which is, that he "will never eat brown bread when he can get white." The one shaved, is then either immersed in a tub of water, or has a bucketful from above poured on his head, and the frolic ends.

The sailors of the English ship *Thomas* on a voyage from Ireland to America, one day in May, 1816, got up the same

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"stunt" when they sighted the Banks of Newfoundland. But it did not end here. Patrick Duffie, a passenger who would not pay or treat and who made quite a row over it and was handled rather roughly, brought an action for assault and battery against the captain and several of the sailors when he reached New York and the jury awarded him damages.

THE TRIAL.[1]

In the Marine Court of New York City, October, 1816.

HON. HENRY WHARTON,
ROBERT SWANTON,
JOHN B. SCOTT,
} *Judges.*

October 17.

This was an action for damages for assault and battery alleged to have been committed on board the British ship *Thomas* while on the high seas. The defendants were George Matthewson, the captain of the ship, and Richard Clark, George Jenkins, John Marknell and several other sailors.

Mr. Caines[2] for the Plaintiff; *Mr. Fay*[3] for the Defendant.

THE EVIDENCE.

Peter Duffie. Am the plaintiff and was a passenger on board the *Thomas* which sailed from Cork for New York last May. About five weeks after we sailed and just as we were in sight of land which they called the Banks a number of the sailors disguised in fantastic clothes, ordered the passengers on deck and proceeded to make us go through a ceremony against our will. When we got on deck Marknell, who was dressed up as Father Neptune, came over the side of the ship. He had evidently been lowered over the side before we got on deck. He had a trumpet in his hand. He hailed the crew in language I did not understand but I heard him tell them to bring his razor

[1] *Bibliography.*—New York City Hall Recorder. See 1 Am. St. Tr. 61.

[2] CAINES, George. (1771-1825.) Member of the Bar of New York City and author of several legal treatises. Reporter of many New York decisions.

[3] See 1 Am. St. Tr. 718.

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and some lather and a cup of water. He then ordered the sailors to bring the passengers before him one by one and he demanded money or rum as his right when land was sighted. Those that paid up were let go. I refused, when Martnell told his aids to perform the operation. They took hold of me, tied me up and covered my face with a foul mixture of tar and soap and slush. They scraped it off with an iron hoop and then dipped me into a tub of water. Before this they made me take a ridiculous oath that I would never eat brown bread when I could get white.

James Slabers. Was a passenger on the *Thomas* and saw the frolic. I got off as I paid two dollars tribute as required. Saw them put Duffie through, also half a dozen other passengers who would not pay including one woman, Ann Jones. The fun was very rough and I would have not enjoyed it. I preferred to pay the tribute.

Cross-examined. Duffie was very mad; for he was the first to refuse to pay. He stayed on deck and watched the others and after a while seemed much amused and to enjoy it all. They did not drop the woman in the tar water, but poured it over her from a bucket instead.

To Mr. Caines. The victims were blindfolded: the razor was nothing but a hoop. When Neptune came on deck he pretended to have emerged from the ocean and hailed the crew with his trumpet to which they responded in a doggerel which they seemed to be very familiar with. When Duffie refused to pay or treat Father Neptune thundered through his trumpet: "Who are these mortals I see." One of the sailors responded like this when a passenger refused to pay or treat: "Oh! omnipotent father, King of the ocean, behold the rebellious sons of Terra, who have dared to intrude into thy dominions, refusing to bend before thy divine altar, and to render to thee an accustomed libation. Their beards, O! father, are long, uncouth and indecent; retained by them in defiance of thy laws, and in derision of thy divinity." Then Neptune called out: "Carry these impious mortals from my presence—behold their beards, which they dare to retain in despite of my authority. They shall be shaved." And afterwards: "Bring hither that tub, and fill it with sea-water." It was done. "Bring forth the long bearded tribe one by one." The command was obeyed; but Duffie, when it came to his turn, was inclined to be refractory, and resisted. Noticed that those that made no fuss were shaved light while those that resisted were shaved hard. When the ceremony was over, Neptune got over the side of the ship again as though he was descending into the vast deep. Marknell took the part of Neptune and Captain Matthewson assisted all through the ceremony.

SWANTON J. (To the jury.) It was the duty of the master of the ship to treat his passengers with attention and politeness. The captain stood in the same relation to the passengers, as a master of an inn or hotel did toward his guests.

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Having the superintendence of his vessel, the law had invested the captain with the authority necessary for preserving peace and good order. On this occasion, the captain not only failed in treating the plaintiff with a becoming decorum, but countenanced, and actually had some agency in the injury charged in the declaration. The conduct of the defendants toward the plaintiff was highly reprehensible. After taking into consideration the wounded feelings of the plaintiff on the one hand, and the circumstances of the defendants on the other, it would be the duty of the jury to render such a verdict as they considered just and equitable.

The *Jury* rendered a verdict in favor of the plaintiff for $46.

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THE TRIAL OF ELIZABETH SOUTHARD FOR THE MURDER OF WILLIAM P. WALKER, RICHMOND, VIRGINIA, 1851

THE NARRATIVE.

A low quarrel and fight in a low lodging house in a Southern city in the middle of the last century brought about this trial. There is not much in it to interest the reader either as regards the facts or the result. The interest to-day is in the distinction which the law of slavery drew between a white person and a person of color. The principal witnesses were objected to on the ground that they were negroes, but although they had registered themselves as free negroes, the Court found that they were not negroes at all, but "free persons of color who had less than one fourth negro blood," which took them out of the servile class in the eye of the law. And because the Court found the prisoner was in the same condition as to race, she was held entitled to be tried as a white person and not as a negro.

THE TRIAL.[1]

In the Circuit Court of Henrico County, Virginia (Criminal Term), May, 1851.

HON. JOHN S. CASKIE,[2] *Judge.*

[1] *Bibliography.*—"Reports of Criminal Trials in the Circuit, State, and United States Courts, held in Richmond, Virginia. By Robert Howison, Counselor at Law, Richmond. Geo. M. West & Bro., 1851." This is a small volume of 120 pages and contains the reports of 11 criminal trials. In the preface the author says: "Crime is, unhappily, always a subject interesting to man, and criminal trials often furnish the best illustrations of the sentiment that 'truth is strange—stranger than fiction.' Hence, reports of such trials have been generally read with interest. The trials contained in this volume, have all occurred within comparatively a short time, and yet they present a remarkable variety both of fact and of law, and two of them reveal a wild and startling tragedy, seldom exceeded in real life. My object has

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May 7.

The prisoner was indicted for murder, the indictment containing five counts, each charging the blow as given the twelfth day of April, 1851, to William P. Walker, and that he lingered till the twenty-second, and then died. (1) That she struck, with an iron griddle, in her right hand held, upon his head. (2) With an iron griddle, in both hands held, upon the hind part of his head. (3) With a sharp instrument to the (Grand) Jurors unknown, in her hands held, upon the back part of the head. (4) With a hard instrument to the jurors unknown, in her hands held, upon the hind part of his head. (5) With an iron griddle in her hands held, on his head, gave him divers wounds, fractures, contusions, and bruises.

The *Prisoner* was thirty-five years of age; her hair black, and complexion dark. She pleaded *Not Guilty.*

The following jurors were selected: S. G. Waldrop, R. D. Mitchell, Bernhard Brill, William W. Carter, H. B. Ford, Samuel Phillips, Joseph Rennie, William W. Morris, R. G. Walton, William Matthews, James Simpson, Stephen B. Sweeney.

been to give a full and accurate report of the evidence in each case, so as to furnish to the reader a reflected picture of what passed before the Court and Jury. It has been no part of my plan to give the argument of counsel; a verbatim report only would do full justice to the gentlemen whose names appear as advocates in these cases, and such report would have altered the character designedly given to this work. I wish readers to judge for themselves from the evidence. And therefore the names of the Jurors in each case have been given, that they may be held to a salutary responsibility for their verdicts. That they will be ready at all times to meet this responsibility, I think no one who reads these trials can doubt. Questions of law raised and authorities cited, have been noted with care that the volume may be of some service to professional readers. No apology is offered for the insertion of any trial or any evidence herein found. We must look at things as they are, and not as we would wish them to be, if we desire to learn the origin and the cure of crime."

[2] CASKIE, John S. (1821-1869.) Born in Richmond, Virginia. Graduated University of Virginia. Judge Richmond Circuit Court. Member Congress 1851-1855.

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John B. Young, Commonwealth Attorney, and *B. B. Minor*,[3] for the Commonwealth.

John N. Davis, William Hancock and *R. R. Howison*[4] for the Prisoner.

Mr. Young. I propose to call as witnesses for the Commonwealth, Martha Hobson and Rebecca Hobson, and I ask that they be sworn.

The *Prisoner's Counsel* objected to them as incompetent, on the ground that they were persons of color.

Mr. Young. Then, to raise the question, I offer them at once; I shall insist that they are competent as white persons, or at least that they have no more of negro blood than the accused, and therefore may testify against her.

The *Prisoner's Counsel.* Let them be sworn on their *voir dire.*

Martha Hobson. I have been registered as a free negro in Henrico County Court, and have here a copy of my Register, with the seal of the Court attached.

Rebecca Hobson. I have been registered as a free negro, in the same Court, but have not obtained a copy of my register.

The *Commonwealth's Attorney* admitted her registry without requiring the production of the record.

Mr. Young. I propose to ask Martha Hobson concerning her parentage.

The *Prisoner's Counsel.* We object. The register is conclusive as to the status of the witness. The Court ought not to go behind it. The Statute of Virginia requires,

[3] MINOR, Benjamin B. In July, 1860, was elected President of the University of Missouri, and was installed in October of that year. On February 3rd, 1862, General Halleck issued an order requiring University professors to take the oath of loyalty. President Minor with others did so. On March 19, 1862, the Curators of the University declared all chairs vacated; President Minor protested, but without avail, and on June 22, 1865, the University was re-opened, and John H. Lathrop elected President. Degree of LL.D. was conferred on Ex-President Minor in 1901 by the University of Missouri; he died a few years later.

[4] HOWISON, Robert Reed. Born Virginia 1820. Lawyer and author of several histories and biographies.

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that a free negro shall be registered. The county court has complete jurisdiction and ought not to have registered her if she was not a free negro; it is *res adjudicata,* and the decision of that court upon the amount of negro blood may be regarded in the light of a proceeding *in rem,* and so, binding upon all. If she claimed to be of mixed blood, to have less than one fourth of negro blood, she might have that question specially decided in her favor by the county court.

Mr. Young. This court ought not to be concluded by the register. These persons may have applied for registers as free negroes merely because they did not wish to be annoyed by questions as to their disabilities and their privileges. The Commonwealth was not a party when they were registered and is not bound by the action of the county court.

The COURT. The Registry is not conclusive.

Martha Hobson. My mother was generally called an English woman; she was darker than I am; my father was reputed to be a white man; after I was born, my mother lived with a negro man as his wife; I lived with them several years; my own husband was generally thought to be a free man of color; his color was light; we came from Little York in Gloucester county.

Cross-examined. Never remember to have seen the man that was said to be my father. We were never registered in Gloucester; we only had ourselves registered here because we feared some body might interfere with us; we associated with colored people in Gloucester; Rebecca is my daughter.

The COURT. As questions somewhat novel arise in this case, I have thought it best to call in some physicians, who are probably experts in matters relating to the distinctions between the human races.

The *Prisoner's Counsel.* We object to such testimony. If the Register be not conclusive, then the proper mode of determining the matter is, not by inspection either of the Court or of supposed experts, but by evidence of parentage and pedigree. Our Statute looks to this, when it declares that a fourth or more of negro blood shall exclude. How can the quantity be determined by experts? It can only be known

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by the parentage. 3 Robinson's Prac. 215, State vs. Davis, 2 Bailey, (S. C.) 558.

Mr. Young. The South Carolina case is against you. I think I remember a case from King William which went to the court of appeals, and that court decided that inspection was a proper mode of deciding such questions, but I cannot name the case.

The COURT. I have no doubt I might decide upon my own inspection, and if so, I may avail myself of the knowledge of those better skilled in such inquiries than myself.

R. H. Cabell, M. D. I think the studies of a physician tend to give him peculiar skill and knowledge as to the distinctions between the races of men; comparative anatomy is one of his studies, and that treats of the differences in the anatomical structure—as the shape of the skull—the nose; the extremities, between the various races. (After examining Martha Hobson.) I do not find in this woman any evidences of negro blood; she seems to me to be a pure Caucasian.

Cross-examined. Do not think it possible for a physician to say accurately how much negro blood there is in a person; whether a fourth or more; it would be mere conjecture; this woman's nose is depressed, but she tells me it has been broken; I find nothing in her hair, or skin or general appearance indicating negro blood.

Mr. Young. I ask that Dr. Cabell may now be permitted to examine the prisoner; I propose to prove that she has at least as much negro blood as either of the Hobsons.

The *Prisoner's Counsel.* We insist that the Commonwealth is bound to try the accused as a white person. The indictment treats her as such; it nowhere alleges that she is a free negro, or mulatto; the case of Young, 2 Va. Cases 328, decides that when the punishment for an offense is different in a white person and in a free negro, the indictment against the latter must allege that he is such. The reasoning there, applies here; the evidence is different in the two cases, and the prisoner may be taken by surprise; indicted as a white person, she comes expecting to be tried as a white person, and may be unprepared with proof of her white pedigree, which the Commonwealth seeks to assail.

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The COURT. As the punishment in the case of murder is the same for a white person and for a free negro, the indictment need not make a difference yet the Commonwealth ought not to be prevented from showing the competency of her testimony by proving that the prisoner was not one who could object to it.

Dr. Cabell (recalled). (After examining Rebecca Hobson and the prisoner.) I feel very reluctant to give testimony in this case, and would be glad to be excused; I do not wish to wound the feelings of any one. I have an opinion on the subject; I think the prisoner has negro blood; how much I cannot say; Rebecca Hobson also has negro blood, in my opinion, probably rather more than the prisoner.

W. D. Haskins, M. D. I think it probable that a physician may have peculiar skill, and be an expert in such matters, though it is not strictly a part of his profession, and extended observations would be necessary to give much skill. My opinion is, that all three of these women have some negro blood; the old woman very little; I think the prisoner has more than the witness, Rebecca Hobson.

Cross-examined. It is rather the province of the naturalist than of the physician, to examine these subjects; probably a physician would not have much more skill than any man of general scientific reading. As to the prisoner, I judge chiefly by the hair and the skin; her hair is shorter than is usual in white women; yes, it may have been cut, but it has the appearance of having its natural length; it has also a tendency to curl—not to curl merely, but to a kind of "wavy curl," not easily described, but which is different from the curl in the hair of white women. I do not think it possible for a physician to say whether there be a fourth of negro blood.

Albert M. Snead, M. D. Think it pertains more to the naturalist than the physician, to solve this question, but a physician may acquire some peculiar knowledge as to it, not merely from his reading but from his practice among the two races, as they exist in our society; am of the opinion all these women have negro blood; the old woman has the least; think the other two have about the same quantity.

Cross-examined. I judge by the hair and the skin and some other appearances; there is something indescribable in the feeling of the hair and the looks of the skin, by which I think the presence of negro blood may be detected; cannot say how much.

C. Wortham. Am a physician but do not think I can call myself an expert on this subject; do not feel competent to give the Court instruction and guidance on the question. Other physicians may feel such competency, but I do not.

Isaac A. Goddin. Was in the County Court when Elizabeth Southard was before them in some case, and the Court decided that she was a white person

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(here an extract from the record of the County Court was exhibited by Mr. Davis). We had sufficient evidence, and I heard—

Mr. Young. What Mr. Goddin heard from others, cannot be given in evidence.

The *Prisoner's Counsel.* Upon a qustion of pedigree, hearsay testimony is admissible; this is an exception to the general rule, and we state it thus broadly; if there be a restriction let the Commonwealth point it out.

The COURT. The declarations of a member, or connection of the prisoner's family, may be given in evidence on the question.

Jacob Holloway. Knew the prisoner's parents in Hanover county; they were counsins to each other, and were both descendants from the Madisons of Caroline; her father and mother were regularly married and always associated with white people, and were very reputable people; thought them white people; they always passed for such; knew her grand parents who were Madisons; the Madisons were a dark family.

Cross-examined. Her grandfather was a Madison, he was dark, but not darker than I have seen people who were known to be white people; think I have heard, a long time ago, that there was some rumor of a stain in the blood of the family, but I know nothing of it myself.

Fleming P. Harris. I knew her parents in Hanover; they were very respectable persons, and were recognized as white people; I have known her father to muster in the militia.

May 8.

James H. Conway, M. D. Do not think a physician from his professional studies, would be more skilful in detecting the differences between the races than any other well-read man. There are naturalists who make this their peculiar study. The object of medical study is to become acquainted with the human system generally, and the causes and cure of its maladies, and in my opinion, this may be done to the full extent to which the science now goes, without any peculiar knowledge of the distinctions between the races.

L. R. Waring, M. D. Think a physician need not have any peculiar skill in such matters; cannot claim to be an expert in them, though I have endeavored to attend to the studies of my profession. It must, to a great extent, be matter of conjecture.

M. Burton, M. D. Have paid much attention to the differences between the human races. I have done this as a naturalist, and not merely as a physician. Consider myself as having thus acquired peculiar skill and knowledge on the subject. (After examining the prisoner and the two witnesses.) Think the elder woman, (Martha Hobson,) has no African blood in her; do not find any evidences of it in her. I think both the other women have negro blood, and of the two, the prisoner seems to me to have the least. I think neither of them can have as much as one-fourth of negro blood.

CASKIE, J. Even without the testimony of the physicians, I might have decided this question upon my own inspection,

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but I desired aid and have certainly derived from the evidence strong confirmation of the view I was inclined at first to take. The questions as to the conclusiveness of the Register, and the effect of the indictment upon the rights of the prisoner have been already considered. Our Statute admits as competent witnesses, even against a white person, those free persons of color who have less than one-fourth of negro or Indian blood. As to the prisoner, I am convinced that she has African blood, but I am equally convinced that she has much less than one-fourth, and therefore she is to be tried as a white person. As to Martha Hobson, all that I have heard and seen leaves on my mind the strong opinion that she has no African blood at all; that she is a pure Caucasian, or if her blood be mixed, that she may have a slight tinge, much less than a fourth of Indian blood. As to Rebecca Hobson, I at first supposed that she had much more negro blood than the prisoner, but this view has been modified by a closer inspection, and I am now of opinion that she has very little if any more and that her quantity of African blood is much less than one-fourth. With these views, I must decide that both Martha and Rebecca Hobson are competent witnesses.

EVIDENCE FOR THE COMMONWEALTH.

John H. Walker. Heard that William Walker had been much hurt at Martha Hobson's; think I heard of it Saturday, the thirteenth of April, 1850. I went to the house and found him sitting up by the chimney side, with his head bound up. Asked him if he would come home with me; he said, "not then;" the next evening he came to my house and he stayed there until he died, on the Monday week after he was hurt. He sometimes walked about for a day or two after coming to my house, but did not talk much; he seemed in a stupor several days before he died.

Cross-examined. He was my cousin; we did not have much to do with each other; he would take "sprees" sometimes, but I did not think he was then more violent than other men; he was a very peaceable man when sober.

J. Mull. A few days after this affair happened, saw William Walker, walking on the other side of the bridge over the creek that runs through Rocketts. He had his head tied up; I joined him and we talked some; asked him how he got hurt; he said he got it "skylarking" at Martha Hobson's. He went on to his

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brother's. Don't think I saw him out afterwards.

Cross-examined. "Skylarking" is a phrase often used by sailors; it means pretty rough play, as if we were to take all the tables, desks, books and inkstanks in this room and throw them all about in confusion. Knew William Walker; he got drunk sometimes, but when sober he was quiet.

Martha Hobson. The night this thing happened, Betsey Southard was at my house, and so was William Walker; some time after dark we took something to drink; they commenced romping about the room; they proposed to dance; I told them I didn't believe they could dance as they did in old times; they romped about the floor, and after a while Bill Walker went out and got one of the Watchmen to come; when he came he asked what was the matter; we were all quiet; the Watchman said to Bill Walker, "if you come and make a fuss again, I will put you up the chimney." When the Watchman went away, Betsey asked Walker what he brought the Watchman for; he said, for her; then she proposed to send out for some liquor and said if he wouldn't pay for it, she would. The liquor came, and after awhile they played again, and Betsey threw him down on the floor; they were down some time, and then they got up and had another wrestle and she threw him again. Then she got up and I saw her go off with her body half bent, (here the witness showed the position,) towards the fire-place. He ran after her, and kicked her in the mouth, (Betsey said,) so hard it shook every tooth in her head; then she said, "Oh! damn you, are you up to that," and she caught up this griddle and struck him on the back of the head as he turned off. He fell right down and lay still; I said, "Lord, Betsey, you've killed him;" she said, "Oh, no, he ain't dead, let him bleed a little." After awhile he came too; I put some soot from the chimney on his head, and bound it up with a bandage and he laid down on the bed.

Cross-examined. William Walker lived with me as my husband, we were never married. We all drank that evening; I as well as the rest; don't know why Walker went for the Watchman; he didn't like Betsey much any how; thought they were playing at first, but I think he was getting very "mad" when she threw him down; think he was "mad" when he ran after her to the chimney; he ran very fast; after he kicked her, he turned off to the right; there was a table the way he turned; under it there was a skillet with a handle to it, and there was some other things. When they fell down the first time, they stayed down, it seems to me, perhaps a quarter of an hour; they said nothing all that time. Had once a little difficulty with Elizabeth Southard, but nothing to speak of. Rebecca was present most of the time.

Rebecca Hobson. Was out of the house the first part of the night; when I came in, they were dancing and playing about the floor: I drank, I think, one glass; Walker went out and got the Watchman, but when he came, we were not doing any thing,

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and he went away; Betsey and Walker wrestled and she threw him; only saw her throw him once; she had said to me, "pull my cape down," and I pulled it down; while they were on the floor, he kicked her in the mouth, then she ran and got this griddle and struck him on the head. He fell down and seemed dead, but came too. When she took the griddle she said, "Oh, are you up to that." Didn't hear her say any thing more.

Cross-examined. Did not see Walker run up to the chimney place and kick Betsey in the mouth; did not see her go off, half bent, to the fire-place. I did not see mother put any soot on his head. There was a skillet under the table near him; there was an axe in the house, I think it was near the door; they fell nearer to the door than to the fire-place. Walker was sometimes very violent; he had choked my mother a few days before. He was not a large man. Remember some difficulty between mother and Betsey.

L. R. Waring, M. D. Was called to see William Walker, before his death. Found him in a state approaching stupor. There was a wound on his head which penetrated through the scalp; the skull was also cut through and a piece of the bone driven in upon the brain; used the threphine to elevate this fragment of bone; had little hope of his life; he continued to live, generally in a comatose state, until Monday, when he died. The blow, I think, might have been given with an instrument like this griddle, and must have been struck with considerable force. Have no doubt the blow caused his death.

John H. Walker (recalled). On Wednesday evening, William Walker was much worse and was put to bed; he said he did not think he should ever get well he seemed in earnest when he said it; asked him if I should send for a doctor, and he said yes.

The *Prosecuting Attorney.* Upon this foundation and the former evidence, I now propose to give the declarations of the deceased as to the person who struck the blow, and its attending circumstances to the jury.

The *Prisoner's Counsel.* We shall oppose this, not only on the ground that according to the common law decisions, the foundation is not sufficient, but on the farther ground that the Constitution of the United States forbids the introduction of dying declarations, by necessary inference from Art. VI. Amend. How can the accused be "confronted with the witnesses against him," if these declarations of a man not under oath, and not subject to cross-examination, can be received? And so, Judge Baxter of Georgia, has recently

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ruled out dying declarations—(in a case reported in Washington (Ga.) Gazette and in the Richmond Times, May 8, 1851.) Hunter Hill's case does not shut up this question. There, nothing was relied upon by the prisoner's counsel, except the Bill of Rights of Va.; the Constitution of the United States was not spoken of. But if dying declarations can be received at all the rule now approved will exclude them in this case. It is not enough that the deceased thought he should never recover.—Cowen & Hill's Notes to Phillips on Ev. iii, 607, 608. He must think death to be impending, so that his mind is solemnized by the thought.

Mr. Minor. The Bill of Rights of Va. is broader in its language than the Constitution of the U. S. Compare Art. 8, Bill of Rights with Art. 6 amend. Constitution. So, the General Court, in deciding that the Bill of Rights did not exclude dying declarations, necessarily decided that the Constitution of the U. S. did not. The rule only requires that the deceased shall believe he must soon die; this was the case here.

The COURT. I do not think Art. VI. of the amendments to the Constitution of the United States applies at all to the state courts, or gives any rule to them. The words are, "an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." This must refer to the United States Courts. But while I am bound by the decision in Hunter Hill's case, and am perfectly satisfied of the propriety of admitting dying declarations to a jury, yet, in the case at bar, I do not think the mind of the deceased was so bereft of all hope of life, and so impressed as to the solemnity of his position, as to make his declarations proper evidence; I therefore exclude them.

EVIDENCE FOR THE DEFENSE.

William F. Carredo. The morning after this affair, I heard Isaiah Walker say, his brother was killed; went to the house and peeped through a window and saw Wm. Walker sitting up in bed; asked him who struck him, he said a woman up stairs: I

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went part of the way up stairs, just high enough to see, and I saw a woman lying on the floor, wrapped up in old clothes or something of the kind; I could not tell who she was. A man named Peter Bell was up there, just buttoning on his clothes; saw no other woman.

Joseph Holloway. Knew the prisoner in Hanover, and never heard any thing against her. She was always considered of a peaceable disposition; she stayed with my mother sometimes and I heard her speak of her favorably. Have known nothing of her since she was in Richmond.

Fleming P. Harris. Have seen the prisoner in Hanover where her parents lived; never heard anything against her there, but in the last four or five years she has been beyond the reach of my observation.

May 9.

The argument before the *Jury* commenced at nine and closed at about half past twelve. The *Jury* retired and in half an hour returned with a verdict of *Guilty* of Voluntary Manslaughter. The *Prisoner* was sentenced to confinement in the penitentiary for one year.

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THE TRIAL OF JOHN DAYTON AND THOMAS DYER FOR LARCENY, NEW YORK CITY, 1817

THE NARRATIVE.

A sailing vessel carrying a cargo of flour, butter, honey and other provisions, capsized one afternoon in a gale in the Hudson river opposite New York City. Most of the cargo was on deck and floated upon the water. A sailor named Dyer suggested to several of his companions that they go out and pick up what property they could, which proposition was accepted. They succeeded in bringing a lot of it to shore, and transporting it over to Long Island, where one of them operated a store, and did a good business until interrupted by the police, who arrested the men and confiscated the stock. Tried in New York City for stealing the things which they took from the water, their lawyers contended that a finder was not a thief. But the Court ruled that the things that they took were not "lost," and that therefore they were not "finders," and they were convicted.

THE TRIAL.[1]

In the Court of General Sessions, New York City, November, 1817.

HON. JACOB RATCLIFF,[2] *Mayor.*
THOMAS R. SMITH, } *Aldermen.*
ANTHONY L. UNDERHILL, }

November 3.

John Dayton, Thomas Dyer, Gideon Wagner and Samuel Legg had been indicted for grand larceny, in stealing forty barrels of flour; two firkins of butter; two hives of honey; three tierces of cheese and one chest containing three coats

[1] • New York City Hall Recorder. See 1 Am. St. Tr. 61.
[2] See 1 Am. St. Tr., 61.

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and six pairs of pantaloons, of the value of $443, the property of James Taylor on October 6th, 1817.

The *Prisoners* pleaded *Not Guilty.*

Hugh Maxwell,[3] District Attorney, for the People.

Mr. Scott, Mr. Gardenier, and *Mr. Price* for the Prisoners.

THE EVIDENCE.

James Taylor. I was the Captain and owner of the sloop *Superior.* On the morning of the sixth of October last, the sloop left Catskill about one o'clock in the afternoon. While between Fort Washington and Spuyting Deuvel Creek, about ten miles from New York, a violent gale of wind went over her. The cargo on the deck, consisting of flour, butter, honey, potash, and other articles, was swept off. The prisoners with others on the East shore, seeing the situation of the vessel, put off in boats to save such of the cargo as they could. Some floated on the shore, and some was taken up by the boatmen. Judging from the direction of the wind, that such of the articles as would float would be driven on the eastern shore and preserved by the people there, I continued with the vessel, and did not, until the Friday following, go after the property. On that day I found a part of the property on the shore, and in fifteen days after the accident, found twelve barrels of the flour in the police office.

Samuel Legg. I went along with the prisoners at the suggestion of Dyer when we saw the sloop go over. After we picked the things up from the water Dayton told me that he intended to keep a part of the property as a compensation for his trouble; stating that the owner, in such cases, was generally illiberal, and would not allow near as much as the law allowed, which was half the property. In my presence, he concealed four barrels of flour, a firkin of butter, and a hive of honey, by covering it with stones and bushes. Dyer also took his part of the property, removed it from the place where it came on shore, concealed it. Dyer with Dayton, hired Wanger to come up with a schooner in the night and convey the property to the city. Dayton was a fisherman but after getting the goods he opened a flour ware-house at Corlaer's Hook, and continued merchandizing until the police arrested him.

Mr. Scott contended that the property, having been lost from the vessel, the possession was legally obtained by the prisoner. No trespass was committed; and it did not ap-

[3] See 1 Am. St. Tr., 62.

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pear, from the evidence, that a felonious intent existed in his mind at the time of the original taking.

Mr. Price cited the case of the People v. Anderson, 14 Johns. 294; the marginal note in which, is, that "a bona fide finder of an article lost, as a trunk containing goods, lost from a stage-coach, and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found."

Mr. Maxwell contended that the owner had, continually, a constructive possession, and never intended to abandon his possession.

The MAYOR charged the jury, that the case read from Johnson was not analogous to the case submitted for their determination. There, the property, to every legal intent, was lost to the owner, and came into possession of the prisoner by finding. But in this case, according to the testimony, the property was not lost; it was merely separated from the owner by an accident; he did not lose his control over it and, at no point of time, intended to abandon his right of recovering possession. Here was a vessel in distress; the owner was present, and had the property in his power, and never intended to abandon his control over it. Besides, it was notorious that the property came from the vessel.

In cases of fire in our city, where property is thrown promiscuously in the street, and is often, for a time, beyond the owner's reach, it has always been held, in this court, that it is a felony to take such property with a fraudulent intent. It has never been considered that property, which has been wrested from the owner by accident, is so far lost that it is not the subject of a felony. The Court cannot conceive the difference in principle between cases of that description so frequently tried in this court, and the present case.

In point of moral turpitude, this must surely be ranked among offenses the most atrocious; for it is taking advantage of the distress of others, to purloin their property under color of rendering assistance.

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On the whole, the only question for the jury is, whether, at the time the prisoner took this property, he did it with the fraudulent intent of converting it to his own use, without the consent of the owner? The jury, in determining this question, have a right to recur to the conduct of the prisoner subsequent to such taking, and to all the circumstances in the case as detailed in the testimony. Should the jury believe that the prisoner, at the time he took this property from the water intended to convert it to his own use, it will be their duty to convict him; but if he intended to preserve it for the owner, it will be their duty to acquit him.

The *Jury* found the prisoners GUILTY; but recommended Dyer to mercy.

The COURT sentenced Dayton to the state prison for seven years and the sentence of Dyer was suspended.

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