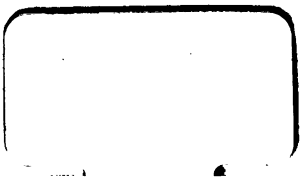

THE

LAW OF HOMICIDE

TOGETHER WITH THE

TRIAL FOR MURDER

OF

JUDGE WILKINSON, DR. WILKINSON AND MR. MURDAUGH

INCLUDING THE INDICTMENTS, EVIDENCE AND SPEECHES

OF

HON. S. S. PRENTISS, HON. BENJAMIN HARDIN, E. J. BULLOCK, ESQ., JUDGE ROWAN, COL. ROBERTSON, AND JOHN B. THOMPSON, ESQ., OF COUNSEL IN FULL

BY A. B. CARLTON, LL. B
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INTRODUCTION.

The writer has long been of the opinion that the publication of some celebrated criminal trial, with all the proceedings, accompanied with notes and commentaries, would be useful and entertaining, not only to students, but also to those engaged in the practice of law. Accordingly this volume is presented to the profession.

The case selected is "The Trial of JUDGE WILKINSON, DR. WILKINSON and MR. MURDAUGH, on indictments for murder, at the Galt House in Louisville," many years ago.

In many respects this is one of the most remarkable and interesting criminal trials that ever occurred in the United States. The circumstances attending the Galt House tragedy, the high character and position of the defendants, and above all, the celebrity of the leading counsel engaged in the cause, invest this remarkable case with a deep and abiding interest and entitle it to be preserved in a permanent and durable form as one of the "*causes celebres*" of America. The counsel for the Commonwealth of Kentucky were Edward J. Bullock, Prosecuting Attorney, assisted by the celebrated and eccentric Ben. Hardin. The defendants were represented by Hon. Judge Rowan, Hon. Seargent S. Prentiss, and several other able lawyers.

All the actors in this drama of real life, have (it is believed) passed away. The fame of those renowned lawyers and orators is preserved mainly by tradition and hearsay. Most persons of mature age in the West and South have heard of those celebrated advocates, while only

a few veterans, yet lingering on the stage, have heard their forensic efforts.

Part I of this work contains the trial, now, for the first time, presented to the public in a durable form, giving the proceedings in full, including the indictments, all the evidence, arguments of counsel, etc. The speeches of the counsel, alone, will be considered by many readers, especially students and young lawyers, as worth the price of the book. The speeches of ROWAN, HARDIN, and others, here given, though not entirely in accord with the present standard of taste, are powerful and able, and are fair specimens of the style of oratory so effective and so much admired in the West and South forty years ago. As to the address of Hon. SEARGENT S. PRENTISS, of Mississippi, it has long been the opinion of many judicious critics, that for power, beauty of diction, wit, pathos and humor, this address of Mr. Prentiss has never been surpassed in this country. If, indeed, *"laudari a viro laudato"* be a proof of great excellence, then the high opinion of S. S. PRENTISS as an orator, as expressed by EDWARD EVERETT, DANIEL WEBSTER, HENRY CLAY, and other noted men, North and South, will place the gifted Mississippian alongside the most renowned orators of ancient or modern times.

The report of the Wilkinson trial is accompanied by foot-notes, referring to subsequent parts of the work, explanatory of the text of the trial and showing the changes in the law.

Part II is an exposition of several topics on the law of homicide, according to present statutes and authorities, arranged under appropriate titles.

Part III is a full and comprehensive statement of the Statutes of Indiana, with full abstracts of judicial decisions in this State and other states in the Mississippi Valley, in relation to homicide.

The Objects of the Author.

The object of the author has been to prepare a *useful book*, especially to the profession in Indiana, and other States in the Mississippi Valley; and while this work is not intended to supply the place of other and more voluminous publications of a like character, yet it is believed that, in no other work, within so few pages can there be found so much matter that is so useful to the profession in homicide cases. The author hopes to be allowed to make this claim, *salvo pudere*, without arrogating to himself any extraordinary superiority in style, law knowledge or scholarship. He claims no other merit than what is found in the plan which he has adopted, and a patient and pains-taking collation of the materials he has accumulated in his practice and reading during the last thirty years.

A leading object of the author has been, to present in Part II, *multum in parvo*—as much law as possible in as few words as may be consistent with clearness. Accordingly he often disposes, in a few lines, with sufficient clearness, as he believes, of a topic, that occupies many pages of elaborate disquisition in the more ponderous and voluminous disquisitions on criminal law. Avoiding the philosophical and metaphysical refinements and new-found classifications and analyses of some modern writers, he has endeavored to present a plain, concise and practical view of the Law of Homicide, as it is now administered, according to the latest authorities and judicial decisions.

A leading object with the writer has been to present a publication that is attractive, entertaining and useful to the student and young practitioner, and at the same time a work of utility to the profession at large. It is the experience of every one in the profession, that at his commencement of the practice of law, while he may have diligently read the text books and other works, and has an adequate supply of law knowledge, he is yet puzzled

and quite at sea as to the *modus operandi* of conducting a trial. This kind of knowledge comes, in a large degree, by practice and observation of the proceedings in court. It is one of the designs of this work to accomplish the same object by presenting a celebrated trial, giving all the proceedings from beginning to end, accompanied by appropriate comments and notes. The trial selected is of remarkable interest, the speeches able and learned, and some of them eloquent and thrillingly beautiful. In short, the publication is intended to accomplish what is so rare in legal publications—a commingling of the *utile dulci*.

PART I.

TRIAL OF

JUDGE WILKINSON, DR. WILKINSON AND MR. MURDAUGH

ON INDICTMENTS FOR THE MURDER OF

JOHN ROTHWELL AND ALEXANDER H. MEEKS.

SPECIAL TERM, APPOINTED BY ACT OF ASSEMBLY, CHANGING THE VENUE FROM JEFFERSON TO MERCER CIRCUIT COURT. HON. JOHN L. BRIDGES, JUDGE, EDWARD J. BULLOCK, PROSECUTING ATTORNEY.

MONDAY, March 4, 1839.

§1. Pursuant to Act of Assembly* passed in the Legislature of Kentucky on the 24th day of January, on the petition of Messrs. Wilkinsons and Murdaugh, for a change of venue from Jefferson county to Mercer county, the trial of this important case was appointed to commence at Harrodsburgh on Monday, the 4th of March, 1839. On the appointed day, the Court being opened in due form, before Judge Bridges, the counsel for the prosecution applied for time to collect the witnesses for the Commonwealth, most of those summoned not being in attendance. The Court required till next day for considering the grounds urged, and upon resuming, on the 5th, decided that all parties should be prepared to go to trial on the following Monday.

The intermediate time was employed by the prosecution and defense in collecting by summons or attachment the several witnesses, most of whom arrived at Harrodsburgh on Sunday evening, the 10th, by the stages, and next morning it was generally known that all parties were prepared and anxious for the trial.

*See Appendix, letter A.

defense were: Cohoon, Randall, Jones and Huff. C. Humphries and Jacob Vanarsdall were the two who had heard Dr. Graham speak of the matter, but had formed no opinions.

§ 4. Judge Rowan, previous to the reading of the indictments, addressed the Court for permission to introduce Mr. S. S. Prentiss, of Mississippi, a practicing lawyer at the head of the bar in his own State, and who now asked leave to practice in this court for the purpose of aiding in the present defense. The Court assented, being satisfied of Judge Rowan's assertion, and ordered the clerk to swear in Mr. Prentiss, which was accordingly done.

The jurors sworn and called over by the Clerk of the Court were: Benjamin Alson, R. M Davis, Buckner Miller, Robert Alexander, John Bowman, John Burton, Elijah Gabbett, John Bohan, John Adair, Elineazer McGoffin, Charles Humphries and Jacob Vanarsdall.

The Clerk of the Court then read the two indictments, as follows:

(1) § 5. The Commonwealth of Kentucky, Jefferson county, and Circuit, Sct. December Term of the Jefferson Circuit Court, in the year of our Lord one thousand eight hundred and thirty-eight, the jurors of the Grand Jury, empaneled and sworn to enquire in and for the body of the said county of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, upon their oaths, present, that Edward C. Wilkinson, Gentleman, (2) John Murdaugh, Gentleman, and Benjamin R. Wilkinson, Doctor of Medicine, late of the said county and circuit, on the fifteenth day of December, 1838, in the said county of Jefferson and State of Kentucky, with force and arms, feloniously, wilfully, and of their malice aforethought, an assault did make in and upon one John Rothwell, there being; and the said

(1) "Edward C. Wilkinson, *gentleman*, etc. This word "gentleman" is called an *addition*. Formerly it was required that in an indictment for felony, not only the name of the defendant should be given (if known), but also his "*addition*," that is, his "*estate*, or *degree*, or *mystery*, meaning his title, dignity, trade or profession. The omission of the "addition" was formerly fatal to the indictment. But in Indiana and most of the other States it is no longer necessary, either by virtue of statutes or judicial decisions. 6 Blackf., 49.

"*With force and arms.*" The use of these words is now unnecessary. Wharton's Precedents, pp. 9, 43.

"*With a certain knife.*" The common law rule in pleading the instrument of death, is, that where the instrument laid, and the instrument proved, are of the same nature and character, there is no variance; when they are of opposite nature and character, the contrary. Thus, evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. See further on this subject, *post*, Part II.

"*Had and held in his right hand.*" This averment need not be strictly proved. It is not a fatal variance, if the evidence shows that the instrument of death was held in the other hand. Arch. C. P., 10th Ed., 407.

"*In and upon the left side of the back*," etc. Hale says that it must be averred in what part of the body the deceased was wounded, and therefore if it be charged that the wound was on the arm, hand or side, without saying whether on the right or left, it is bad. 2 Hale, 185. [N. B. It is believed that this is not good law at the present time in this country.] If, however (says Hale), the wound be stated to be on the left side, and proved to be on the right, or alleged to be on one part of the body, and proved to be on another, the variance is immaterial. 2 Hale, 186; see *post*, § 573 of Part II. The proof need not correspond with the averment as to the part of the body to which the violence was applied. 7 Blackf., 70. It is not necessary that the part of the body struck should be specified in the indictment. *Carter* v. *The State*, 2 Ind., 617.

"*Between the eleventh and twelfth ribs*," etc., *of the length of four inches*," etc. It is now decided by the English judges that it is not necessary to state, in the indictment, the length, depth or breadth of the wound. *Rex* v. *Mosley*, 1 Mood. C. C., 97; see *post*, § 573.

"*Languishing, did live*," etc. This is proper only in cases where there is an actual intermission between the blow, etc., and the death; in other cases it may be rejected as surplusage. *State of Penn.* v. *Bell*, Add., 171, 175.

"*Against the form of the statute*," etc., "*and against the peace and dignity*," etc. This allegation is superseded as unnecessary by statute in Indiana.

(2) See *post*, § 572.

Edward C. Wilkinson, with a certain knife, which the said Edward C. Wilkinson then and there had and held in his right hand, the said John Rothwell in and upon the left side of the back, near the backbone of the said John Rothwell, and also in and upon the chest, near the collar bone and right lung of him the said John Rothwell, then and there, feloniously, wilfully, and of his malice aforethought, did strike, thrust and penetrate, giving to the said John Rothwell then and there, with the knife aforesaid, in and upon the left side of the back, near the backbone of him the said John Rothwell, two mortal wounds—one of said mortal wounds between the eleventh and twelfth ribs of the said John Rothwell, and of the length of four inches and of the depth of five inches; the other said mortal wound on and cutting through the seventh rib on the same left side of him the said John Rothwell, and of the length of five inches and of the depth of four inches; and also giving to the said John Rothwell then and there, with the knife aforesaid, one other mortal wound, in the chest of him the said John Rothwell, near the collar bone and near the right lung of him the said John Rothwell, of the width of one inch and of the depth of five inches; and that the said John Murdaugh and the said Benjamin R. Wilkinson were then and there feloniously, wilfully, and of their malice aforethought, present, aiding, assisting, comforting, helping and maintaining the said Edward C. Wilkinson in giving to the said John Rothwell the said several mortal wounds, in manner and form aforesaid; of which said mortal wounds, the said John Rothwell, from the said fifteenth day of December, in the year aforesaid, until the sixteenth day of the same month and year aforesaid, at the county and circuit aforesaid, did languish, and, languishing, did live; and on the said sixteenth day of December, in the year of our Lord 1838, aforesaid, at the county and circuit aforesaid, the said John Rothwell, of the said several mortal wounds aforesaid, did die. So the said jurors, upon their oath aforesaid, do say, that the said Edward C. Wilkinson, tho said John Murdaugh, and the said Benjamin R. Wilkinson, then and there feloniously, wilfully, and of their malice aforethought, in manner and form and by the means aforesaid, did kill and murder the said John Rothwell, contrary to the form of the statute in that case made and provided, and against the peace and dignity of the Commonwealth of Kentucky.

FR. JOHNSON,

Commonwealth Attorney in and for the Fifth Judicial District.

A copy, attest:

PHIL. T. ALLIN, *Clerk.*

§ 6. The Commonwealth of Kentucky, Jefferson county, and Circuit, Sct., December Term of the Jefferson Circuit Court, in the year of our Lord 1838, the jurors of the Grand Jury, empaneled and sworn, in and for the body of the said county of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, upon their oaths present—that John Murdaugh, Gentleman, Edward C. Wilkinson, Gentleman, and Benjamin R. Wilkinson, Gentleman, late of the said county and circuit, on the fifteenth day of December, 1838, in the said county of Jefferson and State of Kentucky, with force and arms, feloniously, wilfully, and of their malice aforethought, did make an assault in and upon Alexander H. Meek, there being; and the said John Murdaugh, with a certain knife, which he the said John Murdaugh then and there had and held in his left hand, the said Alexander H. Meek, in and upon the right side of the belly, between the hip bone and the navel of him the said Alexander H. Meek, then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust and penetrate, giving to the said Alexander H. Meek, then and there, with the knife aforesaid, in and upon the right side of the belly, between the hip and the navel of him the said Alexander H. Meek, one mortal wound, of the breadth of one inch, and of the length of six inches, and of the depth of six inches—of which said mortal wound the said Alexander H. Meek then and there instantly died; and that the said Edward C. Wilkinson and the said Benjamin R. Wilkinson were then and there feloniously, wilfully, voluntarily, maliciously, and of their malice aforethought, present, aiding, assisting, helping, abetting, comforting, sustaining, and maintaining the said John Murdaugh in the felony and murder aforesaid, in manner and form aforesaid, to do and commit. So the jurors aforesaid, upon their oaths, aforesaid, do say—that the said John Murdaugh, the said Edward C. Wilkinson and the said Benjamin R. Wilkinson, then and there, feloniously, wilfully and maliciously, and of their malice aforethought, in manner and form aforesaid, did kill and murder the said

Witnesses for the Prosecution.

Alexander H. Meek, contrary to the form of the statute in that case made and provided, and against the peace and dignity of the Commonwealth of Kentucky.

FR. JOHNSON,
Commonwealth Attorney in and for the Fifth Judicial District.

A copy, attest:
PHIL. T. ALLIN, *Clerk Mercer Circuit Court.*

§ 7. After reading each indictment the Clerk gave the prisoners in charge to the jury in this form:

"Upon this indictment, gentlemen, the prisoners at the bar have been arraigned, and have pleaded NOT GUILTY, and for their trial have thrown themselves upon God and their country, which country you are. You will therefore hear the evidence between the Commonwealth and the accused, and a true verdict give according to the same; and if you find them guilty you will assess the punishment—if not, you will say so, and no more."

Here fifteen witnesses for the prosecution were sworn, and all but Mr. Redding ordered to withdraw into an apartment attached to the court.

Mr. Redding was then requested by Mr. Hardin to state what he knew of the transaction.

Mr. REDDING: Some time in December Dr. Wilkinson called at my shop to purchase a suit of clothes, and desired that they would be ready on the following Saturday. He then agreed for an overcoat, to be furnished the next week, and a pair of pantaloons, and said he would call at the appointed day for the suit of clothes.

[Colonel Robertson here rose, and observed to the Court that on a former occasion, at the examining court, the counsel for the defense had suffered evidence to be gone into relative to a matter that had occurred some four or five hours previous to the transaction laid in the indictments. He could not conceive why it should now be attempted to connect these transactions. It would be established that the persons killed had not been present at what occurred at Mr. Redding's, and had nothing to do with that affair. He therefore objected to the present investigation being allowed to embrace the affair at Redding's store, which formed the subject of another prosecution.

§ 8. The Court said it was impossible at the present stage of the case to judge whether the two affrays had any connection or not; and there could not be any material objection to hearing the evidence now in progress, because if it subsequently turn out that there is no connection, it must be discarded by the jury, as far as it relates to the first affray; and whatever may be given in proof that is not legal evidence will then become harmless. The witness should be allowed to make his statement.]

Mr. REDDING resumed: I had the clothes prepared, and folded them on the counter to send to the Galt House on the appointed Saturday evening.

Mr. HARDIN: Where was this? You have a tailor's shop?

Mr. REDDING: My shop is on the lower corner of Third and Main streets. There is but one square between my shop and the Galt House; but my shop is on the opposite side of Main street.

Mr. HARDIN: In the city of Louisville?

Mr. REDDING: Yes.

Mr. HARDIN: Well; proceed with your statement.

Mr. REDDING: On that Saturday afternoon the Doctor came to my store about the clothes, and I showed them to him. I asked him to try on the coat. He said yes, and took off his old coat and tried on the new one, which he seemed to like very well. He merely remarked, as to the fit of the coat, that it was a little loose; but he had been sick and had fallen away, and hoped soon to fill it up.

He then took the things out of his old coat pockets and put them into the pockets of the new coat. He desired me to send the pantaloons and vest to the Galt House, and at the same time handed me a $100 Mississippi bank bill, which he requested I would hold over for a week or two, as he had information with regard to the arrangements of the banks below, that the discount in a few days would be considerably reduced.

§ 9. He then went away, and in the course of an hour or so returned, accompanied by two gentlemen, as I afterward learned, his brother Judge Wilkinson and Mr. Murdaugh. When the Doctor came in the second time he said he would have to throw the coat on my hands as it did not fit and his friends had told him it was badly made—not fashionable; it was the Judge that said most about it's not being fashionable. I offered to get any alteration necessary made. He said no, that it was no coat at all. As soon as I found they were not disposed to take it, I said I would keep it. The Doctor then took out some money and said he would pay for the pantaloons and vest—which had been sent to the Galt House. The Judge said, no, do not pay for them, perhaps they would not fit—they would be like the coat. I thought he and Murdaugh had more to say against the clothes than the Doctor, who, I saw, would be pleased enough only for them. He said the law was, that if a coat did not fit it should be taken back. When the Judge interfered so much, I said it took more than one to judge a coat, and that I thought he had already said more than he ought. The Judge, who had been sitting near the stove, then jumped up and said he did not come there to be insulted. I remarked that I did not intend to insult him. He snatched up the iron poker at the stove and rushed at me with it, attempting to strike me, but I received the blows on my arm. Seeing that no one in the store was interfering, and hearing something about a Bowie knife, I thought to get them to the street where some one would be passing, and I seized the Judge and jerked him to the side door, near the corner, going into Third street.

As I got to the door I think I slipped and fell, and the Judge fell with me.

§10. I thought the whole three were on top of me, and I struggled till I got the Judge under me, and I raised to keep off the Doctor, or to pull him down, when he tried to stab me with his knife but was prevented by some one. The knife was like this now handed me; I think it is the same knife. The Judge still held on to the poker. I should have stated that when the Doctor drew his knife on me, a voice quite near, which I thought was Murdaugh's, cried out, "Kill the damned rascal." It was then that some one ran up and held the Doctor's arm. I threw them off and got out on the pavement. Murdaugh was on the pavement with his knife drawn. I picked up a brickbat, and told them I would whip the whole three if they would lay aside their weapons. Seeing no interference, I returned into the shop, and the Doctor followed me in with his drawn knife in his hand, demanding his $100 bill. In the scuffle I had lost my pocketbook, in which it was, but some one just then, who had picked it up, handed it to me, and I gave the Doctor his $100 bill. They then went away with the knives drawn, and the Judge carried off the poker. Several persons came into the shop after they had gone, and some advised me to get them taken up. I did not at first want to do so, but after a little time was persuaded to go to the mayor's office, accompanied by Bill Johnson; but before this I went to Mr. Fulton's store and got a small dirk knife from Mr. Noel, which I put into my watch pocket. As we went to the mayor's office we called at Vacaro's and Hymen's coffee houses to inquire for the marshal, Mr. Turner, or one of the police officers. Not meeting any of them, we proceeded to the mayor's office, and went up stairs to Mr. Pollard's room. I told the circumstances to Mr. Pollard, the clerk of the police court, and told him I wanted a warrant. He asked me for the names. I said I only knew for certain that one was Wilkinson, but I could get the names at the Galt House.

§11. Mr. Pollard said he could not give me a warrant without the names, but if I saw Mr. Turner I could get him to go with me and arrest them without a warrant. I told him that I would go to the Galt House for the names, and bring them to the office. We then started for the jail in search of Mr. Turner, and went around there, but could not find him, as he was not there. Bill Johnson went into the jail to inquire for Mr. Turner, and I staid on the outside on the pavement, inquiring about the officers. Before Johnson came out I started off to Market street, and over towards Rothwell's corner. I saw Rothwell, my brother-in-law, standing at Dr. Bernard's office, and told him what had happened. I was going up Market street, and he went along with me. We tried as we went along to find Mr. Turner, or one of the city officers, but not being able to do so, we proceeded on to the Galt

House. We went into the bar-room and I saw Mr. Sneed, who minds the bar, and asked him for the register, and the names of the three Mississippi gentlemen. In the meantime Mr. Everett came in, and I asked him if he would give me the names on paper. He very politely said he would, and immediately did so. I then got to talking with Mr. McGrath, who was inside the counter, and told how I had been treated at my own store. In a short time Judge Wilkinson came into the bar-room, and came up to the counter to take a glass of water I was leaning on the counter, and said to him: "I think you are the gentleman that struck me with the poker in my own house to-day?" He observed that he was, and then said: "I will not quarrel or fight with a man of your profession, but if you interfere with me, or lay a hand on me, I'll kill you." As he said this he put his hand behind him, as I thought, in his coat pocket for some weapon. I then called him a coward for coming to my house with two others to assault me; and I offered if he and they would lay aside their weapons, and come into the street or into a room, I would whip the whole three of them. He then walked backwards and forwards across the room, and I kept telling him what I thought of him.

§ 12. In a short time he passed out of the bar-room. He was gone but a little while when he and the Doctor and Mr. Murdaugh came into the bar-room. I saw the Doctor and the Judge behind, and Murdaugh came towards me, a little below where I stood at the counter. I remarked to him as he came up that he was the man who had drawn his knife on me in my own shop. He said he had understood that I had said that he had drawn a Bowie knife on me, and if I did say so, I was a damned liar, or any one else that said it told a damned lie. As he was saying this he threw up his hand with a drawn knife in it. I think I heard some one remark that he was the man, for he had seen him, but the fight then began so suddenly, and the crowd rushed so close together about Murdaugh and the others, that they were hurried past me, and I could not see what was doing. I know that Meeks was killed, but I did not see him killed. Mr. Rothwell came up when he heard the damned lie given, and pushed me back with his arms, which caused me to be outside the scuffle. A little while after that, I saw Judge Wilkinson with a large Bowie knife in his hand—he came hurrying past me. The knife he had was like this; I think it is like the same knife. [Mr. Hardin had handed the knife to witness. It was probably from eight to ten inches long in the blade, two inches wide, heavy, and shaped at the point like other knives of that name.] He came rushing by me with such a knife as this, apparently stabbing at several persons. By that time Holmes had Dr. Wilkinson down in the left hand corner of the room—the left hand as you face the fire.

Examined by Mr. Hardin.

§ 13. The Judge went towards the door, and Meeks was lying in the opposite corner, between the counter and dining-room, either dead or dying. I did not know him. The crowd in the left hand corner by this time was retreating into the passage and making towards the stairs. I gathered up a chair and followed them, and was in the effort of striking with the chair, but fearing I might hit the wrong person, I did not make the blow, and I got towards the foot of the stairs, where I heard Mr. Oldham say, as if in answer to some one on the stairs, that he'd give the damned rascal a pistol, and a pistol was fired, but I did not then know whether by him or from above.

MR. HARDIN: Mr. Redding, was the poker large enough to kill a person with a blow? A. Yes, I should think it was.

Q. What did you observe of Rothwell in the passage? A. He told me that he was very badly stabbed.

Q. You say you did not know Meeks, or that it was Meeks that was killed? A. Some one—perhaps it was Mr. McGrath—remarked that a man was killed. I went towards the body, and saw it was dead. I did not know him.

Q. How long did Mr. Rothwell live? A. Till next evening.

Q. He died in the city of Louisville? A. Yes, at my house.

Q. Where did you first see Mr. Rothwell that evening? A. I met him in Dr. Bernard's office, in Market street; he lived at the corner.

Q. Was he related to you? A. Yes, he was my brother-in-law.

Q. Did you ask him to go with you to the Galt House? A. I think I did not ask him to accompany me at all. He merely kept on with me when I told him what had happened.

§ 14. Q. What object had you and he in going to the Galt House? A. I went with no other design than to get the names of the three Mississippi gentlemen.

Q. What brought you to the mayor's office? A. I went to the mayor's office for the warrant and for the city marshal to arrest them.

Q. Why, then, did you return to the Galt House without the warrant? A. Because I could not get a proper warrant without first going for the names. Not being able to get the names without going to the Galt House, I went there for them.

Q. Were you told of any other way in which they could be arrested? A. Mr. Pollard told me that if I came across Mr. Turner, the city marshal, he could arrest them without a warrant.

Q. Did you try to get the marshal? A. I inquired at the jail, at Mr. Vacaro's, and at another place, for Mr. Turner.

Q. When you went into the bar-room, did you tell Mr. Everett the object you had in demanding the names? A. Yes; and Mr. Everett remarked it could not surely be Judge Wilkinson.

Cross-examination by Col. Robertson.

Q. You mentioned a dirk you had—did you display it at the Galt House upon any occasion that evening? A. No; I never drew it from my watch-pocket.

Q. Was Mr. Rothwell in the room when you first spoke to Judge Wilkinson? A. No; I do not think he or any friend of mine was present.

§ 15. Q. Did you see the blow inflicted on Rothwell that caused his death? A. No; the crowd shut me out from seeing distinctly what was doing.

Q. Did you find one of the knives on the floor? A. Yes, when the fray was over.

Q. Where did you next see these three knives together? A. I called at the jail and asked Mr. Chenoweth if the knives were there. He said yes, and produced them.

Q. Was there blood on the three knives at the time? A. Yes.

Q. Can you account for the blood being on them still? A. I told Mr. Chenoweth at the jail to keep them with the blood on them, just as they were. He rolled them up in a piece of paper.

Q. What became of them since? A. He gave them to me rolled up in paper, and I put them away in my trunk. [Here the jury examined the knives.]

CROSS-EXAMINED BY COL. ROBERTSON.

Q. Were either of the unfortunate men who lost their lives at your house when the poker business commenced? A. No, sir; I do not recollect seeing Mr. Meeks at my house at all. He might have been there, but not knowing him, I have no recollection of seeing him. I am certain Mr. Rothwell was not there.

Q. Now, I beg you will be particular in answering me; are you sure neither was there? A. I am certain that I do not know either was there. Mr. Meeks might have been there and I not know it.

§ 16. Q. Did any one take part in it while it was going on? A. I don't think any one but myself was engaged in that business.

Q. How long after that did the affray at the Galt House take place? A. I could not say the time.

Q. Was it one, two, three, four, five, six or eight hours? A. I can not say exactly how long.

Q. Can you not say about what time? A. A very short time after it happened I went to the mayor's office——

Q. Never mind that now—say *about* what time did you go to the Galt House after the affray at your shop? A. It was but a short time.

Q. Was it four or five hours? A. Oh, no.

Q. Well, state about what time? A. It was late in the evening—I suppose it was from half an hour to an hour; I could not now tell. I started off a few minutes after the fight——

Cross-examination by Col. Robertson.

Q. I want to know the time between the fight at your house and the fight at the Galt House? A. Well, you know the distance, Colonel Robertson——

Q. It is not the distance, but the time I want to know?

THE COURT: Say the time, sir. A. Well, it could not have been an hour, I think; it was between half an hour and an hour. I said that before.

Q. When you first started for the mayor's office who was with you? A. Mr. Johnson.

Q. Where did you meet Mr. Johnson? A. He was in my shop after the difficulty. A good many had been in.

§17. Q. Where did you and Johnson go? A. We went to the mayor's office together.

Q. Where did you part? A. We parted at or near the jail; but I can not exactly say where. I know he was not with me when I got on Market street.

Q. Well, when you next saw him, where was it? A. It was at the Galt House.

Q. You say you got a knife? A. Yes, a dirk.

Q. You borrowed it from Mr. Fulton's? A. I borrowed it immediately after the first fray. It was a small dirk.

Q. Had it two edges, or one? A. I do not recollect—I never took much notice of it; I do not even recollect pulling it out of the scabbard.

Q. For what purpose did you borrow that knife? A. I thought, perhaps, these men might attack me; I knew they were armed and I was not.

Q. Who was with you when you borrowed the dirk? A. No one was with me.

Q. Where did you see Rothwell first that evening? A. I met him at Dr. Bernard's office, near Sixth street.

Q. Had you really no intention in going to the Galt House but to get the names? A. No; none.

Q. Then why did you ask Mr. Rothwell to go with you; you could get the names yourself? A. I did not ask Mr. Rothwell to accompany me; he went along unasked.

Q. When you entered the bar-room of the Galt House whom did you see there? A. I saw Mr. McGrath and one or two others.

Q. How long after you got the names was it till the Judge came in? A. After I got the names I remained a few minutes—probably fifteen or twenty minutes—and then the Judge came in.

§18. Q. Well, when he came in you were the first to begin the altercation, were you not? A. I merely remarked to him that I believed he was the gentleman who had struck me with the poker in

my own shop, and he said he did not wish to quarrel or fight with a person of my profession.

Q. Then it was, I suppose, that you exhausted the vocabulary of the English language in abusing him? A. Why, yes, sir, I suppose I did. I told him very plainly what I thought of him.

Q. You called him some hard names, such as coward and so forth? A. I called him a coward, and other things that I don't now recollect, and said I would whip the whole three if they'd lay aside their weapons.

Q. Well, after this language, did he molest you? What did he do? A. He walked back and forward several times, and finally he went out.

Q. And what became of you? A. I remained after.

Q. For what purpose? You had got the names. A. I had no other business than expecting Mr. Turner, the marshal, would be along, and call in; I expected Mr. Turner or one of the officers would come in.

Q. How long was it before Judge Wilkinson returned? A. A very short time.

Q. Was it five, ten, fifteen, or twenty minutes? A. It might be five, ten, or perhaps fifteen minutes.

Q. Where was Mr. Rothwell? A. I did not see him then.

Q. When did you see him afterwards? A. I saw him next when he came up to push me aside.

Q. Had he not a stick? A. I did not see any stick with him there.

Q. Did he not go to Mr. Monohan's and get a stick? A. I did not see him have a stick, or know of him preparing himself with anything of the kind.

Q. You and Rothwell went there together. Had he not a stick then? A. I did not see one with him.

§ 19. Q. Where was he when you got the names? A. When we first went in he separated, and I did not see him till he came up to push me away.

Q. Did you see him on Dr. Wilkinson, when the Doctor was down? A. I did not see him on Dr. Wilkinson at all.

Q. Did you see him use a stick in that room? A. If he had a stick I did not know it; I never saw him use one there.

JUDGE ROWAN: Have you not employed counsel in this case? A. I have spoken to Mr. Hardin.

Q. Have you not employed him? A. I spoke to him to attend to the case.

Q. Can you not say whether or not you have employed him? A. Yes, I have.

Q. What fee are you to give him?

MR. HARDIN: I have no objection to that being answered.

JUDGE ROWAN: What, sir, is the amount of fee you have promised? A. Mr. Hardin demanded $1,000, and I made no objection.

Q. Are you to give him anything more? A. No, sir; there is nothing more.

Q. No contingent addition? A. No, sir; not any.

Q. After Johnson left you where did you see him next? A. I do not recollect seeing him again till at the Galt House.

Q. When parting at the jail did you not agree to meet at the Galt House? A. No, sir; there was no agreement of the kind.

Q. Did you make no agreement for him to bring any one with him? A. No, sir.

Q. Did you meet him with any person on your way, and with whom? A. No; not that I recollect.

Q. Did you see any one on your way down Market street? A. Yes; on our way down I think we might have met Mr. Holmes and some one else. Mr. Johnson might have had some conversation with him, but I think I felt no disposition to talk just then.

§ 20. Q. Is not Mr. Holmes a remarkably stout and large man? A. I think he is a very stout man.

Q. With whom else did you meet him? A. Mr. Wallace, I think.

Q. Any one else? A. It appears to me there was another gentleman with him; but I am not positive.

Q. Did Mr. Johnson say nothing about how your friends ought to treat the Mississippians? A. No, sir; not that I recollect.

Q. Was Mr. Holmes at the Galt House? A. Not at first; but I saw him there afterwards with Mr. Halbert.

Q. Mr. Halbert is a large, stout man? A. Yes; he is a very stout man.

Q. Were there any other large, stout men there? A. Yes.

Q. Was Mr. Oldham there? A. Yes; I saw Mr. Oldham.

Q. You saw him fire the pistol? A. I was not sure that it was he fired it, or that the shot did not come from above.

Q. Who else of your acquaintance was there? A. Mr. Reaugh and several others might have been there.

Q. Was Mr. Monohan there? A. Yes; I saw Mr. Monohan there; he stopped at the Galt House.

Q. Were any of these men in the house or passage while you were abusing Judge Wilkinson? A. I do not know whether they were or not. I did not see them, if they were.

Q. Was not your object in abusing Judge Wilkinson to bring on a quarrel, that you might chastise him? A. No, sir; if that had been my object I should have proceeded otherwise.

§ 21. Q. Do you recollect any of the persons named asking you any questions about the Judge? A. I do not recollect. I think not.

Re-examination of Mr. Bedding.

Q. Why did you stay after the Judge retired? A. I expected Mr. Turner or Mr. Pollard would come up.

RE-EXAMINED.

Q. The bar-room opens into the dining-room? A. Yes.

Q. Do the boarders come into the bar-room when waiting for supper? A. They do; but there are two ways of going into the supper-room.

Q. Were not many persons assembled waiting for supper? A. I do not know.

Q. Did you see these three gentlemen when they entered the bar-room? A. I did not see them immediately when they came in. I saw them when Mr. Murdaugh advanced.

Q. Did you make any observation respecting them when you first saw them together? A. I think I remarked that I believed they were all three on me.

Q. Which of them did you see first? A. I saw Mr. Murdaugh first; the others after him.

Q. What was the first thing you saw Rothwell do? A. When Mr. Rothwell came up towards us he put his arm so as to push me back.

Q. Did you see the Doctor knocked down by Mr. Holmes? A. I did not see Mr. Holmes knock the Doctor down; I saw Mr. Holmes over him when he was down.

Q. What in particular did you observe about them when they came in? A. I think the Doctor had his hand in his pocket; and the Judge, too, had his hand in his pocket.

Q. How was Mr. Meeks stabbed? A. I did not see Mr. Meeks when he was stabbed; the crowd cut me off from seeing him; the whole occurred so quick that I had not time to do anything.

Q. When the crowd got past you what did you observe of Meeks? A. Meeks, when I next saw him, was lying on the floor; he was about half way between the dining-room door and the counter, nearest the counter, when Mr. McGrath asked me who was the man that was killed.

RE-CROSS-EXAMINED.

Q. Which of your friends had a stick, a sword-cane, or knives in the scuffle? A. I do not recollect anything of a stick, or sword-cane, or of any knives but those I have mentioned.

§ 22. Q. Well; who had the sword-cane? A. I saw no sword-cane.

Q. Who stabbed Judge Wilkinson in the back with the sword-cane? A. I did not see any one do it.

Q. Did you see Judge Wilkinson use his knife? A. I saw him stabbing at several persons, as I thought. I saw him make one stab at Mr. Rothwell.

Q. Was it your friends that pursued Judge Wilkinson into the passage? A. I suppose it was; I was myself after him.

Q. Where was it you saw him stab at any one? A. I think it was near the foot of the stairs.

Q. It is a considerable distance from the foot of the stairs to the bar-room? A. Yes.

Q. Twenty or thirty feet? A. May be not quite so far.

Q. You say you have no recollection of seeing Meeks before that evening? A. No; none that I can remember.

Q. Did you not see him as you went up to the Galt House? A. No; I do not recollect stopping to speak to any one; but might have made some remark to Mr. Hill, as I passed a store where he stood.

Q. Mr. Horace B. Hill? A. No; it was young Mr. Hill.

Q. Can you account for so many of your friends being there assembled that evening? A. I don't know that I can account for it; Mr. Holmes told me that Mr. Halbert had invited him to go there to have some drink.

JUDGE ROWAN: Who advised you to get out process against these gentlemen? A. I do not recollect; a good many advised me; Johnson was one.

Q. You stated that you did not see Mr. Meeks till at the Galt House? A. I stated that I did not recollect seeing him till then; he was a man with whom I was not acquainted; I might have seen him frequently, but not to know him or to recollect him.

Q. Did you or did you not see him at your house? A. He might have been at my house, but I did not notice him. I have often heard of Mr. Meeks, but do not recollect to have ever seen him to know him before that.

Q. When Mr. Murdaugh came into the bar-room had he on a great coat? A. Yes; a drab-colored great coat.

Q. Holmes did not live in the neighborhood of the Galt House? A. No, sir; Holmes is a river man.

MR. HARDIN: When Holmes is in town he is frequently with Mr. Halbert, I believe? A. Yes; very frequently.

COLONEL ROBERTSON: How do you know that? A. I am acquainted with them both, and have seen it.

§23. Q. Mr. Johnson does not live near the Galt House? A. He has a cellar on Water street, and, I believe, a couple of stalls in the market.

Q. You say you had borrowed the dirk in case you were attacked? A. Yes, sir.

Q. How came it you did not use it? A. I did not draw it at all; I do not know that I thought of drawing it. I had not been in the habit of carrying anything of the kind, or I might have thought of it.

Q. And had you no means of defending yourself? A. I picked up a chair.

Q. Had the dirk any scabbard? A. It had a small metal case—I did not pay much attention to it.

Q. Did you inquire at Mr. Fulton's the price of that dirk? A. I think not.

Q. You do not know the price, then? A. I do not.

RE-EXAMINED BY MR. HARDIN.

Q. I understand there was no arrangement made by you with any of the gentlemen to meet at the Galt House? A. There was none.

Q. Did Judge Wilkinson wear an overcoat? A. I think he wore a frock coat.

Q. Did Mr. Marshall Halbert board at the Galt House? A. Yes.

§ 24. Q. Do not people congregate in the bar-room of the Galt House before supper. A. Yes; they generally do.

Q. There was no condition in respect to the fee you were to give me? A. No condition whatever.

Q. Were you urged to employ counsel by the mother and sisters of Mr. Rothwell? A. Yes; it was at their solicitation.

THE PROSECUTING ATTORNEY: When you say you remained at the Galt House waiting for Mr. Turner, would you have known where to go for him had you left. A. No; I would not have known where to go—I did not know where Mr. Turner lived.

Q. Would not any other officer have anwered? A. Yes; if any other had come in.

Q. Had you any intention in addressing Judge Wilkinson at the Galt House to revive the quarrel? A. It was not my object to revive the quarrel.

Q. When you spoke to Murdaugh and he said if you said so you told a damned lie, who told him *he was the person?* A. I think it was Meeks.

Q. What other weapons did you see for assaulting them but the cowhide? A. I saw no other weapons, nor any other after, but the pistol with Oldham.

Q. Was there any demonstration on the part of any one to induce them to think they would be assaulted? A. None that I know of.

RE-CROSS-EXAMINED.

Q. Is not Mr. Turner a married man with a family? A. Yes, sir; so I understand.

Q. Does he not reside in Louisville? A. Yes, sir.

Q. Could he not have been found at his house? A. I did not expect he would be at home at that time.

Q. When you remarked to Judge Wilkinson, "You are the gentleman who struck me with the poker," what object had you in the remark unless to renew the quarrel? A. I did not say anything more to him till he said he would not quarrel with a man of my profession.

Q. You say you staid to converse with your friend Mr. McGrath. Holmes, Halbert, and the rest of your friends remained from some other motive? A. I don't know how many remained, or for what.

Q. Mr. Rothwell never suggested to you the propriety of "giving them a little throwing over to teach them better manners?" A. No, sir.

Q. Nor Mr. Johnson? A. No, sir.

Q. Nor Mr. Meeks? A. I don't say that I knew Mr. Meeks at all, sir.

§ 25. Q. How long did you stop with Mr. Rothwell when you first met him on Market street? A. I made no stop at all at Rothwell's. I merely told him what occurred and what I was about to do in respect to getting their names.

Q. What remarks did he then make? A. He said that was proper to do.

COLONEL ROBERTSON: Did you feel cool and in good humor? A. I did not feel in very good humor, but I kept cool.

Q. Well, you were very cool and almost in a good humor? A. I was collected enough, but a good way from being in a good humor.

MR. HARDIN: Did Holmes, or Johnson, or the others accompany you when you went to the Galt House? A. No, sir; no one but Mr. Rothwell.

Q. Who interfered when you were talking to the Judge? A. No one.

Q. Where did you see Oldham first that evening? A. The first I saw of him was near the foot of the stairs.

Q. There are two passages, one from across the door of the bar-room, and the other from Main street. In which did you see Oldham? A. It was in the passage near the foot of the stairs—they meet there.

Q. (*For the Defense.*) You say you were cool and collected; did you see that blow given to Mr. Murdaugh? [pointing to the mark of a blow on the side of Mr. Murdaugh's head.] A. No, sir; I did not see it at all.

JUDGE ROWAN: When you called at Mr. Rothwell's how did you invite him to accompany you? A. I did not invite him; I told him what had happened, and what I was going to do. I did not stop I only mentioned it to him.

Q. The jail is nearer to Jefferson street than to Market street; why did you not take the shortest way to the mayor's office, instead of going round by Market street? A. Because it is shorter to go by Market street to the Galt House than by the mayor's office.

Q. When you were at the mayor's office, was it not shorter to go from that to the Galt House than by Rothwell's corner, if you had nothing to get but the names? A. I went to the jail to look for Mr.

Turner; when there, it was shorter to go by Market street than to return by the mayor's office.

Q. Was not Mr. Rothwell a large stout man? A. Yes; he was a tolerable large and stout man.

COLONEL ROBERTSON: You have spoken of a knife being found on the floor; do you know whose knife it was? A. No; I do not know whose knife it was; I only picked it up.

Witness allowed to retire.

MR. CRAIG CALLED AND EXAMINED.

§ 26. MR. HARDIN: Mr. Craig, state what you know of this transaction.

MR. THOMAS CRAIG: I was in Mr. Redding's shop on the day the affray happened which led to the unfortuate occurrence at the Galt House. It was on Saturday, and Dr. Wilkinson called and tried on part of the suit of clothes made for him, not seeming to make any objection to the coat. He left a $100 bill, and he also left his measure for an overcoat, and said that he would redeem the $100 bill and pay for the whole of the clothing. He took away the coat on him, and returned in about an hour and said he would leave the coat on Mr. Redding's hands. He said he found a deficiency under one arm. The Judge made a great many objections to it. He said it was not a fashionable coat; it had not a proper collar, and that it was no coat at all. I went myself up to the mirror with them to look at the fit of the coat.

The Judge came around to the stove and sat by it. My attention was not directed to the conversation, and I can not recollect what was said; but the coat was returned, and the Doctor took out money to pay for the pantaloons and vest, when the Judge remarked that he ought not to pay for them till he would know how they might fit—that they might be like the coat. They came towards the back part of the store, and the Judge sat on a high stool at the stove. The Doctor was near the cutting board. When the Judge made the remarks about the pantaloons, Mr. Redding observed he had more to say about them than he ought; upon which Judge Wilkinson picked up the poker and struck Mr. Redding, and Mr. Redding jerked him to the side door. Mr. Redding, after being out on the street with them, picked up a brickbat. He said he would whip the whole three if they would lay by their weapons. I saw Mr. Murdaugh standing on the edge of the pavement with his knife drawn, in this position [showing position.]

MR. HARDIN: Did you see a knife with Dr. Wilkinson in the shop? A. No; I did not see the Doctor have any knife before he left the shop.

CROSS-EXAMINED.

Q. Was there not a damned lie given before Judge Wilkinson picked up the poker? A. I did not hear any.

Q. Did not Mr. Redding walk up to Judge Wilkinson with his arms

akimbo in an offensive manner before the Judge picked up the poker? A. I did not see anything of the kind.

§ 27. Q. What were the positions of the parties at the time? A. The Judge was sitting and Mr. Redding standing when the Judge picked up the poker.

Q. Repeat as nearly as you can the exact words which led to this. A. The Judge remarked that the law was, that when the clothes did not suit they were to be thrown on his hands. Mr. Redding said to the Judge that he had rather more to say about it than he ought. The Judge said he did not come there to be insulted. Mr. Redding appeared to me to be very mild.

Q. Is this all you heard pass between them? A. I heard the conversation going on, but did not pay much attention to it. I suppose I heard all that passed between them, but was not paying any attention.

Q. How far were you from them? A. About as far as from this to you.

Q. Did you not hear Mr. Redding say "who are you," or "you are too officious?" A. I did not.

Q. What time of the day was it? A. It was after dinner.

Q. What hour? A. It might be between three and four o'clock; perhaps it might be near three, or between that and four.

Q. Which was it, nearer to three than to four? A. I can not exactly say.

Q. Were there many people about the shop during the difficulty? A. There were not many at the shop until after the affray; after that several were there, and advised Mr. Redding to take the law of the Mississippi gentlemen.

Q. Mention those that were there. A. I think Mr. Holmes was there; I can not well say the others, being a stranger at Mr. Redding's. I did not then know Mr. Holmes.

Q. Did you see Mr. Johnson or Mr. Meeks then? A. I did not notice Mr. Meeks, nor did I then know Mr. Johnson.

Q. When some of those present advised Mr. Redding to take the law of them, what reply did he make? A. He said he did not like to sue them.

Q. Did not some one, or several, recommend him to take redress himself, with his friends? A. None that I ever heard.

§ 28. Q. When the Judge struck at Mr. Redding, did the Doctor try to separate them? A. I thought he did, but could not say whether he intended to separate them or to assist his brother.

Q. Could you not tell by his approach whether he meant to separate them or not? A. It was difficult to tell, because Mr. Redding so instantly made a rush out the door when he caught the Judge, that there was no time to see what the Doctor meant.

Q. Did the Doctor touch either of them? A. He did not put his hands upon Mr. Redding, but he put his hand, I thought, upon his brother.

Q. Did you see any knife with the Judge on that occasion? A. I did not see him draw a knife in that affair.

Q. Did you see any knife at all? A. I can not say that I saw any knife but with Mr. Murdaugh, after Mr. Redding had picked up the brick-bat.

Q. Did you see any one but Judge Wilkinson strike Mr. Redding? A. No; I did not see either of the others strike him.

JUDGE ROWAN: Did not various persons come into the shop before Mr. Redding went to the Mayor's office? A. Yes; several.

Q. Was Meeks among them? A. I do not recollect seeing Mr. Meeks.

Q. Where was Mr. Redmond? A. He was outside the door. I think I saw him when I went to the door. The Judge and Mr. Redding had been separated, and I saw Mr. Redding pick up the brickbat.

Q. Was not Mr. Redmond in the house any part of the time? A. I think not; but he might have been, without my seeing him. There is a projection which might have prevented me seeing him from where I sat. I did not observe Mr. Redmond, if he was in the shop.

§29. Q. How much of the room was hid from your view by the projection? A. About one-fifth. I might have seen Mr. Redmond, but am not certain.

Q. Do you live with Mr. Redding? A. Yes; I live with him yet, and work in his shop.

Q. Did you not hear Mr. Murdaugh say, "stop this fight?" A. No, sir.

[Witness allowed to withdraw.]

W. WEAVER, A BOY, CALLED AND EXAMINED.

MR. HARDIN: State what you know of the affray in Redding's shop.

W. WEAVER: I was in Mr. Redding's shop, and saw the gentlemen talking about the coat. Mr. Murdaugh said he did not like the coat; the other said he did; one of them, the Judge, said he'd be damned if it did not take more than one to judge of the coat. Judge Wilkinson called out for his knife. Dr. Wilkinson had a white-handled knife. Mr. Redding pulled Judge Wilkinson out of the door, and the Doctor followed. I think that knife on the table is the same I saw with the Judge when he came in from the street to get back the $100 bill.

Q. Which of them entered with the knife to demand the $100 bill? A. It was the Judge.

Q. Who hallooed for the knife? A. It was the Judge.

Q. Are you sure it was not Redding? A. I heard some one halloo for the knife—it might be Redding.

Q. Were these gentlemen in the shop when you first went in? A. Yes.

Q. Whom did you first tell about this affair? A. I told my uncle.

Q. What brought you into Redding's shop? A. I went there for money.

CROSS-EXAMINED.

Q. What passed between Judge Wilkinson and Mr. Redding when the coat was taken back? A. When the Judge told the other men he would not take the coat, Mr. Redding said he did not insist on him taking it, and then Judge Wilkinson said that Mr. Redding had no right to judge. Mr. Redding said he had no right. I believe Mr. Redding said he meddled more about the coat than the Doctor did. Mr. Redding said something like the Judge making himself damned meddlesome about the matter. Dr. Wilkinson pulled out money to pay for the pantaloons and vest.

Q. Did you see those knives since that period? A. I saw one of them with Mr. Turner.

Q. Did you see them with Mr. Redding? A. No; I did not.

Q. Did you give any testimony at the examining court? A. No, sir.

Q. Do you know why you were called up now to testify? A. I do not know.

Q. Is this the Doctor or the Judge? (pointing to the Doctor.) A. The Doctor, I think.

Q. Is this the Judge? A. It is.

Q. Was it he came in with the drawn knife to demand the $100 bill? A. Yes; it was.

Q. Who were the other persons in the store besides yourself? A. No one but the Doctor, Judge Wilkinson, Mr. Murdaugh, Mr. Redding, and Mr. Craig, except another boy with me. One went in and went out again before the fight began.

Q. Do you know any one named Redmond in Louisville? A. I do not.

[Witness allowed to withdraw.]

The Court said it was time to close for the night, which was assented to by the gentlemen of the bar.

THE COURT: What do you propose to do with the jury?

The counsel for the defense said they had no objection to the jury being allowed to retire, and have proper accommodations.

THE COURT: Very well; let the sheriff take charge of the jury, and provide for them at a tavern. You, gentlemen of the jury, will take care not to converse with any person on the subject, or express any opinion concerning this cause, or to allow any one to address you about it, during your absence from court.

Adjourned to eight o'clock next morning.

SECOND DAY.

TUESDAY MORNING, March 12.

§ 30. Pursuant to adjournment the court sat this morning at eight o'clock, and the clerk having read the minutes of the former day's proceedings, called the names of the jurors, and the sheriff was directed to remove the witnesses for the prosecution out of hearing of the court.

Colonel Robertson then recalled and examined Mr. Redding.

Q. You have prosecuted these gentlemen for the affray in your own house, separately, for your own benefit? A. Yes, sir; I have sued them for damages.

Q. Is there a coffee-house kept in your house? A. My shop is on the corner.

Q. There is a coffee-house in the same building? A. There is a coffee-house on Pearl street, next above my shop, in the same building.

Q. Who owns that coffee-house? A. It belongs to my brother and me; the coffee-house is attended by my brother.

[Witness allowed to retire.]

MR. SAMUEI REDMOND CALLED AND EXAMINED.

Mr. HARDIN: Mr. Redmond, go on and tell all that you observed at Mr. Mr. Redding's store that evening.

§ 31. Mr. REDMOND: I worked for Mr. Redding and went to his store that Saturday afternoon to draw some money. I saw these gentlemen at the store. The first of the difficulty I saw, was Mr. Redding pulling the Judge out of the door. He fell and turned under, the Judge being on top; but Mr. Redding succeeded in turning the Judge under, and the Doctor immediately attacked Redding with his knife, and Mr. Murdaugh cried out, "Kill the damned son of a bitch." Just as the Doctor was in the act of stabbing Mr. Redding, and the knife was within three or four inches of his breast, I seized the Doctor's arm and said, "Don't do that, if you please;" and then Mr. Murdaugh said, "Part them." Redding then got out into the street, with one shoe off and the other on; and at the same time Murdaugh was on the pavement with his knife drawn.

Q. When you first saw the Doctor approaching Redding and the Judge, had he his knife drawn? A. I supposed he had it in his hand and drawn.

Q. What induced you to interfere? A. I seized the Doctor's arm to keep him from stabbing Mr. Redding.

Q. What were the relative positions of the parties after you seized the Doctor's arm? A. The Doctor raised up and Murdaugh was on the pavement with his knife drawn.

Q. Which followed Redding into the store? A. The Doctor; he

entered the store with his knife drawn in his hand, demanding his $100 bill.

Q. Well; what followed? Mr. Redding had dropped his pocket book in the scuffle, and I picked it up and carried it in to him; he then took out the $100 bill and returned it to the Doctor, saying, "Here's your $100 bill."

Q. What color was the handle of the knife you saw with the Doctor? A. It was white; and so was that of Mr. Murdaugh.

Q. Did the Judge remain with the others? A. He had gone over to the other side of the street and then returned as if to persuade one of the gentlemen to go away. They all then went off, two with their knives drawn, and the Judge with the poker.

CROSS-EXAMINED.

Q. Where had you been before they fell into the street? A. I had been in the back shop; I came to the store to get money.

Q. Were you living with Mr. Redding then? A. Yes; I worked for him.

Q. Are you in his employment now? A. No; I am not.

Q. Why did you stay at the door? A. I was only staying to get the money. I had left the back shop to go to the front shop to get the money.

Q. Had not you stated times for getting your money? A. No, I had none; whenever I asked for money I got it. I had finished my job and went to get my pay.

Q. Were you in the shop after the affray was over? A. Yes.

§ 32. Q. Did you not say in the examining court that you were in the shop when the affray began? A. I did not say so.

Q. Did you not say at the examining court anything about offensive language you had heard? A. No; I did not.

Q. Did you not, in fact, hear Mr. Redding give the damned lie in the shop? A. I was not in the shop then and did not hear Mr. Redding give the damned lie at all.

Q. Did you or did you not say so at the examining court? A. I did not say so there or any where else.

[Here Judge Rowan stated to the Court that the minutes taken at the examining court had been transmitted through Mr. Redding's hands to the Prosecuting Attorney of this court, and it was only in courtesy and through the politeness of the Prosecuting Attorney that the counsel for the defense had been allowed the perusal of them. The Prosecuting Attorney had now withdrawn these minutes and he (Judge Rowan) now demanded it as a public document.

The Court said it was probable the right was regulated by Act of Assembly.

Mr. Bullock, the Prosecuting Attorney, said he did not stand upon that point; but the reason he withdrew the minutes was that they were neither minutes of evidence nor even a synopsis of what had taken place at the examining court. They appeared to be nothing but a few memoranda made for the use of the grand jury, but so inadequate for any purpose in a final trial, that, finding they could not be available to either side, he had decided upon not using them on the prosecution nor yielding them to the defense. Here the matter dropped, the understanding appearing to be that the minutes were not perfect enough to use in evidence.]

MR. REDMOND IN CONTINUATION.

Q. Who went with you to Mr. Redding's store? A. I don't recollect that any one was with me.

Q. Which, did you say, attempted to stab Mr. Redding? A. It was Doctor Wilkinson.

Q. Well, now, how can you be sure that was his design? A. All I know is that he would have stabbed him had I not arrested his hand.

Q. Had not Mr. Redding a pair of shears in his hand defending himself in the shop? A. I did not see any such thing.

Q. Where were you when Dr. Wilkinson was attacking Redding? A. I was on the pavement.

Q. Was not Mr. Redding, by his superior strength, near turning over Dr. Wilkinson? A. Yes; I thought so.

§ 33. Q. Did he attempt to use the knife till he was in danger of being turned under? A. I did not see the knife till the Doctor had it in the attitude of stabbing; Mr. Redding raised up a little, keeping the Judge under with one arm, and with his other arm around the Doctor's neck, trying to pull him down.

Q. I wish you to be as particular as possible in describing this. A. Well, I have done so already. Mr. Redding had Judge Wilkinson down and reached his arm to pull down the Doctor, when the Doctor raised his knife to stab Mr. Redding as he was about to be pulled under by Mr. Redding. [Here witness showed the manner].

Q. Where was the Doctor's knife till then? A. I did not see the knife till that time with the Doctor.

Q. What appeared to be his intention when he came up? A. It appeared to be his design to pull Mr. Redding off his brother.

Q. Was it not when Mr. Redding had him nearly turned under that he drew his knife? A. As Mr. Redding was trying to pull him down, the Doctor raised the knife to stab him.

Q. Could you recognize the knife? A. I think it is one of those present in court.

Q. Was it not at that moment that he drew and opened his knife?

A. He must have had it drawn and open before, because he could not have got his other hand disengaged to assist in opening it when Mr. Redding had hold of him.

Q. Which of these was the knife? A. I think that was it; the other is the one Mr. Murdaugh had.

Q. Where was Mr. Craig? A. I saw him after I went into the shop.

Q. When these gentlemen were in the shop talking, where was Mr. Craig? A. Mr. Craig was at his board.

Q. Did you see a boy named Weaver there? A. Yes.

Q. What hour was it when the affair happened? A. I think it was between three and four o'clock.

RE-EXAMINED.

Q. Did you see the Doctor taking out his knife? A. No; I saw him with it drawn in his hand when he made the stab at Mr. Redding.

Q. Did you see Mr. Murdaugh when he cried out "Kill the damned rascal," or some such word? A. Yes.

Q. Was there any attempt made by the Doctor to take his brother off when on the top of Mr. Redding? A. No.

Q. Did you see any indication from Mr. Murdaugh to take Judge Wilkinson off Mr. Redding? No; not any.

§ 34. Q. Did you see Mr. Redding under Judge Wilkinson? A. Yes; when they fell on the pavement out of the door, I saw Judge Wilkinson uppermost. Mr. Redding fell underneath when they fell out of the door.

Q. Did they put up their knives when they raised up? A. The Doctor and Mr. Murdaugh had their knives drawn after that, when out on the pavement.

Q. Where was the Judge then? A. He returned from the street to the pavement and took one of the gentlemen by the arm to get him away.

Q. When they went off were they still armed? A. They went with the knives in their hands.

Q. Did you see Mr. Redding take up a brickbat when he got disengaged? A. Yes.

Q. Was this before or after the knives were drawn? A. The knives were drawn before Mr. Redding picked up the brickbat.

Q. Where was Mr. Murdaugh when he called out "Kill the damned rascal?" A. Mr. Murdaugh stood on the pavement near the street, when he said "Kill the damned son of a bitch."

Q. It was not till you caught the Doctor's arm, so that he could not make the blow, that Murdaugh advised you to "Part them—don't let him kill him?" A. Yes; I kept hold of the Doctor's arm, so that he could not make the blow.

Q. Was it all in the same breath that he said "Kill the damned rascal," and "Part them—don't let him kill him?" A. No; not in the same breath—there was a little time between the expressions.

MR. JOHN PARIS EXAMINED.

MR. HARDIN: Mr. Paris, state to the Court and the jury what you know of this affair.

Mr. PARIS: I was passing Mr. Redding's store after dinner, when I heard some fuss, and stopped to look in. When I heard the fuss at first I was in Main street, and I went around the corner into Third street, when I saw Mr. Redding fall out of the side door with one of the gentlemen. Another gentleman had a knife and said he would kill him. I said "Don't kill him," and a young man then caught his arm. After this Mr. Redding picked up a brickbat, and one of the gentlemen said, "Give me my money" He followed Redding into the shop and got the $100 bill. They returned to the street, and as Redding got to the door he said he would whip the whole three of them if they would put away their knives.

Q. Which of the gentlemen had the knife when you first saw them? A. I think it was the gentleman they called the Doctor.

Q. What sort of knife was it? A It was just such a knife as one of them—[pointing to a knife.]

Q. Who caught the Doctor's arm? A. I do not recollect the young man's name who caught the Doctor's arm.

Q. Look here [pointing to the witness' bench], if you can recognize the person. A. I think that young man [pointing to Mr. Redmond] is the person.

Q. Which way were you going when your attention was first attracted? A. I was coming up Main street when I heard the scuffle, and then turned the corner into Third street.

Q. Did you see Mr. Murdaugh, and what was he doing? A. I saw Mr. Murdaugh there but he was not taking any part in the affair.

Q. Was he not also armed with a knife? A. I saw him after, on the pavement, with a drawn knife.

CROSS-EXAMINED.

Q. Which of them said "Damn you, I'll kill you?" A. It was the gentleman with the knife.

Q. You made some remark to him? A. I said, "Don't kill him."

Q. Then he must have had time to stab Redding, if you had time to ask him not to do it. A. No; he had not time to make the stab when his arm was caught.

Q. While he was saying the words, "I'll kill you," had he not time to do so if he had intended it? A. I can not say whether he had time to kill him in the saying of the words.

Examination of Mr. Everett.

Q. What occurred after they got up? A. All three went into the shop, and when they came out Mr. Redding came to the door and said, "Lay down your damned knives, and I'll whip the three of you." "No," said Mr. Murdaugh, "I'd rather cut your damned guts out." With that one of the gentlemen came up and took him away. They went off with their knives drawn.

Q. What hour was it? A. It was between three and four o'clock.

Q. Did you hear Mr. Redding say there were "fifty or five hundred on him?" A. No; I did not.

Q. Or Mr. Murdaugh say "it was a damned lie?" A. No; I heard nothing of that sort.

Q. Are you positive as to the words used by Murdaugh when Redding offered to whip the three of them? A. I think Redding said, "If you are gentlemen, lay down your knives, and I'll whip the three of you." Mr. Murdaugh replied, "I'd rather cut your damned guts out."

§ 36. Q. Are you a coffee-house keeper? A. Yes.

Q. What were the relative positions of the parties when the Doctor said, "I'll kill you?" A. I can not say exactly, being frightened at the time. The Doctor was standing up; Mr. Redding standing up, but rather leaning back, and Judge Wilkinson standing up.

RE-EXAMINED.

Q. Were they so that you could see them distinctly? A. No; they were crowded or huddled up, and I could not well tell how their positions were.

Q. Were you at the examining court? A. I was, but not examined.

Q. Did any one ask you any questions about what you could tell? A. Col. Robertson asked me some questions.

Q. (*For Defense.*) When you say they were huddled together, do you mean to say they were on their feet? A. Yes.

MR. EVERETT CALLED AND EXAMINED.

MR. HARDIN: State, Mr. Everett, what you know of this transaction.

MR. EVERETT: Mr. Redding applied to me for the names of three Mississippi gentlemen, one of which, he said, was Wilkinson. I gave him the names. I called Mr. Redding to the window and asked him the nature of the difficulty. He told me about it. Shortly after I went out, and in ten or fifteen minutes I was told by Mr. Snead that there was likely to be some difficulty, upon which I returned, and saw Judge Wilkinson walking up and down the bar-room, very much excited. Redding was addressing the Judge. I determined to go around and get the Judge away, and, going into the passage towards the bar-room door, I met the Judge coming out of the bar-room. I asked him to go with me to his room, which he did. We found his brother and Mr. Murdaugh there. The Judge asked me if I had pistols. I said no,

and he then asked me to get him some. I said I would try, and I went down to the bar. In about ten minutes I saw the Judge enter the bar-room, and I then put on my hat and walked out of the house.

[Here Mr. Everett was asked to make a drawing of the bar-room, which he did, and it was examined by the jury and some gentlemen of the bar].

§ 37. Q. When you went up stairs with the Judge, who was in the room? A. We found the Doctor and Mr. Murdaugh there.

Q. What passed between the parties? A. The Judge told them what had occurred below in the bar-room.

Q. He then asked you for the pistols? A. Yes; it was then he asked for the pistols.

Q. What part of the house is the room in? A. It is on the first story above—room 35.

Q. Does the supper bell be rung in that part of the building? A. It is rung along the passage, and then down the stairs.

Q. Had the bell been so rung at or nearly after the time you were above with them? A. No; it was too soon for supper.

Q. Is the room in the southeast corner of the building? A. Yes; on the first floor above.

Q. Had the bell been rung for supper when the Judge came down to the bar-room the second time? A. No; it was rather before supper time.

Q. What time does the bell ring for supper? A. At that season it rings about half-past five or near six o'clock.

Q. Did you see any part of the affray when the Judge re-entered the bar-room? No, for I picked up my hat and went away.

Q. Did you afterwards see any of it? A. The difficulty was over when I returned.

CROSS-EXAMINED.

Q. What were the words that passed between the Judge and Mr. Redding when you first saw them? A. I do not recollect them.

§ 38. Q. Did you observe by them and others anything alarming? A. I observed that there was a good deal of excitement.

Q. Did you see many strange faces in the bar-room? A. There were many strange faces in the bar-room that evening.

Q. Had you any difficulty in getting the Judge to go to his room? A. I merely asked him to walk up, and he immediately consented, and we went up the public steps.

Q. Why did you interpose to get the Judge to his room? A. From what I saw pass between the Judge and Mr. Redding, I saw the Judge was greatly excited, and I thought it my duty to prevent a quarrel.

Q. Was not Mr. Redding greatly excited? A. I did not notice whether Mr. Redding was greatly excited or not.

Q. What way did you understand the Judge's request for pistols? A. No words passed to justify me in forming an opinion of what they were wanted for.

Q. Well, what did they want them for? A. I can not say that they mentioned what they wanted them for.

Q. When they afterwards came down to the bar-room, was it by the usual and main passage and door to the supper room they came? A. It was.

Q. Is it usual for those who are boarding to assemble in the bar-room a short time before supper? A. It is the usual practice.

§ 39. Q. How many bells are rung for supper? A. Only one bell for supper. The practice of the house is to collect in the bar-room before the supper is ready; sometimes there is delay; sometimes none.

Q. When the bell rings, is there not a considerable rush made to the supper-room? A. It has been the case that if a person did not rush in he would be late for supper. Unfortunately, of late it has not been so.

Q. What time was it when you noticed those strange faces assembled in the bar-room? A. I think it was about five o'clock.

Q. What hour was it when Mr. Redding first came to the Galt House? A. When he came to ask for the names it was about four o'clock.

Q. What time was it when the affray took place? A. It was about dark.

Q. What hour was it when all was over? A. It must have been about six o'clock.

Q. Was it not on account of the number and strange faces of those in the bar-room that you feared Judge Wilkinson was in danger when you took him out of the bar-room? A. Mr. Sneed told me that there would probably be a difficulty; on that account I wished to take the Judge away. I did not infer danger from any particular person or collection.

Q. Did not Judge Wilkinson on reaching his room in company with you exclaim, "Great God! we claim from you the means of our protection?" A. I can not say that I heard such words.

Q. Were Meeks, Rothwell, Johnson, Holmes and Oldham frequenters of the house? A. Meeks I did not know; I did not know Mr. Rothwell, though I have been in Louisville since '35; Johnson I did not know; nor Holmes; I knew Oldham.

Q. Was Mr. Redding a frequenter of the house? A. No; Mr. Redding was not in the habit of being at our house.

Q. Do you not easily recognize persons who have been at the house? A. I usually know a person who has been at the house.

Q. Mention some that were there that evening who frequented the

house occasionally. A. Monohan was often at the house; he generally has business when he attends there. Mr. Reaugh is sometimes there.

§ 40. Q. Well, to come to the point, what was it about the persons in the bar-room that excited your alarm and caused you to take Judge Wilkinson to his room? A. I remarked many strange faces, which tended to excite my alarm and apprehension. It was from what I had heard of the affair at Mr. Redding's store, the assembly of persons, and the words between Mr. Redding and the Judge, that my apprehensions were excited.

Q. Can you see into the bar-room from the stairs? A. Yes; there is a window looking into the bar-room from the steps of the stairs.

Q. Are these the public stairs? A. Yes, the principal and public stairs.

MR. HARDIN: Is there not another door to the dining room known to those familiar with the house? A. There is a small, private door used by those well acquainted with the house.

Q. Was there such a crowd in the house as to cause a rush to the dining room door at supper time? A. No; not at that time.

Q. When navigation is open and the Legislature in session, are there not many strange faces arriving at the Galt House every evening? A. I could not say what proportion of strange faces these circumstances would cause to be present.

Q. Do you recollect the date of this affair? A. I can not say whether it was the 15th day of December or not.

Q. Was not the navigation open then? A. I can not say.

Q. Had Mr. Marshall Halbert been boarding at the Galt House at that time? A. He had been there about a week.

Q. If the affray had not happened at Mr. Redding's shop, would the assembly of strangers in the bar-room of the Galt House that evening have attracted your attention? A. I do not think it would.

Q. (*For Defense.*) Had Judge Wilkinson been at the Galt House many times before? A. Yes, many times.

Q. What were his deportment and general character? A. He had always been a remarkably mild and retiring gentleman, of inoffensive manners.

§ 41. Q. Was it because you saw strange faces in the bar-room at the same time Mr. Redding was there, and on account of what you had heard of the previous affray, that you wished to get Judge Wilkinson to his own room? A. Those were the reasons I wished to get the Judge away.

MR. HARDIN: Had not a number of boarders who do not lodge in the Galt House assembled in the bar-room for supper? A. Yes; several.

Q. Do not other citizens assemble there from half of an hour to a

quarter of an hour before supper, to hear the news and look over the book of arrivals? A. Yes, it is very general.

Q. (*For Defense.*) From the time Mr. Redding asked the names till the whole difficulty was over. how long was it? A. I think it was probably over an hour.

Q. How long was it from the time Mr. Snead spoke to you till you went up with Judge Wilkinson to his room? A. It was only a few minutes.

Q. How long was it till the Judge returned? A. It was probably fifteen minutes. It could not have been more than twenty or twenty-five minutes from the time Mr. Snead spoke to me to go in till the Judge returned to the bar-room.

JOHN LUCAS, CALLED AND EXAMINED.

MR. HARDIN: Are you one of the city officers that arrested these gentlemen? A. Yes.

Q. Did you find any of these knives about them? A. I did not see any of these knives at the time.

MR. ROBERT POPE, CALLED AND EXAMINED.

§ 42. MR. HARDIN: Mr. Pope, tell the Court and jury what you know of this transaction.

MR. POPE: I was in the Galt House the evening this affair took place. I boarded there at that time. When I went in that evening there appeared to be a great deal of excitement. There were many persons in the bar-room not usually there. I was standing behind the counter when Mr. Redding came in with a paper in his hand and pronounced Judge Wilkinson a damned rascal, liar, swindler and murderer. Shortly after the Judge entered the room and came towards the counter where the glasses and decanters were to take a glass of water. Redding said to him he was the gentleman who struck him in his shop that evening. The Judge said he would not fight him or quarrel with him, but if he touched him or laid a hand on him he'd kill him. Redding then called him names and abused him—calling him coward, etc. The Judge walked up and down the room, and then left it. In some short time after Judge Wilkinson returned into the bar-room, and Murdaugh and the Doctor along with him. Murdaugh came towards Redding who was standing with his back to the counter, and Redding remarked you are one of the damned rascals who attacked me at the shop with a bowie knife this evening. Mr. Murdaugh said, "If you say I attacked you with a bowie knife you are a damned liar, and if you touch me I will cut your guts out."

Some one then caught Murdaugh's hand and the fight commenced. Blows were struck at Murdaugh, and the crowd closed up as they passed round towards the dining room door. Immediately after, my

attention was attracted to the other corner of the room near the folding doors into the passage, and I saw Judge Wilkinson standing in the door way with a bowie knife in his hand. Rothwell was standing a few feet from the door in a line towards the fire-place. The Judge looked a moment and then stabbed Rothwell under the shoulder. Rothwell was stooped a little—not as if fighting—but leaning over some one down on the floor. Almost instantly a fight commenced with raised chairs, and the crowd moved out of the room into the passage.

§ 43. Q. Did you see the Judge effect the stab he made? A. I saw the knife enter Rothwell's back.

Q. Which way was he turned? A. His back was full toward me, rather leaving his side inclining to his back next the folding door, and his face turned from the door.

Q. Was he fighting at the time? I did not think Rothwell was doing anything at the time.

Q. Did you see him get the other wounds? A. I saw but the one stab.

Q. What sort of door is that from the passage into the bar-room, and what was the relative positions of the parties? A. It is a folding door. One fold was open; the other shut. The Judge was in the open part by himself. Rothwell was a few feet from the door towards the window of second cross street.

Q. Which was he nearer to—the window or the door? A. About one-fourth nearer to the door than to the window.

Q. How far was he from where the Judge stood before he made the stab? A. About five or six feet.

Q. In what part of the room did the fight begin? A. It began with the altercation between Redding and Murdaugh, near the place at the counter where the bottles and glasses usually stand—about one-third of the counter from the passage door.

Q. When Murdaugh came up to Redding was he armed, and with what? He had his knife open in his hand; a Spanish dirk knife like one of these.

Q. When the words passed was the open knife in his hand? A. It was.

§ 44. Q. How soon did you notice him with his knife drawn after entering the room? A. My attention was drawn to him when Redding said he was one of the men who attacked him with a knife in his shop that evening.

Q. When Redding said that, what reply did Murdaugh make? A. He said, "If you lay your hands on me, or touch me, I'll cut your guts out.

Q. When Murdaugh came in at the door from the passage, had he his knife drawn in his hand? A. I did not notice him coming in at

Re-examination by Mr. Hardin.

the door. My attention was first drawn to him when the words passed which I have already mentioned.

Q. Did you see Mr. Meeks killed? A. No; I did not. I saw him afterwards lying on the floor, and perceived that he was stabbed in the belly. There was a short cow-hide, or something that I took to be such, lying by his hand. It had been an impression on my mind that he had struck Mr. Murdaugh with that cow-hide, which caused him to be stabbed. He was expiring when I looked at him, and in a moment died—almost instantly as I looked at him.

CROSS-EXAMINED.

Q. Were you acquainted with Dr. Wilkinson? A. I never saw Dr. Wilkinson, to know him, till he was before the examining court.

Q. What was Rothwell's position when stabbed? A. He was stooping and the fight was going on before him, where I supposed some one was down, but I did not see any person down.

Q. What occasioned you to be in the bar-room at the time? A. I was there to supper. I generally went into the bar-room fifteen minutes before supper.

Q. When Murdaugh's hand was caught, and he struggled towards the dining-room door, did you see any blows struck on him? A. I saw some blows given at him, but could not say by whom, the crowd closed them up so.

MR. HARDIN: Do any persons board at the Galt House that do not lodge there? A. Yes; several.

§ 45. Q. Do such boarders congregate in the bar-room before meals? A. Yes; always.

Q. (*For Defense.*) Did you see Murdaugh struck at with a stick? A. I had an impression that some one was using a stick at Murdaugh.

Q. Was the fight going on before Rothwell when he was stabbed? A. It was going on between the door and the window, and he was between the fight and the door when he was stabbed.

Q. What was the distance between the crowd and where Judge Wilkinson stood? A. About six or seven steps. [Feet.]

Q. How far was the Judge from the end of the settee? A. About two or three feet.

Q. Which was Judge Wilkinson nearer to, the door or the settee? A. About two-thirds nearer the settee than the door.

Q. What space was between where the Judge stood and Rothwell? A. About five or six feet.

Q. From the position in which Rothwell stood could the Judge tell from where he stood whether Rothwell was taking part in the fight? A. It appeared to me that Rothwell was not interfering but leaning over something down before him.

Q. Could you tell what he was doing before he was stabbed? A. I had not observed him till I saw the Judge make the stab. I did not know that he was in the room till then.

§46. Q. When Murdaugh was seized by the hand was he not dragged over towards the dining-room door? A. Yes; I thought so.

Q. Were not several blows inflicted on him during that time?

MR. HARDIN: Had he his knife drawn in his hand before any blows were struck at him? A. Yes; when he came up to Redding and Redding said, "You are one of the men who struck me in my house."

Q. (*For Defense.*) When Murdaugh was first closed upon by the crowd did you see him struck? A. He might have got a couple of blows at the moment.

Q. What is the distance from the entrance of the bar-room from the passage to the dining-room door? A. About eight steps.

Q. Which is the length of the room? A. It is longer between the doors than from the counter to the door; but the whole room is longer the other way.

Q. Where in the room was Meeks stabbed? A. Near the dining-room door.

MR. HARDIN: How many weapons did you see in use that night? A. I saw only two—Mr. Murdaugh's and Judge Wilkinson's.

[Witness allowed to withdraw.]

WILLIAM JOHNSON CALLED AND EXAMINED.

§47. MR. HARDIN: Mr. Johnson, state what you know of this affair.

MR. JOHNSON: On Saturday evening I was going from Main to Third street, and near the corner went into the Pearl Street House, kept by Mr. Redding's brother, who told me Jack was irritated at what had occurred at his shop. I went in to ask Jack about it and saw Mr. Rowland, Captain Rogers and Mr. Norris there. Some one said the Mississippians were damned rascals and ought to be punished; and somebody else said there was a regular course to be taken. Mr. Redding said he had no one to go with him to the mayor's office, and I volunteered to go with him. We went, and took Henry Shone along with us. As we went along we called at Vacaro's and at Hyman's, inquiring for the officers. We then went to the mayor's office and up to Mr. Pollard's room, but he refused to give a warrant without the names. He offered a blank warrant to have the names inserted as soon as they could be ascertained. Redding would not take the warrant till he could get the names. Mr. Pollard said if we could get the marshal, Mr. Turner, he would act without the warrant. We went to the jail to inquire for him and see Mr. Ronald. Mr. Ronald asked me about the matter, and I was a minute or two telling him and Mr Chenoworth. Mr. Redding was out on the pavement talking to Mr. Shone, as I supposed, but when I turned out again he was gone. It appears that Mr.

Redding called at Mr. Rothwell's, and took him along to hunt for the names. As I passed on I overtook Mr. Deering between Mr. Vacaro's and Mr. Shaffer's, and he went along with me, and as we went, we inquired where we'd find Mr. Turner or Mr. Dunn, the officers, till we came to Zanone's corner, where we parted. I went on to Jack Redding's, and Mr. Varmun's son told me Mr. Redding and Mr. Rothwell had gone to the Galt House for the names. I went on in the direction of the Galt House, having a little business with Mr. McCrum, about buying a calf. I stopped to talk to Mr. McCrum, awhile, about the calf and then I passed on to the Galt House. I went into the bar-room and saw Mr. Rothwell standing at the fire-place with his back to the fire, and saw Mr. Redding at the counter getting the names. I stepped to the door and invited Rothwell to come over to the City saloon and have something to drink, but he refused, saying he had taken something at the bar. I then went myself, and took Mr. Oliver and Mr. Meeks over, and we met Mr. Taylor at the door of the saloon, and we all went in and drank something. After drinking, Taylor and Meeks went over to the Galt House and Mr. Oliver and I had a few words with the bar-keeper, after which we left and went to the Galt House. On returning there, it appeared as if some excitement had been going on there. Mr. Redding was leaning on the counter, relating some circumstances, and Mr. Murdaugh came in. He spoke, and the damned lie passed between them, and, as I thought, Mr. Murdaugh struck at Mr. Redding, and made two or three blows at Mr. Meeks, who struck him with a whip or cane. They were then crowded toward the dining-room door, and I saw Murdaugh strike at Meeks with his knife. I saw Judge Wilkinson make a thrust at Meeks, too, and shortly after observed him fall dead. The Judge retreated back to the counter from which he had approached Meeks, and by the time he got back, Meeks fell dead. After Meeks fell, Murdaugh tried to escape out of the door, and the Judge passed between the dining-room door and Meeks' feet, as if to make his escape after Murdaugh. While doing so, the Doctor was down in the other corner, and Holmes beating him with his fist, and Rothwell leaning over Holmes, saying, "Peace, gentlemen, for God's sake," and trying to get Holmes off the Doctor. When Murdaugh had got to the door, and the Judge after him, and when the Judge got to the door, seeing the fight in the corner with his brother, he turned back and made a lunge with his bowie-knife at Rothwell, whose back was to him. Then Murdaugh and the Judge made their escape, and the Doctor got disengaged and made to the door, when Oldham was entering, and the Doctor struck at him with his knife, and Oldham sort of shrunk from the blow, when the door closed, and I saw no more.

§ 48. Q. What part of the bar-room was Murdaugh in, after entering the room? A. In the southeast corner, with his knife drawn.

Q. Where was Judge Wilkinson then? A. Judge Wilkinson was in the northeast corner, probably unknown to the spectators.

Q. Which, did Murdaugh or Redding speak first? A. I think Mr. Redding said, "I presume you are the gentleman who attempted to strike me with your knife; give me some cause why you did so." I think Murdaugh said, "It is a damned lie!"

Q. Is this the knife Murdaugh had in his hand? A. I think it is—it was just such a knife.

Q. Did you see Murdaugh aim a blow of the knife at Redding? A. I think he struck at Redding, and that Meeks struck him off.

Q. Had you seen Meeks that day before the affray at Redding's shop? A. I did not see Meeks that day till I saw him at the tailor shop.

Q. When Murdaugh, and Redding and Meeks were at the counter near the center of the bar-room, where was Judge Wilkinson? A Judge Wilkinson was in the northeast corner, and kept there till Meeks was in the northwest corner, when he approached him and made a thrust of his bowie-knife, and then retreated back to the same corner he had been in before. As Judge Wilkinson made the thrust, before he could get back, Meeks fell dead.

CROSS-EXAMINED.

Q. Where did you first meet Meeks that day? A. As I was going from the post-office to the Pearl Street House, I saw Meeks and Redding's brother. I had a few minutes' conversation with them, and then observed I would go and ask Jack about it myself. I then started to do so, and Meeks came out of the door, but whether he came with me into the store or not, I do not know.

§ 49. Q. Who were in the store when you went in? A. Captain Rogers, Mr. Rowland and Mr. Redding.

Q. Did you notice any conversation between Meeks and Redding in the store? A. No; there was none.

Q. Was Meeks present when you spoke to Redding? A. He was either in the store or at the door.

Q. Did you see Meeks and Redding in conversation in the shop? A. I do not know whether Mr. Meeks spoke or was known to Mr. Redding.

Q. Did you not see him in the shop? A. I do not know that I saw him in the shop or not. Mr. Meeks came with me from the coffee-house towards the store. He was my acquaintance, and accompanied me toward the door.

Q. Was Mr. Redding in the coffee-house, just before that? A. I did not see Mr. Redding in the coffee-house; it was his brother. Mr. Meeks went with me toward the shop, but I can not say whether Mr. Redding noticed him or not.

Q. Did Meeks say why he accompanied you? A. He did not inti-

mate why he accompanied me. He started with me from the coffee-house, when I said I'd go to the shop.

Q. Can you say whether he did, or did not, enter the shop? A. I do not know whether he came into the shop.

Q. When you were in the shop, what advice was given to Redding? A. Some advised Redding to chastise the Mississippians; but one said there was a regular course to take.

Q. Who were the persons in the store then? A. Mr. Redmond, who had seen the fuss. Mr. Rothwell was also there.

Q. Are you sure Meeks was not one of those present? A. I can not say whether Meeks was in the store. He had started with me from the coffee-house toward the store door, but can not say that he entered.

§ 50. Q. Well, who else was in the store? A. Mr. Roland and Captain Rogers and Mr. Redmond. There might be three or four more standing about. I saw Mr. Paris there.

Q. When the proposition was made to Redding, to chastise these gentlemen, did you interfere? A. Yes; I said to Redding, "No, take the law." Mr. Redding then asked me if I would go with him to the mayor's office, and I went with him.

Q. When you went to the jail, whom did Redding converse with? A. Mr. Redding and Mr. Chenoweth were talking on the pavement, and I went in.

Q. Did you see any one besides those you have already named, on your way to the mayor's office? A. I saw others as I went, that I did not know.

Q. Did you hear Deering say, if they were not secured, they would be gone before the warrant could be got? A. I did not.

Q. Did you not say to Deering, that if they came out their hides would not hold shucks? A. I never said so to Deering.

Q. When you were in the bar-room, did you hear Mr. Miller make any observation about his being a grand juror, and the boys must mind themselves? A. I have no recollection of hearing Mr. Miller say that he was one of the grand jury, and the boys must mind themselves. I saw him talking to Mr. Reaugh, but do not remember the conversation.

Q. What motive had you for following Redding and Rothwell to the Galt House? A. I only went up Main street to negotiate with Mr. McCrum about his calf. When I was so far, I thought I would go into the Galt House to see if Mr. Redding had got the names.

§ 51. Q. When you did go in, what passed between you and them? A. When I was going to take Meeks, Oliver, and Joseph Taylor to the opposite coffee-house, I asked Rothwell to come over and have something to drink; he refused, saying he had drank some at the bar.

Q. What motive had you for returning to the bar-room, when you knew Redding had got the names? A. I expected Mr. Turner would be along to arrest them.

Q. How did you know Redding and Rothwell were at the Galt House together, before you got there? A. When I called at the store and asked Mr. Varnum's son for Mr. Redding, he told me that he and Rothwell had gone to the Galt House to get the names.

Q. When you proposed to Meeks, Oliver, Taylor and the others in the saloon, to have something to drink, did you not say "Come, boys, let us take a drink, and then let us go over and give these fellows hell?" A. No, ZUR—No, *Sir!*—Nothing of the kind.

Q. After these gentlemen were put in jail, did you not go from house to house, proclaiming that they ought to be hanged? A. Many gentlemen asked questions, and I told them as near as I could tell, about what I had seen, but always said let the law take its course.

Q. What conversation passed at the opposite coffee-house while you and the others were drinking, relative to the expected row? A. There was no conversation of that kind.

Q. When you met Holmes in Third street, who was with him? A. He and some other person were passing along toward the theatre—they were going about a dog.

Q. Did Mr. Redding or Mr. Shone speak to him? A. They might have spoken to him but I do not recollect that they did.

Q. What did you say to Holmes? A. I am not sure I said anything, or what it was, if I did, except it might be something about the dog.

§52. Q. When you invited Rothwell to go from the bar-room to the coffee-house, what sort of a stick had he in his hand? A. I did not see any stick with him.

Q. When he was at the door had he not a stick? A. I did not see a stick with him at the door, or the fight, or at all that night.

Q. At the beginning of the fight in the bar-room who struck the first blow? A. I thought Meeks struck at Murdaugh with the whip to keep him from making the stab with the knife.

Q. What weapon had you prepared yourself with? A. I had neither weapon nor stick myself.

Q. Who had the sword-cane? A. I saw no sword-cane.

Q. Who gave Judge Wilkinson the stab in his back? A. I don't know.

Q. What conversation took place between you and Mr. Reaugh? A. I do not remember—it was about some men being sponges, or some such thing.

Q. Try if you can recollect? A. Oh, it was about that, and one thing and another.

Q. Come, now, recollect what it was about? A. Why, Judge, can you recollect what corn-patch you planted ten years ago?

Q. My question is a very plain one; can not you recollect some of the words that passed? A. No, for I do not keep the leaves of a dictionary in my head.

Q. Well, we'll see if some one else can recollect it. When the proposition was made to Mr. Redding to take vengeance on these gentlemen, who observed it, and what did Meeks say? A. It was proposed by some by-stander or loafer, but I do not recollect Meeks recommending it.

Q. Was Mr. Samuel Jackson there? A. I do not recollect seeing him there at all.

Q. What time of the day was it? A. It was before sun-set—may be an hour.

Q. Did you see Mr. Holmes in the bar-room of the Galt House when the affray began? A. Yes.

§ 53. Q. Did you see Mr. Oldham? A. I saw him at the door, as they made their retreat out.

Q. Did you hear or see him shoot the pistol? A. I did not mind it.

Q. Did you not know he had pistols? A. I knew he always carried arms since he was a city officer.

§ 54. Q. When you and Redding went to the mayor's office, and saw Mr. Pollard, what did he say? A. As we had not the names he offered to let us have the warrant with blanks for the names, to be afterward filled up, and said if we could find Mr. Turner, he could act without a warrant. Mr. Redding said no, he would get the names first.

Q. After that, whom did you invite to the Galt House. A. I do not recollect inviting any one.

Q. Did you not tell any one to be there? A. No; I have no recollection of any such thing.

Q. Did Redding refuse to take the blank warrant? A. Yes; he said he would get the names first.

RE-EXAMINED.

Q. Where did you see Mr. Holmes first in the Galt House? A. In the passage, talking to Mr. Halbert.

Q. Where did you see him during the fight? A. I saw him standing over the Doctor.

Q. Whom did you talk to, besides Mr. Redding and Mr. Shone, about going to the Galt House. A. No one that I recollect.

Q. Did you go to the Galt House for the purpose of assaulting these gentlemen? A. I did not.

Q. Did Mr. Redding say he was going for that purpose? A. I never heard him announce any such intention. Mr. Redding and others apprehended some little difficulty might occur in getting the names, but I did not hear any reason assigned.

Q. Did you know Mr. Meeks, and if you did, say what sized man was he? A. I knew him well—he was quite a small man?

Q. Did you see Meeks after you left him at the door of the tailor's shop till you saw him in the Galt House? A. No; I did not.

Q. When you met Meeks at the Pearl street coffee-house. what did he say? He said it was hard the way these gentlemen had treated Redding.

[Witness allowed to withdraw.]

MR. TRABUE CALLED AND EXAMINED.

§ 55. MR. HARDIN: Mr. Trabue be so good to tell the Court and the jury what you saw of this business.

MR. TRABUE: I was in Louisville about the 15th or 20th of December, when this affair took place. I heard this business talked over—myself and another gentleman boarded at the Galt House. I was in the bar-room near the fire when some one observed that had not the Mississippi gentlemen gone up stairs they would have been badly treated. Some one pointed out Mr. Redding, whom I knew before. Judge Wilkinson came in and walked backward and forward two or three times greatly excited. Mr. Redding then entered the door and crossed the Judge's path. The Judge stopped and looked at him, and Redding placed his back against the counter. I think when Murdaugh entered, he was the first that spoke, saying, "I understand you say that I drew a bowie knife on you—if you say so you are a damned liar." Mr. Redding said, "I don't know that you are the man, but one of the three did." Mr. Murdaugh replied, "If you or any one else says it was I, it is a damned lie." A little man, whom I knew afterwards to be Meeks, came up and said, "You *are* the damned little rascal that did it," and he struck at Murdaugh with his whip. About the same time, Rothwell struck Murdaugh, who had his knife open in his hand when he was first struck at. The crowd closed up on them, and they were hurried towards the dining-room door. Shortly after, I saw the Judge stabbing about, with his bowie-knife. Murdaugh, Meeks and Rothwell were in the middle of the scuffle when the Judge made toward them, and I saw him stab Rothwell in the back, or toward the side. Rothwell made a slight shrink on getting the stab, and sort-o' turned round to see who struck him. As soon as I saw Judge Wilkinson stab Rothwell in the back, Dr. Wilkinson was knocked up against me; and sometime after, Holmes had the Doctor down, and raised his head with one hand to strike him with the other. Marshall Halbert came up and addressed Holmes, saying, "You have beat him enough." I helped to separate them and the Doctor made his escape. I saw the Judge, and I saw a bowie knife glistening; they got out into the passage and I heard a pistol fired. At the same moment I saw Meeks drop dead. Rothwell on the instant came in with the blood flowing from his wound. He took off his coat with some assistance.

Cross-examination of Mr. Trabue.

§ 56. Q. When you saw Judge Wilkinson stab Rothwell, in what part of the room was it? A. Near the dining-room door.

Q. Did you see Rothwell get any other stab? A. I saw but the one.

Q. Which corner of the room was it in? A. In the opposite corner from where Dr. Wilkinson and Holmes were engaged.

Q. Describe the corners as you face the fire? A. Holmes and Dr. Wilkinson were fighting in the left-hand corner as you face the fire; the Judge, Rothwell, and Halbert, were fighting in the right-hand corner as you face the fire.

Q. Are you sure you saw Rothwell get but the one stab? A. It sometimes has been an impression on my mind that as Rothwell turned, the Judge made another stab at him, but I am not certain.

Q. Did you see Judge Wilkinson attempt stabbing any one else? A. I saw him repeatedly stabbing about with his bowie-knife.

Q. Was any person then molesting him? A. At the time he was stabbing about, I did not see any person interfering with him.

Q. Is this the knife he had? A. The knife was similar to that.

Q. What was his manner of stabbing about as you describe? A. I saw the Judge make several thrusts forward in this way, throwing his head back [jerking forward his arm.]

§ 57. Q. When Murdaugh came into the room which, did he, or Redding speak first? A. Although there are many persons say Redding spoke the first word, I am certain it was Murdaugh, unless Redding spoke very low.

Q. On whom was your attention first fixed? A. I had my eye upon Murdaugh, Meeks and the Judge; as soon as this striking commenced I retreated from them.

Q. Did you then see the Doctor? A. I had not discovered the Doctor till I saw Holmes beating him. I would have seen more of the fight between Meeks, Murdaugh and Rothwell had not Dr. Wilkinson been struck up against me.

Q. Was he then knocked down? A. He was not knocked down till after Rothwell had been stabbed by Judge Wilkinson.

Q. Did Rothwell continue to fight after the stab you saw? A. My attention was drawn from Rothwell to Dr. Wilkinson, and I did not see Rothwell again until he was walking from where Meeks fell toward the passage through the door. The pistol was fired and he turned into the room bleeding.

Q. Were they fighting out of the room at the time? A. The room had been cleared.

CROSS-EXAMINED.

Q. Did any one else strike at Murdaugh besides Meeks? A. I saw some one besides Meeks strike at Murdaugh, and have an impression it was a large man like Rothwell with a stick or cane.

Q. What sort of whip or cane was it Meeks struck with? A. I thought it was a polished steel cane that Meeks struck with, but I may be mistaken in that; my impression is very indistinct.

§ 58. Q. When Mr. Murdaugh was struck, was he warning them off? A. He was warning them not to strike him.

Q. When did he draw his knife? A. As he gave the lie to the report. He said, "Any man that says so, is a liar."

Q. Did he say knife, or bowie-knife? A. I do not recollect that he said bowie-knife. His words were, "It is reported that I drew a knife on you, and if any one says I did, he is a damned liar." Meeks came up and said, "You are the damned little rascal that did it," and with that struck at Murdaugh.

Q. Did any one else at the same time commence striking? A. My impression is that another, a large man, struck at Murdaugh with a stick at the same time.

Q. When the Judge first left the bar-room, did Redding remain until the Judge's return? A. Redding went out before the Judge came in. After the Judge came in and paced the room, Redding entered and crossed his path to the counter, and by that time a right smart crowd entered the door and got about them.

Q. Was a difficulty expected by those in the room? A. I don't think there were five men in the house that did not expect a difficulty. It was considerably talked of all the evening.

Q. What occurred in the passage when they got out there? A. I was not out to see what passed in the passage. After Rothwell got his coat off and lay on the chairs, I left the bar-room and went to my room.

Q. What weapons did you observe with both parties? A. The only weapons I saw as I recollect, were the two knives, the whip, or what appeared to me to be a polished steel cane.

§ 59. Q. When Murdaugh was struck with that cane, did it wound his head? A. I think there was a wound made when I saw it strike.

Q. Where did you last notice Murdaugh in the fight? A. The last of Murdaugh I saw after the first scuffle, I thought he was staggering back for the door where he had entered.

Q. Could any one observe all that was going on together.? A. I do not think it possible that any one could see everything that occurred.

Q. The terror was so great that people fled from it? A. I think before the fight was half over, there did not remain more than ten or a dozen persons in the house.

RE-EXAMINED.

Q. What time in December did it occur? A. I think about the 15th or 20th. I was there a day or two before it happened.

Q. It was in Louisville, in the county of Jefferson? A. Yes.

[Witness allowed to withdraw.]

MR. MONTGOMERY CALLED AND EXAMINED.

§ 60. Being requested by Mr. Hardin to state what he knew of the affair—

MR. MONTGOMERY: I was at the Galt House with Mr. Trabue. The first I saw of the affair, was at Mr. Redding's shop. As I was passing in the street I saw two or three gentlemen engaged in the doorway. Mr. Redding appeared to have turned back on the pavement. Mr. Murdaugh was on the pavement too, and had a drawn knife in his hand. Redding said if they would lay aside their weapons he would whip the three of them. Murdaugh said he could not begin to do it, pointing his knife at him. Judge Wilkinson then came up and took Murdaugh away.

Q. What time was it? A. It was between three and four o'clock.

Q. State what you know of the affair at the Galt House. A. Afterwards, at the Galt House, I saw Redding getting the names. He was using very rough language. It was nearly dark when Redding came back into the bar-room. Mr. Halbert said there would be rough work with the Mississippians. Hearing some one speak loud near the counter, I got up and went toward the counter. Mr. Meeks was near Mr. Redding, who was addressed by Mr. Murdaugh. Mr. Rothwell was next Mr. Redding. Murdaugh had his drawn knife in his hand. He remaked that "if any one said he drew a bowie-knife, it was a damned lie." Meeks said "he was the damned little rascal that did it," and struck at him. Murdaugh tried to use the knife, but his hand was seized, and he changed his knife into the other hand, and made a stab at Meeks, and cut him in the belly, and his blood shot out upon my pantaloons and vest.

Q. Did you see Rothwell stabbed? A. I saw the Judge thrust his bowie-knife into Rothwell's back. The crowd dispersed, like, and the Judge backed out toward the passage. I turned towards the fire, and saw Mr. Holmes pounding Dr. Wilkinson very heavily. Halbert said to him, "Bill, you have beat him enough," and he and others took hold of him. By that time I saw the Judge again appear at the door, and make a stroke with the knife at Holmes, and immediately I saw Rothwell with the blood flowing from him.

§ 61. Q. Did you see the Judge stab Rothwell twice? A. I did not see the Judge stab Rothwell more than once, and that was in the right-hand corner of the room as you face the fire.

Q. Was the Judge using his knife freely? A. Yes; very freely.

Q. Was any person attacking him? A. I did not see any person attack him. I did not see any one attempt to strike him till after he

had struck at Holmes with his knife, when Holmes and Halbert raised chairs against him. I too, raised a chair, not that I thought he struck at me. Holmes had been separated from the Doctor, when the Judge struck at him.

Q. When the Judge stabbed Rothwell, was Rothwell's back to him? A. Not exactly; but a sort of quartering.

CROSS-EXAMINED.

Q. You live in Oldham county? A. Yes, sir; I do.

Q. Did you hear any person say they would beat the Mississippians? A. Yes; several said they would beat them well. The Mississippians were not in the room at the time.

[Witness allowed to retire.]

MR. THOMAS REAUGH CALLED AND EXAMINED.

§ 62. Mr. HARDIN: Mr. Reaugh, state what you know of this transaction.

MR. REAUGH: I had been in the country that evening, and on my return, Mr. Kintner, of Corydon, asked me to go to the Galt House and have a glass of wine. He was boarding at the Galt House. I drank with him at the bar, and walked to the fire-place. On turning round, I saw Mr. Redding talking to Mr. Rothwell. In a few minutes I saw Mr. Holmes. Mr. Redding was in conversation with Mr. Rothwell, and I think with Mr. Halbert. I turned to Mr. Johnson and asked him if anything was the matter; he said yes, and told me about the difficulty at Mr. Redding's store. I remarked that if the Mississippians fell into the hands of these men they would fare rather rough. "Yes," replied Johnson, "they would skin them quicker than I could skin a sheep." I heard a Mr. Miller say to Mr. Redding that if he'd get the names he'd attend to the matter in the grand jury. Mr. Redding went to the bar; shortly after, a gentleman came in and Mr. Redding turned to him and said, "I believe, sir, you are the gentleman that struck me with the poker?" He turned round and said, "Yes, sir, I am." Mr. Redding then used very rough language, when the Judge said, "Go away, or I'll kill you." The Judge then walked the room, and peaceably passed out to meet Mr. Everett in the passage. The Judge was gone some time when he returned again and walked across to the dining-room door. I think he had his right hand in the left hand pocket of his coat. He stood with his eye fixed on the opposite door, Mr. Redding a few steps from him, when a gentleman with a drab overcoat came toward Mr. Redding with a knife in his hand. He addressed himself to Mr. Redding in this way: "Sir, do you say I drew a bowie-knife on you? If you say so, you are a damned liar!" Mr. Redding said, "I don't say it was you, but one of the three." A little man, whom I afterwards knew to be Meeks, came up

and said, "You *are* the damned little rascal," and I think he was making the blow with his whip as he said the words. I retired to the fire-place and saw Mr. Meeks stagger to the northwest corner of the room. I saw him struck, as I thought, with a dirk, and then fall. At the same time I saw a fight in the southwest corner, and Judge Wilkinson at the door striking the first blow at Rothwell, but it did not seem as if the blow could reach him, but as he turned a little the second blow did, and it appeared as if, at the time, Rothwell was inthe act of taking off Holmes from Dr. Wilkinson.

§ 63. Q. When Judge Wilkinson stabbed Rothwell, was Rothwell in the southwest corner in the act of taking hold of Holmes to relieve Dr. Wilkinson? A. Yes; it appeared as if he was taking Holmes, or some other man, off the Doctor.

Q. In what corner of the room, as you face the fire? A. In the left-hand corner.

Q. It was some twenty feet from the dining-room door? A. I think it was.

Q. If you took a line from the passage door to the fire-place, where would Rothwell's position be? A. A little to the left of that range line.

CROSS-EXAMINED.

Q. What part did Rothwell take in the fight between Meeks and Murdaugh? A. I did not see him take any part.

Q. Had not Rothwell a stick in his hand? A. To the best of my recollection I think he had.

Q. Where did you see Meeks first that evening, and was he then excited? A. Mr. Meeks seemed considerably excited when I first saw him that evening in the passage, and he asked me to go and drink with him in company with another man.

Q. When you remarked these large gentlemen would handle the Mississippians roughly if they fell into their hands, and Johnson said "they would skin them as quick as he could skin a sheep," what caused you to ask Johnson what was the matter? A. The appearance of these men made me ask Johnson the question.

Q. How many blows, and in what manner did Judge Wilkinson strike at Rothwell? A. Judge Wilkinson struck two blows, as I think, holding the knife in this way [showing it in his right hand, pointing forward.]

Q. Had Murdaugh a knife in his hand when he was struck by Meeks? A. He had a knife, but they were so close together it was impossible for me to tell what was done.

[Witness allowed to withdraw.]

MR. REDMOND RE-CALLED.

§ 64. MR. HARDIN: Mr. Redmond, state what you saw at the Galt House that evening.

Cross-examination of Mr. Redmond.

MR. REDMOND: I was at the Galt House that evening, on my way to my supper. I live on Market, between Brook and Floyd streets, and passing the Galt House, on my way home, I heard pretty lould talk inside, which induced me to enter. When I went in Mr. Redding was abusing Judge Wilkinson, who remarked he did not want to have anything to do with a man of his profession, and if he laid hands on him, he'd kill him. He then walked up and down the room with his right hand in his left hand coat pocket. Mr. Everett called him to the counter, and, catching his arm, told him he had better go to his room. He went out, and in ten or fifteen minutes he returned, accompanied by Mr. Murdaugh, the only one I noticed coming in with him. When Mr. Murdaugh came in, I was behind Mr. Redding. Mr. Redding said, "You are one of the gentlemen who drew a knife on me." Murdaugh said, "You are a damned liar." Meeks said, "You are; I saw you myself." Murdaugh replied, "You are a liar," and made a pass at him with his knife at the same instant that Meeks struck him with his whip. Some one caught Murdaugh's right hand, and he changed the knife into his left hand, and the second thrust he cut Meeks in the belly. Meeks staggered about, a little backward, and finally fell toward the counter. I was then making my way out of the room pretty quick, I tell you; and, and as I was going by the crowd in the left-hand corner, I saw Holmes scuffling with the Doctor. The Doctor had a knife in his hand at the time. Rothwell was leaning over Holmes, begging him to get off. Holmes said, "Let me hit him one more blow." Judge Wilkinson was at the door, and made a thrust at Rothwell, and stabbed him over the hip, when Rothwell straightend up and exclaimed, "Oh! I am cut," and the Judge retreated out of the door.

§ 65. Q. Were you asked at the examining court anything concerning what you had seen at the Galt House? A. No; I was not asked about it.

Q. After the Judge left the bar-room, you left also? A. Yes; I had no object in view to remain.

CROSS EXAMINED.

Q. Did you not tell a journeyman tailor who works for Mr. Davie, what was to happen at the Galt House? A. *No, SIR!* I told him what had happened at Reddings's shop.

Q. You say you saw a knife in the Doctor's hand; was he using it? A. When the Doctor lay on the floor his hand was flat on the boards with his knife in it. I think he was pretty well used up; and from the way Holmes had him fixed, I expect he had no chance of using his knife.

Q. During the ten or fifteen minutes between the acts in the bar-

room was there any talk among those present about what had passed? A. There was talk of what had happened, and of Redding having offered to whip the whole three if they would lay aside their weapons.

Q. Were you at the Galt House when Redding went first? A. No; I did not go to the Galt House to see that.

Q. You were in Mr. Redding's employment? A. I worked for Mr. Redding at the time.

[Here the court adjourned for dinner, and re-assembled at 2 o'clock.]

MR. JAMES W. GARRISON CALLED AND EXAMINED.

§ 66. MR. HARDIN: Mr. Garrison, state what you observed of this affair.

MR. GARRISON: I was at the Galt House that evening and saw Mr. Redding there, and heard him tell a gentleman that Judge Wilkinson was one of the persons who had attacked him at his own house, and that they were cowardly fellows. After a little I heard the Judge say to Redding, "I will not fight with a man of your profession; but if you interfere with me I will kill you." He shortly after retired. I observed to Redding, that if I was in his place I would not interfere with these fellows. Another person observed, "Yes, I would get their names and put them under city authorities." Redding replied that he had got or would get their names. In about ten minutes the Judge returned and walked across the room very briskly with his right hand in his coat pocket. On the third time, Redding crossed the track to the counter, and observed that the three men were now present. Mr. Murdaugh then spoke to Mr. Redding, and he turned round and said something very short to him in reply; directly the damned lie was given to what Redding said, and the crowd closed on them. I was outside the crowd and did not see the knives. I saw blows struck, but could not tell upon whom.

CROSS-EXAMINED.

Q. State, if you can, who gave or received the blows? A. I can not tell either.

Q. When Mr. Redding said the three men were present, did he speak loud enough to be heard all over the room? A. Yes; I thought so.

Q. You stated that when Mr. Murdaugh addressed Mr. Redding, Redding turned round toward him? A. Yes.

Q. What was Mr. Redding doing after that? A. I did not see him that evening afterwards.

§ 67. Q. What did you observe of Mr. Johnson, Mr. Meeks or Mr. Holmes? A. I did not see Mr. Johnson to know him, nor was I acquainted with Meeks or Holmes.

Q. What induced you to caution Redding by saying, if you were he,

you would not interfere with these fellows? A. From what the gentlemen said to Mr. Redding, I thought, perhaps, the gentlemen had knives and that some one might be killed.

Q. Did not Mr. Redding use very hard and opprobrious language to the Judge when he first addressed him? A. I think I was in the bar-room when the fuss began. I did not consider Redding had used very hard language, except saying that they were cowards, and if they would lay aside their weapons and go into a room he'd whip the whole three of them.

MR. THOMAS A. M'GRATH CALLED AND EXAMINED.

§68. MR. HARDIN: Mr. McGrath, state what you know of this affair.

MR. MCGRATH: I happened to be in the Galt House on the evening of this fight, and had been there but a short time until I understood there had been a difficulty. I heard some person speaking of it and saw Mr. Redding there a few minutes before Judge Wilkinson came into the room. Either Mr. Redding or some of his friends had spoken to me. Judge Wilkinson came into the room, and Mr. Redding addressed the Judge in this manner: "Sir," said he, "I believe you are the gentleman who struck me with the poker in my house this evening, and you are a damned rascal; and if you will come into a room or the street and lay aside your weapons I'll whip the whole three of you!" The Judge walked up and down the room with his hand in his pocket. After Mr. Redding had abused him a good deal, the Judge came to the counter and took a glass of water. He then said to Redding he would not quarrel or fight with a man of his profession; but if he would interfere with him he would kill him. I advised Mr. Everett to take the Judge to his own room, and Mr. Everett went around to do so. At the same time the Judge left the bar-room. In five or ten minutes, the Judge, Mr. Murdaugh and Dr. Wilkinson, all three, entered the bar-room together. I was inside the counter, in the bar-room, and Mr. Redding stood at the counter, opposite me. Mr. Murdaugh came forward toward Mr. Redding, who said to him, "Sir, I believe you are one of the men who drew a knife on me at my house this evening?" Mr. Murdaugh said, "Sir, I understand you say I drew a bowie-knife on you, and you are a damned liar if you say so," opening his knife. In a moment the crowd got round them and they moved down the counter and I could not well see what was doing. Mr. Redding moved down with them. I could see in the crowd, that blows were passing, but could not discern who gave or received the blows. I saw a knife with Mr. Murdaugh, and observed him striking with it, and I thought he had killed Mr. Redding, when I saw a man fall. After that there was a general fight through the room.

§69. Q. Did you see Mr. Meeks killed? A. I saw him fall, but did not see the knife enter him.

Q. Which hand did Murdaugh hold the knife in, when you saw him strike? A. It was in his right hand I saw the knife.

Q. After Meeks fell, what was done to Murdaugh? A. I saw no more of Mr. Murdaugh that evening.

Q. State what you observed of Judge Wilkinson. A. The first I saw of Judge Wilkinson after the fight began, he was standing near the dining-room door, with his back to the door, not standing erect, but a little stooped, and holding his arm above with a bowie-knife, six or eight inches in the blade in his hand. He held his arm and the knife in his hand rather above the heads of the crowd, as if to make a passsage. He passed through the crowd to the door opposite, and when he got in that door-way he turned and faced into the room. He seemed to take his stand there, and then I saw him take a jump forward and make a thrust toward where I believe Mr. Holmes, or Mr. Rothwell, I could not tell which, was engaged in the fight with Dr. Wilkinson. He returned from the blow and jumped forward, making another thrust, and again returned; and as he lunged forward the third time, Marshall Halbert took up a chair and threatened the Judge to keep back, though I do not think he could have reached him with the chair from where he stood.

Q. Did you see the stab inflicted on Rothwell? A. I did not see the knife enter Rothwell at all.

CROSS-EXAMINED.

(*a*) Q. State how long you have known Judge Wilkinson, and what has been his general character.

A. I have known Judge Wilkinson for three years. I have heard a good many gentlemen speak of him before and since this transaction, and have always heard him spoken of in the highest terms. I have been in the South this winter, and in his neighborhood, and have heard him spoken well of there.

RE-EXAMINED.

§ 70. Q. You have made clothes for Judge Wilkinson and I suppose he has treated you civily? A. He has always acted like a gentleman to me.

Q. You were in the South this winter? A. Yes, sir; I have said so.

Q. Did you hear a letter spoken of, there, as having been written by Judge Rowan, which caused a great excitement in Judge Wilkinson's

(*a*) This question was irregular. It was not a matter of cross-examination. After the Commonwealth closed. the defendants had a right to prove their good character. But as no objection was made. it was properly allowed. "What has been his general character" is too broad. The law requires (in such a case as this), that the inqury should be confined to the defendant's general character for peace and humanity, or the reverse.

favor? A. I heard the letter much spoken of. There was a great excitement, but I can not say it was caused by that letter.

Q. (*For Defense*). I suppose a great many gentlemen spoke to you about this trial? A. Yes; a great many.

[Witness allowed to retire.]

MR. JAMES W. GRAHAM CALLED AND EXAMINED.

MR. HARDIN: Mr. Graham, state what you know about this transaction.

MR. GRAHAM: I was passing by the Galt House that evening, about dusk, and I saw Mr. Redding and Mr. Rothwell crossing the street alone; Mr. Rothwell probably ahead of Mr. Redding. I slapped Mr. Redding on the shoulder, and thought there was something singular about his countenance. He turned round and shook hands with me.

CROSS-EXAMINED.

Q. Was it not some strong appearance of excitement attracted your attention? A. It was something unusual in Mr. Redding's countenance that caused me to take notice.

Q. Were there any persons following them at the time? A. I do not think there was any person in the street within a square of them at the time.

DR. KNIGHT CALLED AND EXAMINED

MR. HARDIN: Dr. Knight, describe the injuries inflicted on Mr. Meeks and Mr. Rothwell.

DR. KNIGHT: I did not examine the wound on Mr. Meeks. I saw it, but he was dead at the time. I examined Mr. Rothwell—he had three wounds; one between the eleventh and twelfth ribs; the second through the seventh rib, separating it. Both wounds were through the spleen. There was a third wound in the chest near the collar bone, down to the right lung. I consider the wound in the chest caused his death; the wounds in the side had a favorable appearance from the protrusion of the lips of the wounds.

Q. Did not these wounds in the spleen contribute to death? A. Though not the immediate cause, they certainly contributed.

Q. By what sort of weapon did the wounds appear to be inflicted? A. Those through the spleen by a large knife; that in the chest by some small instrument.

Q. Could it have been made by any of these knives? A. It was not by a bowie-knife. It was quite a small puncture—made by a very small instrument. I think the puncture must have been about six or seven inches in length to where it penetrated. The wound was about

as broad as the blade of this knife, and to the depth of from five to seven inches.

CROSS-EXAMINED.

Q. Were the wounds made by the bowie-knife the immediate cause of death? A. No, the wound in the chest caused the death by suffocation.

Q. Without that wound would death necessarily have ensued? A. It is hard to tell what might have been the effect of the wounds in the spleen. It is not a vital organ; but wounds leading to inflammation might prove fatal; however, if inflammation could be kept down, and there were no other aggravating tendencies in the system, I do not consider that they would have caused death.

RE-EXAMINED.

§ 72. Q. Was there not air admitted and expelled by the wounds in the side, which caused the collapsing of the lung? A. Air might have been taken in and expelled in that way, but not by the lungs, for there is no connection between the cavity of the abdomen and that of the lungs, but the puncture through the seventh rib passed through the diaphragm.

Q. (*For Defense*). Could the puncture in the chest be made by that bowie-knife? A. Certainly not.

Q. The circumstance of the lips of the wound protruding, you consider a favorable symptom? A. Much more favorable than if they had contracted, because the protrusion of the lips admitted of the flowing of any blood or suppuration; a contraction would confine these, and thus lead to inflammation, which might prove fatal in its progress.

DR. M'DOWELL CALLED AND EXAMINED.

MR. HARDIN: Doctor, state whether it is your opinion that the wounds you examined on the body of Rothwell, through the spleen, contributed to his death?

DR. M'DOWELL: I am of opinion that all the wounds contributed to death; but the immediate cause was from the puncture on the right side.

Q. Did not the other two wounds, in conjunction with that, contribute to death, and, in fact, accelerate it? A. Certainly; that is my opinion.

CROSS-EXAMINED.

Q. Would not the puncture have caused death of itself? A. No; the lobes of one side afford sufficient respiration to sustain life.

Q. What collapsed the lobes on the left side? A. Atmospheric pressure.

Q. How could atmospheric pressure affect them from wounds pene-

trating the abdomen, as both the bowie-knife wounds entered the spleen? A. Both wounds entered the cavity of the chest, and passed through the diaphragm into the spleen in the abdomen.

Q. What was the injury on the lung? A. It was not wounded.

Q. Did both wounds penetrate the cavity of the abdomen? A. Yes; both.

§73. Q. What sort of instrument do you think the puncture on the right side was made with? A. I conceive it must have been a very slender instrument; I should think not more than half an inch in width.

Q. What direction did it take? A. From the top of the sternum to the juncture of the second rib with its cartilage.

Q. Was the lung penetrated? A. We could not find any trace that it was.

Q. What appearance had the puncture on the skin where the instrument entered? A. The puncture of the skin was very small, as with a dull blade. The perforation was from a third to half an inch in breadth.

Q. Would death have ensued from the wounds in the left side? A. By process of inflammation, it might; by process of suppuration the patient might recover.

CROSS-EXAMINED.

Q. What did you observe of Judge Wilkinson's wounds on visiting him in the jail? A. On attending Judge Wilkinson in jail with my partner, Dr. Powell, his attending physician, I merely saw the wound.

Q. What depth was the wound in his back? A. I declined probing it, but from the length of the discoloration, supposed it to be three or four inches, extending from near the shoulder blade towards the spine. It must have been the puncture of a very slender blade.

Q. How would it compare with the puncture in Rothwell's chest? A. It was a little larger.

Q. Did you examine the wounds on Mr. Murdaugh's head? A. His head had been dressed, and the adhesive plasters were not removed.

Q. What state was Dr. Wilkinson in? A. His face and head were greatly bruised. His face very much discolored, and his eyes swollen till nearly closed.

Q. Had not the Judge some contusions about the face? A. I did not remark them particularly.

[Witness allowed to retire. It was here announced by the Prosecuting Attorney that the evidence for the Commonwealth was through. Twelve witnesses for the defense were then called up and sworn.]

MR. JACKSON CALLED AND EXAMINED.

§74. Col. Robertson: Mr. Jackson, state what you know of this business.

Cross-examination of Mr. Jackson.

MR. JACKSON: I can not say that I know anything of either fight. I was passing Mr. Redding's in the evening. From a few doors below Mr. Redding's I heard some loud talking. I had some clothes in my hands. I went in and saw Mr. Johnson, Mr. Redding and Mr. Meeks. I heard Mr. Johnson talking of what ought to be done with these men. He said to Redding and the others that they ought to go to the Galt House and flog them. He asked Mr. Redding to do so. Mr. Redding did not seem to say anything. Johnson said, "Jack, just say the word and I'll go for my friend, Bill Holmes, and we'll give them hell!" and said he had as much manhood as ever was wrapped up in so much hide. Meeks said, "Let us go any how, and we'll have a spree." After this, Mr. Redding said, "No; I'll see them another time and get satisfaction.'

Sometime after, I met Mr. Johnson in the street, and tried to pass him, but he stopped me, and I asked what he wanted. He said, "I am going after Holmes and think you ought to come to the Galt House;" and that Jack Redding was a fine man and good citizen, and that we ought to see him righted. I refused to interfere, saying I was not a man of that character, and I would do my own fighting, and let others do the same.

§ 75. Q. Meeks was the same man who was afterwards killed? A. Yes. I saw him fifteen minutes after he died; he was on a cot in the Galt House.

Q. Did not Johnson make use of some strong expression when you observed you were not a man of that character? A. He observed, "church, hell or heaven ought to be laid aside to right a friend." I told him he had better not have anything to do with these men.

Q. Was Meeks with Johnson at the time? A. No.

CROSS-EXAMINED.

Q. Did Johnson tell you a fight was intended? A. I judged it from the way he talked. I told him it was not my character to seek places of quarrel.

Q. What brought you into the shop? A. I went because I heard loud talking. I heard Johnson talking loud; the high words brought me into the shop.

Q. Why, on that occasion, were you induced to go in, if your character was not of a fighting nature? A. I had no reason but because I heard the loud talk—louder than common.

Q. Who was in the store when you went in? A. I saw Mr. Craig, Mr. Paris, Mr. Johnson and Mr. Redding. I do not remember whether it was Mr. Craig or Mr. Redmond—Meeks was there, too.

Q. And Johnson said, "Jack, just say the word, and I'll go round and get my friend Holmes?" A. "To give them hell."

Q. What did Redding say to that? A. He discouraged the idea.

Q. Were you examined before the examining court? A. Yes.

Q. Did you then tell of Johnson inviting you to the Galt House? A. I think I did.

§ 76. Q. How long did you stay in the shop? A. About five minutes.

Q. Did you particularly remark Meeks? A. Yes; he appeared to be excited, and directed his conversation to Mr. Redding.

Q. What part of the store was he in? A. I don't think he was in the house. He had one foot on the step of the door.

Q. Which was it, Mr. Craig or Mr. Redmond was present? A. I think it was Mr. Craig.

Q. Where did you next meet Mr. Johnson? A. In about fifteen minutes after, I met him going towards the market.

Q. In what direction? A. From Mr. Redding's corner towards Market street, in an opposite direction from the Galt House.

Q. Were there not boys in the shop? A. I do not recollect seeing any.

Q. Did Mr. Redding agree to Mr. Johnson's proposition? A. No.

Q. When in the shop Johnson, said he would go see Bill Holmes and his friend, and go up and give them hell, what did Mr. Redding say to that? A. Mr. Redding said no.

Q. When you next met Johnson, in what direction with respect to the Galt House was he going? A. In a direction from the Galt House.

[Witness allowed to retire.]

MR. E. R. DEERING CALLED AND EXAMINED.

§ 77. COL. ROBERTSON: Mr. Deering, what did you see of this affair?

MR. DEERING: I was passing down Market street about sun-down, and near the Market House I saw Mr. Johnson, Holmes, and others, talking about Mississippi gentlemen who had treated Mr. Redding very badly. I went on, and returning again, between Fourth and Fifth streets, I met Mr. Johnson, who asked me about Mr. Turner. I asked him what was the matter. He said he wanted officers to assist them, and I said he'd be late to get officers, for they would be gone. He said there was enough gone there, and if they came down their hides would not hold shucks. Curiosity afterwards brought me to the Galt House to see what was going on; the first I saw was Oldham. Mr. Redding was in the bar-room with a piece of paper in his hand. I went away towards home, and some time after returned, and found a good many persons in the bar-room. I saw a gentleman with a drab coat coming in, and heard Mr. Redding say he was the gentleman that drew his knife. He said, "If you say so, you are a damned liar," and Meeks came up and said, "You are a damned little rascal," and struck at Murdaugh with the whip two or three times. I then left.

Q. When Johnson that evening asked you to go to the Galt House,

did you understand by him that he was to take part in what was to be done there? A. He did not so express himself.

Q. When you saw the talking at the end of the market, did Johnson seem much excited? A. I think he did.

Q. Were those he talked to excited? A. Not that I could see.

Q. What did Johnson say? A. He said the Mississippians ought to be taken out and get a genteel flogging.

Q. Did you see Mr. Redding and Mr. Rothwell at the Galt House? A. Yes; and I asked Rothwell what was the matter. He said he was not so very well pleased.

§ 78. Q. Is Mr. Holmes a very large and stout man? A. He is a very large and stout man; but I knew him for five years when I was captain of the watch, and considered him a very peaceable man, though reputed one of the stoutest men in Louisville.

Q. Are not Mr. Halbert and Mr. Oldham very stout men? A. Yes; Mr. Oldham is considered a very stout man.

CROSS-EXAMINED.

Q. What time in the evening was it when you saw Mr. Holmes and Mr. Johnson talking? A. It was near sun-down.

Q. How long were they talking? A. I don't know; I left them talking there.

Q. When you next saw Johnson where was it? A. I think he was coming from the mayor's office.

Q. Where and how long did you see Oldham at the Galt House? A. I saw him going in, but did not see him again that evening.

Q. What time was it? A. It was dark—about half an hour before the fight.

Q. Did you, after that, see him in the bar-room? A. I did not.

[Witness allowed to retire.]

MR. ALFRED HARRIS CALLED AND EXAMINED.

COL. ROBERTSON: Mr. Harris, state what you know of this business.

MR. HARRIS: I met Mr. Johnson near my own house that evening. He was accompanied by Mr. Shone. He told me about three Mississippi gentlemen who had insulted Mr. Redding, whose friends should go to the Galt House. He asked me to go. I said I would not. He said, "Are you a friend of Mr. Redding's?" I said yes; there was no man I felt more friendly to, but if he had been assaulted, as Mr. Johnson stated, the law was at his side, and that the thing was so far past now that it was not worth while to go. He said, "Then you won't go?" and I said I would not. I heard no more of it till next morning.

[Witness allowed to retire.]

MR. BENJAMIN OLIVER CALLED AND EXAMINED.

§ 79. COL. ROBERTSON:—Mr. Oliver, state what you know of this affair.

MR. OLIVER: I was on Jefferson street, and on my way home; at Zanone's corner some one asked me if I had heard anything of the fracas at the Galt House. I said no. I then met Meeks. He and myself and Taylor and Mr. Johnson went from the Galt House to the opposite coffee-house. When I heard Meeks proposing to go to the Galt House I thought to stop him and talked to him about it. He had his knife out, and I said to him, "Mr. Meeks, give me your knife to cut my nails." He gave it to me. He said he must go to the Galt House for he was bound to have a fight that night, and by G—d he'd have it. He went, and in some time came back and asked for his knife, and I gave it to him and he went over. Some time after he came over again and wanting to get the knife; afraid he'd get into some scrape, I said it was strange he would not lend me his knife to pair my nails after so long an acquaintance. He said, "My dear sir, I thought you had done;" and he gave me the knife. He then started for the Galt House, saying he was bound for the Galt House that night and would go. He went, and sometime after I followed. When I followed him and entered the Galt House, shortly after, I heard the word that Meeks was a dead man. I went into the bar-room and saw that he was dead. I put my hand on him and found life was extinct. I then retired to the reading room and saw Mr. Holmes was wounded, and a Doctor tying up his arm. I then saw some fuss towards the stairs and a chair moving in the air. After a while Mr. Throckmorton asked if any one knew him well; he asked me to help and put him on a cot. I did so. Meeks was a small man. He had been keeping bar for Mr. Dewees on Wall street.

[Witness allowed to retire.]

MR. WILLIAM MILLER CALLED AND EXAMINED.

§80. COL. ROBERTSON: Mr. Miller, state what you know of this affair.

MR. MILLER: I was on the third cross street in the evening about five o'clock, and, between a tin shop and the corner heard that an affray had taken place on the corner, and being on the city grand jury I thought I would inquire about the matter. I went into the shop and asked for the names of those who had seen the fray, and got those of Craig and Redmond. Mr. Halbert came in and said a good deal of what he'd do. I went home and remained for some time and then went to the Galt House to my supper. As I entered the bar-room I observed Mr. Redding say to Judge Wilkinson that if they'd come out into the street without their weapons he would fight the whole three; and the Judge said he did not want to have anything to do with him. Mr. Redding repeated his observation, and the Judge made the same reply at least twice. I sat in the corner and was chatting, when Marshall Halbert passed near me, and I advised him to take his friend

Redding away, and I said I was on the grand jury and had names down which would enable me to take care of the matter. Some one made some speech about steaks and passed on; the speech was, as if I ought to leave the room, or I'd see beef steaks served up. I shortly after heard it proclaimed at the counter, "There they are—all three of them," and the crowd gathered to the counter. I left the room and went out to one of the clothing stores. While there, I heard a pistol fired and some time after returned and the affair was over and Meeks was killed.

§ 81. Q. Do you know Johnson, and that it was he talked about the steaks? A. I have seen him, but can not say he was the person talked about the steaks.

Q. Do you believe he was the man? A. I do, but could not affirm it positively.

Q. What was the date of this transaction? A. I think the 15th—it might be from a week to ten days before Christmas.

Q. Do not the boarders collect in the bar-room a short time before supper? A. Yes; generally from ten to fifteen or twenty minutes.

Q. Was the navigation of the river open at that time? A. I can not now say.

Q. Was Mr. Marshall Halbert a boarder in the house at that time? A. He was.

[Witness allowed to retire].

MR. GEORGE WAGGRY CALLED AND EXAMINED.

COL. ROBERTSON: Mr. Waggry, state what you know of this transaction.

MR. WAGGRY: I was sitting in the bar-room of the Galt House, and talking to Mr. Miller when some one turned round and said "There is one of the men." Some one said to Mr. Miller, "We'll have some steak after a while for supper." Another person came along and said, "We'll have a hell of a fight here just now." Mr. Miller advised Mr. Halbert to take away Mr. Redding.

Q. Do you know the person who spoke about the steak?. A. No; I would not know the person.

Q. Well, go on. A. Shortly after, I saw the three men enter, and when the damned lie was given I saw Meeks strike at the smallest, and saw dirks and knives and canes in the fight. Some time after I saw Rothwell come round and blood flowing from his wounds.

Q. How many did you see beating Murdaugh near the dining-room door? A. I saw two men beating the small man who, I suppose, was Murdaugh.

Q. Who had the bowie-knife? A. One of the three that came in abreast.

Q. Did you know any of the parties? A. They were strangers to me on both sides.

Q. Did you see any of the business in the passage? A. I saw one, said to be Mr. Wilkinson, going up the stairs and a chair thrown at him. I also saw a pistol fired.

Q. Where did you then observe Mr. Holmes? A. In the reading-room with his arm wounded.

[Witness allowed to retire.]

GENERAL CHAMBERS CALLED AND EXAMINED.

§ 82. COL. ROBERTSON: General Chambers, state what you saw at the Galt House.

GEN. CHAMBERS: On going into the bar-room of the Galt House, I observed persons that I was not in the habit of seeing there, which created in my mind some suspicions. I was at the fire-place, and made some inquiry of the cause. Shortly after I observed Mr. Redding make use of very opprobrious language to Judge Wilkinson, and the Judge said, "If you lay your hands on me I'll kill you." Mr. Redding made some remarks as if he did not understand him, when the Judge faced around and repeated what he had said. He then left the room. In ten or fifteen minutes he came back, and on his return he began to walk backward and forward. When he came in, he was followed by two persons. He had not walked more than twice when the crowd got round those two who had followed him in. I then heard some angry words, and the affray commenced. One of the persons broke off and got towards the supper-room door, followed by Mr. Rothwell, beating him with a stick very severely. Mr. Rothwell partly lost hold of his stick and endeavored to catch a fresh grip, and on resuming his hold struck at the person again, when the Judge stepped up and made a thrust of his bowie-knife at him. Rothwell turned his face to see who had struck him. Just then I saw another man fall, and observed, "There was one gone." I turned my attention to another corner and saw one of the gentlemen down, and a large man beating him very severely. My attention was next directed to the other corner, where the first stab was made, and I saw Meeks lying dead.

Q. Are you sure whom it was you saw Rothwell beating in the other corner? A. I think it was the Doctor, and that Rothwell was beating him.

§ 83. Q. Can you repeat any of the language used by Mr. Redding to Judge Wilkinson when he was abusing him? A. I think part of the language was, "You are a damned rascal and a coward and a pretty Mississippi judge."

CROSS-EXAMINED.

Q. In what part of the room was it that you saw the Judge make the first thrust of his bowie-knife at Rothwell? A. It was near the dining-room door; in the opposite corner from where Holmes had the man down.

Q. How far might it be from the passage door into the bar-room? A. It would be about twenty-four feet.

Q. Describe the relative places, and distance between them? A. It was near the left-hand corner, as you face the fire-place, that Holmes had the man down; Rothwell was stabbed in the opposite corner—probably the two positions were twenty feet apart. Rothwell at the time was striking a man that I thought was Dr. Wilkinson.

Q. Are you not now sure that it was Mr. Murdaugh? A. I am not now satisfied that it was. However, they were all strangers to me except Judge Wilkinson, whom I had known a little.

RE-EXAMINED.

Q. Did you observe how the Doctor had got to the left-hand corner? A. While he was beaten he seemed to make a circuit in that direction till he fell.

Q. Was your attention confined to that part of the affray? A. When they beat round to the corner where I was, an opening was made, and my attention was immediately attracted to where Meeks had fallen.

[Witness allowed to retire.]

MR. F. DONOGHUE CALLED AND EXAMINED.

§ 84. COL. ROBERTSON: Mr. Donoghue, state what you know of this business.

MR. DONOGHUE: I was in the Galt House on the evening of the affray, a few minutes before the first supper bell rang, and saw Mr. Rothwell and other gentlemen at the fire in the bar-room. One of them walked to the bar. I started from the fire-place to go to my supper, and as I went I heard Mr. Rothwell ask some one—I think it was Mr. Redding—if they were there. He was answered, "No." He then said, "Come, let us go up stairs and bring them down and give them hell!"

CROSS-EXAMINED.

Q. Did you board at the Galt House? A. No; I boarded at Mr. Green's, three squares from that, on Market street.

Q. Did you see the fight? A. I did not come back till all was over.

Q. Where was Rothwell when you returned? A. He was still lying in the bar-room.

Q. Did you frequent the Galt House much? A. I was there frequently that week—I had some acquaintances there.

Q. What other person besides Rothwell did you see in the bar-room at first? A. I did not know any others of the men—but think it is likely I saw Mr. Johnson there.

[Witness allowed to retire].

MR. WM. SUTHERLAND CALLED AND EXAMINED.

§ 85. COL. ROBERTSON: State to the Court, Mr. Sutherland, what you saw of this transaction.

MR. SUTHERLAND: The first thing that drew my attention was Mr. Redding abusing Judge Wilkinson. The Judge was walking across the floor and Mr. Redding abusing him for some little time, and the Judge left the room. The fuss was hushed up for a little while, and Mr. Miller observed to Mr. Redding that that was not the way to do business, and that he ought to get their names and bring them before the grand jury. Mr. Redding said he had got the names. I had my face toward where Mr. Miller was sitting. Mr. Miller had his face turned toward the dining-room door. I heard a fuss in the direction of the door, and on turning, saw a crowd. Some one said there would be shooting, and I got out of the room and tried to see through the window what was doing, but could not see very distinctly. I remained at the window until Mr. Murdaugh came and got on the stair-steps, when some one struck at him, and he sort of fell forward, but recovered and got up the steps, when some one fired a pistol up the stairs, and I very quick got over the banister.

[Witness allowed to retire].

MR. JOSEPH BROWN CALLED AND EXAMINED.

§ 86. COL. ROBERTSON: Mr. Brown, state what you know concerning this affair, and whether you were examined at the examining court.

MR. BROWN: I was not examined at the examining court. The evening of this affair, I had been engaged at Louisville, for some ten or twelve days, and had, about supper time, come to the Galt House to supper. When I entered, I saw General Chambers sitting at the fire. Mr. Miller was there also. The first thing that attracted my attention was Mr. Redding abusing Judge Wilkinson. Judge Wilkinson was walking back and forward with his right hand in his coat pocket, when he said, "If you touch me I'll certainly kill you." He then left the room, and what had taken place became the general subject of conversation. Some time intervened, when the Judge returned to the room with Dr. Wilkinson and Mr. Murdaugh, whom I did not then know. I then remarked to General Chambers that there would be some difficulty. Before this, Mr. Miller had said to Mr. Redding, "Hush that stuff—it is not the proper way—get the names and we'll have them before the grand jury"—when a man stooped down to Mr. Miller and said, "Hush, you, Billy Miller, if it comes to handicuffs, the boys will settle it." I then determined to leave the room, and as the gentlemen entered, I passed out and saw the crowd gather round them. When I got near the stairs I met Mr. Everett going out. From the third or fourth step I could see into the bar-room through the window. The crowd was moving about, as if in a scuffle, in a kind of circle round the room by the dining-room door. The first licks I had seen struck were

by a large man with a stick. He laid on Mr. Murdaugh. The next I saw in the fight was this gentleman they call Dr. Wilkinson, falling at the left hand side of the fire place. The room began to get clear, the rush being made into the passage. I retreated to my room and out on the porch, and as I made a turn I saw Mr. Murdaugh was struck with a chair as he ascended the stairs, and Judge Wilkinson also had a chair thrown at him as some one hallooed, "Shoot the damned rascal," and immediately a pistol was fired.

§ 87. Q. Where were you before the fight began? A. In the bar-room.

Q. When you were on the stairs, what portion of the fight could you see? A. I could see through the glass window all of the fight opposite the window.

Q. How far was it from where you stood to where the fight was going on? A. It might be about thirty feet.

Q. Did you see Dr. Wilkinson when he was knocked down near the fire-place? A. Yes, and I thought when he fell that his head struck the grate or fender.

CROSS-EXAMINED.

Q. How long were you at the Galt House, then? A. About ten days.

Q. During that time were strangers coming and going? A. Yes; continually.

Q. It was no uncommon thing to see strange faces in the bar-room? A. I always saw many strange faces there.

Q. Did you see Judge Wilkinson inflict the wound on Rothwell with the bowie-knife? A. I did not see a bowie-knife with Judge Wilkinson, nor did I see the wound inflicted. All I saw distinctly was a big man striking with a stick.

RE-EXAMINED.

Q. During the time you were at the Galt House was there much communication by the river? A. No; I think not.

Q. Did you notice as many strange faces before that evening of the affray in the bar-room as you used on former times? A. I did not think there were so many.

RE-CROSS-EXAMINED.

Q. Have you not remarked that business men congregate in the bar-room about the time the stages arrive to learn the news by them, and see the names entered on the register? A. Yes; it is customary.

[Witness allowed to retire.]

MR. MARTIN RAILY CALLED AND EXAMINED.

§ 88. COL. ROBERTSON: State, Mr. Raily, what you know of this affair.

MR. RAILY: I came to the Galt House between sun-down and dark. When I got in there were but few there. Afterwards, numbers crowded in. I was at the fire-place, and a gentleman stood at the fire, I think it was Mr. Reaugh, who said if there was any fighting to be done he should be in it. Mr. Miller said to Mr. Redding, that it was not the way to settle the matter; that he ought to get a writ and have them taken. Redding said he had applied for the names. Shortly after I heard Judge Wilkinson tell Mr. Redding that if he meddled with him he would kill him. Then Judge Wilkinson passed out of the room into the passage, and Mr. Redding shortly after left the room also. After Judge Wilkinson returned he had got nearly across the room toward the dining-room door, when Mr. Redding entered the room, and as the Judge whirled and returned, Redding crossed his path toward the counter. Mr. Murdaugh and Dr. Wilkinson then came in. Mr. Redding said, "These are the three gentlemen who assaulted me in my own house." When he said this, one of the three said to him, "I understand you said I am the person who doubled teams on you this evening; if you say so, you are a damned liar." Another came up and said he was, and struck at him. A big man also struck at him with a sword cane, and as he was striking, the scabbard part flew off and he continued beating with the spear part. The crowd was getting up to the fire-place, and Mr. Rothwell came into the corner and was either assisting to beat, or to save, the Doctor, when I saw a person from the folding-door stab Rothwell. Another person took up a chair and attempted to beat at the person that stabbed, but finally laid it down and pursued him. Shortly afterwards I heard a pistol fired.

§ 89. Q. Did you see Oldham with any weapon? A. I saw him with a bowie-knife, wiping the blood off it with his handkerchief.

Q. What time that evening did you arrive at the Galt House? A. Between sun-down and dark. I got shaved at the barber's shop and then went to the Galt House.

Q. Are you sure what kind of stick the big man used when beating Murdaugh? A. It was a sword-cane. I saw the cane part fall on the floor, and the spear part remain in his hand.

Q. Was Oldham in the room then? A. No; I saw Oldham, but not in the room when the fighting was going on.

Q. You are certain you saw him wipe the blood from his bowie-knife? A. I think it was, for certain, the man they called Oldham.

Q. Who thrust the bowie-knife into Rothwell? A. I did not know the person. If it had been even an intimate acquaintance I should not have known him.

[Witness allowed to retire.]

MR. JOHN C. DAVIE CALLED AND EXAMINED.

COL. ROBERTSON: Mr. Davie, state what you know of the affair at the Galt House.

MR. DAVIE: I know nothing of the affair at the Galt House.

[Witness allowed to retire.]

MR. P. S. BARBER CALLED AND EXAMINED.

§ 90. COL. ROBERTSON: Well, Mr. Barber, will you state what you know about this hat?—[handing a hat to Mr. Barber.]

Mr. BARBER: This is a hat I sold to Mr. Murdaugh. It was the day before this affray took place. It was then a sound hat. At present I see defects in it. It must have been cut by some sharp instrument—here in the side of the leaf, and also in the side.

[Witness allowed to retire.]

JOHN C DAVIE RE-CALLED.

Q. How did you come into possession of the hat? A. Judge Wilkinson, Mr. Murdaugh and the Doctor sent for me to the jail and requested of me to go to the Galt House and ask for the key of the room 35, and I did so. A servant brought me to the room, and I got a black satin vest with blood on it, and the hat and drab coat, with other clothes, which, according to directions I had got, I packed up and took to my store. I observed the hat had some cuts on it. It was in my possession until brought into the examining court, since which, with the other things, it has been in possession of the clerk of the city court.

[Witness allowed to retire.]

MR. EVERETT RE-CALLED.

Q. What room did these gentlemen occupy? A. Room 35.

Q. Had any person access to that room from the time these gentlemen were arrested till Mr. Davie went there by their directions? A. No; not any person. It was locked up from eight or nine o'clock that evening till Mr. Davie entered it. The servant had charge of the room.

MR. JAMES E. PEARSON CALLED AND EXAMINED.

§ 91. COL. ROBERTSON: Mr. Pearson, detail what you know of this business.

MR. PEARSON: On the evening this affray took place, I was going up street before sun-down, and at the corner opposite Mr. Redding's store three gentlemen were on the pavement and left for the Galt House. I went to the Galt House before supper time and got behind the bar and stood at the fire. Captain Rogers remarked to me that there would be a fight, from the crowd he saw. He asked where Major Throckmorton was. I turned out and thought I saw the Major talking to Captain Rogers, when I came back into the bar. Captain Rogers asked me, did I know who the persons in the bar-room were? I said I knew

Redding. But presently I saw General Chambers and I thought I would go round to talk with him. I went to where General Chambers stood, and we fell into conversation. Mr. Rothwell was there with a stick in his hand, and Mr. Reaugh, Mr. Halbert and Mr. Holmes were also there. Judge Wilkinson, by this time, was walking up and down the room, and Redding abusing him very much, saying he was a pretty sort of Mississippi judge; that he was a rascal, swindler and assassin. The Judge said, "My friend, you may say what you please, but I do not fight men of your profession." Shortly after the Judge left the room and staid away a little time. When he returned there must have been fifty men in the room, which induced me to go to the Judge and ask him to leave the room. He made a step or two with me to retire, when about twenty men were crowding in, and we heard some angry words, and the affray began. The Judge turning and seeing this, said, "Sir, I can not leave the room and my friends, till I see how this affair with these men ends." He did not get from me immediately. I saw persons strike the man with the drab coat, but think it was Mr. Rothwell struck with the stick. I observed some person catch a chair, and first thought he was taking up the chair to fight with, but soon perceived he was only leaning on it for support. My attention was attracted to another corner, and I saw a person knocked down very suddenly. I turned next to where the other man had been struck, and saw Meeks attempting to stagger toward the counter; when about half way, he fell forward.

§ 92. Q. Was he the man that had the cow-hide? A. Yes; it was the person that was killed that had the cow-hide.

Q. Which was the person he was engaged with? A. Murdaugh; he was trying to press on Meeks, who was striking him off with the cow-hide.

Q. What part of the room did the person lie in whom you saw knocked down? A. If you draw a line from the passage-door to the fire-place, the part where he lay would be on that line.

Q. Did you see Judge Wilkinson make a stab from the door-way towards Rothwell? A. Yes; but I think the stab was past Rothwell at Holmes, who was engaged with the Judge's brother. Holmes had his arm badly cut. I heard him say he was badly wounded in the arm.

Q. Did you board at the Galt House? A. Yes, about that period.

Q. Which is it, before or after supper, the crowd generally goes to the bar-room to hear news and look at the register? A. Generally after supper.

Q. How long before supper do the boarders assemble in the bar-room? A. Generally twenty minutes before supper time; sometimes less; I have often been late, and obliged to go to the second table.

Q. When Holmes said he was badly wounded, where was he, and

was he armed? A. He was going out of the room into the passage, and, as I thought, took out a bowie-knife.

§ 93. Q. Did you notice many strangers, in particular, that evening in the bar-room? A. I heard there were strangers there, but did not notice many.

Q. Was the river in a good state of navigation? A. I think the river was very low then, and navigation not open.

Q. Were you acquainted with Mr. Holmes's person? A. I had never seen Mr. Holmes before.

[Witness allowed to retire.]

MR. MONTGOMERY CALLED AND EXAMINED.

COL. ROBERTSON: State, Mr. Montgomery, what you know.

MR. MONTGOMERY: I was in the bar-room, sitting near the fire, when the fuss began near the bar and counter. I heard the gentleman say, "There are the three now." I then heard one of the men say, to keep their hands off him, and not to touch him, or he'd kill them. I saw a gentleman draw a stick or sword cane, I could not tell which, and I retreated out, and was pretty near the stairs when the pistol was fired. I heard either Dr. Wilkinson or Mr. Murdaugh desire the crowd to keep off, and say, if they touched them it would be at the risk of their lives. I understood the reason of their giving that warning was on account of what had happened at Redding's store.

Q. Did you hear what passed between Judge Wilkinson and Mr. Redding? A. I heard some words pass, but could not tell what they were.

CROSS-EXAMINED.

Q. Where do you live? A. I live at Greensburg.

Q. How did you happen to be in Louisville? A. I was there upon business.

Q. Are you well acquainted in Louisville? A. I am a stranger there, but know some of the citizens.

Q. When you heard the first words spoken, did you see the speakers? A. After the words had passed, I could see them. I heard one say "Don't you interrupt us, or it is at the risk of your lives."

[Here the evening being far advanced, the propriety of closing for the day was suggested, and the court adjourned to half past 8 o'clock next morning.]

THIRD DAY.

WEDNESDAY, March 15, 1839.

§ 94. The court sat at half past 8 o'clock, and the clerk having read over the minutes of the previous day's proceedings and called over the names of the jurors during a short delay waiting for the appearance of the gentlemen on trial, Mr. Hardin rose to ask the Court for instructions to the court-keeper not to keep such strong fires in the stoves [one at each end of the Attorney's bar, Mr. H's seat being between the two stoves]. The Court facetiously remarked that as the gentleman did not like *to be placed between two fires*, there could be no objection to acceding to his wishes. This was a happy hit, as Mr. S. S. Prentiss sat rather to Mr. H's left hand, and Judge Rowan to his right; and it was understood both were preparing a battery of eloquence to fire off at him in the arguments to evidence. Mr. Davis, one of the town attorneys for the defense, hoped the Court would allow the stove to remain lit next the end of the bar appropriated for the gentlemen on the defense. The Court observed that the gentleman [Mr. Hardin] would not, of course, impose a greater degree of *coldness* on the opposite gentleman than they could bear; if they *felt chilly* they too ought to be indulged.

By this time the three gentlemen on trial and their counsel came into court, and the examination of witnesses was taken up.

MR. PEARSON WAS THEN RE-CALLED AND EXAMINED.

COL. ROBERTSON: State the fact you informed me of last evening.

MR. PEARSON. A. On coming back into the bar-room, the first person I met at the bar-room door was Mr. Marshall Halbert. I requested he would have the business stopped. Mr. Halbert said, "No, let it go on." The next person I met was Mr. Reaugh, to whom I said the same. He concurred with me, and thought it ought to be stopped. Mr. Halbert's feelings appeared to be entirely on the other side.

[Witness allowed to retire.]

MR. HENRY BANKS CALLED AND EXAMINED.

§ 95. MR. BANKS: I was walking from Market to Main street, when I discovered a little difficulty at Redding's shop. I made some inquiry about the fuss, and was told by a young man named Hill about the three Mississippians. I then turned to Mr. Redding and asked if he was hurt. He said not. I asked him who they were. He said that they were three Mississippians, and that he'd have satisfaction. He said he'd whip all three in a room. I went on to the stage office and was sitting there. In about an hour and a quarter a young man came

in and said there would be the damn'dest work at the Galt House in a short time that I ever did see. [Objected to.] In about fifteen or twenty minutes the affray in the Galt House began. All I saw in the Galt House was Murdaugh knocked down on the steps, and afterward fired at. There were two balls discharged by the shot at him; one struck in the casing, and the other in the wall at the left-hand side.

Q. Who fired the pistol? A. Oldham. The young man said something about a pistol going up the steps. Oldham said, "There it is, damn you—you have it," and fired at the same time.

Q. Who knocked Murdaugh down on the stairs? A. I do not know.

CROSS-EXAMINED.

Q. What answer did Redding make to your first inquiries of him that evening? A. That he was not hurt.

Q. What sort of satisfaction did he say he would have? A. He did not say what kind.

Q. Then it might be by law as well as anything else? A. He did not say whether by law or otherwise.

Q. Do you keep the stage office? A. No; I do not.

Q. What passed in the bar-room of the Galt House? A. I did not see what passed there. I only came into the Galt House as the Mississippians went up the stairs.

Q. Did you go up the stairs? A. I went up when these gentlemen were arrested.

[Witness allowed to retire.]

DR. GRAHAM CALLED AND EXAMINED.

§ 96. COL. ROBERTSON: Doctor, state what you saw of this business.

DR. GRAHAM: The first I recollect of the affair was in the bar-room of the Galt House. Mr. Redding was abusing Judge Wilkinson. The Judge made no remark for some considerable time. I went away upon some business, and in about twenty minutes returned again to the Galt House. I saw the servants peeping into the bar, and guessed there was something like an exhibition going on. I went in and saw the Judge and Redding moving a little backward and forward, abusing and calling hard names, such as coward, liar, villain and scoundrel, and saying, "he should like to know in the name of God, who made him a judge, and that he must have taken the title on himself; and that he was too big a coward to do anything right." He continued so long that I got tired, and turned to speak to some one. Judge Wilkinson paced the room, pulled his cap over his face, and, as I thought, assumed the philosopher, or tried to do it. He walked to the counter and put his cap before his face, one hand in his pocket, and walked along the counter, Mr. Redding going to the extreme of exasperation all the

time. Redding at last pulled his hand out of his pocket, and said he'd whip the whole three if they'd go into the street. The Judge said he did not wish to fight or quarrel with a man of his profession. I turned round and in a short time Judge Wilkinson passed out of the room. Some one observed, "The damned rascal has run." I don't think it came from Mr. Redding. I walked into the passage to go to the bar for the purpose of inquiring the cause of the quarrel; when in the bar I heard the word "lie," and "damned lie," in succession. I saw a small man, with a drab coat, holding a knife in this position [showing position] with his back to the writing desk. I recognized him only as a small man with a drab coat. He had a small knife, held that way, and spoke in a threatening manner. He hallooed out, "Stand back and don't crowd on me, or I'll kill the first man that rushes upon me." I thonght he looked like a rattling viper that would say, "Don't step on me or I'll bite you." I heard other voices cry out, "Stand back, G—d damn you, or I'll kill you!" At that word, I saw a cane strike at his head, and most probably hit on the left shoulder. As he uttered the exclamation the blow came. He held his knife, and from the violence in which he shook it, and the manner in which he spoke, I conceived he felt danger. I did not see any one touch his hand, but I think before he lowered his hand I saw a cane, of the size and appearance of a sword-cane, strike him. A crowd and general row commenced, and chairs were raised—some rushing in and some rushing out, and such confusion ensued that I saw no more of that part of the affair. After a little I saw Dr. Wilkinson, or a man, lying on the floor, making an effort to get up, but at every effort he was beat down by the person leaning over him. I then saw the same person take him by the collar with one hand and beat him with the other. I hallooed across the counter to part them—that it was a shame.

§ 98. Q. Did you see Meeks killed? A. Towards the dining-room door I saw a man fall forward. I saw him first leaning on a chair, and then fall, leaning on his elbow. I saw an arm from behind him, make, as I thought, a stab, but it may have been some one supporting him, judging from the rattling of the chairs.

Q. Then what made you think it was a stab? A. The quickness of the stroke made me think it was a stab. I just saw the arm round the falling man. This I did not state at the examining court.

Q. Did you know Rothwell? A. I did not.

Q. Who was beating Dr. Wilkinson? A. I can not say; it was a very large man.

Q. When the Doctor fell, did it seem to be by a trip, or how? A. I never saw a man knocked down as suddenly by a blow.

Q. When the fight first occurred, what was the first serious occur-

rence you observed? A. After a while I saw a man fall on the floor, and Mr. McGrath observed, "There is one gone; can you do anything for him? I then got over the counter, and went to the person lying on the floor. I discovered a small opening in the abdomen, and taking off his waistcoat, found his bowels were protruding. I saw that the blood vessel supplying the lower system was severed. I commenced trying to put in the bowels, but found the man was dying, and I desisted, saying it was no use. Several persons asked about his name, but no one appeared to recognize him. I then passed on and saw Rothwell lying in the other corner, on his right side, and Dr. Johnson dressing his wounds.

Q. Did you observe a cow-hide with Meeks when you went to him? A. Yes; it was lying near his hand. It had a small whip end, tied in a knot. I took it up, saying it might be a letter in the alphabet; and I had it handed in to the bar to be locked up.

CROSS-EXAMINED.

§ 99. Q. Did you hear the lie given when the blows began? A. Yes, I heard the lie and the damned lie more than once.

Q. By whom were they given? A. I can not tell by whom.

Q. Who warned the opposing party to stand back? A. I think it was Mr. Murdaugh used the admonition to stand back or he'd kill them. I was at the time asking about the persons so excited. I was in the bar, and the counter and some distance were between me and them.

Q. Was it a white-handled knife Murdaugh held in his hand? A. I only saw the blade of the knife. It was a knife like that [pointing to one on the table], and judging from the glistening of the blade, which was highly polished, I thought it must be a new knife.

Q. What were the exact words used? A. I think they were, "stand back, or I'll kill you."

Q. Might it not have been from some one opposite Mr. Murdaugh? A. It was in a loud voice, and I did not then think it was Mr. Murdaugh.

Q. Are you now satisfied it was not Mr. Murdaugh? A. I am of opinion myself that it was Mr. Murdaugh.

Q. What occurred when the words "damned rascal," or, "it's a damned lie," were uttered? A. I saw a stick come at Mr. Murdaugh, as they were uttered.

Q. How far off were you? A. I was about as far off as yon stove.

§ 100. Q. Did not Mr. Halbert know and recognize Meeks as he was dying? A. Several came up to ask who knew the man as I was trying to put in the bowels, but I did not notice whether Mr. Halbert

came up or not. One or two of my friends and some strangers came up to ask.

RE-EXAMINED.

Q. State what Mr. Halbert said when the affray was all over. A. Marshall Halbert came up to the counter immediately after the affray, before the room was cleared, and asked me to drink. He seemed disposed to communicate freely, and said, "By G—d, I hoed a wide row this evening—we took it with a rush; Dr. Wilkinson, the first man that entered, I downed with a chair, and Bill Holmes mounted him and rode him round the room. The Doctor's back was to me when I downed him; it was rather bad, but, by G—d, I could not help it. Bill then pounded him so that he fell quite limber upon the floor, and I thought he was dead; but the Judge came round and Bill took a chair, when the Judge, throwing up his arm, with his bowie-knife in his hand, struck Bill, and, by G—d, I thought his arm was cut off."

Q. When the crowd closed upon the little man in the drab coat did he advance? A. No; he kept rather backing.

Q. Were they large men that were in the crowd? A. Yes—and very large men.

RE-CROSS-EXAMINED.

Q. Were you not examined in the examining court? A. Yes.

Q. Was Mr. Halbert there? A. He sat beside me in the court.

Q. Did you state the same there as here? A. I stated the same there as here.

Q. Did you see Halbert performing those great actions he boasted of? A. I did not see him at all during the action. My attention had been attracted from that quarter of the room. I, myself, think Halbert was bragging of more than he did.

Q. Which was it; you or Halbert, first invited to drink? A. I am not sure which. It is probable I asked him, but I am not certain.

[Witness allowed to retire.]

MR. S. S. PRENTISS CALLED AND EXAMINED.

§101. JUDGE ROWAN: Mr. Prentiss, please to state what you know of these gentlemen's character and standing in society.

MR. PRENTISS: I have been acquainted with Judge Wilkinson intimately, in Mississippi, for six or seven years. My profession has brought me into intercourse with him as a practicing lawyer. I believe there is no man in the State of Mississippi whose character stands higher than that of Judge Wilkinson, particularly, to a marked extent, for a modest and retiring disposition. I know this to be his character as a legislator and public man.

I know his brother, Dr. Wilkinson, and as far as I have known, his character is of a very high standing in the State of Mississippi.

The first time I saw Mr. Murdaugh was in the winter of 1835 or 1836; he was introduced to me by Judge Wilkinson as a protege of his. The Judge has acted for some time as his friend and guardian. I know the Judge, and we have been very intimate, and that Mr. Murdaugh accompanied Judge Wilkinson as his friend on the occasion of his marriage. It is three or four years since I got acquainted with Mr. Murdaugh, at Jackson, in Mississippi; his general character is very good and stands high in every respect. I have never heard of his being engaged in any difficulty.

Of Judge Wilkinson I can speak with the utmost confidence. As a circuit judge, a distinguished member of the Legislature, a commissioner appointed by the State to go to New York on State business, and a public man, I know that no man ever stood higher in the estimation of the South. In his public capacity he has been particularly noticed for being free from anything like a controversial disposition. His general character is for being more retired and unwilling to meddle in controversy than others.

Q. How long have you been acquainted with him? A. About seven years. I became acquainted with Judge Wilkinson, then commencing practice in the law, in Yazoo. During my professional business in Mississippi we have been thrown together very much, and I have had opportunities of knowing his friends and acquaintances, and can form a fair estimate of his general character.

CROSS-EXAMINED.

Q. You say you got acquainted with Mr. Murdaugh three years ago? A. Yes; about that time.

Q. When did he receive license as a practicing lawyer? A. I think it was last winter.

Q. Had he been qualified as such, before, anywhere else? A. I do not know whether he had been in Virginia, or not.

Q. Was he not in the navy? A. I know nothing of that. In fact, I know nothing of his early history; nor would I have known of his family had not inquiry grown out of this transaction.

Q. Did you not hear Judge Wilkinson make a certain speech at the election in Mississippi? A. I did not hear that speech delivered.

Q. Did not that speech render him unpopular? A. The speech was talked of as being unpopular, notwithstanding which he was elected.

[Witness allowed to retire.]

MR. DAWSON CALLED AND EXAMINED.

§ 103. JUDGE ROWAN: Mr. Dawson, state what you know of these gentlemen's character.

MR. DAWSON: I formed an acquaintance with Judge Wilkinson a year ago. I live in Vicksburg. I have known him, from general char-

acter, since I have lived in Mississippi—for seven or eight years. There is no man stands higher in his State in the affections and esteem of its inhabitants. I have never heard anything improper imputed to him.

CROSS-EXAMINED.

Q. What part of the State do you live in? A. I live in Vicksburg.

Q. How far from Vicksburg does Judge Wilkinson live? A. About seventy miles.

Q. How long have you resided in Mississippi? A. About eight years.

[Witness allowed to retire.]

MR. ROWAN, JR., CALLED AND EXAMINED.

JUDGE ROWAN: State what condition you found these gentlemen in on visiting them in jail, the night of this affray.

MR. ROWAN: I visited these gentlemen in jail shortly after the affair occurred. I was there in an hour after it had happened. I saw that they were very much bruised and that they had wounds and blood on them. The Doctor particularly was very much bruised and cut. Mr. Murdaugh also was very much cut, and there was a good deal of blood about him.

Q. Do you know upon what occasion Mr. Murdaugh then had accompanied Judge Wilkinson from Mississippi? A. I know that he accompanied him on the occasion of the Judge's expected marriage.

Q. Had Judge Wilkinson visited Bardstown some time before? A. Yes; ten or twelve months before his marriage.

§104. Q. Was his engagement with the lady whom he since married made at the time of this affair? A. Yes; and I think the marriage was to take place about a week before this affair.

Q. Recollect if it was the Thursday after, that the marriage was to take place? A. I think, upon recollection, it is probable that it was.

Q. Have you not been in the State of Mississippi and heard these gentlemen's general character? A. I have, and know that they are spoken of as testified by Mr. Prentiss and Mr. Dawson.

[Witness allowed to retire.]

MR. EVERETT RE-CALLED.

Q. Mr. Everett, when did these gentlemen arrive at the Galt House? A. They all arrived together at the Galt House about a week before this affair. They occupied the same room as Mr. Wickliffe.

Q. When was the Judge's marriage to take place? A. I only know from the information of my family and neighbors that the marriage was to take place the Tuesday succeeding the affray at Louisville. The preparations for the wedding, as I understood, had been made.

Q. What was the general character of Judge Wilkinson? A. As far

as my information or knowledge of Judge Wilkinson goes, I have never heard anything of him but a fair character.

[Here it was announced by defendants' counsel that they were through with the evidence for the defense. Mr. Hardin stated that it would be necessary to recall some witnesses for the prosecution.]

MR. OLIVER RE-CALLED.

Q. What did you state in your evidence about seeing Holmes in the reading room? A. I said in my examination that when I came back to the Galt House I saw some one dressing Mr. Holmes' arm in the reading room, and after that I saw the fighting at the foot of the stairs with the chair and heard the pistol fired.

Col. Robertson here arose and addressed the Court for leave to introduce one more witness for the defense—Mr. Franklin Roberts—which was granted by the Court.

MR. FRANKLIN ROBERTS CALLED AND EXAMINED.

§ 105. COL. ROBERTSON: Mr. Roberts, state what you know of the matter.

MR. ROBERTS: All I know is that I happened to enter a coffee house on Christmas morning and heard gentlemen talking of this affair. Mr. Henry Oldham was one. I heard him say that Mr. Holmes came out with a chair, Oldham following the Judge, and that he, Oldham, took a pistol out of his pocket and fired at the Judge. Some one asked if it was his pistol; he said, "No, it was my pistol and I fired it, and I wonder it did not hit him for it had two balls in it."

FOR PROSECUTION—THOMAS A. M'GRATH RE-CALLED.

Q. Was the fight over before Mr. Holmes' arm was dressed? A. Yes; it was entirely over.

Q. Was the pistol fired before Holmes' arm was dressed? A. Yes; the fight was over five minutes at least before his arm was dressed.

Q. Did you help to take off Holmes' coat? A. No; I did not help to do so.

Q. Do you know Mr. Oliver? A. I do not.

Q. Have you not heard of his character and reputation? A. I did not hear any thing about his reputation till I heard it here.

Q. Do you know Mr. Deering and his character? A. I know Mr. Deering. I never heard any thing against his character.

MR. REDDING RE-CALLED.

Q. Was Mr. Johnson at your shop that evening? A. I do not recollect seeing him at my shop that evening at all.

MR. CRAIG RE-CALLED.

§ 106. Q. Did you see Jackson in Redding's shop that evening?

A. I did not know Jackson at that time. I did not, that I can say, see such a man in the shop that evening.

Q. (*For Defense*). Did you hear Johnson say he would go for Bill Holmes and give the Mississippians hell? A. I heard nothing of the kind from Johnson.

MR. WILLIAM JOHNSON RE-CALLED.

Q. Did you see Jackson at Redding's that evening? A. I do not remember seeing Jackson that evening. He might have been at my stall in the morning.

MR. J. W. GRAHAM RE-CALLED.

Q. (*a*) State what you know of Jackson. A. I know Jackson. I was a carpenter and he served three years of his time to me. From what I know of his general character, I would say he is a man of middling character.

Q. Would you place confidence in his statement upon oath? A. I have no confidence in a man's veracity whose integrity I have no confidence in. I have had some dealings with him. [Objected to.]

Q. State from his general character among his neighbors and acquaintances what credibility is due to him as a witness. A. From that general character, I would say that there are a great many men I would believe in preference to him. That is, probably, owing to my opinion of the man, as I have mentioned. Mr. Jackson has made statements to me, that I—— [Objected to.]

§ 107. Q. What do you know of Mr. Oliver's general character? A. I have known Mr. Oliver a long time, and have heard his character spoken of. It was not very good—it was very bad—and I know it would not be entitled to any credit in the city of Louisville.

Q. Say if you know Mr. Redding and his character? A. I know Mr. Redding. His character for integrity, industry, and veracity stands as high as that of any man in the community.

CROSS-EXAMINED.

JUDGE ROWAN: Q. Did Mr. Jackson serve his time to you? A. He served part of his time to me.

Q. You are a sort of steam-doctor? A. Not exactly; do you know me, Judge?

(*a*) "State what you know of Jackson?" It does not appear that this form of the question was objected to. But it is certainly a very loose mode of impeaching the character of a witness. The proper question is: "Are you acquainted with the general character [or reputation] of the witness for truth among his neighbors, or in the neighborhood in which he resides?" If the answer is in the affirmative, then the next question is: "What is that character?" The evidence is not confined to the very time of the trial, nor the place where the witness to be impeached, then resides; but he may state his general character in the neighborhood where he lived for a reasonable period theretofore.

Q. Did Jackson serve all his time to you? A. He just finished out his time with me.

Q. Is he not a hard-working man? A. Yes; when he does work.

Q. Have not you and he had differences? A. Yes, but not of late.

Q. Are you not still acquainted with him? A. I am, and have at different times advised him to change his habits—of late particularly.

Q. Is he not a member of the church? A. He was that six years ago; I do not know that he is now a member of the church.

Q. Is he not, in fact, a hard-working, industrious man? A. I would not call him industrious, though at times he works hard by spells.

Q. Had not you and he a fight some time ago? A. Eight or nine years ago Mr. Jackson and I had a fight.

Q. Is he not a man of family? A. He has a wife, but I do not know whether he has children or not.

Q. Is it not your own opinion, more than his general character, you give? A. I have heard a good many people speak very hardly of him. I have no unkind feelings toward him myself. He knows that I have within the last year advised him to change his habits, and have pointed out how he would prosper if he did so. His habits are, that when he has a job, he works hard, and then any sport carries him off to the neglect of his business.

§ 108. Q. Why do you, from that, doubt his veracity? A. I doubt his veracity from what I have heard his acquaintances, and men with whom he has been dealing, say of him.

Q. Did not Mr. Jackson, in the fight with you, prove rather the strongest? A. I should say not.

Q. Did you not keep up this opinion of him from the examination at the Louisville Police Court. A. No; for I was not there. I know nothing of what he proved. I did not even know that he had been a witness there, or was to be one here.

Q. Were you not greatly excited against these gentlemen when the affair occurred? A. I did then think it a most outrageous affair, but took no part about it. I spoke of it on several occasions as an outrageous act that ought to be punished severely. I was then living in Louisville; I now live in the country.

Q. Did you not so lately as yesterday express yourself in violent language about this trial? A. I spoke of the outrage of being dragged off here.

§ 109. Q. Did you not make use of violent expressions about our Legislature? A. I said if they were in hell, and I a fireman, I would give them a good warming, because I felt aggrieved at being brought this distance from home.

Q. What do you know of the Galt House affair? A. Nothing. I did not hear of it till next morning.

Q. Did you not go about in an exasperated manner talking of it? A. My excited feelings were not expressed till after the affair was over; but whenever it was spoken of in my presence, I expressed my opinion freely.

MR. REAUGH RE-CALLED.

Q. State what you know of Mr. Oliver and his character. A. I only know Mr. Oliver by sight. I have no personal acquaintance with him. His reputed character in Louisville is not very good. I know nothing of him myself.

Q. (*For Defense.*) Was it not since this affair that you heard him spoken of? A. I do not recollect having heard of him before.

MR. TRABUE RE-CALLED.

Q. Mr. Trabue, describe as particularly as you can the appearance of Judge Wilkinson when he entered the bar-room. A. He walked two, three or four times across the room. He had his hand behind, and stopped in the middle of the room, a little nearer the dining-room door, and seemed to face the corner where Mr. Redding was standing. He threw his head up and cast his eye at Mr. Redding, and then at the door, as if on the look out, and greatly excited. About that time, Mr. Redding being standing with his back to the counter, Mr. Murdaugh spoke to Mr. Redding.

Q. What did you see Mr. Halbert do? A. I saw Mr. Halbert do nothing but tell Holmes he had beaten the Doctor enough. He was wanting to take Holmes off the Doctor.

§110. Q. Well, after that, did he do nothing? A. He or Holmes—one or both—took up a chair, following the Doctor to the door.

Q. Did you hear Halbert say he had knocked down the Doctor? A. I heard Halbert say such things, and that when he had knocked down the Doctor, Holmes jumped on him; but I am satisfied Halbert was only bragging, and that he did not do it.

Q. Could Mr. Pearson have got hold of Judge Wilkinson's arm without your observation? A. He could, when my attention was attracted to Mr. Redding and Murdaugh; Mr. Pearson may have been nearer the Judge, and probably spoke to him in a whisper. I might not in that case have heard him, as there was a noise, and we were all under a little anxiety, expecting something would take place.

COL. ROBERTSON: Was Mr. Redding out of the room when the Judge entered the second time? A. Yes; the Judge entered first, and in a few moments Mr. Redding, who, when he entered, crossed the Judge's path.

Q. Did not a crowd rush in at Mr. Redding's heels? A. I could not say a crowd followed Mr. Redding in, but, as I thought, seven or eight men did.

MR. HENRY OLDHAM CALLED.

Q. Were you in the bar-room when the fighting was going on? A.

No; I was going in through the bar-room door, when, I think it was Dr. Wilkinson, was rushing out, and cut me in the arm. and I knocked him down. Mr. Holmes then came to the passage with a raised chair, and struck at the Judge, breaking the chair against the door. The Judge ran to the stairs. Mr Holmes struck Mr. Murdaugh at the stairs with the chair. Mr. Murdaugh got up towards the head of the stairs and hallooed for his pistol. That put me in mind of my pistol, and I took it out and fired it at him.

§ 111. Q. Where did you say you were cut? A. In the arm, as I attempted to enter the bar-room door.

Q. Was there any concert for you to go to the Galt House that evening? A. None at all.

Q. Why did you knock the Doctor down? A. Because he had cut me in the arm.

Q. Was there any provocation on your part to induce him to cut you? A. No. I knew none of the gentlemen. Why he cut me in the arm I am unable to tell. I am confident he never saw me before.

CROSS-EXAMINED.

Q. How long had you been in the Galt House then? A. Three or four minutes—but I had been in the bar-room at first before it began.

Q. Name such of the persons as you saw there then. A. I saw Mr. Holmes, Mr. Rothwell and Mr. Halbert in the bar-room. When they came in they asked me to take some liquor, which I did. A gentleman came and asked to see me, and I went away with him. We staid out some time, talking about boats, which he said he had lying at the mouth of the Kentucky river. We were talking outside, when I could hear chairs rattling, and then on trying to go into the bar-room, I got the cut in the arm.

RE-CROSS-EXAMINED.

Q. When were you first in the bar-room that evening? A. Before any fuss began at all there.

Q. Did you not remain to see the fuss? A. I went out at the time of the fuss.

Q. Were there not many people there and in the passages? A. There appeared to be a good many, and some fuss in the passage.

§ 112. Q. What sort of a knife were you cut with? A. I was cut with a dirk knife.

Q Can you be positive who cut you? A. Dr. Wilkinson was the man that cut me, and I knocked him down for it.

Q. Had you given him, by word or gesture, no cause for doing it? A. I had not.

Q. Did you not go there to have a fight? A. No. I went there accidentally—it was on my way home. I fought on my own hook.

Q. You shot at Murdaugh on your own hook? A. At the head of

the stairs, when he hallooed out for his pistol, I took the advantage to get out mine, and I fired it at him.

Q. When the Doctor was coming out of the door was he not cut and bruised and disabled? A. I could not see by him whether he was or not.

Q. Did you tell all this at the examining court? A. I stated the same there as here.

Q. What colored handle had the knife which the Doctor cut you with? A. I think it was a white handled knife.

Q. Did you fire before you were stabbed? A. No; I was stabbed first.

Q. And you had your pistol prepared with two bullets? A. No; there were not two bullets; but there was one bullet cut in three pieces. It had been two or three days loaded.

Q. Well, you had other weapons? A. I had a bowie-knife.

Q. Was the pistol a rifled-barrel pistol? A. Yes.

Q. How came you to arm yourself thus? A. I usually carry a bowie-knife and pistol about me since I belonged to the City Guard last summer.

§ 113. Q. Of course you used your bowie-knife with effect that evening? A. I did not use it on that occasion.

Q. You certainly displayed it? A. The button on the scabbard came off, and it slipped through my pantaloons.

Q. Was there not blood on it? A. There could be no blood on it, but it had a red scabbard, which may have been mistaken.

Q. Did you not wipe blood off with your handkerchief? A. I am confident I did not for there could be none on it.

Q. Do you say you made no exhibition of it? A. A gentleman at Zanone's coffee house asked me to show him a bowie-knife, and I showed him mine—that is the only exhibition could be talked of.

Q. Did you hear of the affair at Redding's? A. Not until I went to the Galt House. I did not even hear of it till the Galt House affair commenced. I did not hear of it before I went into the bar-room.

MR. PEARSON RE-CALLED.

Q. (*For Defense.*) What is Mr. Jackson's general character? A. I have known Mr. Jackson as a carpenter for many years. He is in the habit of making boxes and cases for the dry goods merchants. I have formed a favorable opinion of him, and I know that is the opinion of several other merchants. What his private associations may be I do not know.

Q. Have you ever heard of his veracity being called in question. A. I have not.

§ 114. Q. (*For Prosecution.*) Have you heard his character spoken of? A. I don't know that I have, except as to his capacity as a good workman.

Q. (*For Defense.*) From what you know of him would you credit him upon oath? A. I could; I believe I could have confidence in his word.

Q. What do you know of Mr. Oliver? A. I have no acquaintance with Mr. Oliver, and have not heard his character spoken of.

MR. MILLER RE-CALLED.

Q. (*For Defense.*) State what you know of Mr. Jackson's character. A. I am very little acquainted with Mr. Jackson. As far as I know, I have considered him an industrious mechanic. I really have been favorably impressed with his general character, and am a good deal surprised to hear it doubted.

Q. (*For Prosecution.*) How has your opinion been formed? A. Upon appearances.

MR. JAMES M'DONALD CALLED.

§ 115. Q. What is Mr. Jackson's general character? A. I have known Mr. Jackson for a few years—that is I know him when I see him. So far as I know he is sober. I never heard his veracity questioned. I have merely known Mr. Jackson as I know other men passing to and fro.

Q. (*For Prosecution.*) Do you know much about Mr. Jackson? A. I know very little about him.

Q. (*For Defense.*) If he had been a man of loose habits would you not have heard it? A. I should think so.

Q. Do you know Mr. Oliver? A. I have known him for ten or twelve years, but I know very little about him. I never heard anything against his veracity that I can think of.

Q. Do you know him to be a door-keeper at the theatre? A. I seldom go to the theatre. I do not recollect ever seeing him there as a door-keeper.

MR. ALFRED HARRIS RE-CALLED.

Q. State what you know of Mr. Jackson's general character? A. I am acquainted with Mr. Jackson. I can not say a great deal about his general character. As far as concerned with me, it has been fair.

Q. How is he spoken of by his neighbors? A. I have heard him spoken of in this way—that he is fond of conversation, and as a person that says more than he ought.

Q. Would you credit him on his oath? A. I can not say that I would not. I know very little about him.

[It was understood that the evidence on both sides here closed.]

It was then half-past eleven, and the Court decided that a recess till after dinner should be taken, and upon the re-sitting of the Court the arguments should commence in the order prescribed.

ARGUMENTS OF COUNSEL.

§ 116. By one o'clock the court-house became crowded to excess. not less than a thousand well-dressed and respectable persons being present. The gallery upon which the bench is situated was appropriated to ladies. There were, probably, from one to two hundred ladies present, of whom three-fourths were distinguished for great beauty. Judge Bridges having arrived at the appointed hour, Judge Rowan suggested to the Court the desire of many citizens, that the hearing of the arguments might be adjourned to the adjacent church; to which, if the Court approved, the jury no doubt would consent, for the accommodation of the public and the ladies in particular. The Court conceived that no judicial proceeding would be proper anywhere, under present circumstances, but in the ordinary tribunal of the country, and although the mere delivery of arguments from the counsel was not necessary in the nature of a judicial act, yet some proceeding, or recalling of evidence, might be requisite, which would embarrass such a departure from the usual course. To accommodate the ladies, the Court would order the galleries to be appropriated exclusively to their use. The gallery was accordingly cleared of gentlemen, and the ladies provided with seats. The jurors being called over and order commanded, the Prosecuting Attorney, Mr. Bullock, opened the argument in the following address:

THE ARGUMENT OF MR. BULLOCK, THE PROSECUTING ATTORNEY.

§ 117. *Gentlemen of the Jury:* You have gratified me by the attention you have bestowed upon the examination of evidence in this cause, and I feel assured from that, of your honest intention to do your duty in weighing the evidence and deciding upon it as becomes you. Yours is, indeed, no ordinary duty, and I know you are aware of your obligation. I would not have your feelings excited on the one hand or the other of this prosecution; but I would have you impressed with a proper conviction of the facts to enable you to do your duty between the Commonwealth and the accused.

I, also, occupy a public situation here, to which the laws have assigned duties of no ordinary trust. I am required not alone to see that the laws be vindicated, but that the innocent should be separated from the guilty, and protected from persecution.

If guilt exist, it is my duty to present the evidence of it to you, together with the law applicable to the case; and if that evidence is so satisfactory as to bring conviction to your minds, you are required to decide according to the law and the facts.

You, gentlemen, have taken an oath that you have no interest,

feeling or prejudice, one way or another; and it behooves you as honest and impartial jurors, to weigh well not only the evidence but the arguments for the Commonwealth as well as for the accused, and according to your solemn oath, a true verdict give.

In the opening of this argument I shall not enter into the depths of the case. I shall merely lay before you the law in relation to the alleged offense, that you may be enabled to judge of its violation from the evidence of the facts.

§ 118. There are three individuals arraigned before you for separate and distinct offenses: Edward C. Wilkinson is now on trial for the murder of John Rothwell, and John Murdaugh and Benjamin R. Wilkinson for aiding, assisting and abetting. John Murdaugh is upon trial on another indictment for the murder of John Meeks; and the other two for aiding, assisting and abetting. You are to try both cases, for the evidence is applicable to both, and your verdict will apply to both. So far as your verdict and finding reach, it is immaterial whether you find one guilty of the killing and the others as accomplices, or the three together guilty, because, if you believe but one did the act, and that the others were accomplices, the guilt is the same in all, and it is immaterial which struck the blow that produced the death. It is also necessary to mention that if you believe one or two out of the three guilty, and the other innocent, you have the right to find your verdict against the guilty and to acquit the innocent.

§ 119. I make these observations that your attention may not be drawn from the main point—the vindication of the law and the application of the evidence.

It has been proved to you that two men were killed in the city of Louisville; that blows were inflicted on them with deadly weapons, and that they died from the effects of those wounds. The laws of Kentucky afford protection to all her citizens. Two of these citizens have been slain, and your first inquiry is—who committed this crime against our laws? Three gentlemen, now before you, are charged with this murder. I need not lose time in endeavoring to prove to you that one or more of these gentlemen inflicted the blows which caused these deaths, because, from the evidence you are bound to believe that the Judge or Mr. Murdaugh inflicted them, and that each participated in the act of the other. The question is—have they been guilty of any crime which the laws of the land will reach? and if they have, what that crime is designated. It is in the eye of the law homicide; and homicide is either justifiable or punishable by law. The killing constitutes the homicide, and that has been proved; but it is for you to say whether that killing has been murder, manslaughter or justifiable homicide. Although these gentlemen are indicted for the major offense—murder—you may, if the evidence justify you, find them guilty of the

minor offense—manslaughter; or, even if the excusable homicide is proven, you may acquit them. But, as they are charged with the commission of the crime of murder, it is necessary you should hear the law read as it exists in cases of homicide. In defining the law I shall endeavor not to set down aught in malice, neither shall I on the other hand aught extenuate.

§120. Murder is one of the highest crimes known to our laws. It is defined by Sir William Blackstone, page 142: "When a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace [or, as in this case, in the peace of the Commonwealth of Kentucky], with malice aforethought, either express or implied."(a)

That a killing has been committed it would now be a waste of your time to prove; you have it already established by the evidence, and it is not denied. The only question you have to decide, in addition to that fact, is, whether this killing was, or was not, the result of malice. Malice aforethought does not only mean "a spirit of hatred and malevolence to the deceased in particular, such as arises from former grudge or previous quarrels, and which is evidenced by lying in wait, etc.;" this is express malice, but it is not the only kind of malice. "For the law meaneth by the term malice that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, and which carry in them plain indications of a heart regardless of social duty and fatally bent upon mischief." (See Foster, page 256, and Blackstone, page 199.) The constitution makes you, gentlemen of the jury, the arbiters of life and death. You are to make a solemn inquiry into the causes which deprived, by violence, your country of the life and services of one or more of its citizens.

§121. In all cases of death by violence the law implies that it is done by malice until the contrary is proved. Such is the shield thrown by the law around human life, that it raises a presumption of malice in the consummation of violence. Should I succeed in satisfying you that a killing has been done where malice is proved by the evidence, of that amount known to the law, it is murder; and unless you can find in the circumstances proved to you that there are extenuating circumstances, you can not compromise the law by doing less than the duty which it demands of you. Sir Michael Foster, page 255, lays down the rule, "That 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

(a)See post § 492 of Part II, and § 606 of Part III.

founded in malice until the contrary appears." The law does not require in proof of malice, that there should have been a previous grudge, for it may arise at the moment of inflicting the deadly violence, or be inflicted upon persons, previous to the act, unknown to the slayer. On this occasion it is not necessary to prove that Judge Wilkinson or Mr. Murdaugh had ever known their unfortunate victims; if their act springs from "hearts regardless of social duty and fatally bent upon mischief"—and this is manifested in different ways, from the manner of the assault, the weapon used, and the probability that death would result from the blow, For, in all all cases of homicide upon provocation, if it may be reasonably collected from the weapon used, or from any other circumstances, that the party intended to kill, or to do some great bodily harm, such homicide is murder. And right it should be; for he who carries a weapon calculated to take life, shows he broods over blood, and that he thinks with levity of taking the life of a fellow-being.

Nature itself revolts at the idea of death, and a thrill of horror runs through every nerve at the thought of imbruing our hand in the life's blood of a fellow-being; and he, therefore, who, with the impending glittering blade over an unarmed man, can strike with a deliberate intent to kill, is a monster—dead to the social ties, dead to the sympathies of our natures and no longer worthy of human regard, or to the protection of human laws.

You see, then, gentlemen, that it is not essential to the crime of murder that there should have been any previous grudge or quarrel, or even a previous acquaintance. But if you believe the killing was done with a heart fatally bent upon mischief, and fraught with malice—and you must judge of this from the manner of the blow, the nature of the weapon, and all the other circumstances of the case—then it is murder, and you must so find, let your feelings be how they may—yea, even though you write your verdict in tears.

As I have said before, if you believe these gentlemen have been guilty of this crime, you are to consider whether any extenuating circumstances are in proof, and in mercy you are bound to regard those extenuating circumstances; but if you believe those circumstances are not of that weight which the law says is necessary to justify the taking of human life, you are not to be swayed from your duty by your feelings.

§ 122. Gentlemen, I am sorry to say that there has been thrown into this case a quantity of trash and chaff not recognized by the laws of evidence; and this has been done, no doubt, with a view of preventing you from readily discovering in this trashy chaff, the grains of wheat—the facts upon which your decision must be made. I did not interrupt this course, because the counsel for the defense had the right to introduce their own testimony in the method which suited them,

and I could not tell until the testimony for the accused was closed whether those declarations and opinions of others would be connected with other facts and circumstances so as to make them relevant and proper. Many of the witnesses have detailed to you what they thought —what others said—if not what others thought. This surely is not evidence; yet I found that I could not arrest such an improper course. All I can now do is to tell you that you have no right to give the least weight to that kind of evidence, for you are sworn to decide this cause, not by the vague conjectures and opinions of others, nor even by your own, but by the lights of truth and sober reason.

The counsel on the opposite side will endeavor to show you that there was a mob, or a concert of a mob, got up by Redding and his friends to assault these gentlemen at the Galt House. You will have the opinions of counsel on this point, but you must keep in mind that opinions are not evidence. Ascertain the facts from the proof, and consult your own consciences to make up your judgment. Recollect that you are here to judge the law and the facts; and that you are not to mingle up with them that which is not legitimate testimony. I can compare the defense in this case to nothing but a boiling cauldron, into which a vast quantity of angry feelings and fermenting passions have been thrown; and it must be your business, gentlemen, to filter the truth from the dregs and scum with which it is intermixed. You are to ascertain whether, when the affray commenced and the fatal blows were given, there was danger to these gentlemen of their own lives. That there was not seems to me clearly established. The witnesses tell you, one and all, that there were strange faces in the bar-room of the Galt House. Well! what of that? Is it an uncommon circumstance that there should be strange faces in the bar-room of a public hotel, the most extensive and most frequented in the western country? Almost on all occasions, at every moment of the day, there are strange faces to be met with there. That bar-room is the resort of every stranger attracted by the celebrity of the house and having business to transact in Louisville or its vicinity. If anything can be based upon this circumstance, I should be glad to know what supposition the gentlemen for the defense can raise upon it. When Redding was in that bar-room getting the names of these Mississippi gentlemen, what demonstration was there of a contemplated assault by others? None! There is nothing in the whole case to warrant the assertion except the mere conjecture of some few individuals. Not a man produced here to testify the facts, not a man who heard and saw the whole transaction, has sworn that Rothwell, Holmes, or Halbert, then said a word to Judge Wilkinson. How, then, could he infer that they were to be engaged in any concert? When Judge Wilkinson went off after what passed between Redding and him, he was not suffered to go his way

in peace? What reason could he have had to consider there was an individual, except Redding, who could have a particle of ill-will against him? Well, he left the bar-room, was met at the door into the passage by Mr. Everett, and retired to his own room. In doing so he passed unmolested, unobstructed, and on reaching his appartment had time to detail to his companions, Mr. Murdaugh and Dr. Wilkinson, all that had occurred between him and Redding in the bar-room. Without waiting for their comments or reply, he demands pistols from Mr. Everett. What did he want with pistols if not for attack? If he wanted them for defense, why did he not wait for them? No, gentlemen, Judge Wilkinson and his companions did not need pistols for their defense, or they would not have come down armed with their knives alone. They could not restrain themselves, so eager were they for the attack. They came down, and of what passed you are to be the judges.

§ 123. I have satisfied you that there had been no concert—no scheme to assault these gentlemen. There is no proof of it, and it can only be inferred from conjecture; but are you to conjecture? You are forbidden by the law.

When Judge Wilkinson returned to the bar-room, he had no right to suppose that he would be even addressed, much less assaulted, by any other person than Redding. In the absence of all proof that there was any one desiring to attack him, who is there that even says he (Judge Wilkinson) was told that Redding's friends had any design of that kind? Did any witness for the defense, prodigal of long stories of his thinking, tell him there was such a design? Not one. There is nothing in the whole case to justify the supposition. That some may have been there from curiosity is possible, but certainly none from design to assault.

§ 124. Well, after coming down, Judge Wilkinson entered the bar-room accompanied by Mr. Murdaugh and Dr. Wilkinson. The Judge, after pacing the room, stood firmly, and fixed his eye on Redding, while Murdaugh approached the latter, and, according to some of the witnesses, addressed him insultingly, at the moment throwing his knife open in a menacing manner. What immediately followed is known to you from the evidence. All have seen the subsequent transactions differently, yet they occurred in one way only. It is necessary to remark these conflicting accounts in order to arrive at the facts; and it will also be necessary for you to select from the mass of evidence, the testimony of such men as you think have given their evidence without intent to pervert the truth; those who witnessed the transaction with the greatest quantity of self-possession and the clearest observation. Not such men as those who started and got away to the outside of the windows, though they may be honest, yet evidently having acted under

alarm and trepidation sufficient to render them incapable of seeing calmly and dispassionately what occurred. It is natural to conclude that the excitement and alarm caused the different views taken of the transaction by different individuals. Some of these individuals who remained and retained their self-command, I know to be men who could look on and take in what occurred without much danger of misconception. I know Trabue and Montgomery to be such men, and I feel satisfied that Mr. Robert Pope, though not as well known to me, is of this number, if I may form an opinion from his manner of giving his testimony. I admit that most men are incapable of viewing coolly and deliberately the shedding of human blood: but that some men are more self-possessed under such circumstances than others will not be denied. It is surely more consonant to human sense to predicate our conviction upon the testimony of those who evince the most coolness and self-possession when their veracity is questioned. An additional reason why I attach great weight to Mr. Trabue's testimony is, that he expected the affray and was prepared to watch narrowly what was about to take place. He tells you that he had his eye fixed on Judge Wilkinson and Mr. Redding at the moment his ear caught the words passed from a third person. He was watching these two that he might observe which would commence the expected conflict. Mr. Trabue's is the most consistent and rational account of what then occurred, and I adopt his view of it in preference to others, because I want a clear view only of the facts. Gentlemen, I seek not these men's conviction if they are innocent. It would be at variance with the trust reposed in me as the organ of government placed between the Commonwealth and the accused. But if your verdict must be against them, though you write it in tears, justice demands that it should be rendered faithfully. What are the rational conclusions you ought to come to? I will tell you my conviction on that point, grounded on the evidence of Trabue and Montgomery and corroborated by others. When Judge Wilkinson had arrived in his bed-room; had told his brother and Mr. Murdaugh what had occurred between himself and Redding; and Mr. Everett had left them—these gentlemen deliberately agreed to come down and see the contest out. They were Mississippians—they had shown their knives, at least two of them, and a third, a large bowie-knife, had been added—and they descended for the work of death. They knew of no hostile foes below but Redding, for they could not know of any other; there was no reason to believe they could meet with any others in the bar-room over whom they could crow and triumph, but Redding; and they did crow and triumph over him; for it is in proof that he truckled under, when Murdaugh said, "I understand, sir, you say, or it is reported, that I assaulted you in your own house with a bowie-knife. If you say so you are a damned liar." Redding did not stand up to

this like a man. He backed out by saying, "I do not say it was you, but one of the three did it." Is it like what a man backed by a mob would say? Is this like what a man surrounded by a company of friends would say? Gentlemen, it is impossible to believe it.

§125. It is immaterial what part Redding took in the affray. The question is, what excuse these gentlemen had for taking the life of a fellow-creature. It is my duty to show you what the law says in reference to killing and excuses for killing. I shall come to that presently. Murdaugh had his knife in his hand before any attempt at assault had been made on him. When Meeks approached him what, would any man expect but a blow? What kind of blow did Murdaugh receive from Meeks? Why nothing but a blow of a short cowhide over the head, and unfortunately for Murdaugh, the law will not excuse him for resenting a blow that could not have threatened his life, by taking a life for that blow. I promised to show you what the law says on this point:

"He that would excuse himself upon the foot of self-defense must show that before a mortal stroke was given he had declined farther combat and had retreated as far as he could with safety, and, also, that he killed his adversary through mere necessity and to avoid immediate death or great bodily harm."—Foster, page 277. (*a*) This is the law; and it is not now necessary for me to go farther than to show you it is founded upon natural and immutable principles of justice. "A, being assaulted by B, returneth the blow, and a fight ensueth. A, before a mortal wound is given, declineth any further conflict, and retreateth as far as he can with safety; and then, in his own defense, killeth B; this is excusable self-defense, though A had given several blows, *not mortal*, before his retreat. But if the *mortal stroke* had been *first* given it would have been manslaughter."—Foster, page 277. He must show that at the moment of the mortal blow, he gave it from necessity, to avoid his own death or great bodily harm. Here is another case: "The prisoner was indicted for the murder of his brother, and the case upon evidence appeared to be that the prisoner on the night the fact was committed, came home drunk. His father ordered him to go to bed, which he refused to do, whereupon a scuffle ensued between the father and son. The deceased, who was then in bed, hearing the disturbance, got up and fell upon the prisoner, threw him down, and beat him upon the ground, and there kept him down, so that he could not escape nor avoid the blows; and as they were so striving, the prisoner gave the deceased a wound with a penknife, of which he died. This, upon a special verdict, was, at a conference of all the Judges of England, ruled MANSLAUGHTER—*for there did not appear to be any inevitable*

(a) See post, § 474, Part II.

necessity so as to excuse the killing in this manner."—Foster, page 278. In all cases where a blow is given to produce death, unless to avoid death or great bodily harm, it is either murder or manslaughter.

§ 126. Now, unless there was absolute necessity that Murdaugh, to avoid death or great bodily harm from the blow inflicted by Meeks, gave that deadly blow which killed Meeks, after he had changed the knife from his right to his left hand; and unless you believe that he could not himself escape death but by killing Meeks, you must believe him guilty of manslaughter at least, according to the law. The law discountenances the idea that because a man is a mechanic, you are not in an unavoidable scuffle to resort to fisticuffs, on account of any presumed superiority of station; but when your adversary assaults in that way, that you may draw a deadly weapon and kill your opponent, because the law can not excuse such unequal odds. What is there in this case to justify Murdaugh? Montgomery, whose breast was sprinkled with the spouting blood of Meeks, though at several feet distance, tells you there was no blow when Meeks was stabbed. If Murdaugh was struck with a stick or cane afterward, he is not to say that because of that subsequent blow or blows he is justified in having previously inflicted death. As to what transpired when Rothwell was stabbed—you will recollect that Rothwell had three wounds. We are able to account for two of them by direct evidence; for the other we account by circumstantial evidence. Two witnesses who saw the Judge's bowie-knife enter him, say the first stab was given in the right-hand corner of the bar-room as you face the fire-place. These two are Trabue and General Chambers. They say that when Rothwell was in the north-west corner, Judge Wilkinson rushed up and plunged his murderous knife into his back, towards the left side, at a time, too, when Rothwell was not offending him, and could not offend him, because his back was turned. A second time Judge Wilkinson stabbed Rothwell in nearly the same place, when Rothwell was in another part of the room. So that it is at least certain that two of the wounds inflicted upon Rothwell were inflicted by Judge Wilkinson. Let them say what they will about Meeks having struck Murdaugh, and that at the time any one else was offending Judge Wilkinson's brother, I say, and I say it here in the presence of His Honor, who will set me right if I am in error, that a man has no right to take a life in defense of his brother because merely he is his brother, though a right might exist if in defense of his child or wife. There is no conclusive testimony that Rothwell was assaulting Dr. Wilkinson when stabbed by Judge Wilkinson; on the contrary, it is proved that Rothwell was endeavoring to rescue Dr. Wilkinson from Holmes. Now, as to the law of self-defense, we find it in page 273, under the head of "justifiable self-defense," etc.,

when a man comes with evident intent to commit felony, which he must be engaged in at the time.

§ 127. The other case is where in self-defense an adversary is killed. But there is no law to justify Judge Wilkinson in doing what he, did on the plea of saving his brother.

In the slaying of Meeks by Murdaugh, I will ask—was there that absolute necessity for the taking of life, because he was struck over the head with a whip, which is recognized by the law? They can not pro duce any law of England to show it, and I defy them to show any statute of Kentucky that warrants it.

In order to justify you, gentlemen of the jury, in finding the three persons indicted guilty of the offenses charged, though only one or two committed the act, it must appear that there was an aiding or abetting, a concert of action. What did these three gentlemen come down to the bar-room for, if not to countenance each other, and aid each other in striking terror into those with whom they meditated a conflict? Why did they arm themselves with their knives and enter together, if they did not mean to stand by each other?. It was to show that they were united, unanimous, and mutually willing to aid and abet each other in their design.

I did not intend to occupy so much of your time—depending upon a further development of this argument by Mr. Hardin to show how the prosecution will reconcile the events detailed in evidence. You will hear from the gentlemen opposite their view of the case for the defense. You will weigh the facts with the arguments on both sides, and I trust—I know—you will hold the scales of justice impartially. It is useless to talk of statutes for suppressing the use of bowie-knives or concealed weapons unless jurors execute the laws fairly and fearlessly. If, in this instance, there has been a violation of that security for life guaranteed by our constitution, execute your duties, gentlemen, as law-abiding citizens. That you will do so conscientiously, fearlessly, and becomingly, I have every confidence; and with this conviction, I confide the case to your hands.

THE ARGUMENT OF COLONEL ROBERTSON.

§ 128. Colonel Robertson then rose and addressed the Court and jury as follows:

It has fallen to my lot, gentlemen of the jury, to follow the Attorney for the Commonwealth, and to open the defense on the part of the accused. In doing this I take pleasure in according to the gentleman my profound acknowledgments for the just, fair and liberal ground on which he has placed the law that must control, as well the prosecution as the defense in this case, while at the same time I have to express my regret that he has permitted himself to draw deductions from the

evidence which I think can not be maintained. I do not know that I shall be able to present this case to you in the aspect which properly belongs to it, nor do I know that my feeble state of health will allow me to proceed far with the argument which I propose to offer. Should I find myself unable to go on with the discussion, I will resume my seat, and leave the case in the hands of the distinguished gentlemen who are associated with me in the defense, and who, under any circumstances, would be able to do far more justice to the accused than would fall within the range of my powers. For three months past I have been prevented by a local disease from engaging in argument at the bar, and this is the first occasion, during that time, in which I have attempted to engage in forensic strife.

§129. Gentlemen, I feel very sensibly the weight of responsibility which rests upon me, not because there is anything alarming in the case itself, but because the charge is a solemn one, presented in the most solemn form, and which, if true, might produce the most solemn consequences. The case, too, has been made to wear the most aggravated form, not only by an abuse of public feeling, for a time, about the city of Louisville, but by the indiscretion of the public prints, two of which, in the city, not only departed from invariable usage upon such occasions, but, unfortunately for the accused, these papers permitted themselves to fall into the grossest errors, operating against the truth of the case, and against the accused, and which, to this day, have not been corrected, or in any way atoned for. Other papers at a distance copied from them, and thus has there been a most extensive circulation of facts which never existed, to the great injury of the accused. Under these circumstances, though the public mind has, in a great degree, corrected itself, by the lights which were thrown open before the examining court, yet we deemed it better to bring the cause to the consideration of twelve men, not only equal in all other respects to a jury to be selected in Louisville, but who should be entirely untainted by prejudice, and would be certain to render a verdict according to law and to evidence. Such a jury, gentlemen, we think we have found in the county of Mercer; such a jury now sits before us, and to you is committed the fate of our clients.

§130. If I were left to the exercise of my own judgment, I would willingly submit this cause to your determination without an argument, but, gentlemen, we have thought, upon consultation, that too much was at stake, and that duty requires at our hands a discussion, such as may not only convince *your* minds, but which shall correct the errors that may have taken root in the public mind abroad and at home; for, we wish not only to acquit the accused, but that the acquittal shall restore that high character which belonged to them before this

unfortunate occurrence, and which, as we conceive, has been, in no degree, darkened by any part of their conduct. It is true that they regret, most sincerely, that they were placed in a condition which required them to take the lives of their fellow-men, or submit to their disgrace, and perhaps the loss of their own lives; but having once been placed in that situation, but one course was left to them, and they did not hesitate in taking that course.

Gentlemen of the jury, I feel the most unqualified confidence in our ability to show you, in the course of this discussion, one of the clearest cases of self-defense that was ever presented to a court and jury to decide, and if, in doing so, I shall be compelled to speak harshly of some of the witnesses on the part of the Commonwealth, it must be remembered that these witnesses have placed themselves in a situation that makes it my duty to animadvert freely upon what they have said, and to disappoint them in that conviction which their very manner shows they are so eager to procure.

§ 131. Our clients stand before you, gentlemen, charged with no mean, ignoble crime; they stand before you in the highest and noblest attitude in which man can exhibit himself before his fellow-man; they stand before you, *upon proof*, that they invaded not the rights of others, whilst at the same time, understanding their own rights, they defended *them* against the assaults of their assailants, even unto bloodshed and death, as by law they had a right to do. In presenting to you the view which I entertain of the case now before you, I shall not go into any laborious detailed analysis of the testimony. Even if my state of health would allow me to do this, I should nevertheless decline it, because my honorable associates in the defense will do ample justice to that and every other branch of the subject. My object will be to present the case to you in somewhat of a general aspect, for, after all, it will be found that the great principles involved are but few, and these few are of well-settled law. I know that the able counsel on the part of the prosecution will endeavor to perplex you with almost countless cases from high authorities; but when these cases are well examined, it will be found that they are perverted and misapplied; and, in no degree, do they affect the right of self-defense, possessed by every individual in this country, and upon which we shall rest this cause.

In the humble view which I shall endeavor to present to you of this case, I shall call your attention to the authorities which seem to me to govern and control it, to state the evidence in a fair and candid manner; and then by a just application of the law to the testimony, endeavor to conduct you to rational and just conclusions.

§ 132. I have said that we shall rest this cause upon the great principles of self-defense; and I shall endeavor to confine myself to this ground as far as I can, or as far as may be consistent with a general and

somewhat systematic view of the law and evidence; yet in doing this, I shall unavoidably be led into some necessary views of the law of homicide; noticing the degrees into which it has been divided, and explaining, wherever explanations may be required. In the case before you, gentlemen of the jury, the self-defense on which I shall rely, was not only against the attack of individuals, but these individuals, as I shall show by the evidence, had previously agreed to associate themselves together *as a band of lawless conspirators* for the purpose of meeting at the Galt House in the course of the evening, and so to take revenge of the accused, by inflicting upon them the ignominious punishment of *public cow-hiding*, or in the event of resistence, then to use weapons of death, with which the testimony shows they were provided. As I feel that I have no occasion to misstate the evidence, I shall not only endeavor to present it fairly, but should I not do so, I will be obliged to the counsel for the prosecution to set me right as soon as they may think me wrong upon this point.

Intending to place the defense upon grounds of self-defense, and that self-defense being against the attack of a band of conspirators against the honor and perhaps the lives of the accused, I will, for my own convenience, and for the benefit of the counsel who may reply to me, state the authorities on which I shall mainly rely. They are few, but I think they are strong.

§ 133. "If two or more come together to do an unlawful act against the King's peace, of which the probable consequence might be bloodshed, as *to beat a man*, to *commit a riot*, or to rob a park, and one of them kills a man, it is murder in them all, because of the unlawful act, the *malitia præcognita*, or evil intended beforehand."—4th Blackstone, page 201, Chitty's edition.

"But if several attack a person at once with deadly weapons, as may be supposed to have happened in Ford's case, though they wait till he be upon his guard, yet it seems (there being no compact to fight), that he would be justifiable in killing any of the assailants in his own defense; because so unequal an attack resembles more a desire of assassination than of combat."—East's Pleas of the Crown, vol. 1, page 276.

"For no man is required by law to remain defenseless and suffer another to beat him as long as he pleases, without resistance, although it be evident that the other did not aim at his life, but he may lawfully exert so much force as is necessary to compel him to desist."—Same book, page 286.

But who is to judge of the degree of force necessary to be applied to make the man who attacks desist? I answer, in the very nature of things, he who is attacked must be the judge, and so the law intended, and so it has been ruled. as may be seen from the following authority: "Yet, still," says East, speaking upon this very point, "if the party

killing, had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition kill him, though it should afterward appear that there was no such design, it will be only manslaughter, or even misadventure, according to the degree of caution used, and the probable ground of such belief."—Same book, page 173.

§ 134. "For," (says the same author, speaking of unlawful combinations) "if the act or design be unlawful or premeditated, and death happen from any thing done in the prosecution of it, it is clearly murder in *all* who took part in the same transaction."—Same book, page 259.

"He who voluntarily, knowingly and unlawfully, intends hurt to the person of another [as Redding and his party intended to the accused], though he intend not death, yet if death ensue, is guilty of murder, or manslaughter, according to circumstances. As if A, intending to beat B, happen to kill him, if done from pre-conceived malice, or in cool blood upon revenge, it will be no alleviation that he did not intend all the mischief that followed."—Same book, page 266.

The learned author, in continuation of his illustrations, by rules laid down, says:

"The above rules govern all the cases where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by a violent disseizin, with great numbers, or *to beat a man*, or rob a park, or standing in opposition to the sheriff's posse, for they must, at their peril, abide the merit of their actions who wilfully engage in such bold disturbances of the public peace. In such cases the law adopts the presumption of fact that they came with intent to oppose all who should hinder them in their design."—Same book, page 257.

As Judge Wilkinson's case differs somewhat from the others, and as some authorities may be applicable to his case, which may not apply to the others, I will, at this time, introduce the following general principle, immediately following the last quotation and in the same book.

§ 135. "And in all such instances, whether the breach of the peace were sudden or premeditated, not only officers, but even private persons, may interfere to suppress the riot, giving notice of such their intention, and much more may they defend themselves; and if, in so doing, they kill any of the rioters, if they could not otherwise accomplish their purpose, *it will be justifiable;* and the killing any person so interfering by any of the rioters, would be murder in all who took part in the fact or abetted thereto."—Same book, page 257.

As Judge Wilkinson's case will turn somewhat upon the right of third persons to interefere and prevent a felony, such, for instance, as

the killing of another, I will continue my authorities, that I may be saved trouble hereafter. Lord Hale, in speaking upon this right of third persons to interfere for the purpose of preventing a felony, puts this case, viz:

"If A, B and C be walking in company together, and C assault B, who flies, and is in danger of being killed from C's pursuit unless present help be afforded, and A thereupon kill C in the defense of the life of B, it seems that in this case of such inevitable danger of the life of B, the killing of C by A is in the nature of self-defense, but it must plainly appear by the circumstances of the case as the manner of assault, the weapons with which it was made, etc., that B's life was in imminent danger."—Lord Hale, page 484.

I will continue my authorities—Blackstone, speaking of crimes committed by violence, says, "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"—4th Blackstone, Chitty's edition, page 134.

§ 136. "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 of which we are now speaking, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil, or quarrel, by killing him who assaults him, and this is what the law expresses by the word *chance-medley*, or, as some rather 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 of pretty much the same import."—Blackstone, page 135, Chitty's edition.

"Homicide, or the killing of any human creature, is of three kinds, *justifiable*, *excusable* and *felonious*. The first has no share of guilt at all; the second, very little, but the third is the highest crime against the law of nature, that man is capable of committing."—4th vol. Blackstone, page 178, Chitty's edition.

Murder is described or defined by Sir Edward Coke to be "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."—4th Blackstone, page 195, Chitty's edition.

The statute of Kentucky which prescribes the punishment of persons convicted of manslaughter, contains this proviso: "*Provided always*, that nothing in this act contained, shall extend to any person

who shall kill another in *self-defense*, nor extend to any other who shall kill another by chance, in keeping or preserving the peace, so as the said manslaughter be not committed willingly, and under color of keeping the peace."—Morehead & Brown's Digest, page 1294.

§ 137. Gentlemen of the jury, I believe you now have all the authorities to which I shall have occasion to advert in the course of the remarks I shall address to you, and I have given them to you drawn together in one view, under the hope that you will bear them in mind, and know how to apply them to every branch of the case, as such branch may be presented in the argument.

Let us now see what is the testimony before you, and by a short process of analysis, you will be enabled to make such an application of the law to the testimony as can not fail to conduct you to just and rational conclusions. I repeat, gentlemen, that I do not propose to go into any strict and rigid examination of the testimony; the labor will be more than my feeble condition will bear. I shall take little more than a passing view of its general character, for I verily believe that you already understand the whole case as well as you will be able to do after discussion; at least so far as *my* argument will go.

I do not intend to trouble you with any argument upon the scenes which have been described as having happened at Redding's own house, in the afternoon of the day on which this tragedy was played at the Galt House, because they are separate and distinct matters, occurring at different times, at different places and with different men. Rothwell and Meeks, for the killing of whom the accused are now arraigned before you, were neither at Redding's when the difficulty about the coat took place, and what occurred there, can not have any legal connection with the Galt House affair. We might, indeed, have prevented the evidence relating to what happened at Redding's from going to your consideration, and with that view might have submitted a successful motion to the Court. But we had other objects in view. We wished nothing concealed which might affect the characters of our clients, and we wished, moreover, to show the malice which animated and moved the lawless band of conspirators with which the accused afterward had to contend. So far as it may be necessary to show this violent and malicious feeling on the part of Redding and his company, I may probably have occasion to refer to portions of the testimony showing the things which happened at Redding's house, because the danger which surrounded the accused at the Galt House can only be known by first showing in what state of feeling this lawless band entered the house in which the tragical scenes were afterward exhibited.

Gentlemen of the jury, whether you shall view the case as an individual conflict between the slayers and the slain; whether you view it

as an affray of the moment, without previous concert, or whether you view it as a previously and deliberately formed conspiracy, maliciously entered into by Redding and his party, for the unlawful purpose of beating and disgracing the accused, they (the accused) stand equally justified or excused. View it as you may, place it in every varied aspect, and it is still a case of self-defense; strictly so, by the most rigid construction of law.

§138. This right of self-defense is not a right derived from municipal law, it is not a thing that has been taught us, we have not learned it from books; it is a principle of our nature, born with us, and has grown with us, in feeling and in strength. It is the most important right which belongs to man by the law of nature; it is his birthright, of which human power can not deprive him, and which man when he entered into the social compact, reserved to himself and to posterity—municipal law is a *consequence*, and not a *cause*, of the social compact. Before man entered into a state of society, each one judged of the wrongs which he supposed he had sustained, and he took redress in that mode and manner which inclination and strength enabled him to do; this state of things could not long endure, for the strong would soon gain possession of all that belonged to the weak; and thus all the principles of right and justice were broken down and destroyed. To remedy this, a plan was conceived by individuals of forming what is called the social compact. This social compact was an agreement amongst all that the general affairs of mankind should be regulated by law-makers, chosen or appointed in such mode as might be from time to time prescribed by supreme authority. The great object in view, at the time of agreeing to this social compact, was to secure individuals in the exercise of certain great and inalienable rights which belong to man as his *birth-right*, and of which posterity could not be deprived. Amongst these inalienable rights will be found the right of every person to defend his *person*, his *property*, and his *habitation*. Hence we find that municipal law, in all civilized countries, is constantly throwing new guards around these rights. You will be told, no doubt, by the learned counsel for the prosecution, that when an individual is unlawfully assaulted, he must only apply as much force *in resistance*, as will prevent the contemplated injury. This authority I shall not deny, but insist that, in this resistance, the party assaulted is the only judge of the *degree* to which it shall be carried, and if he has good reason to believe that nothing but killing his assailant will save him from being wounded, maimed or killed, then he is authorized to slay his assailant, and in this position I think I am well sustained by some of the authorities already read to you. You will be told that it was the duty of the accused to retreat to the *wall*, as the books call it, before a mortal blow could be given. Gentlemen of the jury, all this is true as a general proposition,

but it has its limitations and exceptions. If a man is already against a wall he can retreat no further; this is one exception. If he is in his own house and is assaulted with a felonious design, he need not retreat; this is another exception; and if he is so fiercely attacked that the delay in retreating would place him in imminent danger, then he need not retreat; and this is another exception. Whilst, therefore, the general rule may be very good, it is liable to at least these three exceptions.

§ 139 (*a*). In approaching the testimony in this case, we are struck with the remarkable fact that every witness on both sides, who speaks upon this point, proves clearly that the first blows were given by Meeks and Rothwell, and, that these blows were inflicted by them upon Murdaugh. Strange enough, but perhaps *just* enough, that they who raised the tempest should be the first victims of its fury. Johnson (a witness for the Commonwealth) is the only witness on either side who does not distinctly state that the first blows were given by Meeks and Rothwell, and Johnson goes no further than to say that he believes mutual blows were given about the same time by Murdaugh and his assailants. As I shall have occasion to notice the testimony of this witness (Johnson) in the course of my remarks, I will let him alone for the present, and proceed with the evidence somewhat in the order in which it was introduced, beginning with that of Mr. Redding, and before I shall have done with him, I think you will agree with me that, upon this occasion, he is totally without credit as a witness, whatever may be his claim to general good character. One of the rules of evidence, gentlemen, is that a witness must stand indifferent between the parties to entitle him to credit with a jury. Another rule is, that he must be consistent in his statement, and another is, that if his testimony shall be falsified in any *material part*, the falsification shall attach to the whole, and destroy the whole; and I propose to show that these rules all rest heavily upon this witness, and that he is not entitled to credit in anything he has stated to you. In the first place, what is his position? Why, he tells us himself, that he is under contract to the counsel he has employed (Mr. Hardin) to pay him one thousand dollars for his services in this cause, and although the witness does not state it himself, yet the contract must have been made under circumstances which amounted to a declaration on the part of Redding, that he wished the accused capitally punished, if Mr. Hardin could procure it to be done, whether they were guilty or not, when judged by the principles of law. Now, gentlemen, look at the witness and his situation, and say, if you can, that he stands indifferent between the Commonwealth and the accused. If the witness has so far become the avenger of blood, as to give to counsel

(*a*). See part II, § 474 as to self-defense; also §§ 475, 476 to § 486, inclusive.

distinguished for talents, the large fee of one thousand dollars, do you not believe that he will, when called on to give testimony in the same case, either *say* things, or *suppress* things, which go to stifle truth, and make out a verdict of *guilty* against the accused? None can doubt the truth of this proposition, and I will not impeach your understandings, gentlemen, by supposing that any one can doubt for a moment upon the point. He is, then, for this reason, unworthy of credit. But he is liable to successful impeachment as a witness upon another ground, still more fatal to his credibility. He has stated that he had no acquaintance with Meeks at the time of this unfortunate tragedy, and that he had never seen him until their meeting at the Galt House on the evening of the affray. He was cautioned and put upon his guard upon cross-examination, and was plainly told that there existed testimony upon this point, which would be introduced; still he obstinately persisted in this statement, notwithstanding the solemn oath which he had taken to tell the whole truth. The *motive* of this departure from truth was plain and clear. He knew that a deliberate conspiracy, formed in the evening of the fatal night, between himself, *Meeks* and others, would be attempted to be proven, and he hoped to escape from the proof of this deliberately formed conspiracy by establishing the fact that he was a stranger to Meeks. Now, let us see whether he was a stranger to Meeks or not. Nathaniel Jackson, a witness for the accused, states that sometime after the affair at Redding's shop, he was going by, and hearing an unusually loud talking, he went in to see who they were, and what was the matter. When he got into the room he found Redding, Johnson, *Meeks* and others, talking about the Wikinsons and their conduct. Propositions were made by Johnson, and perhaps Meeks, also, to go and take satisfaction. To this Redding did not readily assent, upon which Meeks said, "I will take satisfaction, any how."

§140. Here, then, is proof conclusive and complete, that Redding did know *Meeks* before their meeting at the Galt House on the night of the affray; according to Jackson, Meeks was in Redding's house, where it is not likely he would have been if he and Redding were strangers to each other; Meeks seemed to take a deep interest in the concerns of Redding, which a *stranger* would not be likely to do, and they spoke and conversed with each other freely and familiarly, which, it seems to me, *strangers* would not be likely to do. Another witness, whose name I can not now call, also spoke of seeing Meeks and Redding together before the Galt House affray; but this is enough for my purpose; it is sufficient to show that Redding departed from the truth when he stated that he was a stranger to Meeks, and the consequence is, *destruction* of his whole testimony. This, however, is not the only palpable mis-statement which he has made. You will remember, gentlemen, how

unwilling the witness was to state what *time* intervened between the fight at his own house and the affray at the Galt House. He evaded the question as long as he could and in every way that he could; at length, being compelled to answer, he said the time was about *half an hour*. In making this statement, the witness plainly acted in obedience to a corrupt motive. He had heard counsel and others say something about time enough intervening between fighting and killing, to allow the blood to cool and the passions to subside. He thought that if he could make it appear that he and his party went to take revenge before the passions had time to cool, that then he would be excused for the violation of law which he committed. But what says Redmond, Montgomery and others, who are witnesses for the Commonwealth? Why, they all say that the fight at Redding's took place between three and four o'clock, and Everett, another witness for the Commonwealth, states that it was six o'clock and after, when the affray at the Galt House took place. Thus does the witness stand falsified upon another part of his testimony, and under the influence of motives that can not be misunderstood. Having placed him in such an attitude, I have not thought it necessary to combat anything more that he has said; before I dismiss him, however, I will take a little further notice of him.

§ 141. Bear in mind, gentlemen, that this witness is the life and soul of this prosecution; that it was he who marshaled his forces and brought on the battle, after which he was seen no more till the battle was over. He no sooner saw the fight begin than he called reflection to his aid. He discovered all at once that "discretion was the better part of valor," and, agreeing with the poet, he said to himself,—

> "He who is in battle slain,
> Will never rise to fight again;
> But he who fights and runs away,
> May live to fight another day."

So, off he moves, gets out of the way of danger, and no witness who has testified knows where he was until all danger had passed. So much for John W. Redding, the most important witness on the part of the Commonwealth, whose testimony I am sure you will cast to the winds as utterly unworthy of the slightest degree of credit.

The next witness for the prosecution deemed by the counsel as of any value, is the celebrated William Johnson. The witness is proven to be one of the conspirators and whose feelings must be presumed to be against the accused. He is a butcher by trade, and in his testimony has dealt so much in technicalities, that he has surprised us all. Enough has been shown by his manner and language to demonstrate his total unworthiness. This is the witness who thinks that simultaneous blows were given by Murdaugh and Meeks, and he stands contradicted by the whole of the witnesses on the same side. This is the

witness who thinks that Murdaugh returned the blows which he received from Meeks and from Rothwell, although it is admitted that Murdaugh had nothing with which such blows could have been returned.

§ 142. It is true that a knife is proven to have been in one of his hands, and with this knife he inflicted upon Meeks, no doubt, the mortal wound which caused his death; and in doing this he did nothing more than he was justified in doing, as well by natural as by municipal law. He did not retreat because it is in proof that he already stood with his back against a counter; he did not retreat because the blows came so fiercely upon him that delay might have cost him his life; he did not retreat because he was in a hotel as a boarder, the proprietors of which were bound to protect him as much as he might have protected himself in his own house, and, in truth, he was substantially in his own house in the eye of the law, at full liberty to defend himself against the felonious attack of all the world. If these things be true, and they are all proven before you, then Murdaugh's case stands protected and fortified by all those exceptions against the necessity of retreating, which I have already brought to your view from high authorities. But even if the testimony for the Commonwealth had not made out the points which I have here stated, the evidence on the part of the accused would far more than supply the deficiency. Raily, Pearson, Brown, Sutherland, Chambers, and many others, all state that they saw Meeks strike Murdaugh twice with a cow-hide, and most of them state that they saw Rothwell strike twice with a stick, and surely this is enough to put to flight all doubts which Johnson's statement may have caused. In such a situation, what was Murdaugh to do? The counsel on the other side will tell you, perhaps, that Murdaugh ought to have opposed as much force as might be necessary to prevent the contemplated injury. Gentlemen of the jury, Murdaugh is a man weighing rather more than a hundred pounds, and Rothwell is proven to have weighed more than one hundred and eighty pounds, whilst Meeks is admitted to have been a much larger man than Murdaugh; and now I will ask you to tell me what degree of force could Murdaugh have applied, short of death, to prevent the contemplated injury? He could apply none, as every one must admit.

§ 143. What, then, ought to have been done? Would you have him stand and receive in humble submission, the disgraceful infliction of stripes with a whip? No, gentlemen, when such an exigency arises, a jury of Kentucky will not stop to inquire into the provisions of law; they will, with one voice, command the assaulted man to preserve his honor and his character by slaying, if necessary, him who seeks to degrade him. Gentlemen, the best way to test this thing is to put yourselves in Murdaugh's place, and decide, each of you for yourself, what you

would do, and as you would answer for yourself, so you will answer for Murdaugh. Imagine to yourselves a son who should submit to be publicly horse-whipped and then return to you and make an humble complaint against the wrong doer. How would you receive him? I know that I speak as well the sentiments of the father as the mother, when I say that such a son would find no favor at home from father, mother, brother nor sister. His disgrace would be eternal, he would be loathed and scorned by his fellow men, and a foot ball to all who might choose to make him so. Murdaugh violated no law. He was assailed by a lawless band. He had already a counter at his back and could retreat no further, and he was in his own house, his castle of defense. In this situation he relieved himself by slaying his enemy. The alternative was kill or be killed; he chose to kill, and in that choice he stands justified by every principle of divine, natural and municipal law. The witness Johnson also states that he saw Judge Wilkinson stab Meeks, and in this he stands unsupported by every other witness in the cause.

§ 144. The whole testimony shows that whilst Murdaugh stabbed Meeks in one part of the room, Judge Wilkinson was in another part of the room, and could not have given the stab of which Johnson speaks. Let this witness then be viewed in his manner, his conduct, and his position as one of the lawless band, and I take it for granted that you will consider him as entitled to no credit whatever. Besides all this, he stands contradicted by Nathaniel Jackson, who states that he saw Meeks, Redding, and Johnson together in Redding's coffee-house on the evening before this affray at the Galt House took place, which statement is denied by Johnson, and the motive of denial is too plain to be concealed. Jackson stands as fair as any witness ever did, and can have no possible motive for saying any thing but the truth. So much for Johnson and his testimony; let him then sink into everlasting oblivion. The next witness whom I shall notice is Henry Oldham, another of the conspirators, whose testimony is stamped with falsehood upon every part of it. He states that he happened accidentally at the Galt House that evening, that he knew nothing of any contemplated affray, and that he was armed with a pair of pistols and a bowie-knife; that whilst in the passage, some body cut his arm with a knife; that it was too dark to distinguish clearly, but he thinks that the person who cut him was Dr. Wilkinson, who held in his hand a white-handled knife; that nothing else occurred to him, and that when Murdaugh or Judge Wilkinson was going up stairs, he (the witness) deliberately pulled out a pistol, loaded with a ball, which was cut into three pieces, and fired at the person going up stairs, and Everett, as well as other witnesses prove, that two holes were afterward found at the head of the stairs, in the door-case, in the direction which he fired.

Now, gentlemen, I ask you to look at this testimony and reflect upon it; and when you have done so, tell me what you think of an individual who boldly acknowledges before a court and jury that he went to the Galt House on the evening of the affray, armed, as I have stated, *without a motive*, and that he endeavored to take the life of an honorable man who had done him no wrong, by firing a loaded pistol deliberately at him. Tell me, gentleman, what you think of such an animal. For, really, I can not class him with human beings. The witness who will make such an acknowledgement would not hesitate to swear to anything which might, in his judgment, induce you to find a verdict of guilty, and I feel well assured that his whole statement will be disregarded by you.

§ 145. The witnesses, Craig and Redmond, who have been examined by the Commonwealth, are proven to be the workmen of Redding, and at the time of the affray at Redding's house, were living with him. I take it for granted that, even if their testimony was material, you would consider and decide upon it with great care and caution; neither of them, however, has said anything worthy of notice, and I therefore pass them over. Thomas A. McGrath, also, has been examined on the part of the Commonwealth. This witness is of very high respectability, and has made his statement, I have no doubt, with strict regard to truth. His statement, when examined, will be found very beneficial to the accused. He proves the abusive language used by Redding to Judge Wilkinson, and which was soon followed by a general fight. This abusive language on the part of Redding, was, no doubt, agreed upon by the conspirators as a signal when the attack was to be made, and we accordingly find that an attack upon Murdaugh was made nearly about the time of this abuse of the Judge by Redding. But, gentlemen, I do not mean to make any further remark upon the testimony of McGrath. I know him well. I am satisfied that he is entitled to the highest credit. I hope, therefore that you will believe every word that he has said, and when you look at his statement you will find that he has said much more in favor of the accused, than against them. As to the remaining witnesses examined on the part of the prosecution, I deem it unnecessary to consume your time in noticing what they have said. Not, indeed, because they are not entitled (many of them), to high credit, but because they have not said anything which materially affects the case, either on the one side or the other. The seeming discrepancy between the statements of most of the witnesses, and the statements of Robert Pope and Daniel Trabue will be examined when I come to the case of Judge Wilkinson, and you will then see that in truth the difference between the witnesses is easily explained and reconciled.

§146. I now come to the case of Dr. Wilkinson, who really is

presented before you under very extraordinary circumstances. He has been arraigned before this court, gentlemen, upon two bills of indictment found against him *for murder*, by a grand jury of Jefferson county, and I am justified in saying that this finding on the part of the Jefferson grand jury was without any evidence whatever, and as I am informed, without even the statement which has been made to you by the witness, Henry Oldham. It was this most extraordinary finding, gentlemen, that caused you to be troubled with this cause, and by looking well at this fact, together with other things which have come to your knowledge, you will be able to decide how far we have acted prudently, in taking the case out of the hands of a Louisville jury. *Conviction* we did not fear, but a divided jury was what we deprecated. The testimony against Dr. Wilkinson, which has been given before you, is not entitled to a moment's consideration. It is given by Oldham, who, from his own showing, is entitled to no credit, who unblushingly states that he aimed a deliberate shot at an unoffending individual. Why, gentlemen, such a man deserved to be cut down by all who came near him; for, according to his own account of himself, he was an enemy to the human race, and went to the Galt House armed—prepared to kill whomsoever he might choose. But even this witness, bad as he is, does not state positively that he was cut by Dr. Wilkinson; at first he stated that the passage was so dark that he could not distinguish who it was, but being more closely examined by the counsel for the prosecution, he *took the track very kindly*, and was not only able to distinguish features, but was also able to discover that the man held in his hand a knife with a *white handle*, although the handle of the knife must have been covered by the hand that held it, and the whole testimony as to *time*, must convince you that it was nearly dark. But the most remarkable fact about this witness is, that nobody has proven where he was cut, of what character the wound was, nor whether blood was drawn or not. Certain it is that he appeared before the examining court in Louisville, two days after he states the cut to have been received by him, as a witness, apparently as well as anybody, and never pretended to exhibit the wound. I dismiss him without further comment at this stage of the argument, intending to take further notice of him by and by, when I shall come to speak more fully than I have done of the conspiracy that was formed by this band of lawless men. As no other witness has said one word to inculpate Dr. Wilkinson, as all have proven how badly and how causelessly he was beaten, I can not think it necessary to say one word more in his defense. There can not be a living man who will doubt his perfect innocence.

§ 147. Having disposed of the cases of Murdaugh and Dr. Wilkinson, I now come to the case of Judge Wilkinson, and candor requires me to say that it differs somewhat from the other two. It involves new prin-

ciples of law, and though these principles are somewhat different from those on which I have heretofore relied, yet they are not more difficult to understand, explain and apply. The case of Judge Wilkinson, as one of the individuals against whom the conspirators proceeded with their unlawful design, is controlled and governed by the same law which control and govern the cases of Murdaugh and his brother, in its general aspect, but has a new and additional feature, not to be found in the other cases, and which new feature involves the inquiry, *how far third persons are authorized to interfere to prevent a felony.* The attorney for the Commonwealth has read to you from Foster, authority, showing, as he contends, in what *degrees* of natural and artificial relations in life, third persons may interfere, and he quotes the only passage to be found in the book *directly* upon the point. The passage declares that third persons may interfere to prevent the killing of those who bear the relations to each other of husband and wife, father and son, and servant and master; and these being all the degrees of relationship which are given by the author, it is contended by the attorney that no others are allowable. Upon this point I join issue with my worthy adversary.

§ 148. To the authority itself, I yield all the obligation that can be desired; the difference between the attorney and myself, is this: He contends that the cases put by Foster are a *limitation* of the principle, whilst I insist that they are given by way of *illustration* of the principle. I contend that those cases belong to a numerous *class of cases*, of which the cases put by Foster are but examples. Why should not the brother be permitted to save the life of his brother, against an attempt to kill him, as well as that the son may save the life of his father, or the husband the wife, or the servant the master? Does not the same reasoning apply? In a diminished degree, I admit, but is it not the same principle, resting upon the same reasoning, and springing from the same feeling? Surely these views are sound, and when the authority is well examined, in connection with the context, I think that but one opinion ought to prevail. If I am wrong in this view, gentlemen, then I must say that the interpretation given to this authority, by the attorney for the Commonwealth, will prove in its practical operation that such a law is against public opinion, and the laws of nature, and consequently can not and ought not to be enforced. Is it seriously contended, gentlemen of the jury, that a brother must stand by and witness a ruffian attack upon his brother and do nothing to relieve him? Must a brother permit his brother to be killed when he has it amply in his power to prevent it? Shall a brother hesitate to take the life of one who makes an unprovoked and felonious attack upon his brother? God forbid that a jury of our country should ever be found willing to render a verdict of guilty against a brother who kills the violent assailant of a brother under circumstances portending death, or great bodily

harm to such brother. I can not agree, gentlemen, that such is the law, and if I could so agree I should not hesitate to denounce such doctrines and implore you to do the same thing rather than break down the walls of society, and scatter to the winds the cement which binds us together. But, if there were doubts upon this subject, the authority before read to you from Lord Hale will put to flight those doubts, for, in that case, *a stranger* is authorized and justified in killing one who attempts to commit a felony upon a *stranger;* and the reasoning is, that since the Commonwealth must lose one of her citizens, it is better to lose the *bad* citizen than the *good* one, for, the felonious attack proves the one to be bad, whilst the other must be considered as a good citizen.

§ 149. With this exposition of the law, let us inquire into the case of Judge Wilkinson, who stands indicted for the killing of Rothwell, and I think you will agree with me in saying that he stands justified or excused by every principle of natural and municipal law; and here, gentlemen, I shall assume as true, what I shall presently demonstrate by the evidence, that Judge Wilkinson, whilst in the bar-room of the hotel at which he was boarding, found himself in the same room with a band of lawless conspirators, who had associated themselves together for the purpose of seeking out himself and his companions, Murdaugh and Dr. Wilkinson, and, after finding them, to degrade and disgrace them by a public horse-whipping, and in the event of resistance, to take their lives with weapons which they carried with them for the purpose, and in contemplation of that resistance which they expected to find. Gentlemen of the jury, I have now reached the point at which I consider the most important developments in this whole transaction are to be made, as far as they can be made by a comparison of the law and the evidence, one with the other. I have reached a point in the argument where I shall endeavor to unveil to you, from the evidence, one of the boldest combinations of lawless men, for the purpose of uprooting all the great principles of society, that ever attempted to execute their plans in the face of any civilized community, and from the consummation of which they were prevented only by the firm and chivalric spirit which animated and sustained the accused in their determination of self-defense.

§ 150. In forming their plans the conspirators acted with great caution. They were very sensible of the outrage which they had determined to perpetrate, and evidently feared the consequences which might arise, and they prepared themselves with deadly weapons to rush into extremes. They formed a combination consisting of seven men, most of whom are distinguished for their athletic power. These seven men we have identified with the conspiracy by testimony not to be questioned. Their names are John W. Redding, William Johnson,

Meeks, Marshall Halbert, Henry Oldham, Bill Holmes and John Rothwell, four of whom have been proven to be very stout and powerful men. Their object was to attack, beat, disgrace or kill the three weak and feeble men who stand indicted before you, and whose strength you can now judge of, by your own view. The history is this—Redding supposed, by an affray which had taken place at his shop between three and four o'clock of Saturday, the 15th of December last, that he had been injured and aggrieved. Whether he judged rightly or not, I shall not pretend to decide, because for this supposed wrong he has indicted the accused in a separate proceeding, and instituted a civil action to recover damages; these indictments and civil suits are now depending and undetermined, and have no connection whatever with the case before you. After the supposed injury at his shop had taken place, Redding called around him his advisers, and, after consultation it was determined that *Bill Holmes* and others should be applied to, that a strong band of desperadoes should be formed, and that they would proceed to the Galt House that night and take revenge of the "Mississippians," to use the language of some of the witnesses. They, accordingly met at the Galt House just before dark, and proceeded to execute their unlawful design; in what way, and with what success, you are informed by the testimony. But it may be said that I have stated the conspiracy without proving the facts. Gentlemen, I know I have, but I mean to take up the testimony and prove that what I have stated is true; and, in doing this, I shall consume as little of your time as possible, because I feel very sure that you see this branch of the cause in the same aspect that I do.

§ 151. The first witness to whose statement upon this point I shall call your attention is that of Nathaniel Jackson. He states that he was passing by Redding's shop soon after the fight there, and that the loud talking inside of the house induced him to go in and see what was the matter. Upon entering the house, amongst others who were there he found the unfortunate Meeks, Johnson and Redding. Propositions to recruit and enlist men to do the very thing attempted, were made by Johnson and Meeks to Redding, in presence of the witness which was not agreed upon whilst the witness remained in the house, but he left them in the house talking the matter over. In the course of the same evening the witness met William Johnson on the street, when Johnson unhesitatingly proposed to the witness that he should join a party who were going to the Galt House that night to see Redding righted. The witness declined it, and, with other things, said that he belonged to the church and such conduct would not be proper in him, whereupon Johnson said, "*Church, hell or heaven,*" he ought to go. The witness and Johnson separated at this point. Jackson also states

that whilst he was at Redding's shop William Johnson said to those around him, "If Jack [meaning John W. Redding] will only say the word we will go and get *Bill Holmes* and others, and give them *hell*," meaning the accused. This is the first link in one chain of testimony upon the formation of the conspiracy, and I beg, gentlemen, that you will bear it in mind. Our next witness is E. R. Deering, who states that in the evening of the day before the meeting at the Galt House he met with William Johnson at the end of the market house and Johnson either proposed to the witness "to go along with the party, or that he was going after Bill Holmes and others to go to the Galt House."

§ 152. No matter which, either will answer my purpose. The witness said to Johnson that if the Mississippians had heard of their design, they would be gone before the party could get to the Galt House; whereupon Johnson replied that "Enough were already gone to the Galt House to take care of the Mississippians, and if they attempted to go away, *their hides would not hold shucks*." The witness then separated from Johnson. This is the second link in a chain of testimony upon this point. Our next and last witness upon this point is Alfred Harris; he states that, "In the course of the same evening, Johnson applied to him to make one of the party who were going to the Galt House to see Redding righted." Redding himself acknowledges that he had gone to the jail that night just before dark, and, as he returned, he called at John Rothwell's and procured Rothwell to go with him to the Galt House, and that they did go there together. Now, gentlemen, I ask you to put these facts together and decide for yourself whether this man William Johnson was not the active man who (under a previous arrangement no doubt,) was busily engaged in getting as many individuals to engage in this lawless and bloody affair as he could procure? Continue your view and see who were at the Galt House. Why, you will find the very names that I have mentioned all ready to do the bloody work. Are you not satisfied, gentlemen, that Redding succeeded in enlisting these men for the very purpose which I have mentioned, and have I not redeemed my promise, to make good the statement I made from the testimony? But these conspirators seem to think that they would be able to deceive the public by proving, as they have proven, that they arrived at the Galt House separately, and at different times, and by different routes. Why, gentlemen, this is precisely what they would do under such circumstances, and the fact of their seizing upon this point is proof that they had looked at it before, and that they meant to use it, if necessary, upon any trial that might take place.

§ 153. It is the very thing which satisfies my mind that all things had been talked in due season, and this arrangement had been agreed upon between them for the very purpose which they now attempted

to use it. They, no doubt, agreed to meet at the Galt House by a particular hour, but that they must go separately, at different times, and by different streets, so as to keep down suspicion. But they did not succeed even in this, for their own witness (Everett), a very observing and intelligent man, and one of the occupiers of the Galt House, tells you, amongst other things, that as soon as he saw these *strange faces* at the Galt House *in such numbers* he became alarmed, and knew that something rash would happen; and further states that "He was satisfied that if the affair at Redding's had not taken place, the men whose presence alarmed him would not have been there." Now, gentlemen, look at these words, and the witness from whom they came. The witness is an intelligent and honorable man, and he appears for the prosecution. From his own statement, what was his opinion of what he saw at the time he was looking at these men? Why, clearly and obviously, that he believed these men had assembled themselves together at the Galt House to beat and take revenge for what had happened at Redding's shop. He saw it in their very look, manner and language, and this can not be doubted. Well, gentlemen, if Everett saw this by merely looking at the men, could not the accused also see the same things? And if they did, ought they not to put themselves in a proper attitude for defense? Surely you will agree with me in saying they ought, and, accordingly, when Judge Wilkinson came down stairs after having left the bar-room, he brought with him an efficient weapon of defense. We have had much difficulty in proving what arms these conspirators had with them, and, all things considered, it is wonderful that we have been able to prove so much on that point. Yet, we have proven that Redding had a bowie or dirk-knife, which he borrowed that evening from Mr. Fulton. We have also proven that Oldham had a pair of pistols and a bowie-knife. And we have proven that nearly all had knives and whips, and that one had a sword cane.

§ 154. Thus, gentlemen, have I shown to you that this unlawful combination was deliberately formed, and that they proceeded to execute their unlawful purpose *with malice aforethought*; though, according to law it would be entirely immaterial whether the conspiracy was entered into before or after they arrived at the Galt House. Their guilt is as bad in one case as the other. I will now return to the point from which I digressed in order to prove the conspiracy. Judge Wilkinson found himself and his comrades in the same room with seven strong, stout men, who, he could not doubt, had come there to beat, disgrace and kill himself and his companions, and perilous as was his situation, he remained in a cool, collected state of mind and feeling. To use the language of one witness, he looked like a philosopher. He had been grossly abused by Redding, but all he said was, "*Keep your hands off me, or I will kill you.*"

He remained in the room whilst blood and death were dealing out around him. One man was already dead, and his eye was attracted to a part of the room where some man was down and several large men were beating him, amongst whom was the unfortunate Rothwell. He soon discovered that the man who was down was his brother, and his death seemed inevitable. In a situation so full of difficulty, what was Judge Wilkinson to do? He himself was wounded in the shoulder and scarcely able to continue the fight. But what was he to do? Must he look on and see his brother beaten to death, or must he interfere and save him by using the weapon which he held in his hand? Say, gentlemen, what was he to do? What would you and each of you have done, if placed in the same situation? Gentlemen, I know what you would have done, because I know what you ought to have done; you would have done as Judge Wilkinson did, slay the man who was feloniously engaged in slaying your brother. This is what every brave and gallant man ought to do under such circumstances, and his justification will be found in the law of nature, in the case from Hale, as well as the general principles of municipal law, as already stated, in the approbation of his own conscience and in the plaudits of mankind. in every civilized community.

§ 155. I am now very nearly done with the evidence; but the testimony of Daniel Trabue and Robert Pope, very respectable gentlemen, and witnesses for the Commonwealth, differing somewhat from others in relation to the *place* in the room where Rothwell was stabbed, I think it proper to make a single remark upon their statements, merely to show that the fact is not material, be it one way or the other. These witnesses state that they saw Judge Wilkinson stab Rothwell in a place in the room different from that stated by the other witnesses. Be it so; but remember that General Chambers states that when the attack was made on Dr. Wilkinson, the fighting went around the room until Dr. Wilkinson fell in a particular corner, and therefore it is not material at what place in the room the fatal stab was given, so that it was given while the Doctor was suffering a course of alarming and apparently felonious beating. But these witnesses must be mistaken, because General Chambers, who was a very deliberate observer, and has given his testimony with great clearness and composure, says that he saw Rothwell beating Dr. Wilkinson at the time with a large stick; that the stick had somewhat lost the firm grip of his hand, and while he was adjusting it, in order to recover his grip and aim a more efficient blow, Judge Wilkinson gave him his stabs, which, perhaps, caused his death, according to the opinions of some, but according to the opinions of Doctors Knight and McDowell, did not cause the death of Rothwell. but that his death was produced by a small wound in the breast, which penetrated the lungs, and which was given by an instrument very different from the bowie-knife held by Judge

Wilkinson. These two doctors were called on after death to make *post mortem* examination. Besides, the whole current of testimony sustains General Chambers in his statement, therefore his statement ought to preponderate.

§ 156. Gentlemen of the jury, I am approaching the close of my argument, and shall have but little occasion to again refer to the testimony. If Judge Wilkinson had not relieved his brother as he did, better would it have been for him if he never had been born. He could not again have looked society in the face, nor would he afterward have received the countenance of any honorable man. In this country public opinion controls and governs the conduct of all men, and we are forced to act in obedience to it, whatever law to the contrary may exist. We wish not only to acquit these honorable men, but we wish, by the aid of your verdict, to return them to their State and to their friends *brightened* by the severe crucible through which they shall have passed. We wish them to carry back with them the pure and spotless characters by which their integrity and morality were shielded when they left their homes in December last.

To John W. Redding may be ascribed the bloody tragedy which has been discussed. To him belongs the death of Rothwell and of Meeks. If he is a man of feeling, the residue of his days will be dark and gloomy. The ghost of Banquo did not more terribly haunt the imagination of Macbeth, than will the ghost of Rothwell haunt and follow him through the remaining part of his life. Nor will he be able to say to the bloody ghost of Rothwell what Macbeth said to the bloody ghost of Banquo, "You can not shake your gory locks at me; you can not say 'twas I that did it." The ghost of Rothwell will shake its gory locks at him, and *will* say that, though you did not do it with your own hands, you caused it to be done by the hands of others. Upon Redding's head rests the blood of the murdered Meeks and Rothwell, and the water of oceans will never be able to wash out the deadly stain. Let him repose under this mighty weight with the best grace he can. I shall never again disturb him with its recital.

§ 157. Gentlemen of the jury, I have endeavored to show to you that this unlawful attack upon the accused, made by the conspirators at the Galt House on the night of the 15th December last, was the fruit of a deliberate and malicious combination formed for the purpose some three or four hours before it was attempted to be executed, and if I have succeeded in this, then I ask you to apply the law which I have already read from the highest authority. This law declares that an attack made by one of an unlawful combination of many, is an attack by all, and that if any one be killed, that *all* who were combined, though some might be in another room of the same house, shall be equally guilty of murder, and consequently if one or more of the

conspirators be killed, such killing shall be excusable according to English law, and *justifiable* as I conceive, according to the proviso from the law of Kentucky, which I have also read to you. Nor is this the only view which you are to take of this branch of the subject. The attack of one of the unlawful combination being an attack by all, it follows irresistably that all of those who shall be attacked, may resist it at the moment the attack is made, and that, therefore, as soon as Murdaugh and Dr. Wilkinson were assaulted, Judge Wilkinson, though he himself might not have been struck, might interfere and prevent the felony which was contemplated, by killing such of the conspirators as were engaged in the unequal combat. This is the law according to the authorities read, and that Murdaugh and Dr. Wilkinson were violently assaulted in the beginning of the affray, is clearly proven to you by the Commonwealth's own testimony. But Judge Wilkinson had also been attacked before he gave the mortal wound to Rothwell, for it is proven by the testimony that he had a wound in the shoulder two and half inches long and of dangerous direction, and therefore he was doubly justified in killing those who were engaged in this violent and unlawful combination.

§ 158. It is due to the accused, gentlemen of the jury, that I should say something more of them before I close. I have known these gentlemen and their fathers before them, almost from their infancy. I knew them in our mother state, Virginia. They grew up into manhood without a blemish upon their characters; they carried with them to their adopted state (Mississippi) the fairest and best reputations, and they have maintained their standing there without a blemish as you are told by the testimony. A regard for peace, a profound respect for the laws, a determination to conduct themselves towards all as good members of society should do, seem to be traits of character strongly stamped upon their whole course of life as the best members of society could desire. To believe, therefore, with all this evidence of good character and moral integrity before us, that they would wantonly have attacked a set of *strangers* whom they never had seen before, would be to reverse the qualities of all human nature, and knowing them as well as I do, I would not believe it though witnesses from Heaven should come and testify to the facts. But the facts proven even by mortals do not show them guilty of any thing but a determination to defend themselves. Judge Wilkinson had come to Kentucky at the time for the purpose of executing and consummating the most important and holy contract which man can enter into. On the Tuesday of this bloody tragedy he was to take to his bosom as his wife, one of the most lovely girls of Kentucky, and all the considerations which spring from such a prospect naturally prompted him to avoid all personal dangers.

§159. His natural disposition and his delicate situation at the time, united in keeping him thoughtful of his own safety; and it would be one of the most violent of all presumptions to suppose that at such a time and under such circumstances, he would be found violating the law, and hazarding his own existence. No, gentlemen, such an opinion can not for a moment be entertained. Necessity alone prompted him to action, and however tragical may have been the consequences, *that necessity* is the only thing which he deplores. A necessity forced upon him by a band of violent, athletic and lawless men, who sought him in his own house, to degrade and disgrace him by public chastisement. There is no part of the United States where a man would be punished for such conduct, and least of all, is it to be expected at the hands of a *Kentucky* jury, composed of men whose fathers fought themselves into their homes, and were distinguished by a spirit of chivalry which enabled them to subdue every foe, and surmount every danger. With you, the descendants of such gallant sires, may safely be entrusted this, and every other cause which involves the sacred principles of honor.

Before I take my seat, I beg leave to say one word to the distinguished gentleman who has been employed to aid in this prosecution. I regret, most sincerely regret, to see the practice of hired counsel in criminal cases gaining ground in this Commonwealth. Under its influence the heart becomes corroded and steeled against all the sympathies of our nature. The learned gentleman who is aiding in this prosecution, is to receive one thousand dollars for his services, and from the very nature of his bargain, as it has been proven, he must have undertaken to convict, if he can, whether the accused be innocent or guilty. Three times have we met him, first at the examining court, next at the circuit court of Jefferson, and now before this court. Here the generous and gallant Hector takes his last, his final stand, and his fate is victory or death. Three times has he been pursued around the walls of Troy, and as he can not now speak for himself, I will speak for him and will use his own words:

"Too long, oh, son of Peleus, Troy has viewed
Her walls thrice circled, and her chief pursued.
But now, some god within me bids me try
Thine or my fate, I kill thee, or I die.
Come, then, the glorious conflict let us try,
Let the steel sparkle, and the javelin fly."

§160. But the gentleman will probably say that the beautiful quotation which I have made from the still more beautiful Iliad, is neither an apt nor an appropriate illustration, since in the combat between Hector and Achilles, Hector was vanquished and slain. In answer to

which I say, that, in those ancient days the gods were supposed to hold in *their* hands the fate of men and of nations, and that they invariably decided according to the principles of right and justice. In more modern times, gentlemen of the jury, you have been substituted for the gods; you hold in your hands the fate of my gallant and much injured friends, and, not less just than the gods, you, too, will decide according to right and justice. Do this, as I know you will, and we shall be content.

The distinguished gentleman who aids in this prosecution, has furnished us with some proof of the corroding influence upon the human heart, caused by a long indulgence in prosecution for alleged crimes. I am sure that nature gave him a kind and generous disposition, and that he is still possessed of these amiable qualities. I do not doubt but he has so long lent his aid in prosecutions of this kind, that he has brought himself "to look on blood and carnage with composure." He will doubtless make, as he has heretofore made, a bold and mighty effort to convict the accused, though in my judgment such conviction would be against both the law and the evidence. Neither the shrieks nor the tears of the lovely Andromache, nor the groans and lamentations of the aged Priam, can stay him in his fierce pursuit; the wife and the father sink into nothingness when compared with the glittering fee that awaits his efforts; he has bargained for conviction, and he goes for his bond. Give it to him, gentlemen. Tell him to take his pound of flesh, but tell him at the same time, that if in cutting it he spills one drop of blood, Shylock himself shall be the only victim of the law.

You have now heard this bloody history, gentlemen, in the best form permitted by my feeble health; and whether you take it into consideration upon the exclusive testimony of the Commonwealth, or whether you view the testimony on both sides, your minds must arrive at the same conclusion. In either case I know that your verdict will be, *not guilty*.

Gentlemen of the jury, in conclusion, I will say that if it were necessary, I would invoke the lovely beauty by which we are surrounded,(*a*) to aid me in a cause so just and holy. I would ask them to indicate to you their feelings in favor (as I know they are), of my persecuted and much injured friends; for, after all, we exercise our energies, and are stimulated to generous and noble deeds for the sake of woman, and when she commands *we* are bound to obey; take woman from the world and the dark planet is left without a sun.

Gentlemen, I have done. So far as I am concerned the case is with you, and if law, justice and evidence can favor us in the cause, we dread not your verdict, for we have all on our side.

(*a*.) About two hundred ladies were present.

COMMENTS ON COUNSEL.

§161. [The Prosecuting Attorney, Mr. Bullock, who opened the argument, is a young man, apparently not thirty years of age, and much respected for his private worth, as well as his promising professional abilities. It will be observed in his speech that he is more remarkable for a plain and common sense method of statement than for any ambitious straining after display. The matter in hand, and the honest enforcement of the law, as he conceives its bearing, principally occupy his thoughts and nerve his discourse. His manner is not deficient of ardor, but an ill-controlled diffidence, and some little affectation to conceal its awkward effects in delivery, with an occasional hesitation in choosing an expression exactly suitable to his meaning, too often check that flow of language which is essential to graceful oratory. Considerable allowance should, however, be made for a young lawyer of limited experience in such weighty causes as that now in progress, and especially in the presence of distinguished orators, such as seldom can be congregated on a trial of this kind

Col. Robertson is, perhaps, over sixty years of age, and but for the effects of feeble health, would probably look much younger. His appearance in person and manners is that of a polished gentleman of the old school, when amongst the shining lights of the Old Dominion, (for the Colonel is a native of Virginia), ruffled shirts, gold headed canes and starched frills, so appropriately graced the studied suavity of court manners. The Colonel's oratory partakes of the same gentlemanly and studied propriety, consequently it flavors more of cold declamation than fervid eloquence. But it is by no means deficient of flowing language, point, perspicuity, and strength of argument. In matters of law and research, the Colonel displays considerable industry, as it will be observed that in his speech of scarcely an hour, he touched all the points of argument subsequently adverted to by his coadjutors.

§162. At the conclusion of Col. Robertson's speech, which occupied nearly an hour in the delivery, the Hon. S. S. Prentiss arose, as expressed by the writer in his correspondence from Harrodsburg during the trial, "greeted by aspirations from the sweetest lips in the world —the fair enchantresses who hold the magic wand over man's happiness in this sublunary sphere. He would, indeed, be less than mortal if he could plead the cause of mercy before that gallery of lovely beings without impassioned eloquence; and gloriously did Mr. Prentiss redeem the anticipations of many a throbbing bosom in that galaxy of beauty, where, to be enshrined and cherished but for a moment, even by the electric spark of eloquent communion, were a rich reward."

As this passage from the correspondence alluded to, and that which follows have both gone the rounds of the press, from one corner of the

Union to the other, it may be fairly inferred the estimate given of the 'observed of all observers,' is appreciated as it was meant, and they may with propriety be placed on permanent record here.

"Those who have seen and heard Mr. Prentiss will not be easily satisfied with any vain attempt to depict his merits. Those who have not, will hardly have their anticipations realized by any thing short of the opportunity of judging for themselves. I must content myself with giving a mere outline of my own impressions. His height is under the middle size, and person not remarkable for anything striking; and although his countenance is pleasing and intellectual, and the formation of his head favorable to the belief that he possesses a phrenological development of every superior mental organ, yet wanting that elevation which a commanding figure alone can give, he would probably pass without exciting more than ordinary attention, if no occasion presented itself of calling his powers of eloquence into action. When he speaks, if he always speaks as he did on this occasion, it is indeed no wonder if he demonstrates in his own person, that the highest order of human genius, is that which is gifted with transcendent eloquence. He spoke with all the ardor of unconquerable friendship under varied excitements, and with a depth of feeling and power of expression which would take eloquence scarcely less than his own to describe. When he spoke of the undoubting faithfulness with which his heart clung to his friend, Judge Wilkinson, through good report and through evil report, of the bright land which gave them birth, of the beloved State of their adoption, and of the sad fatality which had induced that unhappy deed, that placed him at the bar, a pleader, and his friend before that tribunal as an imputed criminal—his whole frame thrilled with an emotion which radiated like animal magnetism to every bosom in that vast assembly. Mr. Prentiss's style of oratory appears to me impassioned, glowing, and occasionally highly figurative; always lofty and refined, yet nervous, manly and powerful. He sometimes sports gracefully with sarcasm, but seems to delight more in the extremes of eulogy or denunciation, than in the consecutive impressment of argument."]

THE ARGUMENT OF HON. S. S. PRENTISS.

§163. In three or four minutes after Colonel Robertson had concluded, the Hon. S. S. Prentiss arose and addressed the jury as follows:

May it please Your Honor, and you, Gentlemen of the Jury: I rise to address you with mingled feelings of regret and pleasure.

I regret the occasion, which has caused me thus accidentally and unexpectedly to appear before you, and has compelled you to abandon, for the time, the peaceful and quiet vocations of private life, for the purpose of performing the most important and solemn duty which, in the relations of civilized society, devolves upon the citizen.

I regret to behold a valued and cherished friend passing through one of the most terrible ordeals ever invented to try human feelings or test the human character; an ordeal through which, I do not doubt, he will pass triumphantly and honorably, without leaving one blot or stain upon the fair fame that has been so long his rightful portion, but through which he can not pass unscathed in his sensibilities and feelings. The lightning scar will remain upon his heart, and public justice herself can not, even though by acclamation through your mouths she proclaims his innocence, ever heal the wounds inflicted by this fierce and unrelenting prosecution, urged on, as it has been, by the demons of revenge and avarice.

Most of all do I regret the public excitement which has prevailed in relation to these defendants, the uncharitable pre-judgment which has forestalled the action of law, the inhospitable prejudice aroused against them because they are strangers, and the attempt which has been, and is still making, to mingle with the pure stream of justice, the foul, bitter, and turbid torrent of private vengeance.

But I am also gratified; gratified that the persecution under which my friends have labored, is about to cease; that their characters as well as the cause of public justice will soon be vindicated; that the murky cloud which has enveloped them will be dissipated, and the voice of slander and prejudice sink into silence before the clear, stern, truthful response of this solemn tribunal.

§ 164. The defendants are particularly fortunate in being tried before such a tribunal. The bearing and character of His Honor who presides with so much dignity, give ample assurance that the law will be correctly and impartially laid down; and, I trust I may be permitted to remark that I have never seen a jury in whose hands I would sooner entrust the cause of my clients, while, at the same time, I am satisfied you will do full justice to the Commonwealth.

I came before you an utter stranger, and yet I feel not as a stranger toward you. I have watched during the course of the examination the various emotions which the evidence was so well calculated to arouse in your bosoms, both as men and as Kentuckians; and when I beheld the flush of honorable shame upon your cheeks, the sparkle of indignation in your eye, or the curl of scorn upon your lips as the foul conspiracy was developed, I felt that years could not make us better acquainted. I saw upon your faces the mystic sign which constitutes the bond of union among honest and honorable men, and I knew that I was about to address those whose feelings would respond to my own. I rejoiced that my clients were, in the fullest sense of the term, to be tried by *a jury of their peers.*

§ 165. Gentlemen of the jury, this is a case of no ordinary character and possesses no ordinary interest. Three of the most respectable citizens of the State of Mississippi stand before you indicted for the crime of murder, the highest offense known to the law of the land.

The crime is charged to have been committed not in your own county, but in the city of Louisville, and there the indictment was found. The defendants during the past winter, applied to the Legislature for a change of venue and elected your county as the place at which they would prefer to have the question of their innocence or guilt investigated.

This course, at first blush, may be calculated to raise in your minds some unfavorable impressions. You may naturally inquire why it was taken; why they did not await their trial in the county in which the offense was charged to have been committed; in fine, why they came here? I feel it my duty before entering into the merits of this case, to answer these questions and to obviate such impressions as I have alluded to, which, without explanation, might very naturally exist.

In doing so it will be necessary to advert briefly to the history of the case.

My clients have come before you for justice. They have fled to you even as to the horns of the altar, for protection.

§ 166. It is not unknown to you that upon the occurrence of the events, the character of which you are about to try, great tumult and excitement prevailed in the city of Louisville. Passion and prejudice poured poison into the public ear. Popular feeling was aroused into madness. It was with the utmost difficulty that the strong arm of the constituted authorities wrenched the victims from the hands of an infuriated mob. Even the thick walls of the prison hardly afforded protection to the accused. Crouched and shivering upon the cold floor of their gloomy dungeon, they listened to the footsteps of the gathering crowds, and ever and anon, the winter wind that played melancholy music through the rusty grates was drowned by the fierce howling of the human wolves who prowled and bayed around their place of refuge greedy and thirsting for blood.

Every breeze that swept over the city bore away slander and falsehood upon its wings. Even the public press, though I doubt not unwittingly, joined in the work of injustice. The misrepresentations of the prosecutor and his friends became the public history of the transaction, and from one end of the Union to the other these defendants were held up to public gaze and public execration as foul, unmanly murderers, and that, too, before any judicial investigation whatever had occurred, or any opportunity been afforded them for saying a single word in their defense.

§ 167. I recollect well when I received the first information of the affair. It was in some respectable newspaper, which professed to give a full account of the transaction, and set forth with horrible minuteness a column of disgusting particulars.

Instantly, openly and unhesitatingly, I pronounced the paragraph false, and tramped it under my heels. When rumor seemed to endorse and sustain the assertions of the public prints, I laughed her to scorn. I had known Judge Wilkinson long and well. I knew him to be incapable of the acts attributed to him, or of the crime with which he was charged. Not an instant did I falter or waver in my belief. I hurled back the charge as readily as if it had been made against myself. What! A man whom I had known for years as the very soul of honor and integrity, to be guilty, suddenly and without provocation, of a base and cowardly assassination! One whose whole course of life had been governed and shaped by the highest moral principle; whose feelings were familiar to me; whose breast ever had a window in it for my inspection, and yet had never exhibited a cowardly thought or a dishonorable sentiment; that such a one, and at such an era in his life, too, should have leaped at a single bound the wide gulf which separates vice from virtue, and have plunged at once into the depths of crime and infamy! Why, it was too monstrous for credence. It was too gross for credulity itself. Had I believed it, I should have lost all confidence in my kind. I would no longer have trusted myself in society where so slender a barrier divided good from evil. I should have become a man-hater, and, Timon-like, gone forth into the desert, that I might rail with freedom against my race. You may judge of my gratification in finding the real state of facts in the case responsive to my own opinion.

§ 168. I am told, gentlemen, that during this popular excitement there were some whose standing and character might have authorized the expectation of a different course of conduct, who seemed to think it not amiss to exert their talents and influence in aggravating instead of assuaging the violent passions of the multitude. I am told that when the examination took place before the magistrates every bad passion, every ungenerous prejudice, was appealed to. The argument was addressed, not to the court, but to the populace.

It was said that the unfortuate individuals who fell in the affray were *mechanics*, while the defendants were *Mississippians—aristocratic slave holders*—who looked upon a poor man as no better than a negro. They were called *gentlemen* in derision and contempt. Every instance of violence which has occurred in Mississippi for years past was brought up and arrayed with malignant pleasure, and these defendants made answerable for all the crimes which, however much to be regretted, are so common in a new and rapidly populating country.

It was this course of conduct and this state of feeling which induced the change of venue. I have made these remarks because I fear that a similar spirit still actuates that portion of this prosecution which is conducted, not by the State, but private individuals.

§169. I am not aware that the Commonwealth of Kentucky is incapable of vindicating her violated laws, or unwilling to prosecute the perpetrators of crime. The district attorney has given ample proof that she is provided with officers fully capable of asserting her rights and protecting her citizens, and with the exception of one or two remarks, which fell from him inadvertently, I accord to his observations my most unqualified approbation. He has done equal justice to the State and the defendants; he has acquitted himself ably, honorably, and impartially. But, gentlemen, though the State is satisfied the prosecutor is not. Your laws have spoken through their constituted agent; now private vengeance and vindictive malice will claim to be heard. One of the ablest lawyers of your country, or of any country, has been employed to conduct the *private part* of this prosecution; employed, not by the Commonwealth, but by the real murderer; him whose forehead I intend, before I am done, to brand with the mark of Cain—that in after life all may know and all may shun him. The money of the prosecutor has purchased the talent of the advocate, and the contract is, that *blood* shall be exchanged for *gold*. The learned and distinguished gentleman to whom I allude, and who sits before me, may well excite the apprehension of the most innocent. If rumor speak truth he has character sufficient, even though without ability, and ability sufficient, even without character, to crush the victims of his purchased wrath.

I said that with the exception of one or two remarks, I was pleased with the manly and honorable course of the Commonwealth's attorney. These remarks seemed to be more in the spirit of his colleague than in accordance with his own feelings.

§170. I was sorry to hear him mention so pointedly, and dwell so long upon the fact that the defendants were *Mississippians*, as if that constituted an ingredient in their crime or furnished a proof of their guilt. If to be a Mississippian is an offense in my clients, I can not defend them; I am myself *particeps criminis*. We are all guilty. With malice aforethought, we have left our own bright and beautiful homes, and sought that land, the name of which seems to arouse in the minds of the opposing counsel only images of horror. Truly the learned gentlemen are mistaken in us; we are no cannibals nor savagas. I would that they would visit us and disabuse their minds of these unkind prejudices. They would find in that far country thousands of their own Kentuckians who have cast their lot by the monarch stream, in the enjoyment of whose rich gifts, though they forget not, they hardly regret the bright river upon whose banks they strayed in childhood.

No State has contributed more of her sons to Mississippi than Kentucky, nor do they suffer by being transplanted to that genial soil. Their native State may well be proud of them as they ever are of her.

But I do injustice to you and to myself by dwelling upon this matter. Here in the heart of Kentucky my clients have sought and obtained an unprejudiced. impartial jury. You hold in your hands the balance of justice; and I ask and expect that you will not permit the prosecution to cast extraneous and improper weights into the scale, against the lives of the defendants. You constitute the mirror, whose office it is to reflect, in your verdict, the law and the evidence which have been submitted to you. Let no foul breath dim its pure surface and cause it to render back a broken and distorted image. Through you now flows the stream of public justice; let it not become turbid by the trampling of unholy feet. Let not the learned counsel who conducts the private part of this prosecution act the necromancer with you, as he did with the populace in the city of Louisville, when he raised a tempest which his own wizard hand could not have controlled.

§171. Well may he exclaim in reference to that act, like the foul spirit in Manfred:

> "I am the rider of the wind,
> The stirrer of the storm;
> The hurricane I left behind
> Is yet with lightning warm."

Aye, so it is still "with lightning warm." But you, gentlemen, will perform the humane office of a conductor, and convey this electric fluid safely to the earth.

You will excuse these prefatory observations; they are instigated by no doubt of you, but by a sense of duty to the defendants. I wish to obviate in advance, the attempts which I know will be made to excite against them improper and ungenerous prejudices. You have seen in the examination of one of the witnesses, Mr. Graham, this very day, a specimen of the kind of feeling which has existed elsewhere, and which I so earnestly deprecate. So enraged was he because the defendants had obtained an impartial jury, that he wished the whole Legislature in that place not to be mentioned to ears polite, and that he might be the fireman; and all on account of the law changing the venue. Now, though I doubt much whether this worthy gentleman will be gratified in his benevolent wishes in relation to the final destiny of the Senate and House of Representatives of this good Commonwealth, yet I can not but believe that his desires in regard to himself will be accomplished, and his ambitious aspirations fully realized in the ultimate enjoyment of that singular office which he so warmly covets.

§172. Gentlemen of the jury—I ask for these defendants no sympathy, nor do they wish it. I ask for them only justice—such justice

alone as you would demand if you occupied their situation and they yours. They scorn to solicit that from your pity which they challenge from your sense of right. I should ill perform toward them the double duty which I have assumed, both of friend and advocate, did I treat their participation in this unfortunate transaction otherwise than candidly and frankly; did I attempt to avoid responsibility by exciting commiseration. I know that sooner than permit deception and concealment in relation to their conduct, they would bare their necks to the loathsome fingers of the hangman, for to them the infamous cord has less of terror than falsehood and self-degradation.

That these defendants took away the lives of the two individuals whose deaths are charged in the indictment, they do not deny. But they assert that they did not so voluntarily or maliciously; that they committed the act from stern and imperative necessity; from the promptings of the common instincts of nature; by virtue of the broad and universal law of self-defense; and they deny that they have violated thereby the ordinances of either God or man. They admit the act, and justify it.

§ 173. The ground of their defense is simple, and I will state it so that it can not be misapprehended. They assert, and I shall attempt from the evidence submitted to convince you that a conspiracy was formed by Mr. Redding, the prosecutor, and various other persons, among whom were the deceased, to inflict personal violence upon them; that the conspirators, by preconcerted agreement, assembled at the Galt House, in the city of Louisville, and attempted to accomplish their object; and that, in the necessary, proper, and legal defense of their lives and persons from such attempt, the defendants caused the deaths of two of the conspirators. After discussing this proposition, I shall submit another, which is, that even though a conspiracy on the part of the deceased and their companions, to inflict personal violence and bodily injury upon the defendants, did not exist, yet the defendants had *reasonable* ground to suppose the existence of such a conspiracy, and to apprehend great bodily harm therefrom; and that upon such reasonable apprehension they were justified in their action, upon the principle of self-defense, equally as if such conspiracy had in point of fact existed. (*a*).

The law applicable to these two propositions is simple, being, in fact, nothing more than a transcript from the law of nature. The principles governing and regulating the right of self-defense are substantially the same in the jurisprudence of all countries—at least all civilized ones. These principles have been read to you from the books by my learned and excellent friend Col. Robertson, and require no repetition.

(*a*). As to self-defense and reasonable apprehension, see *post* §§ 474, 485, 486.

§ 174. That a man has a right to defend himself from great bodily harm, and to resist a conspiracy to inflict upon him personal violence if there is reasonable danger, even to the death of the assailant, will not, I presume, be disputed. That *reasonable, well-grounded* apprehension, arising from the actions of others of immediate violence and injury, is a good and legal excuse for defensive action, proportionate to the apparent impending violence and sufficient to prevent it, I take to be equally indisputable.

By these plain rules and upon these simple principles, let us proceed to test the guilt or innocence of the defendants.

First, then, as to the existence of the conspiracy. Before examining the direct evidence to this point, you will naturally inquire, was there any cause for this alleged conspiracy? Motive always precedes action. Was there any motive for it? If we establish the existence of the seed, we shall feel less hesitation in being convinced of the production of the plant. Was there, then, any motive on the part of Mr. Redding and his friends for forming a combination to inflict personal violence upon the defendants? In answering this question it will be necessary to take notice of the evidence which has been given in relation to events that transpired at the shop of Mr. Redding at a period anterior to the transaction at the Galt House, and which, except for the clue they afford to the motive, and consequently to the subsequent action of the parties, would have no bearing upon the case before you. You will take heed to remember that whatever of impropriety you may consider as attaching to the conduct of Judge Wilkinson and his friends during this part of the affair, must not be permitted to weigh in your verdict, inasmuch as that conduct is the subject of another indictment which is still pending in this court.

§ 175. Judge Wilkinson visited Louisville for the purpose of making the preparations necessary for the celebration of his nuptials. The other two defendants had also their preparations to make, inasmuch as they were to act as his friends upon this interesting occasion. Dr. Wilkinson, a brother of the Judge, had ordered a suit of clothes of Mr. Redding, who follows the very respectable occupation of tailor, occasionally relieved and interspersed by the more agreeable pursuits of a coffee-house keeper. On the day but one preceding that fixed for the marriage ceremonies, the Doctor, in company with his brother and friend, Murdaugh, proceeded to the shop of Mr. Redding for the purpose of obtaining the wedding garments. Upon trying on the coat it was found ill-made and of a most ungraceful fit. It hung loosely about his shoulders, and excited by its awkward construction the criticism and animadversion of his friends. Even the artificer did not presume to defend the work of his own hands, but simply contended

that he could re-organize the garment and compel it, by his amending skill, into fair and just proportions. From the evidence I presume no one will doubt that it was a shocking bad coat. Now, though under ordinary circumstances, the aptitude of a garment is not a matter of very vital importance in the economy of life, and ought not to become the subject of controversy, yet all will admit that there are occasions upon which a gentleman may pardonably indulge a somewhat fastidious taste in relation to this matter. Doctor Wilkinson will certainly be excused, considering the attitude in which he stood for desiring a well made and fashionable coat.

§ 176. I confess I am not a very good judge in concerns of this sort. I have had no experience on the subject, and my investigations in relation to it have been exceedingly limited. Under favor, however, and with due deference to the better judgment of the learned counsel on the other side, I give it as my decided opinion that a gentleman who is about to participate in a marriage ceremony is justified in refusing to wear a coat, which, by its loose construction and superabundant material, indicates, as in the case before us, a manifest want of good husbandry.

Suffice it to say, Dr. Wilkinson and his friends did object to the garment, and Mr. Redding, after some altercation, consented to retain it. The pantaloons, which constituted a part of the suit, had been sent to the hotel, and the doctor was in the act of paying for them out of a $100 bill, which he had previously deposited with Mr. R., when the Judge remarked that he had better not pay for the pantaloons until he had first tried them on, as they might be found to fit no better than the coat. Mr. Redding, according to his own evidence, responded that "they had said too much already about the matter," to which the Judge, he says, replied that he did not come there to be insulted, and immediately seized the poker and struck him, upon which the Doctor and Mr. Murdaugh also fell on him with their knives drawn. Redding then seized his shears but did not succeed in cabbaging therewith any part of his assailants. He was successful, however, in dragging the Judge into the street, where, after a slight scuffle, which resulted in no personal injury to any of the parties, they were separated. After the separation Redding offered, if they would lay down their knives, to fight them all. This kind proposition the defendants declined, but the Doctor returned into the shop, obtained his $100 note, and then the defendants retired from the place.

§ 177. Such, in substance, is Mr. Redding's own account of the transaction at his shop. The witness, Weaver, also proves the altercation which occurred in relation to the fit of the coat and the scuffle which ensued in consequence. He, however, avers that Redding, in a very insulting manner, told the Judge that he "was more meddlesome

than the other," and that he "was too d—d meddlesome," or words to that effect, which insulting language so excited the Judge that he seized the poker and commenced the assault.

The other witness, Craig, Redding's journeyman, testifies, in substance, the same as Redding as to what passed in the shop; corroborates his account of the altercation about the coat, and says that he considered Dr. Wilkinson, not as assisting in the affray, but as attempting to separate the parties. Some of the witnesses think that the Doctor attempted, in the street, to stab Redding as he was getting advantage of his brother. The evidence on this point, as well as in regard to the conduct of Murdaugh, is somewhat contradictory. In the view, however, which I have taken of the case, the discrepancy is of little importance.

It is clearly proven, take the evidence in any way, that Mr. Redding used insulting language toward Judge Wilkinson on account of the Judge's expression of an opinion in relation to the fit of his brother's coat. What was the exact language used, it is difficult to ascertain.

§ 178. There were six persons in the room when the quarrel ensued —on the one side the prosecutor (Redding), his foreman (Craig), and the boy, (Weaver); on the other, the three defendants.

All the evidence on this point has been derived from the first party, and ought, consequently, to be taken with many grains of allowance. The prosecutor has given you his version of the affair, but his cunning has prevented the defendants from giving you theirs. Dr. Wilkinson, who was discharged by the examining magistrate, has been included in the indictment, one would judge, for the very purpose of precluding his testimony. No one can doubt that the conduct of Judge Wilkinson, however reprehensible, resulted from the abusive language and insulting demeanor of Mr. Redding. The happy facility with which he indulged, on a subsequent occasion, in the use of opprobrious epithets, gives good reason to suppose that his remarks on the present were not very guarded. The expression deposed to by Weaver is, I presume, but a sample. "You are too d—d meddlesome," was the observation accompanied, no doubt, by the overbearing and bullying manner which illustrated his conduct afterward, and which smacked more of his spiritual pursuit as the Ganymede of a coffee-house than of his gentle calling as a knight of the shears and thimble. He certainly did on this occasion, "sink the tailor," for tailors are proverbially polite and gentlemanly in their deportment.

§ 179. I do not wish to be considered as justifying Judge Wilkinson or his friends in taking notice of the petulant and insolent conduct of Redding. I think they would have better consulted their character and feelings by treating him with contempt. I will go further, and candidly admit that I consider their course reprehensible; that it

resulted from passion and sudden excitement, and not from deliberate determination. They were themselves convinced of this in a moment, and left the ground, ashamed, as they still are, of their participation in the matter—Judge Wilkinson rebuking and leading away his young and more ardent friend, Murdaugh, who seemed to indicate some disposition to accept the boastful challenge of Mr. Redding, that "He could, if they would lay down their knives, whip them all three." From all the evidence it is perfectly clear that, in the altercation, no personal injury resulted to any of the parties; that the defendants retired voluntarily from the quarrel, while Mr. Redding retained the field, and with boastful taunts and insulting outcries, invited a renewal of the fight. The Mississippians were manifestly satisfied. Not so Mr. Redding; he was, "full of wrath and cabbage," boiling over with violence, and breathing defiance and vengeance against the retreating foe. He, doubtless, retired to his coffee-house and attempted to soothe his wounded feelings with some of the delightful beverages which it was occasionally his profitable province to dispense to others. Here his friends gathered around him; he recounted to them his manifold grievances; he grew warm in the recital; the two white-handled pocket-knives which had been drawn but not used in the affray, danced before his distempered imagination in the shape of trenchant and death-dealing blades. These little instruments of ordinary and general use, became, at once, bowie-knives, "in buckram." He believed, no doubt, and made his friends believe, that he was an injured man, and that some satisfaction was due to his insulted honor. I have presented this part of the case to you simply for the purpose of enabling you to judge of the subsequent action of the parties, and to indicate on which side a desire for vengeance, and a combination to obtain it were most likely to originate. Upon the conclusion of the first affray which party would you have suspected of a disposition to renew it? Where could lie the motive on the part of Judge Wilkinson and his friends for additional violence? But who that is acquainted with the workings of human nature, or the indications of human feeling, will hesitate a moment in believing that revenge lurked in the bosom of Redding, and sought only a safe opportunity for development? His conduct indicated a state of mind precisely fitted for the formation of a conspiracy.

§ 180. Having laid the foundation, I will now proceed to the erection of the superstructure. I will show first by the direct and then by the circumstantial proofs, the existence of this foul and cowardly conspiracy. I will, however, here remark, that I doubt not the misrepresentations and falsehoods of Mr. Redding, in relation to the transaction, induced several of the persons implicated to join the combination, who, with a correct knowledge of the facts, would never have participated in the affair.

First, then, as to the direct and positive evidence. Mr. Jackson says that immediately after the first affray he was passing Mr. Redding's, when his attention was attracted by loud talking in the store, which induced him to enter, where he found Redding, Johnson and Meeks. Johnson was expressing his opinion as to the course which should be pursued toward the Mississippians for their conduct, and said they "ought to go to the Galt House and flog them." "Jack," said he to Mr. Redding, "just say the word, and I'll go for Bill Holmes, and we'll give them hell," at the same time boasting in his own peculiar phraseology, that "he was as much manhood as was ever wrapped up in so much hide." Upon some hesitation being evinced at this proposition, Meeks said, "Let's go any how and we'll have a spree."

Mr. Jackson further deposes that some time after, he was stopped by Johnson, on the street, who told him he was going after Holmes; that Jack Redding was a good man, and that he, Jackson, ought to go with them to the Galt House and see him righted. Jackson declined, alleging as an excuse his religious character, and his desire to abstain from fighting, whereupon Johnson exclaimed in his ardent zeal for enlisting recruits, that "Church, hell or heaven ought to be laid aside to right a friend." Jackson says he understood it distinctly, that it was a fight to which he was invited.

§ 181. Mr. Jackson's testimony is entitled to credit. He did not participate in the affair, and he can have no inducement to speak falsely, for all his prejudices must naturally be enlisted on the side of the prosecution. His character is sustained by unexceptionable testimony, and has been impugned by no one except the salamander gentleman, whose ambition seems to be to pursue in the next world that occupation which in this is principally monopolized by the descendants of Ham.

The next direct evidence of the conspiracy is from Mr. Deering, whose character and testimony are both unimpeachable. He says he was passing down Market street on the evening of the affray, when he saw, near the market house, Johnson, in company with Holmes and others, and that they were discussing the subject of the quarrel between the Mississippians and Redding. This proves that Johnson was carrying into effect his proposition at Redding's store, viz.: "To go and get Bill Holmes and give them hell." He had already found Bill Holmes, and, we shall presently see, made all his arrangements for "giving them hell."

§ 182. Mr. Deering says that soon after he met Mr. Johnson again, who inquired for Mr. Turner, the city marshal. Mr. Deering told him he would be too late with his officers, for the Mississippians would be gone; to which Mr. Johnson responded, "*there were enough gone there—that if they came down their hides would not hold shucks.*" What did this mean if it did not indicate that the conspiracy had already been formed, and a

portion of the conspirators assembled at the Galt House for the purpose of preventing the game from escaping and holding it at bay until the arrival of the rest of the hunters. They had gone, it seems, too, in sufficient numbers to authorize the classical boast of Mr. Johnson, "that if they [meaning the Mississippians] came down, their hides wouldn't hold shucks."

There is one more witness whose testimony is positive to the point; it is Mr. Harris. He swears clearly and unequivocally, that Johnson met him on the evening of the affray, told him that the Mississippians had insulted Mr. Redding, and directly solicited him to go with Redding's friends to the Galt House and see him righted. Mr. Harris says he refused to go, whereupon Johnson exclaimed, "Are you a friend of Redding's?" thereby showing how strong was the feeling when even a mere refusal to participate in the violence was considered as proof that the man refusing was no friend of Redding's.

§ 183. Such, gentlemen, is the positive proof of the conspiracy. It consists of the evidence of three disinterested and honest witnesses, two of whom were directly and strongly solicited to participate in the matter. The testimony of each of these witnesses corroborates that of the other two. The facts sworn to have a natural order and connection. There is a verisimilitude about the whole story, which would not belong to either portion by itself. The testimony is entitled to much more weight than if it had been the recital of a single witness, for if you believe one of the witnesses you must give credit to all. One of them swears that he heard Johnson, in Redding's shop, propose to Redding and his friends that he should get "Bill Holmes" and "give them hell." The next witness saw Johnson on the street immediately after, in company with "Bill Holmes," who seems to have been the Achilles of these myrmidons, explaining to him how his dear Patroclus (Redding), had been insulted by the hectoring Mississippians, and urging him to vengeance. Again the same witness met Johnson, and was informed by him that a portion of his banditti had already taken possession of the passes of the Galt House, and that if the Mississippians appeared "their hides wouldn't hold shucks." The third witness swears to a positive solicitation from Johnson that he should join in the foray, and to the expression of strong indignation by this slayer of cattle upon his refusal to do so.

§ 184. Johnson was the "Malise" of the party, "the messenger of blood and brand" sent forth to summon the clansmen true. Too well did he perform his duty. He collected his friends and conducted them like beasts to the slaughter, while he himself found the "manhood," which, according to his boast, distended his hide, rapidly descending to his heels. But enough, for the present, of this vaporing worthy; I shall pay my respects to him hereafter.

I will now proceed, in pursuance of the plan I had prescribed, to show the existence of the conspiracy by the circumstantial evidence, which is, if possible, more irrefragable than the direct testimony, but yet most beautifully illustrates and confirms it. I will exhibit to you a chain of facts, linked together by a natural and necessary connection which I defy even the strong arm of the opposing counsel to break. I will weave a cable upon whose unyielding strength the defense may safely rely to ride out the storm of this furious prosecution.

§ 185. Mr. Redding went to the Galt House after the affair at his shop for the purpose, as he avows, of obtaining the names of the Mississippians that he might procure process against them from the civil authorities. On his way, as he confesses, he armed himself with a deadly weapon, which, however, I am bound in justice to say, he never had the courage to use. A number of individuals accompanied and followed him, whose manner and strange appearance excited universal attention even in the bar-room of the most frequented hotel in the western country. Their strange faces and strange actions excited general apprehension. Nearly every witness to the unfortunate catastrophe, has deposed that he was struck with the "strange faces" congregated in the bar-room. The learned counsel on the other side has attempted to prove in the examination, and will, no doubt, insist in the argument, that that room is daily crowded with strangers from every part of the country; that the excellence of the fare and the urbanity of its proprietors, invite to the Galt House a large portion of the traveling public, and that consequently it is nowise remarkable that strange faces should be observed in the bar-room. Though I admit the gentleman's premises, I deny his conclusion. That strangers should frequent the Galt House is not wonderful; they do it every day, and for that very reason strange faces, under ordinary circumstances, arouse neither remark nor attention. That the "strange faces" of Mr. Redding's friends should have excited remark and scrutiny, not only from the inmates of the house but from strangers themselves, is truly wonderful, and can be accounted for only by admitting that there was something very peculiar in their conduct and appearance.

§ 186. They went there prepared for pre-concerted action. Having a common object and a well arranged plan, a glance or a motion sufficed to convey intelligence from one to the other. Tell-tale consciousness spoke from each countenance. Their looks, unlike the mysterious brotherhood, gave up to the observer the very secret they wished thereby to conceal. There is a strange and subtle influence, a kind of mental sense by which we acquire intimation of men's intentions, even before they have ripened into word or action. It seems, on such occasions, as if information was conveyed to the

mind by a sort of natural magnetism, without the intervention of the senses.

Thus, in this case, all the by-standers were impressed at once with the conviction that violence was intended by the strange men who had attracted their attention. These men, it is proven, were the friends and intimate companions of Redding. Most of them, though living in the city of Louisville, were not in the habit of going to the Galt House, and yet, by a singular coincidence, had all assembled there on this occasion.

§ 187. They were remarkably stout men, constituting the very elite of the thews and muscle of Louisville, and many of them noted for their prowess in the vulgar broils of the city. Why had they thus congregated on this occasion? Why their strange and suspicious demeanor? I will show you why. It will not be necessary to await the actual fight to become fully conversant with their purpose. It found vent in various shapes, but chiefly bubbled out in the unguarded remarks and almost involuntary expressions of the more garrulous of the party.

I shall be compelled, even at the risk of being tedious, to glance at the evidence of a number of the witnesses in showing you the circumstances at the Galt House, which conclusively indicate the existence of the conspiracy.

Mr. Everett, one of the proprietors of the Galt House, says he was admonished by his bar-keeper that a difficulty was about to arise, and he had better persuade Judge Wilkinson out of the bar-room. Accordingly he went in and took the Judge away, and gives as a reason that he was alarmed at the strange faces in the bar-room, and apprehended difficulty; alarmed, not because the faces were those of strangers, but because of something in their appearance which indicated concert and threatened violence.

§ 188. Mr. Trabue was waiting in the room for supper and says he heard some one remark, "If the Mississippians had not gone up stairs they would have been badly treated," in connection with which remark Redding was pointed out to him. This, it seems, was after the Judge had retired at the solicitation of Mr. Everett. Now, who were to have treated the Mississippians badly, except Mr. Redding and his friends? Who else had any pretense for so doing? Can you doubt for a moment that the remark had reference to Mr. Redding's party? It was probably made by one of them, but whether by one of them or a stranger, it equally indicated their violent determinations. Mr. Trabue also proves that after Judge Wilkinson retired, Mr. Redding also retired; and when the Judge returned into the bar-room, Redding presently entered, followed, to use the language of Mr. Trabue, "by a right smart crowd" of his friends. Now, why did Redding thus

go out and return with his gang at his heels? Why were his movements thus regulated by the motions of the Judge? Wherefore was it that every one expected a difficulty?

Mr. Redding, according to his own story, went to the Galt House simply for the purpose of obtaining the names of the gentlemen who had insulted him.

§ 189. He had accomplished his ostensible object. He had obtained the names, and more than that, had gratified his base appetite by abusing one of the gentlemen in the most indecent and disgusting manner. No rowdy who ever visited his coffee-house could have excelled him in this, to the vulgar mind, sweet mode of vengeance. He had even driven the Judge from the room by the overwhelming torrent of his billingsgate epithets. To use an expression suited to his comprehension and feelings, he remained "cock of the walk." Yet he was not satisfied. He retired and watched the return of the Judge, and then emboldened by his previous impunity, followed with his cut-throat band to complete the work of vengeance.

But to proceed with the circumstantial evidence. Mr. Montgomery states that he was with Mr. Trabue at the Galt House when Redding came in after the names, and also when he came back just before the conflict; heard him use very rough language, and, also, heard Halbert remark that there would be "rough work with the Mississippians." Now this fully corroborates the testimony of Mr. Trabue on the same point, who heard the remark but did recollect who made it. This Marshall Halbert is the man who boasted, after the affair was over, that he had knocked down one of the Mississippians with a chair while his back was towards him, and recounted many other feats of daring to the astonishment of the listeners. I should judge him to be of the blood of honest Jack Falstaff, whose killing, as every body knows, was always by word of mouth, and whose deeds of desperate valor were so unfortunate as to find neither historian nor believer except himself. At all events Halbert, according to his own confession, was one of the conspirators, and I have no doubt performed his part in the affray as well as he knew how, and with much greater humanity than he pretends. In addition to the above remark of Halbert's, Mr. Montgomery states that he heard several persons say at a time when the defendants were not in the room, that they would beat the Mississippians well.

General Chambers, who lives opposite the Galt House and is in the daily habit of visiting it, says he went into the bar-room just before the affray, that he observed persons whom he was not in the habit of seeing there, and that from their appearance and demeanor, his suspicions were immediately aroused.

§ 190. I attach great weight to the testimony of Gen. Chambers. His character for intelligence and observation needs no comment from me; and the fact that his suspicions were aroused must convince every one that cause for alarm existed.

The next testimony to which I shall refer is that of Mr. Oliver. He says that he was acquainted with Mr. Meeks, and was taking a social glass with him on the evening of the affray, when Meeks started off, saying he must go to the Galt House (which was on the opposite side of the street), that he was bound to have a fight that night, and "by G—d he would have one." You will recollect that Meeks was one of the persons who collected around Redding immediately after the affair at the shop, and seconded Johnson's proposition to get Bill Holmes and "give them h—l," by saying "they would go any how, and have a spree." Can you doubt for a moment that the observation made by this unfortunate man to Mr. Oliver, as just recited, had no relation to the previous arrangement with Johnson and others at Redding's shop? The remark of Meeks seems to me, taken in connection with his previous and subsequent conduct, almost conclusive of itself as to the existence of a conspiracy. I had almost forgotten to observe Mr. Oliver's statement that Meeks, before he started, tied a knot in the small end of a cow-hide which he carried, manifestly to prevent it from slipping out of his hand in the conflict which he so eagerly courted. His knife, by a sort of pious fraud, had been taken from him by Mr. Oliver, otherwise the result might have been very different. The prudent caution of Mr. Oliver in disarming him of this weapon, proves how strong must have been the indications of his violent disposition.

§ 191. Mr. Reaugh says he was at the Galt House on the evening of the affray, and saw Redding in conversation with Rothwell and Halbert—he also saw Holmes and Johnson. Something in the demeanor of the party induced him to ask Johnson what was the matter. Johnson replied by relating the affair of the shop, upon which Reaugh observed, "If the Mississippians fall into the hands of these men they will fare rather rough." "Yes," replied the worthy butcher, "they would skin them quicker than I could skin a sheep." Mr. Reaugh states that he made the remark to Johnson because of the remarkable size and strength of the men to whom he alluded, the strange manner in which they had assembled, and the fact that he knew them to be friends of Redding, and that Redding had been in a quarrel with the Mississippians.

Mr. Miller states that being a member of the grand jury, and having heard of the affray at Redding's, he went into a tin shop to inquire about the matter, when Mr. Halbert came in and boasted much of what he intended to do. Witness then went to the Galt House for supper, when he heard Redding abusing Judge Wilkinson and challenging him for a fight. Witness advised Halbert to take Redding

away, observing that he, witness, was on the grand jury, had the names, and would have all the matter attended to. Some one, he thinks Johnson, then remarked that "if he did'nt leave the room, he'd see the finest sort of beef-steaks served up." Presently he heard the exclamation, near the counter, "There they are, all three of them," and the crowd immediately closed in upon the persons so indicated.

Mr. Waggry also heard the remark about the "steaks," and then heard some one exclaim, "We'll have a hell of a fight here just now." He also heard Mr. Miller advise Halbert to take Redding away.

Mr. Brown swears that he heard Mr. Miller tell Mr. Redding he was not taking the proper course; he should have the matter before the grand jury, whereupon some one said, "Hush you, Billy Miller, if it comes to handicuffs the boys will settle it." The witness then became so apprehensive of a fight that he left the room.

§ 192. Now, though Miller is not positive as to the person who made use of the expression about "serving up beef-steaks," yet no one, I take it, will hesitate as to his identity. Who but Johnson could speak in such rich and technical language? Who but Johnson could boast of "having as much manhood as was ever wrapped in the same extent of hide"? While, at the same time, he had so arranged it, that the "hides" of the Mississippians "would not hold shucks." Who but this unmitigated savage would talk of "skinning" a gentleman "quicker than I could skin a sheep?" Why, he rubs his hands, licks his lips, and talks of serving up christians in the shape of "steaks," with as little compunction as you or I would exhibit in eating a radish. The cannibal! He should go, at once, to New Zealand and open his shambles there. His character would suit that country, and I doubt not he would obtain great custom, and find ample demand for his human "steaks." Why, gentlemen I should be afraid to buy meat out of his stall. He talks as if he supplied it by burking. I should expect some day to swallow an unbaptized infant in the disguise of a reeking pig, or to eat a fellow citizen, *incog.*, in a "steak." Such a fellow should be looked to. But again. What meant the expression deposed to by Reaugh, "There they are, all three of them, now?" It was the signal for the conspirators to close in. It clearly proves a pre-concerted plan. No names were mentioned, and without a previous understanding, the expression would have been nonsense. Most of the party did not know the Mississippians, hence it was necessary that some one should give intimation when they entered the room. The expression, "There they are," was the signal for the onset. What meant the expression sworn to by Waggry, "We'll have a hell of a fight here just now?"

What conclusion do you draw from the response made to Miller, when he advised Redding to bring the matter before the grand jury,

"Hush you, Billy Miller, and if it comes to handicuffs the boys will settle it?" If what comes to handicuffs? And who were the boys? Why, if the quarrel with the Mississippians comes to handicuffs. And as for the "boys," there was not a man present who did not know who they were.

§ 193. Redding was one of the "boys," and a very bad boy, too. Billy Holmes was another. Marshall Halbert was a perfect "broth of a boy,' and if his own story is entitled to credit, he must have been twins, for he acted the part of at least two in the fight. Bill Johnson was as much of a boy as ever was "wrapped up in the same amount of hide," though his extraordinary modesty has induced him to deny the soft impeachment. The unfortunate Meeks and Rothwell were two of the "boys;" and last, though not least, comes Harry Oldham, the "Jack Horner" of the party. He "sat in the corner" till the fight was nearly over, when he "put in his thumb" and "pulled out," not "a plum," but a pistol, and ever since has been exclaiming, "What a brave 'boy' am I."

Yes, gentlemen of the jury, these were the "boys" whose strange appearance aroused the suspicions and excited the apprehensions of all.

Permit me, now, to call your attention to the testimony of Mr. Donahue. It is clear and conclusive. He swears that on the evening of the affray, and just before it occurred, being in the bar-room of the Galt House, he heard Rothwell ask Redding "If they were there." Upon being answered in the negative he exclaimed, "Come, let us go up stairs and bring them down and give them hell." Rothwell was the brother-in-law of Redding, had been informed by Redding of his grievances, and had accompanied him to the Galt House. Whom did he mean when he asked if "They were there?" The Mississippians, undoubtedly. Whom did he propose to drag from their rooms and chastise? Of course the same persons for whom he had just inquired. Rothwell asked "If they were there." When the defendants came in, some one cried out "There they are, all three of them." These two expressions manifestly emanated from persons who understood each other and were engaged in pursuit of a common object.

If these remarks had not relation to some previously concerted plan of action, they would be unmeaning and foolish; but granting the existence of the conspiracy I have supposed, and every word is pregnant with meaning, full of force, weight and effect.

§ 194 Mr. Raily deposes to the caution given by Miller to Redding; also to the fact that Redding left the room when Judge Wilkinson had retired, and came back again immediately after the Judge had returned. He also saw Oldham after the affray was over, putting a pistol into his pocket and wiping with his handkerchief the blood from a double-edged dirk.

Mr. Pearson says he went to the Galt House just before supper, on the evening of the affray. As he stood behind the bar, one Capt. Rogers observed that there would be a fight. Presently, witness met Marshall Halbert and told him he ought to stop it, meaning the fight. Halbert said "No, let it go on." This was before Redding had commenced abusing Judge Wilkinson, and proves that the idea of a fight did not originate from that circumstance. The Judge came, and Redding abused him. He went out, and Redding followed. He returned, and presently so did Redding with a crowd at his heels. Seeing the crowd, and apprehending violence, Mr. Pearson was in the act of leading the Judge out of the room, when the crowd rushed upon Murdaugh. The affray commenced and the Judge stopped, refusing to leave the room until he saw his friends out of the difficulty. Need I ask you whether he was right in so doing?

Mr. Banks says he saw Redding just after the first affray, and asked him if he was hurt. He said no, but that "he would have satisfaction," and that "he could whip them all three."

Dr. Graham says that after Judge Wilkinson had left the bar-room the first time, he heard some one observe, "The d—d coward has run."

Does not Mr. Oldham's testimony prove the conspiracy? I do not mean directly, but circumstantially. He says he was not present at the fight in the bar-room, and knew nothing of the affair, nor of the defendants. He says he was standing in the passage when the door opened, and he received a cut from Dr. Wilkinson, whom he knocked down for his pains.

§195. After fighting in the crowd awhile, he saw Murdaugh retreating up stairs, and asking for a pistol, whereupon he was reminded of his own pistol, which he immediately drew and discharged at the young gentleman, giving him not the weapon, but its contents, to-wit, a bullet, split in three pieces. This worthy gentleman, who is certainly

> "as mild a mannered man
> As ever scuttled ship or cut a throat,"

swears positively that he did not know either of the defendants; that he belonged to neither party in the affray, and that he fought, to use his own descriptive and unrivalled phraseology, entirely "upon his own hook."

Surely Mr. Henry Oldham must be the knight-errant of the age, the Don Quixote of the west, the paragon of modern chivalry. He fights, not from base desire of vengeance, nor from sordid love of gold – not even from patriotism or friendship; but from a higher and loftier sentiment—from his pure, ardent, disinterested, unsophisticated love of

glorious strife. Like Job's war-horse, he "smelleth the battle afar off," and to the sound of the trumpet he saith, "Ha! ha!" To him

> "There's something of pride in the perilous hour,
> What'er be the shape in which death may lower,
> For fame is there to tell who bleeds,
> And honor's eye on daring deeds."

§ 196. You have heard, gentlemen, of the bright, warm isles which gem the oriental seas, and are kissed by the fiery sun of the tropics, where the clove, the cinnamon and the nutmeg grow; where the torrid atmosphere is oppressed with a delicious, but fierce and intoxicating influence. There the spirit of man partakes of the same spicy qualities which distinguish the productions of the soil. Even as the rinds of their fruits split open with nature's rich excess, so do the human passions burst forth with an overwhelming violence and prodigality unknown till now in our cold, ungentle clime. There, in the islands of Java, Sumatra, the Malaccas, and others of the same latitude, cases similar to that of Mr. Henry Oldham are of frequent occurrence. In those countries it is called "running a muck." An individual becomes so full of fight that he can no longer contain it. Accordingly, he arms himself with a species of dagger, very similar to that from which Mr. Oldham wiped the blood with his pocket handkerchief, and rushing into the public streets, wounds and slays indiscriminately among the crowd. It is true that this gallant exploit always results in the death of the person performing it, the people of the country entertaining a foolish notion that it is too dangerous and expensive a mode of cultivating national bravery. But in the present instance I trust this rule will be relaxed. Mr. Oldham is the only specimen we possess of this peculiar habit of the spice-islands, and he should be preserved as a curiosity.

But, alas! the age of chivalry has gone by, and in the performance of my duty I fear I shall have to exhibit some little defects in the character of Mr. Oldham, calculated in this censorious day to detract from his general merits.

It is with great pain I feel constrained to say (for he is a sort of favorite of mine), that telling the truth is not one of his knightly accomplishments, and that his heroic conduct in the affray at the Galt House was nothing more nor less, according to his own story, than a downright cowardly attempt at assassination.

§ 197. First, as to his veracity. He says that he was cut, in the passage by Dr. Wilkinson, to whose identity he swears positively; yet it is proven by half a dozen unimpeachable witnesses that the Doctor was, at that time, *hors du combat*, beaten to a mummy—almost lifeless, and perfectly limber—while his knife had fallen from his relaxed and nerveless grasp upon the floor of the bar-room, where it was afterwards picked up.

Yet Oldham swears, manfully, that it was the Doctor who cut him, though, when asked if his face was not bloody, he replied that the passage was too dark to enable him to distinguish faces. If he could not see whether the face of the person who cut him was bruised or bloody, how dare he swear it was Dr. Wilkinson, whom he admits he had never seen before?

Yet, though his vision was so dull in regard to this matter, it was almost supernaturally keen upon another. He swears that he was cut by a dirk knife, "*with a white handle*" Now in this dusky passage, where he could not see his assailant's face, how could he distinguish so accurately the character of the weapon, and more especially of the handle. The handle of such a knife as either of those exhibited would be entirely concealed in the grasp of the holder. But Mr. Oldham could see through the hand and swear to the color of the handle, even when he could not distinguish the color of the assailant's face.

The prosecution seems to be afflicted with a monomania on the subject of white-handled knives. The white-handles cause them greater terror, and excite more of their observation, than the blades. One would be almost led to suppose, from the evidence, that the defendants held by the blades and fought with the handles. These white handles flash before their eyes like the bright inscription upon the dim steel of a Turkish cimeter. I hope, though with many misgivings, that none of them will ever die of a "white handle."

But, to return to my subject, why in the name of all that is human or humane, did Oldham shoot at Murdaugh, whom he acknowledges he did not know, of whose connection with Dr. Wilkinson he was unacquainted, and who had not attempted to do him the slightest injury? According to his own account of the matter, he acted the part of a base and cowardly assassin. If he tells the truth, he is an assassinating villain. If he does not, he is a perjured villain. I leave him choice of these two horns of the dilemma, though I doubt not the latter is the one upon which he is destined to hang. I can not believe in the existence of such a monster as he would make himself out to be, and have offered his conduct to you as evidence of the existence of a conspiracy, and of his participation in it. It is better that he should have the excuse of having fought in Redding's quarrel than no excuse at all.

§ 198. Gentlemen of the jury, I have now performed that portion of my task which embraced the circumstantial evidence. Out of the mouths of fifteen different witnesses, most of them gentlemen of high character and undoubted veracity, I have exhibited to you an almost countless variety of circumstances, the occurrence of which, or any great portion of them, is absolutely incompatible with any other

hypothesis than that of the existence of the conspiracy, which I proposed at the outset to prove.

Upon that hypothesis all these circumstances are easily explicable, and in perfect accordance with the ordinary principles of human action.

I have combined the scattered strands of evidence. I have finished the cable which I promised, and now challenge the opposing counsel to try their strength upon it. They may pick it into oakum, but I defy them to break it.

There is one other argument in favor of the view that I have taken of the origin of this unfortunate affray, which may be properly introduced at this time, and with which I shall close this branch of the subject.

§ 199. It arises out of the respective characters and positions in life of the two parties, and is, in my opinion, entitled to great weight. Who, judging of character and situation, was most likely to have sought and provoked the unfortunate conflict—Judge Wilkinson or Mr. Redding? The conduct of the Judge, under the opprobrious epithets heaped upon him by Redding in the bar-room, sufficiently indicates that, though he had previously given way to sudden passion, he was now cool, collected, and forbearing. His mind had recovered its balance, and he behaved on this occasion, as well as subsequently, with philosophical calmness. I doubt, gentlemen, whether any of you would have permitted Mr. Redding to have indulged, with impunity, in such unmeasured abuse. But the situation of the Judge was peculiar, and every inducement which could operate upon a gentleman warned him against participation in broils and battles. With buoyant feelings and pulse-quickening anticipations he had come more than a thousand miles, upon a pilgrimage to the shrine of beauty, not of blood—upon an errand of love, not of strife. He came to transplant one of Kentucky's fairest flowers to the warm gardens of the sunny South, there to bloom in beauty and in brightness.

The marriage feast was spread; the bridal wreath was woven, and many bounding hearts and sparkling eyes chided the lagging hours. The thoughts of the bridegroom dwelt not upon the ignoble controversy which, for an unguarded moment, had occupied his attention, but upon the bright and glorious future, whose rapturous visions were about to become enchanting realities.

§ 200. Under such circumstances Judge Wilkinson could not have desired the conflict. Had the fires of hell blazed in his bosom, they must have been quenched for a while. The very fiend of discord would have been ashamed, fresh from a voluntary, vulgar, bloody quarrel, and reeking with its unsightly memorials, to have sought the gay wedding banquet.

You can not believe he coveted or courted the unfortunate affray, without, at the same time, considering him destitute, not only of all sentiment of delicacy and refinement, but every characteristic of a man. Does his previous character warrant such a conclusion? He has, as has been shown to you in evidence, ever entertained the character of an honorable and upright gentleman. I see, by the sneer upon the lip of the adverse counsel that the term grates harshly upon his sensibilities. But, I repeat it, Judge Wilkinson has ever entertained the character of a gentleman, a character directly at war with the supposition that his conduct on this occasion resulted otherwise than from necessity. I mean by "a gentleman" not the broadcloth but the man; one who is above doing a mean, a cowardly, or a dishonest action, whatever may be the temptation; one who forms his own standard of right and will not swerve from it; who regards the opinions of the world much, but his own self-respect more. Such men are confined to no particular class of society, though, I fear, they do not abound in any. I will save the learned counsel the trouble of translating his sneer into language, by admitting that they are to be found as readily among mechanics as elsewhere.

§ 201. Such a man I believe Judge Wilkinson to be. Such has ever been his character, and he is entitled to the benefit of it on this occasion. It ought to have, and I know it will have very great weight with you. Good character always has been, and ever should be, a wall of strength around its possessor, and a seven-fold shield to him who bears it.(*a*)

This is one of the advantages virtue has over vice—honorable over dishonorable conduct—an advantage which it is the very highest interest of society to cherish and enforce. In proportion to the excellence of a man's character, is, and ever ought to be, the violence of the presumption that he has been guilty of crime. I appeal, then, to Judge Wilkinson's character, to prove that he could not have desired this unfortunate controversy; that it is impossible he should have been guilty, under the circumstances which then surrounded him, of the crime of willful and malicious murder. What, on the other hand, was the condition of the conspirators? Redding had been going about from street to street, like Peter the Hermit, preaching up a crusade against the Mississippians. Johnson, like Tecumseh—but no, I will not assimilate him to that noble warrior—like an Indian runner, was threading each path in the city, inciting his tribe to dig up the tomahawk, and drive it, not into the scalps, but the "steaks" of the foe. But I will not pursue this point at greater length.

§ 202. I proposed, after arguing the position that there actually was

(*a*) *Post* §§ 566, 567 of Part II.

a conspiracy to chastise the defendants, and inflict upon them great bodily harm, to show, in the next place, that the defendants had good reason to believe such a conspiracy existed, whether in point of fact it did or not. Most of the arguments bearing upon this proposition have been already advanced in support of the other. These I will not repeat. There are one or two others worthy of notice. What could Judge Wilkinson have supposed from the conduct of Redding, but that he sought and provoked a difficulty? What else could he conclude from the unmitigated abuse which was heaped upon him, from the very sluices of vulgarity? That the Judge apprehended violence is evident from the warning which he gave. He told Redding that he might say what he pleased, but not to lay his hands upon him; if he did, he would kill him. He could not be supposed to know that Redding came only for the names. When Meeks stepped up to Murdaugh and struck him with his clubbed whip, while the crowd closed in around, what could Murdaugh reasonably expect but violence and bodily harm, resulting from preconcerted arrangement? Without going at length into an argument on this point, I take it for granted, no one will deny that the defendants had ample grounds for apprehending the existence, on the part of Mr. Redding and his friends, of a conspiracy, to commit upon them personal violence.

§ 203. Let us now look a moment at the conduct of the defendants, at the Galt House, and see whether it transcended the bounds of right, reason or prudence. When Murdaugh and the Doctor entered the room, the exclamation was made, by some one, loud enough for all to hear, "There they are—all three of them, now;" upon which, according to nearly all the witnesses, Mr. Redding made the remark to Murdaugh, "You are the man that drew the bowie-knife on me."

You will recollect that Redding had just crossed Judge Wilkinson's path, and placed himself with his back against the counter, manifestly with the object of bringing on the fight. Murdaugh, indignant at being publicly charged with having drawn a bowie-knife upon an unarmed man, replied, "that any one who said he had drawn a bowie-knife told a d——d lie;" whereupon, instantly steps up Meeks, with his knotted cowhide, exclaiming, "You are the d——d little rascal that did it," at the same time inflicting upon him a very severe blow. By the bye, this assertion of Meeks proves that he had been at Redding's after the first affray, and heard a full account of it. It is urged against the Judge, that when Mr. Everett led him to his room, he asked for pistols. I think an argument may be drawn from this circumstance in his favor. His requisition for arms proves that he considered himself and his friends in great personal danger. He manifestly required them not for offense, but for defense. Had he intended an attack, he would not have gone down to the bar-room without first obtaining the

weapons he desired. Men do not voluntarily attempt the lives of others without being well prepared. It is evident that Judge Wilkinson and his friends thought only of the protection of their own persons, for they went down stairs provided only with the ordinary weapons which they were accustomed to bear. Murdaugh and the Doctor had a pocket knife each, the same they had previously carried. They had added nothing to their armor, either offensive or defensive. The Judge, apprehensive of difficulty, had taken his bowie-knife, which, probably, he had not previously worn. When, at the solicitation of Mr. Everett, he retired, he doubtless informed his friends of what had just transpired in the bar-room, and expressed his fears of violence. This accounts for the readiness with which Murdaugh met the assault of the two powerful men who simultaneously rushed upon him.

§ 204. The evidence is conclusive that Meeks commenced the attack, upon Murdaugh, by two rapid, violent blows of a cow-hide; accompanied by a heavy blow from a stick or cane from the hands of Rothwell. At the same time he seized the hand of Murdaugh, in which, prepared for defense, was an open knife; but Murdaugh, with coolness and celerity, changed the weapon to his left hand, and used it according to the dictates both of law and common sense. The very first blow had driven him to the wall. The crowd closed around him; he could not retreat, and was justified according to the strictest and most technical principles of even English jurisprudence, to take the life of the assailant. No man but a fool or a coward could have acted otherwise than he did. Was he not, according to the rule read by the District Attorney, in imminent danger of his life or of great bodily harm? Let the unhealed wound upon his head respond. Let his hat, which has been exhibited to you, answer the question. Upon this you may perceive two incisions, which must have been caused by a sharp, cutting instrument. No obtuse weapon was capable of the effect. The blows were manifestly sufficient to have caused death, but for the intervention of the elastic material, upon which their principal force was expended. The part, then, taken by Murdaugh in the affray was clearly defensive and justifiable. It is not pretended that Dr. Wilkinson took any other part in the affray than attempting to escape from its violence, unless you notice the evidence of Oldham, that he cut him as he fled from the room. He was beaten, first by Rothwell, then by Holmes, and, if you take their own statements, by those two worthies, Halbert and Oldham. He was crushed almost to atoms. He had not a chance even for self-defense. Rothwell had left Murdaugh, after striking him one blow, in charge of Meeks, and fell upon the Doctor. While beating the Doctor, he was stabbed by the Judge, near the dining-room door. The Doctor fled round the room, still followed

by Rothwell, who was again struck by the Judge, when upon the opposite side. The two blows paralyzed his powers; when Holmes stepped in and so completely prostrated the Doctor, that he was compelled to hold him up with one hand while he beat him with the other.

§ 205. Neither offensive word or action, upon this occasion, on the part of Dr. Wilkinson, is proven or pretended. It is perfectly clear that he was beaten by Redding's friends, simply because he was of the Mississippi party. I consider it highly disgraceful to the grand jury who found the bill that he was included in it.

In reference to the part taken by Judge Wilkinson, it is proven beyond contradiction, by Mr. Pearson, a gentleman of undoubted veracity, that the Judge, at his solicitation, was in the act of leaving the room, as the affray commenced; when, witnessing the attack upon Murdaugh, he stopped, refusing to leave until he saw the result of the controversy, in which his friend was engaged. Standing in the corner of the room, he did not at first take part in the conflict; perceiving, doubtless, that Murdaugh was making good his own defense.

Presently, however, he cast his eyes around and saw his brother trodden under foot, entirely powerless, and apparently either dead or in immediate danger from the fierce blows of Rothwell, who, as you have heard, was a man of tremendous physical power, and armed with a bludgeon, some say, a sword-cane. Then it was he thought it necessary to act; and advancing through the crowd to the spot, he wounded the assailant who was crushing out his brother's life. Gen. Chambers swears positively that Rothwell was beating, with a stick, and with great severity, some one, whom the other witnesses identify as the Doctor, at the time he was stabbed near the dining room door. This produced a slight diversion in the Doctor's favor, who availed himself of it, by retreating, in a stooping posture, towards the passage door. Rothwell, however, pursued and beat him down, but was arrested in his violence by another blow from Judge Wilkinson, which, together with the puncture in his throat, received in all probability from a chance thrust of the sword cane in the hands of one of his own party, disabled him and caused his death. About this time Holmes was completing Rothwell's unfinished work, and the Doctor, hunted entirely around the room, fell, utterly exhausted, at the feet of his relentless pursuers. It is wonderful that he had strength enough to escape with Murdaugh and the Judge.

§ 206. Such, briefly, were the parts enacted by these defenants, respectively, in this unfortunate affray—the result of which, none regret more than themselves. Considering the proof of the conspiracy, and the knowledge, or even the reasonable apprehension on the part of the defendants, of its existence, as affording them ample justification for their participation in the matter, I have not thought it

necessary to go into a minute analysis of the evidence on this branch of the subject, nor to attempt to reconcile those slight discrepancies which will always occur in the testimony of the most veracious witnesses, in giving an account of a transaction viewed from different positions and at different periods of time.

The law of self-defense has always had, and ought to have, a more liberal construction in this country than in England. Men claim more of personal independence here; of course they have more to defend. They claim more freedom and license in their actions toward each other, consequently there is greater reason for apprehending personal attack from an enemy. In this country men retain in their own hands a larger portion of their personal rights than in any other; and one will be authorized to presume an intention to exercise and enforce them, upon grounds that, in other countries, would not excite the slightest suspicion. It is the apprehension of impending harm, and not its actual existence, which constitutes the justification for defensive action. If mine enemy point at me an unloaded pistol or a wooden gun, in a manner calculated to excite in my mind apprehensions of immediate, great bodily harm, I am justifiable in taking his life, though it turn out afterwards that I was in no actual danger.

§ 207. So, on the other hand, if I take the life of another, without being aware of any intended violence on his part, it will constitute no excuse for me to prove that he intended an attack upon me.

The apprehension must be reasonable, and its reasonableness may depend upon a variety of circumstances—of time, place and manner, as well as of character. The same appearance of danger would authorize greater apprehension, and of course readier defensive action, at night than in the day time. An attack upon one in his own house would indicate greater violence, and excuse stronger opposing action, than an attack in the street. (*a*).

Indications of violence from an individual of known desperate and dangerous character will justify defensive and preventive action, which would be inexcusable toward a notorious coward. A stranger may reasonably indulge from the appearance or threats of a mob, apprehensions that would be unpardonable in a citizen surrounded by his friends and neighbors.

§ 208. Bearing these observations in mind, let us look at the situation of the defendants. They were attacked at their hotel, which, for the time being, was their house. They were strangers, and a fierce mob had gathered around them, indicating, both by word and deed, the most violent intentions. They were three small, weak men, without friends—for even the proprietor of the house, who should have protected them, had become alarmed and left them to their fate. Their

(*a*). As to reasonable apprehension, see *post*, §474 to §486.

enemies were, comparatively, giants—dangerous in apperance and desperate in action. Was there not ample ground for the most fearful apprehensions?

But the District Attorney says they are not entitled to the benefit of the law of self-defense, because they came down to supper, and thus placed themselves, voluntarily, within reach of the danger. According to his view of the case, they should have remained in their chamber, in a state of siege, without the right to sally forth even for provisions, while the enemy, cutting off their supplies, would, doubtless, soon have starved them into surrender. But it seems there was a private entrance to the supper table, and they should have skulked in through that. No one but a craven coward, unworthy of the privileges of a man, would have followed such a course. The ordinary entrance to supper was through the bar-room. They had a right to pass this way. No law forbade it. Every principle of independence and self-respect prompted it. And through that bar-room I would have gone, as they did, though the floor had been fresh sown with the fabled dragon's teeth and bristling with its crop of armed men.

§ 209. I care not whether the assailing party had deadly weapons or not, though I will bye and bye show they had, and used them, too. But the true question is, whether the defendants had not good reason for believing them armed and every way prepared for a desperate conflict. I have shown already that Dr. Wilkinson and Murdaugh did not transcend the most technical principle laid down by the Commonwealth's attorney; not even that which requires a man to run to the wall before he can be permitted to defend himself—a principle, which, in practice, is exploded in England, and never did obtain in this country at all. But, says the learned attorney, Judge Wilkinson interfered, and took part, before he was himself attacked; he had no right to anticipate the attack upon himself; he had no right to defend his friend; he had no right to protect his brother's life. Now, I differ from the worthy counsel on all these points; I think he had a right to prevent, by anticipating it, violence upon his person; he had a right to defend his friend, and it was his sacred duty to defend his brother's life.

Judge Wilkinson was the most obnoxious of the party; his friends were already overpowered; he could not expect to escape; and in a moment the whole force of the bandit gang would have been turned upon him.

§ 210. The principles of self-defense, which pervade all animated nature, and act toward life the same part that is performed by the external mechanism of the eye toward the delicate sense of vision, affording it, on the approach of danger, at the same time, warning and protection, do not require that action shall be withheld till it can be

of no avail. When the rattlesnake gives warning of his fatal purpose, the wary traveler waits not for the poisonous blow, but plants upon his head his armed heel, and crushes out, at once, "his venom and his strength." When the hunter hears the rustling in the jungle, and beholds the large green eyes of the spotted tiger glaring upon him, he waits not for the deadly spring, but sends at once through the brain of his crouching enemy the swift and leaden death.

If war were declared against your country by an insulting foe, would you wait till your sleeping cities were wakened by the terrible music of the bursting bomb? till your green fields were trampled by the hoofs of the invader and made red with the blood of your brethren? No! you would send forth fleets and armies—you would unloose upon the broad ocean your keen falcons—and the thunder of your guns would arouse stern echoes along the hostile coast. Yet this would be but national defense, and authorized by the same great principle of self-protection, which applies no less to individuals than to nations.

§ 211. But Judge Wilkinson had no right to interfere in defense of his brother; so says the Commonwealth's attorney. Go, gentlemen, and ask your mothers and sisters whether that be law. I refer you to no musty tomes, but to the living volumes of nature. What! a man not permitted to defend his brother against conspirators? against assassins, who are crushing out the very life of their bruised and powerless victim? Why, he who would shape his conduct by such a principle does not deserve to have a brother or a friend. To fight for self is but the result of an honest instinct, which we have in common with the brutes.

To defend those who are dear to us, is the highest exercise of the principle of self-defense. It nourishes all the noblest social qualities, and constitutes the germ of patriotism itself.

Why is the step of the Kentuckian free as that of the bounding deer; firm, manly and confident as that of the McGregor when his foot was on the heather of his native hills, and his eye on the peak of Ben Lomond? It is because he feels independent and proud; independent in the knowledge of his rights, and proud in the generous consciousness of ability and courage to defend them, not only in his own person, but in the persons of those who are dear to him.

§ 212. It was not the blood that would desert a brother or a friend which swelled the hearts of your fathers in the "olden time," when, in defense of those they loved, they sought the red savage through all the fastnesses of his native forest. It was not such blood that was poured out, free as a gushing torrent, upon the dark banks of the melancholy Raisin, when all Kentucky manned her warrior sires. They were as bold and true as ever fought beneath a plume. The Roncesvalles pass,

when fell before the opposing lance the harnessed chivalry of Spain, looked not upon a braver or a better band.

Kentucky has no law which precludes a man from defending himself, his brother, or his friend. Better for Judge Wilkinson had he never been born, than that he should have failed in his duty on this occasion. Had he acted otherwise than he did, he would have been ruined in his own estimation, and blasted in the opinion of the world. And young Murdaugh, too; he has a mother, who is looking even now from her window, anxiously watching for her son's return—but better, both for her and him, that he should have been borne a bloody corpse to her arms, than that he should have carried to her, unavenged, the degrading marks of the accursed whip.

But there was danger, as well as degradation. Their lives were in imminent hazard. Look at the cuts in Murdaugh's hat and upon his head, the stab received by the Judge, and the wounds inflicted upon the Doctor. Besides the overwhelming superiority in number and strength, the conspirators had very greatly the advantage in weapons. We have proven the exhibition and use, by them, of knives, dirks, a sword-cane and a pistol, without counting the bludgeons, which, in the hands of such men, are weapons little less deadly than the others.

§ 213. Need I dwell longer upon this point? Need I say that the defendants are no murderers? that they acted in self-defense, and took life from necessity, not from malice?

But there is a murderer—and, strange to say, his name appears upon the indictment, not as criminal, but as prosecutor. His garments are wet with the blood of those upon whose deaths you hold this solemn inquest. Yonder he sits, allaying for a moment the hunger of that fierce vulture, conscience, by casting before it the food of pretended regret, and false, but apparent eagerness for justice. He hopes to appease the manes of his slaughtered victims—victims to his falsehood and treachery—by sacrificing upon their graves a hecatomb of innocent men. By base misrepresentations of the conduct of the defendants, he induced his imprudent friends to attempt a vindication of his pretended wrongs, by violence and bloodshed. His clansmen gathered at his call, and followed him for vengeance; but when the fight began, and the keen weapons clashed in the sharp conflict—where was this wordy warrior? Aye, "Where was Roderick then?" No "blast upon his bugle horn" encouraged his companions as they were laying down their lives in his quarrel; no gleam of his dagger indicated a desire to avenge their fall—with treacherous cowardice he left them to their fate, and all his vaunted courage ended in ignominious flight.

§ 214. Sad and gloomy is the path that lies before him. You will in a few moments dash, untasted, from his lips the sweet cup of revenge; to quaff whose intoxicating contents he has paid a price that

would have purchased the goblet of the Egyptian queen. I behold gathering around him, thick and fast, dark and corroding cares. That face, which looks so ruddy, and even now is flushed with shame and conscious guilt, will from this day grow pale, until the craven blood shall refuse to visit his haggard cheek. In his broken and distorted sleep, his dreams will be more fearful than those of the "false, perjured Clarence;" and around his waking pillow, in the deep hour of night, will flit the ghosts of Rothwell and Meeks, shrieking their curses in his shrinking ear.

Upon his head rests not only all the blood shed in this unfortunate strife, but also the soul-killing crime of perjury; for, surely as he lives, did the words of craft and falsehood fall from his lips, ere they were hardly loosened from the Holy volume. But I dismiss him, and do consign him to the furies—trusting, in all charity, that the terrible punishment he must suffer from the scorpion-lash of a guilty conscience will be considered in his last account.

Johnson and Oldham, too, are murderers at heart. But I shall make to them no appeal. There is no chord in their bosoms which can render back music to the touch of feeling. They have both perjured themselves. The former cut up the truth as coolly as if he had been carving meat in his own stall. The latter, on the contrary, was no longer the bold and hot-blooded knight, but the shrinking, pale-faced witness. Cowering beneath your stern and indignant gaze, marked you not how "his coward lip did from its color fly," and how his quailing eye sought from floor to rafter protection from each honest glance?

§215. It seems to me that the finger of Providence is visible in the protection of the defendants. Had this affair occurred at Mr. Redding's coffee-house, instead of at the Galt House, nothing could have saved them. Their lives would have been sworn away, without remorse, by Redding and his gang. All that saved them from sacrifice was the accidental presence of gentlemen, whose testimony can not be doubted, and who have given an honest and true account of the transaction.

Gentlemen of the jury, I shall detain you no longer. It was, in fact, a matter of supererogation for me to address you at all, after the lucid and powerful exposition of the case which has been given by my respected friend, Colonel Robertson. It was doubly so, when it is considered that I am to be succeeded by a gentleman (Judge Rowan), who, better, perhaps, than any other man living, can give you, in his profound learning and experience, a just interpretation of the laws of your State; and in his own person a noble illustration of that proud and generous character which is a part of the birthright of a Kentuckian.

It is true, I had hoped, when the evidence was closed, that the Commonwealth's attorney might have found it in accordance with his duty

and his feelings to have entered, at once, a *nolle prosequi*. Could the genius of "Old Kentucky" have spoken, such would have been her mandate. Blushing with shame at the inhospitable conduct of a portion of her sons she would have hastened to make reparation.

§216. Gentlemen, let her sentiments be spoken by you. Let your verdict take character from the noble State which you in part represent. Without leaving your box, announce to the world that here the defense of one's own person is no crime, and the protection of a brother's life is the subject of approbation, rather than of punishment.

Gentlemen of the jury, I return you my most profound and sincere thanks for the kindness with which you have listened to me, a stranger, pleading the cause of strangers. Your generous and indulgent treatment I shall ever remember with the most grateful emotions.

In full confidence that you, by your sense of humanity and justice, will supply the many defects in my feeble advocacy, I now resign into your hands the fate of my clients. As you shall do unto them, so under like circumstances may it be done unto you.

§217. [Mr. Prentiss, during the delivery of his address, had been repeatedly interrupted by bursts of applause from the assembled auditory, and when he sat down was greeted with irrepressible cheers. In a few minutes after order had been restored, Mr. Thompson arose and addressed the court and jury as follows:]

THE ARGUMENT OF MR. THOMPSON.

May it please the Court—Gentlemen of the Jury: I know you are already wearied by the lengthened protraction of this cause. I am also aware of the high and great claims and unqualified ability of the gentleman [Mr. Prentiss] who has preceded me. By retracing I can not hope to strengthen the positions assumed by him; and so well has he swept the field, but little remains for a gleaner. The mature experience, the distinguished and well-deserved reputation of the gentleman [Mr. Rowan] who will conclude the defense, also admonish me of the propriety of taxing your patience as lightly as consistent with a succinct statement of the law, and brief commentary upon the evidence in the cause.

When all that has been alleged against the defendants, in argument, has been so ably answered, I assure you that nothing but a sense of duty and a compliance with the wishes of the acccused would induce me to address you. The defendants come before you, gentlemen, not as in ordinary cases. Among the wise provisions and wholesome customs of the common law it was ordained that the triers should be of the *visne* or neighborhood. Jurors, thus selected, were presumed, from their acquaintance with the parties, and their knowledge of character, to be better prepared to adjudicate justly upon those arraigned for a

violation of the laws where the offense was committed, and there only, could the party be tried. His character and reputation might shield him from suspicion and prejudice—the whole tenor of his life—the uniform purity of his conduct, would often of themselves, among his neighbors and acquaintances, refute any imputation of crime.

The trial by compurgation is not known to our laws; but the testimony of an upright life, and an unblemished character, is a more convincing, and less suspicious proof of innocence, than the compurgational oath of friends, too partial, perhaps, and too confiding. The moral force of that good name, and the countenance of those steadfast friends, which would encircle and protect the defendants at home, they have not here. But, gentlemen, they are not only strangers, far from home and friends, they are also arraigned, and upon trial before you, not of the *visne* or county, where the offense is alleged to have been committed. By a change of venue, this cause has been translated to another county, because, where the offense was committed, the defendants have been driven from the temple of justice by prejudices unwarranted by the facts, fomented by the newspapers, and sedulously circulated and impressed upon the public mind by those who originated, and upon whose skirts rests the blood of the unfortunate catastrophe, in the tragic events of which the accused are implicated.

§ 218. The defendants, Dr. Wilkinson, Murdaugh and Judge Wilkinson, are now put upon their trial upon two distinct and separate indictments. The first charges Judge Wilkinson with the murder of John Rothwell, and charges Dr. Wilkinson and Murdaugh as principals in the first degree, as being present, aiding, abetting, and assisting him in the murder. The second charges Murdaugh with being guilty of the murder of Alexander Meeks, and charges Judge Wilkinson and Dr. Wilkinson as principals in the first degree, present, aiding, assisting and abetting him in the murder. As you have learned from the testimony, the same, and but the one fatal and unfortunate affair at the Galt House, in Louisville, is the foundation of these two distinct and separate indictments. By the examining court, whose duty and province it is, if, upon inquiry, it deems a party brought before it so far culpable as to merit a stricter examination, to send him on to the Circuit Court for further trial, Dr. Wilkinson was discharged. No beneficial purpose in attaining justice; no requirement of law demanded this double proceeding by distinct indictments. To the Doctor's conduct, the color of crime did not so far affix itself, but that the Mayor of Louisville, promptly, against the tide of public sentiment, dismissed him from further prosecution, as one in whom he found no fault. So inapprehensible was the Doctor, in the opinion and judgment of that officer of the law, a trial before a jury of his country was deemed not

proper. I have not been able to perceive, nor do I now perceive, the propriety of including the Doctor in these indictments. In the affray at the tailor's shop, which is unconnected in point of fact, and in legal contemplation, is separated from and independent of the transaction at the Galt House, the Doctor not only committed no violence, but one of the witnesses tells you he attempted to separate the parties. Opportunity, with safety to himself, the provocation of seeing his brother insulted on his account, and then overpowered, would surely have been a sufficiently exciting cause for that wantonness and malevolence of heart with which he is now charged, if in truth (*a*) "fatally bent on mischief and regardless of social duty," he thirsted for blood. He then, as afterwards, had with him his pocket-knife; anger and personal altercation first, and then actual conflict between Redding and his brother, were transpiring in his presence; on his own account he spoke not an offensive word, he struck no blow. The harshest interpretation that can be given to his actions is, that it is doubtful whether he would have assisted his brother, or separated the combatants.

§ 219. In the affray at the Galt House, not a solitary witness proves that he offensively participated in the affair; there is no evidence that he did, or even offered to do violence to his assailants, unless you are disposed to credit the statements of Oldham. What credence should be given to the testimony of that faith-worthy conspirator, what reliance can be placed on the oath of that volunteer in the fight, your knowledge of human character and the discretion of the gentleman you have already witnessed, will enable you readily to determine. To Redding and company the Doctor gave not the slightest cause of offense; he knew none of them except Redding; was a stranger, passing through Louisville from Mississippi to Bardstown, and was found, much like a "certain man on his way from Jerusalem to Jericho, who fell among thieves and robbers, who stript him, beat him, and leaving him for dead, departed." Upon his entrance into the public bar-room at the Galt House, he was suddenly, unarmed, struck down senseless. He had assaulted no man, provoked no one, insulted nobody; he had not even uttered a syllable. The enormity of getting hungry, and coming down stairs to supper, when supper was ready, is the only crime he is proved to have perpetrated. For this offense he was assailed, bruised until he was livid, and not only beaten there until he was senseless, but now here again is he struck dumb by being joined in these indictments. His power of utterance is suppressed, and his tongue torn out by the roots, that he may not divulge the foul deeds of that night. By a *ruse de guerre* it may well suit the prosecutor to stifle the utterance and suppress the testimony of the adverse party. The accused are not permitted, by any of themselves, to give a narration of the matter; no

(*a*) See *post*, § 500.

one acquainted with all of them, was present to remember their words, watch their movements, feel their danger, and now detail the circumstances of necessity under which they acted.

Redding and his party, the assailants then, the prosecutor and witnesses here, can, without contradiction, save from casual visitors at the house, or accidental lookers-on, give what complexion they please to the cause. Why has Dr. Wilkinson, after his discharge, been included in these indictments? Why has his evidence been stifled—his power of utterance in behalf of his brother and Murdaugh choked? It can not be pretended that he even deserves to be tried. Why, then, not permit him to be heard as a witness? A vision from one of the adverse party, might much *elucidate* the matter. He has been included in the indictments because those of neither side present were persons from all parts of the Union, itinerant, unknown, their attendance as witnesses doubtful, flurried by the suddenness of the affair, their testimony composed from want of acquaintance with the parties, the ignorance or indifference of lookers-on—all these circumstances forbade a hope that the proper acts and parts could be assigned to the proper individuals. Dr. Wilkinson out of the way, the combined oaths of the conspirators, they hoped, would give color and cast to the case. The forms of law have been perverted to subserve the purposes of this prosecution by implicating the Doctor. Explanation from an opponent, or the possibility of contradiction, save from some one accidentally present, being cut off, they hoped by concerted swearing to accomplish what they so signally failed to effect by their combined attack. The Doctor is now inculpated, not because he is guilty, but because it suits the purposes of the prosecution that he shall not be heard as a witness.

§ 220. I will here, gentlemen, briefly advert to the law of homicide in self-defense, and its bearing upon the facts in the cause so far as Murdaugh is concerned:

"SECTION 14. And not only he who on an assault retreats to a wall, or some such streight beyond which he can go no further, before he kills the other, is judged by the law, to act upon unavoidable necessity; but also he who, being assaulted in such a manner and such a place that he can not go back, without manifestly endangering his life, kills the other without retreating." 1 Hawkins, p. c. p. 113. (*a*)

The right of self-defense, as settled by the law, is—first, that rule of action that is instinctively implanted in the human breast by the wisdom of Providence for our preservation; it is only so far modified by the benignity of the law, and of enlightened reason as to require that, from "tenderness of shedding a brother's blood," the assailed party shall so far recede and avoid conflict as his personal safety, or the violence of the assault, will permit. The rule of the civil law, that "*qui*

(*a*) See *post* §§ 477, 478, 479.

cum aliter tueri se non possunt, damni culpam dederint innoxii sunt," is also the English common law, contained in the latter portion of that section of Blackstone's Commentaries read to you by the attorney for the Commonwealth; the party assaulted must not factitiously, but really retreat as far as he can; or, "so 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 bodily harm, then, in his defense, he may kill his assailant instantly, and this is the doctrine of universal justice as well as of municipal law." 4 B. C., p. 185.

§ 221. The same doctrine, that where the fierceness of the assault forbids, or no opportunity is afforded to retreat with safety to the assaulted party, is the law as laid down by Hale (1 H. P. C., p. 482), and in the clear and lucid language of Mr. Justice Parker, of Massachusetts, in the case of the Commonwealth against Thomas O. Selfridge, "When the attack upon him [the assailed party] is so sudden, fierce, and violent as that retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all." (*b*)

If Murdaugh was attacked at such time and in such place, and so fiercely that to save his life, or protect himself from great bodily harm, it was necessary to slay his assailant, the law adjudges him only guilty of homicide, excusable, *se defendendo*. Where the necessity is unavoidable, urgent, imposed upon the party against his will, neither reason nor law require him to do what his safety and personal security forbid he should attempt to do. The law being as I have laid it down, and as may be read from those works of unquestioned authority, I now ask you to collate and apply the facts touching Murdaugh's conduct to the law so understood.

The scope of action, and the line of duty, as permitted and demarked by the principles of law to an assailed party, have not been transcended by him by color of and under pretext of the right of self-defense, in this instance, as I understand the testimony.

§ 222. Murdaugh had no acquaintance with Meeks, did not know him, and had never before seen him; being a lodger at the Galt House, at the usual hour he came down from his room for supper. He came down with his coarse overcoat on, a serious encumbrance to a person about to engage in a combat; a garment of which any one meditating battle would have divested himself. Murdaugh is a small and feeble man, and had he expected danger to himself, or purposed a hostile collision with any one, he would have been more efficiently armed. A pocket-knife was the only weapon about his person. Had he deliberated an attack he would certainly have divested himself of his heavy coat, and armed himself with pistols, or some more effective armor than a common pocket-knife.

(*b*) See *post* § 485 as to Selfridge case.

The proprietor of the Galt House, Mr. Everett, informs you that the time of his coming to the bar-room was in the evening about the time it is usual for the inmates of the house to assemble for supper You are also told that it is customary, and that about the time of, and just before supper is announced, the boarders, sojourners and others, congregate in the bar-room, adjoining the dining-room. When others assembled, and were preparing for supper, Murdaugh also, encumbered with an overcoat, and almost unarmed, came into the public bar-room.

§ 223. The tavern, for the time being, was his house, and he was entitled to all the privileges thereof, so long as he demeaned himself with propriety, and paid charges. Which of the party commenced the conversation is settled by Redding himself, who, although he recollects no concert or conspiracy, nevertheless informs you that the altercation, in words, commenced by his accosting Murdaugh and saying, "You are the man that struck me," or, "You are the man that drew your bowie-knife at my shop," or words to that effect. To this charge against him, falsely made in allusion to what had transpired at the shop in the evening, Murdaugh emphatically responded that "the asserter (whoever he was), of such a charge was a d—d liar." To be calumniated to your face, and falsely taxed with an offense (if offense there was), provoked just such a response as such a charge deserves from a free, fearless man. The affair at the shop would never, in all probability, have been revived, or even so much as alluded to by the defendants. Time had intervened for the passions to cool and for reason to interpose, but in an irritating manner the former quarrel is called up. When Murdaugh asseverated that he was not the individual who gave the blow or drew the bowie-knife at the shop, Meeks, with the murder of whom he is especially charged, seized him, saying, "You are the d—d *little rascal.*" When the conversation commenced, Raily, Trabue and others tell you, the crowd commenced gathering around them; to many of those in the room they were partially obscured. This gathering around him by total strangers was simultaneous with the revival of the previous quarrel, his position near the counter of the bar-room prevented his receding. As they advanced, Graham and Trabue tell you, he warned them off, and that warning, earnest as it was, passed unheeded. Now surrounded, retreat impracticable, a former quarrel revived, his warning unheeded, his knife-hand uplifted, as a menacing signal not to advance, seized by an unknown arm with an oath of violence, what was he to do? Meeks, in wanton drunkenness, had avowed, "that he was bound to have a fight that night." Oliver had, in friendship, taken him off, and by a sort of pious fraud had obtained his knife under the pretense of paring his nails with it. Yet, ill-fated as if demented and doomed, he had returned, and at the same instant with laying violent hands on Murdaugh, Montgomery and others

inform you, he struck him with a whip or cow-skin, and other blows at the same instant were inflicted by others. What, I ask you, was he to do? Every man feels in his own bosom as testifying consciousness, that under such circumstances the right of defense would justify, the law of self-preservation would impel him to act as the laws of his nature prompt him, and the laws of the land justify him in acting. The vilest worm that crawls on the earth, if trodden upon, will turn against the heel that crushes it. The meekest and meanest of animals, when hunted down to death, in desperation will turn on its pursuers; it is an instinct of nature impressed on animal organization by an all-wise Providence. Situated as Murdaugh was, to defend himself was but to act in obedience to a law of his nature; above the control of human laws, implanted in the constitution of his nature for good purposes, the love of self-preservation would predominate if even forbidden by positive municipal regulations, when assailed, overpowered and beaten down almost to the very jaws of death. To strike for your life or security of your person is an instinct inherent in your nature by the laws of heaven. It is an involuntary, spontaneous effort of your animal organization. It is the inspiration of God Almighty himself upon the human heart, to rebel and contend against destruction.

§ 224. Impelled by extreme necessity, under great impending peril of life, Murdaugh did stab Meeks, and of that wound he died. Although the calamitous occurrence is to be regretted, who can doubt the necessity of the act? A left hand thrust, with a pocket-knife, by a feeble and partially disabled man in defending his person against dangers, and himself from degradation against a superior in strength, aided by numbers, caused the death of Meeks. It, gentlemen, is unnecessary for me to recapitulate the testimony, or array the facts, to prove what is perfectly evident, that Meeks' death was the result of a necessity, that he causelessly, wantonly, and without provocation, imposed on a stranger, to him unknown, and who in deed or by words, had never offered him injury. The manner of the attack—the weapon used by Meeks (peril and necessity apart)—gave higher provocation than a brave man will tamely endure. Should Murdaugh, when stricken with a cow-skin, have submitted? Should he have whined and begged as a negro slave when lashed? Should the finger of scorn be pointed at him as a coward, disgraced by the whip? The jests of the rude, the taunts of the vulgar, would mark him for insult and mockery had he not fought. The very girls, even, at church and on gala days, would have pointed to him as the chivalrous young gentleman of the striped jacket had he tamely submitted. There is not a man on that jury, who deserves the name of a man, that would passively submit to personal degradation by personal chastisement. The whelks of the cow-skin would bleed and blister, fret and

forever fester upon his memory, long after all traces of the lash were cured on his back. The life of the aggressor could alone atone for the indignity.

§ 225. As the accusation is more gravely urged against Judge Wilkinson than the other defendants, I will now advert to his conduct. Suits to obtain personal satisfaction for assaults and batteries they never committed are pending against the Doctor and Murdaugh for the affair at the shop. An indictment is also pending against them for that violation of the public peace. The attempt to amerce the Doctor, and hold him pecuniarily responsible for an injury he never committed, is alike to those indictments against him for the murder of men he never before in his dream had thought of, much less of violence towards them. This prosecution is, perhaps, on the ground that he was the Judge's brother. Murdaugh, too, shares in all this legal persecution; first, because he is in bad company; and, secondly, because, *se defendendo*, he slew a man so vile that the prosecution would discredit and render infamous the only man (Oliver), who seems *disposed* to recognize him as an acquaintance. The violation of the public peace at the shop is an injury that another jury will pass upon, and by their verdict avenge the insulted majesty of the law. Another jury will mete out to the prosecutor satisfaction for the injury received on that occasion. You are now, gentlemen, called on in the name and on behalf of the Commonwealth to convict Judge Wilkinson of the murder of John Rothwell, a worthier and less offending man in the affray than Meeks, as it is insisted, and because, however excusable the other defendants may be, the Judge, at least, as the Commonwealth's attorney contends, did not act in necessary self-defense.

§ 226. In addition to the authorities already alluded to relative to the doctrine of self-defense, the following positions upon the law of homicide, are, I believe, sustained by reason, and deducible from the text and reasonings of standard authors. When a retreat would not diminish, but increase the danger of a person under the imperious necessity of exercising his right of self-defense, he may, without retreating, oppose force to force, and even pursue his adversary unto death, if his own preservation require it, and such killing is justifiable. [See Fos. C. L., p. 273; 1 Crim. Law, p. 80.] The right of self-defense is not confined to the party endangered—it is not only an individual, but a social right; it embraces the principal civil and natural relations. Husband and wife, parent and child, master and child, not only may, but in duty are bound to protect one another, and holds good between citizen and citizen in the spirit of the law, according to the reciprocal duties they owe one another. A servant, or any *other person*, when a

felony is attempted, may interpose and justifiably slay the aggressor.(a) A person in possession of a tavern-room, although no injury be intended him, may, against burglars and incendiaries, oppose such force as may be requisite to prevent the felony. To protect against murder, robbery or enormous bodily harm servants of the party attacked, or inmates of the house about to be robbed, may justifiably take the life of the assailant or robber. [See Archbold, p. 121; Foster, p. 273–4.]

§ 227. I quote, almost literally, from the best law-writers—these cases are but examples to illustrate rules. The law is more palpably embodied and distinctly presented to the understanding, when exemplified by a case, than when presented as an abstract rule of action without reference to circumstances. Homicide is justifiable, or excusable, when committed upon compulsion, and *ex necessitate*, because the party does it not from choice as a free agent, but his action on the matter is constrained, his volition controlled by external circumstances; the concurrence of his will to the deed is absent; when there is no freedom of action, no *voluntary assent* of the mind, there is no moral, and should be no legal, accountability. When it is practicable with safety, the law, to eschew the shedding of blood, requires the party should retreat in cases of mutual conflict. But this requirement is only when it is consistent with his safety, and if his safety requires it, he may be stationary or advance with as much propriety as recede. How flight would have affected the Judge's personal security is now a matter of pure speculation. If, for his own personal safety, he was constrained to act as he did, or if in the exercise of a social, not a selfish privilege and duty, he succored his brother and Murdaugh, to preserve their lives or protect them from great bodily harm, he, in law, is excusable. Society and mutual companionship justify such interference, as is happily illustrated by the case of the three men walking in a field, and one is assailed, the others may interpose to prevent a felony being committed, and may interpose to any extent to make their interposition effective, as you have already learned from the case so aptly quoted by Colonel Robertson. The reason of the law is this: The life of a citizen is, in its contemplation, dear, his person sacred. Against assaults, injury, or destruction, he may defend them to the last extremity, if the exigency of the occasion demands it; that right is not altogether personal to him, but it is a social right; and it is not only the right of any person to interfere to prevent the perpetration of a felony, but such interference to intercept the commission of a crime is enjoined as a positive duty.

§ 228. The natural relationship between the Judge and his brother, the mutual ties of friendship between him and Murdaugh, his duty as a citizen, justified him in interfering in the conflict to defend them.

(a) See *post* § 472.

By the spirit of the law for the purpose of defense, he is identified with them; their necessity and justification is his; their right of self-defense is transferred to him, or is, rather, common to all. If the Judge has not malignantly transcended the degree of violent interposition necessary to save his brother and friend's life, he has but fulfilled his duty as a citizen. I do not desire to be understood that officious meddling in broils is countenanced by law, nor do I mean to assume the position that where combatants are struggling in an affray to prevent mischief, or keep the peace, extreme violence is proper; no such licentious latitude of action is even permitted to those engaged in the conflict. I limit the right by the wholesome restrictions imposed on wilful, wanton killing in other cases. Before I call your attention to the evidence, I will merely advert to another principle of law, which is sound in doctrine and applicable to this case. In treating of justifiable homicide in the due advancement of public justice, and in allusion to what killing is justifiable for that purpose, the opinion is intimated as correct by the author. 1 Hawkins P. C., 107: "The killing of dangerous rioters by any private person who can not otherwise suppress them or defend themselves from them [is lawful,] inasmuch as every private person seems to be authorized by the law to arm himself for the purpose aforesaid." This doctrine seems so near akin to lawful killing in the execution of public justice by hanging, or in the arrest of felons who can not be apprehended alive by those who pursue them, that I can not question its correctness. The law, to maintain itself and be respected, must tolerate the means to suppress rebellious contempts of its authority, and such means should be proportioned to the exigency of the occasion, and consistent with the safety of the orderly and law-abiding citizen. Rioters, assembled in force, like rebels against the government, when they condemn the supremacy of the law and spurn its commands, should be regarded as outlaws and traitors. The law surely can not cherish any such suicidal and disorganizing principles as a favorable regard for those who have forfeited all claim to be within the pale of its protection by their disrespect for its principles and the institutions of their country.

§ 229. Without a labored analysis of the testimony, the prominent facts are few and substantially as I shall recall them to your minds. I have but little to say of the scuffle in the evening at the shop; the occurrence itself is quite impertinent to the matters now in issue, as I conceive. The defendants were staying at the Galt House in Louisville. Judge Wilkinson was to be married in a few days, at Bardstown, in the interior of the State.

Whilst in Louisville the wedding day being just at hand, it was thought by them that the operatives of one shop could not in time finish the necessary equipments in the way of dress. The Judge and Murdaugh applied to Davie, one of the witnesses, to make their clothes.

Dr. Wilkinson engaged Redding to construct for him a coat to wear to his brother's wedding. Dr. Wilkinson, to insure promptness and satisfy any misgivings Mr. Redding might entertain of him, a stranger, deposited with him a one hundred dollar Mississippi note. The money was appreciating; the Doctor did not wish to lose the exchange in converting it into Kentucky money just at that time, nor did he desire to incur a possible suspicion on the part of Mr. Redding that the garments would not be paid for. The Judge and Murdaugh obtained their clothes and went to Redding's shop with the Doctor, accompanying him as is usual with comrades in strange places. The fit of the Doctor's coat did not please him—alteration was suggested. The Doctor was for throwing the coat on Redding's hands as an article he was not bound to receive. Some chaffering took place. The hundred dollars was not surrendered, and that was the whole cause of the difficulty. Redding retained the money and insisted that the coat was, or could be, made to fit as such an article of dress ought. The Judge, who was in the room, gave his opinion of the coat. It is probable Redding was not apprised that he was a brother of the Doctor's. He spoke so harshly and insultingly that the Judge rose from the stove where he was sitting, and struck Redding with the little iron rod used for stirring coal. The Judge may have been too hasty, but insulted by being told he was a meddling busy-body, or substantially that, as you no doubt recollect the testimony, did no more than almost any one might be provoked to do. A scuffle ensued in which neither the Judge nor Redding, nor any one else, was hurt. The parties got from the shop into the street; were separated, *and departed, when? Just* as soon as Doctor Wilkinson got his money. Had the money been surrendered as it should, there would have been no difficulty. But for the occurrences happening since, the affair at the shop would have passed off, as it was in reality, a slight casual fracas not worthy of notice. The attempt to swell it into an important fight is ridiculous and the expression of my opinion about the $100 is the most aid I can give you in your deliberations upon that mass of immaterial testimony *from the shop and about the shop.*

§ 230. After the parties separated, the Wilkinsons and Murdaugh go to their boarding house, ashamed of what had happened I have no doubt, or rather not thinking of it at all in the preparations making for their trip to Bardstown. Not so with the other party in the quarrel. Menacing speeches and hostile movements characterise their deportment.

In Redding's coffee house adjoining his shop, Meeks, Johnson and his friends are seen. The affray which had taken place is talked of and discoursed, and the proposals and propriety of going to the Galt House to give the Mississippians "hell" is mentioned. Warrants in

blank against the defendants were offered Redding; those, however, he did not accept, to insert the names when ascertained. Redding, however, must go to the Galt House to procure the names. The *pacific* Johnson, Redding's legal adviser, had made the proposal to give them "hell." Upon this "steak cutter" immortal celebrity has been conferred by the roasting he has received at the hands of the gentleman [Mr. Prentiss] who preceded me. Meeks gets his knife ready, is under the persuasion—yes, a sort of religious obligation rests upon his conscience, that he is bound to have a fight that night. He seemed, however, to have loaned his knife, and gotten in its stead a cow-skin. Oldham who goes around for any chance is up in blood for a fight "on his own hook." At the ingathering, Rothwell, Redding's brother-in-law, and Holmes, congregate with others. The concert of action, the hostile intentions, the conspiracy to inflict grievous injury on the defendants, is so obvious from the testimony, and has been so clearly enforced and happily commented on by others, [Col. Robertson and Mr. Prentiss] that I will not fatigue you with its repetition. When the combined forces had convened according to the plan of concert, allow me, gentlemen of the jury, to ask your marked attention to the manner of conducting the battle. Several hours had elapsed since the skirmish at the shop. The names had been obtained; Redding awaited, it is said, the coming of a peace officer to serve the process.

§231. The names when procured, like the rejected blank process, did not satisfy him—staying for the marshal of the city or other peace officer at that place, an hour or more getting a memorandum of their names, are but flimsy afterthoughts to cloak another arrangement. Redding and his friends, picked men of herculean strength and stature, are *accidentally* in the bar-room about the time the boarders and lodgers at the house assembled to catch the news or be ready for supper. Judge Wilkinson, who I venture had scarcely thought of the battle of the shop, came into the public room alone. If Redding did not recognize the Judge, and if curious about his identity, why did he not address his inquiry to some third person? Why address himself to the man he had fought with only about four hours before? As if ignorant, why insultingly inquire of him, "Are you the gentleman that struck me in my shop?" The Judge very calmly and readily replied, "I am." This conversation thus commenced, and the torrent of vile abuse from Redding instantly following, I take it, was intended to provoke an assault from Judge Wilkinson.

§232. Had he resented by an attack the opprobrious epithets so lavishly bestowed upon him, Redding and company, as the assaulted party, would have shielded themselves under it, as a legal justification, to have inflicted upon him a most grievous battery. This *finesse* to bring on the fight failed, and Judge Wilkinson returned

to his room. Great forbearance had been exercised by Judge Wilkinson. He claimed to be protected from insult and violence, and requested of the proprietor of the house (Mr. Everett), to furnish him with pistols at his room. No arms were brought to him, and after remaining in his room about a quarter of an hour he again came down to the bar-room. In the diagram shown you to point out the localities of the house, you recollect in descending the stairs, just at the foot, there is a window overlooking the bar-room. Time for Redding to depart had intervened since the recent quarrel, and in passing the window by the stairway, if Judge Wilkinson had thought of it and passed into the public room, he would not have discovered Redding there. The witness, Raily, informs you that when Judge Wilkinson, at Everett's instance, returned to his room, Redding and some of his friends also left the public room and went into the entry or across the passage into the reading room. The Judge came into the room in company with the other defendants, or they were immediately in his rear. Up to this time no intimation had ever been given to the defendants that Meeks or Rothwell were enemies. Redding was the only one of the conspirators personally known to them. The existence of such conspiracy they were as ignorant of as they were of the individuals who composed it. The Judge, it is true, was armed with a bowie-knife, but Murdaugh and the Doctor were not equipped for fight. Redding again came into the room—he had been foiled in his effort to bring on a fight by the patient forbearance of the Judge. During the interval the Judge was up stairs, it is more probable that Redding left the public room to re-arrange his plan of attack, than for any other purpose. Whether Judge Wilkinson's knowledge of the topography of the house would have enabled him to sneak to supper by the way back of the bar-room designated in the diagram, we do not know. The premonition he had already received, would have induced a prudent man to arm himself; he came into the bar-room the usual route to the supper table. His right to wear arms for his defense is as unquestionable as his privilege to come into the room. About the time Redding's re-entry into the room, Mr. Pearson, just when Murdaugh was attacked and the remarks were made which I will presently attend to, accosted Judge Wilkinson, to whom he had been passingly introduced the previous summer, and told him it would be better to leave the room.

This suggestion from Pearson he acceded to, and was about leaving when the quarrel and fight arrested his attention and checked his exit from the room. The admonition from Pearson and the testimony from the other witnesses are replete with proof, that however secret to the defendants, it was apparent to others they were to be attacked. The remark made in their absence up stairs, the mysterious presence of unusual personages about the house—fighters all—but too clearly fore-

told the impending danger. At the shop Murdaugh had displayed hastiness of temper; he was young; with him a fight might be provoked; he would possibly answer their purpose. The Judge had been insulted but declined battle. Just before Murdaugh was angered by a provoking falsehood, as to his drawing his knife, etc., at the shop, Redding is heard to say, "These are the three men," or, "Here are the three men." Mark the words; they are of ominous import. To whom were they addressed? The words, "The one whom I shall kiss is he," did not more significantly mark the object of treason, than Redding pointed out the defendants. When the conversation commenced, the conspirators at the signal, like Cæsar's assassins when the petition for the recall of Metellus from exile was presented to him in the senate chamber of Rome, gathered around the intended victim.

The murmurs that in whisper had presaged the storm, the growling muttering broke into open violence. The onset is made upon Murdaugh in one part of the room, as we have before stated. At the same instant the Doctor is stricken down. Proximity to Pearson, an esteemed citizen of Louisville, perhaps saved the Judge. About the time Murdaugh stabbed Meeks, from the testimony of General Chambers and Montgomery, you can not but be satisfied that Rothwell with his cane or bludgeon, was also inflicting violence on him, then reeling and almost bound to the floor by severe blows on the head. The severity of the blows is evident from the scars left, and Meeks could not and did not inflict them. At this crisis the Judge did inflict with his bowie-knife a wound upon Rothwell in the side or back. Murdaugh, extricated, seems to have gotten from the room, and in that part of it where Holmes had the Doctor down prostrated and lifeless, Rothwell hard by, is again stabbed by the Judge. As soon as disengaged, the defendants retreat to their room upstairs. When Rothwell received the second stab a futile attempt is made to show, and Johnson swears he was performing the office of pacificator. He was one of the conspirators, was present, engaged in the fight, had come to the Galt House for the purpose of abetting the lawless violence, and it would be as miraculous if any such instantaneous revulsion of purpose seized him as it is wonderful that no one present heard the pacific expression, "Peace! for God's sake, peace!" about the time of the second stab, except this redoubtable and veritable Billy Johnson.

§ 233. This sketch of fancy is no doubt of a piece with much of the testimony of the conspirators in relation to the matter. Pride of character, if any they have, tempts them to extenuate their conduct for their own exculpation. Chagrined by defeat, burning for vengeance, they testify with all the feelings a party could in his own cause. Their account of the occurrence should be discarded, because others present were disinterested lookers-on, whose recollections are not warped by

bitter prejudices. The testimony of persons not of the party, is every way less exceptionable, less suspicious, and more satisfactory. In scanning the testimony of various witnesses to the same occurrence, enlightened reason teaches the propriety of not rejecting what one testifies, because another did not see or hear the same thing. That you did not see, or, do not know what I have seen or what I know, is no reason even to doubt the details of facts I may make. When within the range of human probability a credible witness attests the existence of a fact, it outweighs the negative testimony of the whole world. What you know to be true is not the less so because others do not know it. Now, rejecting altogether the testimony of the conspirators, or in charity permitting it to prevail, when not contradicted by the unenlisted lookers-on, the brief narration of the matter up to the stabbing of Rothwell is a succint history of facts. To reconcile apparent clashings, or rather to fill up omissions in detail which may seem to occur, apply the rule just suggested, and you may well credit and reconcile all that those gentlemen have testified to. What Trabue saw may have escaped the observation of Graham or Raily, and so of others. The testimony of one can not be impugned because another did not see or may not recollect what he sees. Of the wounds inflicted by the Judge, and wound inflicted in the breast by an unknown hand, Rothwell died. By collateral remarks foreign to the cause I am unwilling to detain you. The severity of the conflict is too well attested by the death of two, and wounds of others of the assailants. The peril of the conflict to the defendants is too well attested by the still visible marks of violence on their persons. The brutal and merciless beating inflicted on the Doctor, the attempt not only to chastise, but to take the life of Murdaugh, as manifested by the cuts with a deadly weapon, through his hat, the assassin stab the Judge received when the combat was being declined, by returning to his room, a retreat itself by the brave men, too clearly proves that *enormous bodily harm* and impending hazard of life had placed the defendants in the attitude justifiable of self-defense. By the joinder of the defendants in the indictments, they are identified in the proceedings as one individual. If for the purpose of accusation, the crime of one is the crime of all, the right of defense should be deemed the right of all to defend.

§ 234. Are good citizens to stand by and let a lawless band of ruffian conspirators slaughter them one by one? Must each run as *far* as he can, and, if overtaken, *fight* if he can? The prosecuting attorney (Mr. Bullock), seems to insist that, unnecessarily, in their malice, Judge Wilkinson stabbed an unoffending man in the back, and thereby caused his death. The nature of the offense is not affected by the part of the body the blow may happen fortuitously to alight upon. That the blows were inflicted maliciously, or even willingly, except so far as constrained

assent of the mind constitutes such willingness, can not be believed. Suppose, gentlemen of the jury, any three of you were to go to the State of Mississippi, and land at Vicksburg or Natchez. Whilst temporarily at a tavern in one of those places, before proceeding to the interior on your business, you have a difficulty with citizens of the place and kill two of them. When the news reached your friends here in Kentucky, a thousand miles from the scene, would they not be willing to swear that necessity, and necessity alone, induced you to kill strangers you never before saw; men, too, with whom neither from business, nor acquaintance, you had ever before had intercourse? Judge Wilkinson, with his brother and friend, had come to Kentucky on an embassy of love. So near the consummation of his nuptials, he would not desire the comliness of his person nor the integrity of his attendants to be soiled by a fight. At such a time, distant, far distant from his thoughts, would be meditations upon bloodshed and murder. As a visitor to our State he was entitled to our hospitality. We do not, as the wandering Arabs of the desert, seize and prey upon the confiding traveler. Surely we are too civilized to regard all strangers as enemies, and like the piratical barbarians of Northern Europe in the dark ages, consider as lawful booty all who unfortunately or accidentally are cast upon our shores? To our State, as the abode of hospitality, Judge Wilkinson had come to contract the tenderest of human relations with one of the daughters of your land. A distinguished citizen of his own State, and known throughout the Union as a valued and honored citizen, a pacific man, at such a time, is it consistent with reason to believe that he would, but by constraint, have involved himself in so disagreeable a difficulty? After the rencounter at the shop, and Judge Wilkinson had had time to bethink himself of the propriety, the flurry of feeling had subsided, and he seems, when accosted by Redding at the Galt House to have sternly resolved on no further difficulty. Quietly he submitted to the foulest tirade of abuse Redding could heap upon him. As far as forbearance is a virtue, he displayed it in an eminent degree. His inflexible purpose not to have a difficulty was not changed by the villification and gasconading of Redding.

§ 235. The language and the deportment of the Judge, his retiring, the motives of action that would influence any man circumstanced as he was, evidences how studiously and consistently with self-respect he avoided a conflict. Now, permit me to ask you, when at last a fight was forced upon the defendants, what should Judge Wilkinson have done? Ought he to have stood calmly by, until at leisure they were all lynched or slain in detail? Should he, if practicable, have run until caught, and then have fought? No! No!! As a true man against them, lawless rioters, he had a right to defend his companion and brother. A mob arrayed in numbers, with force, were inflicting igno-

minious and grievous hurt upon his companion and friend. Men whom he had never wronged, unmerciful in their wanton riotousness, of superior brutal force, were mangling Murdaugh with bludgeons, and instruments of death were savagely playing about his person. The Doctor, his brother, whom he loved with a brother's heart, was overpowered, down-trodden. They were crushing the life from his body as he lay prostrate on the floor. Ought the Judge to have refrained from interfering? Who could refrain? Does reason or law require any such degree of high and impracticable philosophy as apathy and indifference under such circumstances? He that would not rescue a friend or a brother never deserved the fidelity of the one or the affection of the other. Had the Doctor or Murdaugh been murdered and the Judge had not interfered, a voice of execration against his faithlessness and cowardice would have rung over the whole State that could only have been equaled by the deep-toned denunciation that would have resounded through the length of the land, if the mob, unharmed, had succeeded in their bloody and murderous purpose. The revolutionary and disorganizing proceedings of mobs in New York, in Mississippi, and at other points in a few years past, have tarnished the fair character of our country. These lawless conspirators have imprinted on the escutcheon of our State the first foul blotch of lynchism. Contemners of the law, signally foiled by the resistance of their victims, in the name of the law they now ask you to perform an act of vengeance for them. Rebuke them from this place; repudiate their claim to be avenged, through your instrumentality, on men whose lives they have attempted by violence, whose characters they have traduced, whose liberty they have infringed by incarceration in a common felon's jail, and whom they would now doom to felon's graves. By your verdict proclaim to the world that our State, in by-gone times known as the "dark and bloody ground," is now a land of civilization, where peace and good order in society are respected and the laws revered. Gentlemen, any inaccuracy of statement as to the evidence I have fallen into, your memories will correct. The further defense to be made by an older and abler advocate, will more than supply all omission on my part. As to myself, the fate of the defendants is in your hands. I thank you for your polite attention.

ARGUMENT OF HON. BENJAMIN HARDIN.

§ 236. [At forty minutes past two o'clock, Mr. Benjamin Hardin commenced his address, and spoke for two hours and a half, which, with the similar space of time occupied by him next morning in conclusion, made a speech of five hours on the whole. It will be obvious that it would be quite beyond the limits of this publication to publish every thing uttered by any one speaker in five hours. A person can read through an ordinary novel in that space, and generally, a fluent

speaker says more in a given time than can be read, so that a little reflection must convince any one that a speech of five hours alone would fill the whole of this pamphlet. In reporting Mr. Hardin's speech, therefore, it has been found necessary to compress it into a fifth or sixth of the space it would properly occupy. In doing so, much is gained and much lost by the reader. Condensation in the argument is gained, but many of the graces of oratorial ornament and wit must necessarily be sacrificed. The object of this publication being, however, to place facts, and the reasoning upon them before the public, it is conceived that object will be attained by the compression of the longest speeches without any serious disadvantage.]

MR. HARDIN: I shall, gentlemen, very humbly and very cordially congratulate you upon having this case brought so near a close. It has already been protracted beyond the usual limits of criminal trials by the extraordinary ingenuity and uncommon array of talent enlisted on the occasion. The gentlemen on the opposite side have felicitated you upon the *politeness of your patience;* and, among others, I, too, return you my thanks for your attention.

§ 237. I little expected when I engaged in this cause in Louisville last winter, that I should ever have to address *you* on the subject. Although I have been fifty years practicing at the Kentucky bar, this is the first time I have ever had to address a jury in this place, and I can not help feeling that I am as much a stranger here as any gentleman who has addressed you. I shall, however, in speaking to you, apply myself to an exposition of the facts and of the law bearing upon them, and whatever may be your feelings, you will, I am sure, keep in mind that you are bound to exercise your reason, and that you owe a duty of no ordinary responsibility to yourselves, your characters, and your country. That duty is a sacred trust reposed in you which you can not weigh lightly without injury to yourselves as well as wrong to others. Nor must you surrender up your reason to your passions and allow yourselves to be carried away by the shouts of applause from a fashionable audience, as if you were in a theater where a Junius Brutus Booth and a Miss Ellen Tree exhibit the practiced arts of controlling the feelings, and successfully eliciting the noisy plaudits of excitement. This is not a theater—this trial is not a farce—nor are you seated on those benches for amusement. This, gentlemen, is a solemn court of justice—a solemn tribunal in which your Judge, presiding with becoming dignity, represents the majesty of the law, and in which you are expected to deliberate with becoming gravity upon circumstances of awful import. The appalling death of two fellow-creatures is the occasion of your being here assembled, and the guilt or innocence of those at whose hands they fell, is the object of your solemn investigation.

§ 238. · Even though I knew I should have to address a jury of strangers, and an assemblage to whom I am personally unknown, I little anticipated that I should have to make a speech to any other audience than that usually to be found in our halls of justice. But my friend Col. Robertson, whose youth and warmth in that way, urge him to precedence, has taken me by surprise, and placed before me a gallery of beauty and fashion, which might well deprive me of my presence of mind, if I were not fortified with less of the ardor of youth in my veins than himself, and were I not less practiced in those graces of person and manners which he can so successfully play off to woo and win their fascinating smiles.

By law, and in conformity with the original institutions upon which all law is founded, this trial was to have taken place where the occasion of it occurred—in the county of Jefferson. The Legislature, in its wisdom, has thought fit to change the venue from Jefferson to Mercer county; but why, I am unable to say. For, even Colonel Robertson, the very able counsel for the defense, has admitted that, although for a time great excitement existed in Louisville, yet, after the investigation at the examining court, that excitement was altogether allayed. In this country experience has always taught us that when a change of venue is sought, the object is not to obtain justice, but to evade it. The object is to thwart and embarrass the prosecution, and multiply the chances of eluding the responsibility of the law. (*a*). How is this effected? Is it not by a removal to some place esteemed favorable to the accused, by a removal so distant from the scene of action, that the expense and inconvenience render it probable but few of the witnesses can attend; by a removal to where witnesses of a character dubious, if not infamous where known, may find credit because they are unknown. Here we are some seventy or eighty miles from the stage on which this tragedy was acted, yet we are asked why we did not bring the stick and the cow-hide, and Bill Holmes the pilot, as if we would be afraid to produce them were they within our reach. I would ask the opposite side, in my turn, why gentlemen have brought us eighty miles from the scene where we could have elicited the truth in every particular? I listened yesterday with great pleasure to Colonel Robertson, whose speech was very good, and evinced as much of the fire of youth as the flowers of rhetoric; but I can not say it was much calculated to convince the understanding that the "worse can be made to appear the better cause."

§ 239. I also listened with great pleasure to Mr. Prentiss, who addressed you yesterday, and in part to-day, and I must say that,

(*a*). At this day it is not considered proper for counsel to animadvert upon the fact that the defendant has changed the venue. In general, the Judge will interpose to prevent such discussion, as irrelevant and unfair. It is to be observed that throughout this case a good deal of latitude is taken by counsel on both sides.

although there were in his speech some things which I could not approve, and many deductions which I could not admit, yet, on the whole, it was an oratorical effort which I could not help admiring. I am even disposed to go farther, and to say that I am utterly astonished that such forensic powers, and so ably wielded, did not prove less abortive—but I must attribute the feebleness of the effect, more to the weakness of the cause, than to the want of genius in the advocate. However, Mr. Prentiss really astonished me with one proposition he laid down with respect to the common law of this country, that every man is to judge for himself where the point of danger lies, that entitles him to disable another, or to kill him, lest he might, in turn, by possibility, become the killed; so that, in fact, if it were so, the point of danger never could be defined by law, because what a brave man would consider no danger at all, a timid man would consider the point of danger bristling with a thousand deaths. Was there ever such a monstrous doctrine recognized by the laws of any community!

[Here Mr. Prentiss interrupted Mr. Hardin, to say that he had only urged that what might be considered by a man, from apparent circumstances, the point of danger, where resistance was necessary for his own preservation, would in the law be grounds for justifiable homicide.] (*a*)

§210. MR. HARDIN: I will come to that in due time. The dilemma can not be removed, that the same point, according to this doctrine, is, and is not, the point for the resistance contemplated by the law. No, gentlemen; the law recognizes no such absurdities. The law was laid down yesterday correctly by the District Attorney, that when the killing of a man has taken place, it is a murder in the eyes of the law, and must be pronounced by the law to be a murder, till the contrary is shown. What, then, becomes of this new doctrine, unknown to the law, that the slayer and not the law, is to judge and presume the justification? The law itself says, all killing of one man by another is murder. The slayer, according to Mr. Prentiss, says, "Oh, no, I killed my man because I fancied he would kill me—it is not murder, it is justifiable homicide!" Yet, the law again says, if a sheriff, who hangs a man by lawful authority and in doing so commits only a justifiable homicide, should, even for the best of motives, instead of hanging the man, as bound to do, chop his head off with a sword, though death must necessarily follow either way, yet is he guilty of murder, and liable to the punishment, for the killing contrary to the prescribed mode of his duty.

(*a*) One without fault, if attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take his life, or do him great bodily harm, and that the danger is imminent; though, in point of fact, there was no design to do him bodily harm, nor danger that it would be done. *Shorter* v. *The People*, 2 N. Y. 193; *Patterson* v. *The People*, 46 N. Y. 625; See *People* v. *Lamb*, 54 N. Y. 342; *People* v. *Austin*, 1 Park 154; *People* v. *Cole*, 4 Park 35; *Pfomer* v. *People*, *Ib.* 558; *Uhl* v. *People*, 5 Park 410.

§ 241. There are certain maxims of law laid down in the books which are never disputed, because they are founded upon reason and just principles; such, for instance, as these: If A kill B from necessity, to save his own life, the danger being undeniable, it is excusable homicide. If A kill B in a sudden heat of quarrel, it is manslaughter. If A kill B without what in law is called a competent provocation, it is murder. If a man fire a pistol ball into that crowd and kill a man, though it were his bosom friend against whom, personally, he could have no previous malice, it is murder, though he did not intend that death. It is murder in the eye of the law, because the recklessness of human life implied in the rashness of the act, shows that general malice to mankind, which is equally dangerous to the community as any private malice could be. I will read you the law upon the subject of words in a quarrel being no provocation sufficient to justify assault. [Here Mr. Hardin read the well known text that words are no provocation in law.] All killing is murder unless an excuse is shown, but words are no excuse, because they never bring a killing below the crime of murder; neither are indecent and contemptuous actions justification, according to Raymond and Blackstone. Here is a maxim in point: If there is a previous quarrel between A and B, and some time after, in consequence of the previous quarrel, they fight,—then nothing connected with the previous quarrel justifies a killing, and it can not be excused unless it clearly appear that B in killing A had to do so to save his own life. See Hale's Pleas of the Crown, 452, "If there be malice between A and B," etc.

§ 242. The application must be made to the fight at the tailor's shop, and this answers the question why we have introduced evidence in proof of the first affray. There is one principle of law to which I may as well now call your attention as at any other time.

When men act together, and by consent, it is no matter who gives the wound causing death—they are all guilty in the eye of the law of the offense, whatever it may be. [404.]

And in relation to that sort of wound—if a man receive a wound not of a dangerous nature, but by gangrene, or consequent fever, death ensue, it is murder or manslaughter, as the case may be, as much as if the wound itself had been mortal at the instant.

Mr. Prentiss labored a position, and labored it ably, I admit, but Mr. Bullock had previously combatted its application successfully. The position is advanced upon the well known quotation from Lord Hale:

"If A, B and C be walking in company together, and C assault B, who flies, and is in danger of being killed from C's pursuit, unless present help be afforded, and A thereupon kill C in defense of the life of B, it seems that in this case of such inevitable danger of the life of B, the killing of C by A is in the nature of self-defense; but it must

plainly appear by the circumstances of the case as the manner of assault, the weapons with which it was made, etc., that B's life was in imminent danger."

A man seeing another kill a third person, may kill the man about to commit the felony, but then it is at his peril he does it, and he is responsible to the law for his interference. Upon this text, if you are to acquit Judge Wilkinson, it must be apparent that when the stabbing took place there must have been manifest danger to his brother's life; there must have been an apparent—an absolute necessity. To show that there was no such necessity, and to place before you in a clear view the leading features of the facts, I will now claim your attention to the review I shall make of them.

Mr. Redding keeps what is called a merchant tailor's shop on Main street, in Louisville. His store is not far below the Galt House, on the opposite side.

§ 243. These three gentlemen now arraigned before you, are residents of the State of Mississippi, and formerly, as I am informed, were residents of the state of Virginia, and, for aught I know, of the same county, town, or village. They came to Kentucky early in December, for what, is of no import that I can see, although it is made to cut a conspicuous figure here as a favor conferred on Kentucky—a contemplated marriage at Bardstown. They arrived at the Galt House. Where Judge Wilkinson had his clothes made up, if he had any prepared for the occasion, is not shown. Where Mr. Murdaugh had his made, if any, is not shown. But it is shown that Dr. Wilkinson was to have clothes made at Mr. Redding's. They were made with great punctuality, and the Doctor came to Redding's store at the appointed time. He tried on the new coat and seemed well pleased with it. So satisfied was he with the coat that he wore it on the spot, and left a $100 bank bill on account of payment, requesting Mr. Redding would hold over the bank bill, which was of a Mississippi bank, till some expected change for the better would take place in the rates of discount. Dr. Wilkinson then went away, wearing the coat, and desiring the other things to be sent to the Galt House. As I now come to where it will be necessary for me to mention the names of witnesses, I beg it to be understood that I do not mean to avail myself of the example set by the opposite side. I will not shelter myself behind my professional duty, to vilify an unfortunate witness, disarmed of his self-defense—unfortunate, because of his inability to make any reply in the same public court in which he is maligned. Younger gentlemen at the bar than I am, may indulge in the practice, and, perhaps, the rashness of youth and inexperience may excuse what wisdom and manliness could not justify. No character, however spotless—no reputation, however unstained before—can escape the sullying hand wantonly raised to

tarnish it, where there is no immediate opportunity of wiping away that which corrodes while it damps the lustre.

§ 244. When Dr. Wilkinson returned to Redding's store, accompanied by his brother and Mr. Murdaugh, some objection was made to the collar of the coat. It was no serious objection, we may suppose, for we hear from Mr. Prentiss, himself, "the expectancy and rose of the fair State," that he, perhaps, would not have been quite so fastidious. Perhaps, some young fellow, like my friend, Colonel Robertson, "the glass of fashion, and the mould of form," might have been a little squeamish; but, for myself, every one knows I am not particular. I never should have knocked down a tailor with an iron poker because there was a shade of fashion lacking in the collar of my brother's coat. The whole thing, I admit, is a matter of taste, the poker included.

But there was, however, some objection to the fashion of the coat—and that objection was thought grave enough to enlist the triple wisdom of a dignified judge of the land, an eminent doctor of a distant State, and a sage member of the Mississippi bar. Yes, with this formidable array of judicial wisdom, pharmaceutic skill and legal research, these three gentlemen came to a little store in Louisville, to fight a poor tailor! And all about an unfashionable twist in the collar of a coat.

To be sure they came from the Eldorado of the South, with their thousands of bales of cotton condensed into their pockets. They were perfect magnets of attraction, for the secret of their loadstone lay wrapt up in their Mississippi bank notes. Hotel-keepers were bowing to them on all hands, tradesmen and store-keepers honored the pavement they trod, and as to tailors, I am ready to believe they became perfectly fascinated with them. Nay, I even make no doubt that the keepers of watering establishments and medical springs, submitted to the soft impeachment, and became devoted to their interests. It is the necessary consequence of the influence of cotton bales.

§ 245. Here was this hard-working tailor, ever on the watch for good customers, bowing to them as assiduously, if not more assiduously, than the hotel-keepers, or spring doctors—taking back his coat, I have no doubt, with tears in his eyes; but is it reasonable to suppose that, fascinated as he was, by the ability of such customers to pay, he would be so blind to his own interests as to give unprovoked quarrel to such customers? However backward he may have been from prudence and circumstances, it seems there was no want of readiness to carry matters with a high hand on the part of those with whom he was dealing.

Judge Wilkinson is sitting on a stool at the stove, and when he sees his brother about to pay for the pantaloons and vest, he interferes, without being called upon to do so, and opposes the payment for these things, upon which the tailor very naturally asks him what business he has to interfere. The Judge, without telling him that he was the

Doctor's brother, which Redding did not know, and that as such he had a right to advise him, jumps up, snatches an iron poker, with which a man could be knocked down as readily as with a crow-bar, and for the small provocation of a tailor saying, "You make yourself a little too busy in the matter," ignorant that he was addressing a dignified judge, the Judge aims a deadly blow at his head, which, if not fortunately warded off, might have involved consequences to which I must not advert. What does this prove? If it proves nothing else, does it not show plainly that Judge Wilkinson is not quite as mild and forbearing in his disposition as his friend, Mr. Prentiss, would have you to believe. Did Judge Wilkinson's conduct show that it was his belief men's passions should be subject to the control of law, if not of reason? that he was in principle a respecter of the law in this instance?

§ 246. I know it will be argued that there is a wider latitude given to the restraints of law in the Southern than in the Northern States, and a false assumption is built upon this circumstance, that the free use of personal liberty to avenge private quarrels gives greater bravery to a people. But I have read, I have witnessed, and I believe that the people of New England, a section of this great republic, where you can get no man to fight duels, and where every man throws himself under the protection of law for the redress of his private wrongs, when they have been called into the field for the protection of their country, have shown the brightest examples in modern history of personal bravery and national valor. Show me where men have been more prompt to rush upon the bayonets of their country's invaders than the heroes of New England. Sir, courage and bravery belong to the respecters of the law which protects every man's rights in a civilized community. Climate, in a country of such vast extent as this, may have its influence on men, as it is known to have on the inferior race of animals. You may meet the lion, distinguished for his courage and his power, in the Barbary States, where, conscious of his strength, you may pass him unmolested, if you are not the aggressor. As you descend to the more southerly latitudes, you meet the leopard and the panther, with whom treachery and ferocity are the substitutes for courage; and when you pass the equator you meet the hyena, the emblem of uncompromising cruelty, and without a redeeming quality. Men may in like manner be affected by climate; and he who on the iron-bound coast of the frozen North, or on the arid rocks of New Plymouth, would illustrate every noble virtue of his nature, not less distinguished for his piety than his patriotism, for his endurance than his courage, and for his generosity than his bravery, when transplanted to the enervating regions of the South may become different and degenerated, trusting

more to his interests than his patriotism, to advantage than to courage, and to concealed weapons than to bravery.

§ 247. But to resume my review of the evidence. Judge Wilkinson, so remarkable for his mildness and forbearance, as a sample of these qualities, aims a blow, as I have said before, at the tailor's head, which probably would have killed him had he not warded off the blow with his arm in a manner to give great offense to Mr. Prentiss, who can not see the propriety of a tailor grappling with a judge to prevent a repetition of blows that might break his head. The little tailor, however, did grapple with the Judge, and, dragging him to the side door, he falls with his adversary out on the pavement. The tailor, though small, being strong and active, turned the Judge under, and as he did so Murdaugh hallooed out, "Kill the damned rascal," a command which the Doctor was about to obey, and when he was within a couple of inches of plunging his dirk into the tailor's heart, Mr. Redmond caught the Doctor's arm. But for that interference it would have been the last of Redding's career. Mr. Murdaugh had hallooed out to the Doctor, "Kill the damned rascal!" and in the next breath, "Part them! Part them!" This is easily accounted for. When he saw that Redding, by Redmond's interference, had gained the advantage, he perceived that the tables were turned, and fearful of the consequences, became as impatient to have them parted as he had before been anxious to have the tailor killed. Well, they are parted; and when they get up, Dr. Wilkinson still has his knife drawn; Mr. Murdaugh has his knife drawn, and the Judge has his favorite weapon, the poker. The little tailor's courage, notwithstanding this formidable array, is up, and he steps forth, a David before Goliah, and offers to fight the whole three of them if they will lay asider their weapons. This, I think, however, was a mere *brag* with the *poker-players*, for I do not believe he could have done it. Five witnesses swear that both Dr. Wilkinson and Mr. Murdaugh had out their knives. Several concur that Dr. Wilkinson re-entered the store with his knife drawn, demanding his $100 bank bill. All agree that he got it, and many agree that when he and his companions left for the Galt House, two went away exhibiting their knives, and one rejoicing in the poker. The knives, to be sure, have been identified as *white-handled knives*. Mr. Prentiss, in that able speech which you have all heard and admired, and which, it must be admitted, like a West India tornado, swept through this house carrying everything before it, even to the reason of many who heard it, seemed to think that we had some particular fancy for the handles of the knives, because they were white handles. He thought we dwelt uncommonly on the whiteness of the handles, till like spectres they were continually flitting before our visions. With all this poetical or forensic coloring we have nothing to do; we only identified them, and the gentleman

has failed to contradict us by proving that they were black, green or red.

§ 248. We have now, gentlemen, traced a small portion of this affair at the tailor's shop. In what occurred there immediately after what has been mentioned, we find the following facts established: Mr. Redding swears that he was advised to enforce the law against these gentlemen. The principal officer of police, the city marshal, is usually to be found about the Mayor's office or jail, from the peculiar nature of his duties. Mr. Redding proves that he and Johnson went toward the Mayor's office and looked for the marshal at Hyman's and Vacaro's coffee houses. Not finding him there, they went on to the Mayor's office. They applied at the Mayor's office to Mr. Pollard, Clerk of the City Court, and told him that one of the gentlemen was named Wilkinson, and that the names of the others they did not know. They were told by Mr. Pollard that they should have the names; or, if they wished, they might have a blank warrant to be filled up with the names when ascertained. This Redding declined upon being told that if he could meet the marshal he could arrest the parties without a warrant. Redding and Johnson proceeeded to the jail in search of the marshal. Not finding him there, Redding returns by Market street, at the corner of which he met Rothwell, near his residence. As he tells Rothwell, his brother-in-law, the nature of the affair, Rothwell goes along with him. And here I must remark, that to come down to Market street from the jail is the shortest way, though my friend, Col. Robertson, thinks that a man may go round by Jefferson street a few hundred yards out of his road by the way of a short cut. But Redding being but a plain man not given to sophisticated deductions, believes the nearest road is the shortest cut and took the shortest cut by Market street, where he met Rothwell, as I have said, and told him what had occurred. He did not ask his brother-in-law to go with him, but his brother-in-law did think proper to accompany him. There was no Bill Holmes—no Marshall Halbert—no Billy Johnson—no one but Rothwell accompanying Redding. Mr. Graham swears that there was no one with Redding but Rothwell, when he met them near the Galt House. Where was this terrible array of giants and Patagonians of which we have heard so much? Why, no where to be sure; the gentlemen have only drawn largely on their imaginations. As Sheridan once said of Dundass, they are indebted to their imaginations for their facts, though I will not go so far as to say of my sprightly friend Col. Robertson, or my brilliant friend Mr. Prentiss, that either is indebted to his memory for his wit.

§ 249. Jackson swears, indeed, that he heard propositions made of going to the Galt House to give the Mississippians a beating; yet Graham swears Jackson would always lie a little. This Jackson, whom we have

shown to be unworthy of credit, swears to that being a fact which is contradicted by Redding, by Johnson, and by Craig, whose credibility is unimpeached and unimpeachable. But it seems Mr. Prentiss takes peculiar exceptions to Bill Johnson, because he uses strange figures of speech and low and outlandish tropes and metaphors. Well, the gentleman ought not to blame poor Johnson for imitating his betters in the arts and graces of oratory. I suppose he has been reading the newspapers in which the reported speeches of the most eminent members of Congress are recorded, and he finds one distinguished gentleman charges a party with being like a greasy pack of cards, all spotted and marked and shuffled together. Another young aspirant compares the Secretary of the Treasury, a dignitary old enough to be his father, to a she-bear, running through cane-breaks and dropping her cubs at every step; and yet Johnson is blamed for his figures, if he ever used them, of "hides full of shucks," and "skinning of sheep." I thought Mr. Prentiss, who so lately returned from Congress, would have admired Bill Johnson for being so apt a scholar, like that classic personage, Zip Coon, in picking up the new and approved style of tropes and metaphors now so fashionable in the places which he himself has made resound with the aptness of his illustrations.

Gentlemen, I had got to this place in the affair at the Galt House, where Redding and Rothwell were seen unaccompanied by any one entering that hotel. Mr. Redding says when he went into the bar-room he looked over the register and called for the names. Scarcely had he got them when Judge Wilkinson entered and stepped up to the counter to take a drink of water. Redding addressed him thus: "Sir, I believe you are the gentleman who struck me with the poker in my own house this evening." If Judge Wilkinson was sorry for his imprudence, why did he not then say it was in a hasty moment and upon reflection, he felt that he was wrong? Could Redding have resisted the ingenuousness of such an answer to his inquiry? Could he have harbored for a moment longer any irritation for an acknowledged injury? But what did Judge Wilkinson say or do? Why, he heaped insult upon injury by an aristocratic allusion to the tailor's profession. "I will not," he replied, "fight or quarrel *with a man of your profession!*" Now, although I agree with Mr. Prentiss that there is nothing disgraceful in a profession, and I think the poet has expressed himself with scarcely less felicity than Mr. Prentiss on the subject:

> "Honor and shame from no conditions rise;
> Act well your part, there all the honor lies."

And as Burns says,

> "The heart's aí the part, aí
> That's right or wrang;"

yet, we can not help imbibing with our literature, and our sentiments

many trifling prejudices from the mother country where aristocratic pretensions have too successfully attached disgraceful notions to certain pursuits of industry, and among these, the profession most sneered at by the would-be wits of the last century, is that of a tailor. And although a man of that profession here may justly feel that he is as respectable, and follows as respectable a calling as any other man, yet when he thinks those old sneers are leveled at him as an insult, he naturally resents it with the indignation of an honest and industrious and free citizen, not bound by a servility unknown to us, to succumb to him who dares to utter it.

§ 250. There is, I fear, a principle growing up amongst us inimical to our republican institutions—a principle of classification favorable to aristocratic distinctions. We have our bankers, lawyers, and doctors, arrogating one rank in our society; the statesmen, heads of departments and officials, another. Our mechanics and those who toil by the sweat of their brow to produce our riches, are cast into the shade; and knowing as they do, that such an attempt, however noiselessly it is made, still exists palpably, is it any wonder they should be sensitive to every whisper that is breathed to mark the invidious distinctions? An apparent unimportant word may wound deeper than rough language. Call a man a knave, and he may forget it; but call him a fool, and he never forgives you. Call a young lady a coquette, and she may pardon you; but tell her she is ugly, and she will never abide you the longest day she lives. Tell a tailor he is a botch, and he may not even get angry with you; but sneer at him about his *goose* and his *profession*, and you insult him, though the words in themselves are harmless. It is the allusion to prejudices that have existed which carries the poison of insult in its barb. Sir, we must not disguise the fact that there is a line of demarkation drawn by the proud and arrogant between themselves and those who live by the sweat of their brow; between the comparatively idle, who live but to consume, and the industrious, who work but to produce, between the drones of the hive and the laboring bees. And to which, pray, is the country in its strength, prosperity and wealth, indebted for its teeming productiveness? To which for her energy, enterprise, protection, genuine patriotism and celerity in national or municipal times of danger? Go to Louisville when a portion of the city is enveloped in flames, and you will see a thousand mechanics rushing into the devouring element for the protection of property, while the lawyer and the judge, and the haughty aristocrat walk about as spectators with their hands in their pockets. The mechanics compose the moving power and labor-working machine upon whose industry we all feed and fatten. Their labors are the wealth of the country, and when we cease to honor and cherish them, we poison the springs of our own invigorating prosperity, and cut off the sources

of our own enjoyments. Do we treat them with gratitude when we taunt them with epithets, which they esteem derogatory or insulting? Are we to treat them thus in the halcyon days of peace, and when the thunder cloud of war gathers around our course, with a monstrous pusillanimity, fling ourselves into their arms as our only hope and rescue? Has not the history of our country shown, and will it not show again, that when the storm of invasion ravages our coasts, our safety is to be found alone in the strong sinew and ready arm of our laboring population? Where, then, are your bowie-knife-and-pistol gentry, your duelists and your despisers of the man who lives by the sweat of his brow? Sir, they will be found cowering and lurking where they may snuff the battle afar off, and hide their once lofty heads in ignoble safety. But I will not consume your time with recitals which may be found in every page of our history. I shall return to the evidence in the case before you.

§ 251. Mr. Everett is told by Mr. Sneed that there is likely to be some difficulty. Mr. Everett goes into the bar and by some indications to the Judge, meets him in the passage and takes him to his room where they find Dr. Wilkinson and Mr. Murdaugh. Judge Wilkinson relates to them what had happened. The Judge having made this relation, asks Everett to provide him with pistols. Why? For what did he want them? Was any one attacking them there or likely to do it? They were safe in their room. They could only want pistols for the purpose of descending and making the attack themselves. But Everett is asked to provide pistols. He said he would try, and with that avowed purpose, left them. He had not been gone fifteen minutes, in the opinion of some—in the opinion of others scarcely ten, when Judge Wilkinson, with this lower-country tooth-pick, [taking up the bowie-knife] not trusting this time to the more merciful weapon with which he had been practicing, the tailor's poker; with this lower-country tooth-pick he started down prepared to use it. Did he know Rothwell? Did he know any but Redding? No man had accosted him but Redding. Why, then, did he come down with this terrible implement of murder? Why, sir, just exactly for this reason, that he had been mortified at the result of what happened at Redding's store. The judge of the land had been turned over by a tailor. He had been bearded and abused by a tailor, and he provided himself with his bowie-knife and went down to have another deal with that tailor.

Mr. Prentiss seems to think the Judge had a right to go down to his supper. Why, so he had; but he had a right to wait for the bell to ring. He had no right to eat his supper before it was served up—no right to take his bowie-knife down to the kitchen and terrify the cooks to allow him to devour the supper while it was cooking. And had the supper been ready, there were table-knives wherewith to carve his

meat, and he had no right to carve it with a bowie-knife. But the supper was hardly cooking when he went down. The bell had to be rung over the private passage up stairs before it was rung below, and when rung below the folding doors had to be thrown open. But the bell had rung nowhere and Judge Wilkinson, Dr. Wilkinson and Mr. Murdaugh came down before any bells were rung; therefore it was not to supper they came down. Which table had Judge Wilkinson been in the habit of going to? the large table or the ladies' table? There is no proof that he and his companions boarded at the large table; and it is known that many gentlemen as familiar with the house as they had been, prefer the private or ladies' table. We have every reason to believe that was the table at which they boarded. The entrance to the room where that table is kept is not through the bar-room. One entrance to the large dining room, is, indeed, through the waiting room, and there is a bar in that waiting room, at which many gentlemen who are not pleaders, become suitors, make motions, and put in their pleas. I sometimes make my appearance at that bar, but I am not summoned by the attachment of the bottles. I go to hear the politics of the day—for, although I have long since quit the field, I can not be cured of the curiosity to know what wrangling is going on among the little juntas in every village as well as among the mighty ones of Congress.

§ 252. When these three gentlemen got into the bar-room, Mr. Redding was at the counter; Mr. McGrath was inside of it; Mr. Reaugh was at the fire. Some say Mr. Redding came in immediately after the Judge. You must expect that out of twenty witness no two will agree in all the facts; but in a transaction like this, where several fights were going on—where in every corner a man was bleeding, or dying or suffering—that no two men could see everything or anything alike, is to be expected. But, gentlemen, by collecting all the evidence together, contrasting, comparing, and justifying one by another, we can arrive at the facts of the case clearly and beyond the probability of doubt. We can arrive at them with as much certainty as we can at any other set of facts. And from this manner of collating the facts, I am enabled to present them to you without fear of contradiction.

§ 253. One of these facts is that Judge Wilkinson walked across the bar-room, some twenty-five feet, when he came in. Mr. Trabue, a man whose evidence is to be depended upon, seems assured that when Judge Wilkinson came in, he walked three or four times across the room, and then stood awhile with his eye fixed upon Mr. Redding, his foot advanced, and his right hand behind in his coat pocket, and, I make no doubt, with his hand grasping the handle of this very bowie-knife. At that moment Mr. Mundaugh went up to Redding. I will not say, with one of their own witnesses, that in going up to him, he rattled like a viper; but as he went up he addressed Redding, saying, "I understand

that you say I drew a bowie-knife on you in your shop this evening? If you say so you are a damned rascal, or, liar!" And as he said so, he opened his knife and elevated it, as one said, or held it down, according to another. Yes, he accosted Redding in the most insulting terms and threw open his knife at the same time. Is there any witness who has said Redding accosted *him* in an angry manner? One person said of the knife—"Lord, how it gleamed in the candle-light!"

The most warlike nation the world ever saw, was Sparta. When the Spartans prepared for battle, they polished their arms to glisten in the sun. They washed their clothes clean, combed their long black hair, and sang the song of battle. I have no doubt, Mr. Murdaugh, if in the ranks, would have done the same. I make no doubt he would be the last to run. I make no doubt he would have been amongst the foremost to make his gleaming blade glisten in the sun. The highest evidence of a man's dexterity and intent to use his weapons, is the high polish he gives them, and the high state of preservation in which he keeps them for use. Of Murdaugh's dexterity in the use of his knife in the work of death, we have unfortunately too much proof; of his disposition to use it, we have the evidence of the high order in which he kept it for use, even to that state of Spartan polish, which made it gleam in the candle-light, as the sword of the Spartan would glisten in the sun.

§ 254. We are told Meeks was determined for a fight; yet Oliver, whose friendship for these gentlemen seems of the most ardent and disinterested kind, gives up to Meeks his knife, after having so easily obtained possession of it on the small pretense of picking his nails. He had been invited by Oliver to drink at a "saloon" opposite the Galt House. They dignify these establishments now-a-days by the high-sounding title of "saloons;" but when you enter one of them you find it the vilest groggery in the world. These dignified groggeries exist to a shameful extent in Louisville, and why? Because the politicians of Louisville are too busy with their unimportant bickerings, or too truckling to put them down. They are the strongholds of the voting interests of Louisville; and the truckling politicians, who are ready to sacrifice every principle for the triumph of party, court the coffee house keepers, and bend in supplication for their election to the inmates of the groggeries. Even the municipal government is either influenced by paltry mercenary motives in its avidity for the revenue of licenses, or it has not the nerve or public spirit to grapple with the monster. Talk of our constitution being the greatest, the purest, and the most efficient on the face of the earth! Yet, here is an evidence of its working in a duplicate government. The most destructive of vices, because the parent of most, is licensed, encouraged, fostered, pandered to, by politicians, and through their truckling, by the very local government

itself, as if the misery and debasement of the community were more the end and aim of their rule than the encouragement of virtue, industry, sobriety and rational enjoyment.

§ 255. We learn that Meeks was unknown to many; a slender, small, and weakly man, with a bit of a cow-hide, the lash of which some one says was knotted. From what we learn of this cow-hide, I verily believe it would take at least five hundred knocks of it to kill a man—and I doubt if he could be well killed, after all, even with five hundred knocks of it. Meeks, unfortunately for himself, stepped up to Murdaugh, and said, "Yes, you are the d—d little rascal who did it." In reply to this, the very first lunge Murdaugh made at him severed a vital artery and caused his instant death. I am no physician, and know not technically what effect the cutting of that artery may have; but I believe it to be as deadly as if the brains were blown out, or the heart pierced. A man stabbed through the heart no longer lives or breathes, but he may stand a minute. Meeks fell, and in attempting to resume his feet, as he leaned on a chair, pitched forward upon his face, and when examined, he was dead.

When did Rothwell strike Murdaugh? Not till Meeks was killed. Then, it is proven, Rothwell struck with a cane, and Murdaugh was beaten back, and at that instant the tide of battle rolled on to the right corner as you face the fire, and then Rothwell was seen losing his grip of the cane in his right hand, and he was seen endeavoring to resume his grasp of it. General Chambers thinks it was Dr. Wilkinson whom Rothwell was beating at in the right-hand corner, but every one else says it was Murdaugh, and it is of course evident the General is mistaken. Every one of the witnesses swears that Rothwell was engaged with Murdaugh in the right-hand corner, while Holmes was engaged with Dr. Wilkinson in the left-hand corner. Let us now consider the wounds received by Rothwell. Dr. McDowell says the puncture in Rothwell's chest might be made with this knife carried by Murdaugh. The skin by its elasticity might yield without having an orifice as large as the blade, afterward apparent.

§ 256. Who gave Rothwell that wound? Why, Murdaugh, and nobody else. This accounts for Rothwell losing the grip of his stick or cane. The moment this knife penetrated his chest on the right side, that moment his arm became paralyzed, and he could not hold his cane. He caught at it, but he did not use it after. Just then, Judge Wilkinson came up behind with his bowie-knife in his hand, and General Chambers says he saw him make a lunge at Rothwell and stab him in the back. If two men are engaged in a fight, one with a dirk-knife like this, and the other with a stick, in the name of God let another with such a bowie-knife as this stand off; but if he must interfere on behalf of him who has the deadly weapon, and against him who has

not a deadly weapon, let him do the work of death, front to front—let him stab in the breast and not in the back. But, to come up behind and to stab *him* in the back, who is already overmatched by his opponent in point of weapons, evinces a disposition which I shall not trust myself to dwell upon or to portray. Ossian, speaking of Cairbar's treachery, says:—

"Cairbar shrinks before Oscar's sword! *he creeps in darkness behind a stone*—he lifts the spear *in secret*—he pierces my Oscar's side!"

By this time Dr. Wilkinson was down in the left-hand corner and Holmes over him. The fact is, Holmes was the only man that knocked the Doctor up against Trabue, though Halbert boasted of having done it. It was only a boast in Halbert, for I believe he goes over his foughten-fields more at the fireside than on the battle-ground. In the language of Dryden, speaking of Alexander:—

"The King grew vain;
Fought all his battles o'er again,
And thrice he routed all his foes, and thrice he slew the slain."

[It was now five o'clock; and Mr. Hardin requested an adjournment, as it would probably take him two hours more to conclude his argument. To this the Court assented, and an adjournment was made to half-past seven next morning.]

FIFTH DAY.

FRIDAY, March 16th, 1839.

§ 257. [The Court resumed the trial at a quarter before 8 o'clock. Early as the hour was, there could not have been less than from one to two hundred ladies in the gallery, and upwards of a thousand men in the arena of the court. After the jury-call and reading of the minutes, the Court required Mr. Hardin to resume his argument. Mr. H. commenced at 8 o'clock and spoke without intermission for upwards of two hours.]

MR. HARDIN: Gentlemen of the jury, I would endeavor to resume the few remarks on the evidence which I offered yesterday, as near the precise place where I left off as possible, if I did not know that in the present case such particularity is not so requisite as in the case cited by John Randolph, who once told of a man that was so precise that he could, if interrupted and called off in the middle of his dinner by the sound of a horn, on resuming his seat some hours after upon re-sounding the horn, take up his dinner exactly at the identical bite where he had left off. I am not quite so particular, and shall probably recapitulate some of the evidence I have already gone over.

§ 258. Yesterday evening I endeavored to give you the law and the facts of the case as nearly as possible, as far as I went. I shall now

repeat that you are not to take as facts all that may be sworn in a cause. Although witnesses may be men of undoubted integrity and veracity, yet all they state are not facts. They are fallible beings, and likely to misconceive and misinterpret facts without any intention of doing so. We are to ascertain the facts from the mass of evidence, and judge of each witness's competency by contrasting his evidence with that of others, and when it agrees with all or the majority of witnesses, we may safely infer he is right. I endeavored yesterday to examine the facts that occurred at the tailor's shop, for the purpose of showing the ill blood fomented in these gentlemen's hearts against Redding. I then showed that they acted in concert, and provided themselves with what weapons they could, not being able to get all they wanted; and how, upon a small occasion, they were prepared to use these weapons. Indeed, there seems to be no witness as to what occurred when Judge Wilkinson remained in consultation with his companions in his bed-room.

[Here Mr. Hardin made a short recapitulation of the statement he had gone over before, so nearly alike in substance that it is conceived unnecessary here to repeat it. However, some of these points elicited observations from Mr. Hardin, new or important, which it may be necessary to give. The repetition, therefore, of such points of evidence will be excused.]

We may judge of the shifts the defense is driven to, when it is forced to rest upon such witnesses as Oliver, a man whom no one in Louisville would listen to; and Jackson, the Pharisee, who talks of religion without a spark of it in his heart, and who is discredited by men who, as witnesses, are unimpeached.

§ 259. If Judge Wilkinson, Dr. Wilkinson and Mr. Murdaugh were known to be frequenters of the bar before meal times, why has it not been proven by one of their witnesses? That not being proven, I have a right to assume that it could not be done, because it was not the fact.

Next I have to ask, why these gentlemen came into the bar-room provided with arms? Could it be with any other design than to run Redding out of the room? Were they going into a room where they commonly resorted? It is evident they were not. Did they go there on their way to supper? It is evident they did not, for supper was not near being ready.

What disposition for eating a supper merely, does it show in Judge Wilkinson to pace the room three or four times and then fix the eye of destruction on Redding, while his purpose kindles and he grasps his bowie-knife behind in his pocket? What more eagerness for supper does Murdaugh exhibit in going straight up to Redding, rattling like a viper and insulting him with being a liar? Sir, I care not if a man go

into any crowd and before an angry word is used to him, he goes up to as meek a man as Job himself, and says to him, "You are a damned liar or rascal," and flings open his blade to inflict mortal injury, as his words indicate, if the person so accosted strike his insulter, it is not surely any great wonder. And yet Redding did not strike a blow. Mr. Murdaugh may say, "I kept within what I thought was the safe side of the law—I approached with my drawn knife—insulted the person to draw on the attack from him, that I might have some excuse for using my knife in the manner in which I came to use it at any rate." If any man come up and call you a damned liar, or a rascal and spring open his knife in the attitude of striking, should you strike or slay such an assailant, would you not be excusable? But Col. Robertson attributes to an act of this kind nothing but a manifestation of innocence and high spirit. The Colonel is really a gallant man, and judges of others by the fire and chivalry raging in his own breast. You must not laugh, gentlemen, for if you could look upon the volcanic mountain, though you would see its head capped with snow, you would find its bosom like *his*, rumbling with fire, smoke, and brimstone. In former times, the highest honor known to a Roman soldier was to have saved a man in battle, but here it is argued that if a young aspirant to fame pinks and kills his man, he is to be sent home to his parents in honor, crowned with the chaplets of victory. Nay, it is believed, if Bonaparte in his youthful prime, in his Italian campaigns, had had Murdaugh by his side he would have confided to his ready and unerring arm the *execution* of many a hardy adventure. Col. Robertson may say what he pleases, but I say it was Murdaugh commenced the assault, and that all fighting done by him was in the wrong. All fighting done on his account was in the wrong, because he had commenced in the wrong.

§ 260. Well, gentlemen, as I remarked to you yesterday, when I stopped, for I am now returned once more to that point, Murdaugh had given the first provocation, had killed his man, had stabbed another to the death, when Judge Wilkinson stepped up and gave Rothwell a stab in the back, while engaged with and probably receiving the stab in his chest from Murdaugh. Yes, gentlemen, a third man comes up and lunges this beautiful little weapon into Rothwell's side, and starts back! Sir, if men are engaged with deadly weapons, part them if you can; but do not come up behind them and lunge a bowie-knife into the vitals of one, and then come into a public court and demand of a jury not only to acquit you but to do it with shouts of, "Glory, glory, go, go!" And yet, gentlemen, this is the polite invitation given to you by Mr. Prentiss, to acquit such a man with acclamation. When engaged with a man who has only a cane no bigger than his thumb, his opponent gives that man a deadly stab in the chest which paralyzes his

arm—a third person, Judge Wilkinson for instance, comes up *behind* and stabs the paralyzed man *in the back*, it is, no doubt, high time for you to be called upon to mark your approval of the deed by shouts of acclamation. Mr. Prentiss by way of winning your favor with complimentary allusions, thinks Kentucky should no longer be called the "bloody ground," because the river Raisin has carried off the palm in feats of human butchery. But I think the Mississippi gentlemen, of Vicksburg, have bidden fair of late to obtain for that part of Louisiana opposite their city, the palm of being the "dark and bloody ground." I suppose in the far-famed Menifee duel with rifles, if some one had stepped up and lunged a bowie-knife into the vitals of one of the combatants, the shouts of acclamation that would have arisen in that quarter of the world would have resounded to the uttermost ends of the earth.

Dr. Wilkinson, by this time, became engaged with Holmes. Holmes is a stout and large man; but his size has been greatly exaggerated. Like the Patagonians, the first discoverers thought them ten feet in height; the next voyagers only eight, and the next but six. I recollect reading of Captain Smith, that when he first explored the interior of this country, on his return he represented the inhabitants as all Goliahs, six cubits and a span in height. Yet, subsequently, more matter-of-fact men found they were only miserable and cowering Indians of ordinary dimensions. In this manner appearances are magnified.

§261. We are asked why Holmes is not here? We echo to the other side, "Why Holmes is not here?" Our answer is, because he was not to be had, being a pilot down the river and not within the control of the State's Attorney or any process issuing from him.

§262. Mr. Trabue proves that Holmes knocked Dr. Wilkinson against him, and that Holmes followed up his blow and knocked the Doctor down. Another witness proves that Dr. Wilkinson had his knife in his hand on the floor, and Redding proves that he found the knife on the floor and it had blood on it. We have, then, evidence that all three were using their knives for the shedding of blood. Sir, among other appeals made to you for acquitting them, you are told, as a set-off, that there is no state in the Union on which you are more dependent than that of Mississippi. They take their cotton South and receive either through shipping agents, or drafts direct, their money for it from the merchants of Great Britain. True, Kentucky gets some of these dollars from the Mississippians for what they think better than their money, or produce, or they would not buy it. We, in the rounds of trade, pay these dollars, or what represents them, to the Liverpool merchants for merchandise that we think better than the money. The Liverpool merchants in the next turn of the wheel, pay the same dollars back to the Mississippians for their raw cotton, and the Missis-

sippians are nothing loth to take our produce again for the same dollars. And after several twists of this kind, when we get them back and recognize one of them as an old acquaintance, we may say, "How do you do, friend dollar, I am very glad to see the face of an old acquaintance; step into my pocket and warm yourself; I always give shelter to a traveling friend." We are proverbially a hospitable people, and never refuse a night's lodging to a dollar, or its liberty to travel further next day upon leaving us an equivalent for what we lent it. But to be serious, are we not all dependent on each other? I know this, and can not admit that we owe more to Mississippi than Mississippi owes to Kentucky; and why there should in this case be made any parade about our indebtedness to that state, not founded in reality, is for you, gentlemen, to weigh.

§ 263. To resume the facts of this case, what does Judge Wilkinson do? He stabs Holmes in the arm; but he is not indicted for that. He stabs Rothwell when he is engaged with Murdaugh in the right-hand corner; and again, when in the left-hand corner, standing over Holmes, and trying to get him off his own brother. Rothwell had been disabled by two stabs. Judge Wilkinson, standing at the dining-room door, when Rothwell was saying nothing except in mercy trying to persuade Holmes to spare Dr. Wilkinson, comes across the room to the opposite door, finds Rothwell's back turned to him, and then makes the last, the second thrust of the bowie-knife into his victim's back. Mr. Robert Pope says, "I saw Rothwell's back to Judge Wilkinson, when the Judge stabbed him—up to the very handle." I ask you, gentlemen, I speak to you not in language other than the broad and naked truth—is there any witness denies this? Every one who knows Robert Pope, knows that he would not state what he did not know to be the fact. We know that each and all of these wounds contributed to Rothwell's death. The last stab is given by Judge Wilkinson to Rothwell; Dr. Wilkinson and Murdaugh retreat out into the passage, and fight their way to the foot of the stairs. I care not what was done there; it was done after the offense previously committed. Suppose Oldham had shot one of them, and not missed as he did; suppose Murdaugh had been knocked down; and suppose Judge Wilkinson received blows in the passage; does it lighten the offense previously committed? I care not what took place, when a man has killed another. When making his escape, I care not how many guns are fired at him, how many rocks thrown, because it alters not his previous offense.

§ 264. If there is any evidence that any one in the bar-room laid a hand on Judge Wilkinson, who has proved it? Is it not plain, that any bruises or injuries he did receive, were received in the passage?

Mr. Prentiss said he was willing to stack arms with the Kentuckians.

What arms had they? They had a cow-hide whip. We hear of a cane, which he thinks may be conjured into a sword cane. Mr. Holmes, indeed, had his fists, but he could not stack them. We are told that Oldham had arms by a witness who viewed the scene from the outside of a window, like one of the venerable birds perched on a dry limb eyeing the slaughter with a prospective instinct—one of those remarkable birds, renowned alike for their gravity and great stillness. We have heard a good deal said, and well said, if true, about Oldham. That he was unsteady—that he cast his eye to his counsel for relief. Yet we really saw nothing in his conduct to warrant his being called perjurer, scoundrel, coward and rascal; and here I must remark that this very talented young gentleman, Mr. Prentiss, in using such epithets to a witness without even a shadow of justness in the application, warranted me in saying that though I admired some passages in his speech, yet others I should feel bound to denounce as unworthy alike of his profession and of his character.

§265. No man in this State can boast a prouder ancestry than that very Oldham, whom it has been attempted to brand as odious and infamous. They have been among the earliest settlers and most esteemed of our citizens—trusted with command in our army, and venerated on the judicial bench. And has a man sprung from such an honored stock no pride in upholding his name—no feeling to rouse his indignation when epithets, as gross as they are groundless, are poured out to tarnish his reputation for the paltry purpose of influencing a jury to discredit his testimony, and to warp their judgments from the straightforward path of truth and justice?

What proof has Mr. Prentiss to sustain the course he has taken? Sir, there is not a shade of proof. The gentleman is indebted to the fertility of his fancy, and his best friends must regret that he has not, in this instance, cultivated that productive soil for some more praiseworthy object than an ignoble and disgraceful crop of baneful, destructive and loathsome weeds. Does the gentleman think he is one of the angels appointed to pour out the vials of wrath? Has he not indulged in pouring out gratuitously his vials of wrath on Mr. Redding, who could not escape. Redding is stigmatized as a murderer, to be haunted by the ghosts of the slain at his nightly couch. Yet what was his offense? He raised his arm to ward off the blow of an iron poker aimed at him by Judge Wilkinson. He had profaned a judge's person on this trifling provocation by seizing him, dragging him to the door, and turning him under! "Oh! you scoundrel," would Mr. Prentiss exclaim, "why did you do that?" He had retorted upon Judge Wilkinson when taunted by him about his profession; and, worse than all, he did not, when the killing was going on, stay in some convenient place to be killed. "Why did you not, you coward, rascal, murderer,

perjurer, and so forth, *turn your back* to be stabbed *with safety?* Why did you not stand up with your face to the breeze when the sirocco swept along, carrying death on its pinions? Why did you fall on your face, and let the pestilential blast pass over you? Why did you not breath till it was gone? You, and your friends, have offended us by your want of submission, and now you aggravate your offense by coming here to testify against us."

§ 266. Really, it is astonishing they are yet alive! But it will be more astonishing, perhaps, when it is told that they will return to Louisville, and there stand, in point of reputation, just as they stood before these slanders were concocted, digested, and spewed upon them. It will turn out that they are yet unpolluted and unscathed. The same protecting Providence which carried the Israelites through the Red Sea will protect even these persecuted and wronged few.

Gentlemen, I have endeavored to trace facts as far as I have gone with minuteness, and having presented these facts to you, it is for you to determine whether they do not establish these conclusions. When the fight occurred in the bar-room, it was brought on by these gentlemen intentionally. If they brought it on did they fight in their own defense, or because they had drawn the conflict on themselves? Could Meeks have inflicted death with a cow-hide, or Rothwell with a walking-stick, so as to render the killing of them necessary or justifiable according to the true spirit of the law?

But here there is a proposition of law advanced by Mr. Prentiss, which I must combat. He says the law recognizes that the point of resistance unto death, begins where a man himself believes the point of danger ought to be fixed. Then we have no law at all—we may burn up our law books—this revokes all they contain on the subject of homicide. There are two men engaged in a quarrel; one as brave as Cæsar—the other as timid as a hare; one kills the other, when the quarrel has arrived at a certain point. The brave man, if he were a Marshal Ney in courage, is to be hanged, because he had no fear of his life when he killed his adversary. If the timid man is the survivor, he is to be acquitted with acclamation, because of his cowardice, which made him imagine danger where there was none. Thus cowardice and rashness are to be rewarded and cherished, and bravery and forbearance punished with an ignominious death. Is it possible, you, an intelligent jury, can be imposed upon by such sophistry? Is there so low an estimate of your understandings as to suppose it?

§ 267. A is tried and acquitted, because he is a base coward, and apprehends danger at a point where there was no danger at all. B is tried for precisely a similar homicide in every particular, and because he is not quite as big a coward as A, but apprehends some danger, is to be found guilty, and sent to the penitentiary for a term of years

proportionate in duration to his lack of cowardice as contrasted with A. C, for precisely a similar homicide, because he is incapable of fear, is to be convicted of murder, and straight-way hanged!

[Here Mr. Prentiss interrupted Mr. Hardin, and explained, in substance, as before.]

It makes no difference; the same principle is involved.

I knew that I should have to combat this very principle, the moment I saw the hack driving into town with a head peeping out of the window, which head I knew belonged to the shoulders of a certain gentleman from Mississippi. When I was in Vicksburg, I asked a gentleman how it was that Mr. Prentiss defended so successfully so many notorious murderers, who really merited the gallows? "Oh," said he, "he has hit upon a principle which he calls law, that charms every jury to which it is addressed." I asked the gentleman to repeat the magic words to me. He did so. It was the very principle I have been combating. It is possible that as the gentleman afflicted with this chronic principle, which he belches up with so much advantage to himself and relief to others, is now in the neighborhood of Medical Springs, esteemed so potent by Mississippians, he may resuscitate by a few drinks of the charming water, a sophism which I have shown to be no longer tenable by any one who values what is healthy and sound, above that which is merely delusive.

§268. Sir, the principle of self-defense does not warrant a man in killing under the name of self-defense, if he is himself in fault by being the aggressor.

Is the principle of self-defense among nations to be carried into effect as justly applicable to the right of self-defense among individuals? In national controversy, the law of nations, an imaginary code of mutual convenience, is referred to, according to the custom of the country, but in a conflict between individuals, there is a defined law, which must be the redresser. A nation with right and justice on her side, may be conquered by another nation in the wrong, and can not sue for or obtain redress from the wrong-doer; but an individual, in a community, may be wronged by another, and can obtain redress, because he has the law common to both, and a superior power to appeal to. Therefore, there can be no dependent analogy between the laws of nations, and the laws of individual communities. There was some crude idea thrown out yesterday that the laws of Great Britain ought not to be enforced here. We are not to be told at this day that we have any other common law than that derived from the common law of England. The very principles of our statutory laws are dictated by the genius of English common and statutory law, with the exception of such local differences as require local application of principles. If the gentleman could take from us the right to apply the law of England where it

would be in point for us, we could by reciprocity, deprive them of any they might most rely upon. Where then, is the advantage of raising such an objection? But it is quite unnecessary to dwell on this point.

§ 269. I shall now advert to the peculiar necessity enforced upon us of becoming a law-abiding people, if we preserve any regard for our present form of government and constitution. In empires, monarchies, and kingly governments, armies are formed to keep the people in order; but in a republic, what could preserve the social compact, but the law? The moment you dissolve or dispense with the law, that moment you dissolve all national constitution. Every government, and most especially a republican government, is bound to protect each citizen in his property, reputation and life. How can a republican government do it, but by and through the law rigidly and justly administered? Whenever you dispense with the law, you allow men to arm themselves, and to become their own avengers, independent of, and above all law. When they are not only permitted to do so, but to return home as innocent men, what is the effect? Every man will arm himself, and like the turbulent and licensed armed mobs at the fall of the Roman Republic, brutal violence will reign instead of law; all government will be dissolved, and anarchy and confusion will pave the way to usurpation and tyranny. You must venerate the law, if you would not see such a state of things. If you do not, A and B will arm themselves, like the Turk, up to the throat, and kill whom they please out of mere wantonness and sport.

If you go into the Northern States, it is a rare thing if you can find a man in ten thousand with a deadly weapon on his person. Go into other States that shall be nameless, and you will hear of them as often as of corn-shuckings in an Indian Summer. Go further South—to Arkansas or Mississippi, for instance, and though you would be a peaceable man, shuddering at the name of a "tooth-pick" in the North, in these States you may arm yourself to the teeth, and track your steps in blood with impunity. Why is this, but from the relaxation of the laws that are elsewhere enforced and obeyed.

§ 270. I was down the river lately, and it was pointed out to me where the Black Hawk had blown up and killed her scores; to another place where the General Brown had blown up and killed her hundreds; to one spot on the shore where two gentlemen blew each other's brains out with rifles; to another, where the widow somebody's overseer was butchered; to another, where the keeper of a wood-yard was shot for asking pay for his wood; to another, where an aged gentleman had his guts ripped out for protecting his slave from cruel treatment. "Great God!" cried I, at last, "take me back! take me back to where there is more law though less money"—for I could not stand the

horrid recital any longer—when every jutting point or retiring bend bore the landmark of assassination, and irresponsible murder.

Why does the law call for punishment? Surely it is not in vengeance for the past, but to deter others from the too frequent and free use of deadly weapons, whether in Kentucky, Louisiana, Mississippi or Arkansas. Is it to be left to the vitiated taste of the brutal few to give tone to the mind of a community in setting up the code of the bowie-knife against the common law? It was but the other day that in the Legislature of Arkansas, a member on the floor was a little disorderly, and the speaker, to keep quietness, stepped down, brandishing his bowie-knife, to silence the ardor of the unruly member, which he did, effectually; for, of all the ways in the world of putting down a young and aspiring politician, whose tongue will keep wagging in spite of his teeth, your bowie-knife is, I admit, the most effectual. And the speaker, on this occasion, bent upon having silence, silenced the offender, not only then, but for all time to come. To be sure, he went through the form of a court of inquiry, but a life is only a small matter there, and he was acquitted according to the laws of that State.

§ 271. Coming events cast their shadows before, and here we have one symptom of that downfall of our own glorious Republic, which has been so often predicted, but which has been reserved for the present generation to consummate. The symptom is to be found in the flash of those deadly weapons carried about and used with such unerring fatality by our legislative sages and judicial dignitaries. As if the next should come from high places, too, we have a fatal symptom of our downfall furnished by the corruption of those in office, who share in or connive at the grossest defalcation—the widest system of public plunder, even in our monetary defalcations, ever known in any government.

Why should we deceive ourselves with the vain hope that our Republic will boast greater permanency than that of Rome, when we are fast falling into the very track, step by step, which leads to the precipice over which she plunged headlong. That once magnificent mistress of the world marched up the hill of fame and glory with irresistible strides, till she reached the summit and looked around upon the hundred nations in her rule. But, at last, satiated with prosperity, she began to repose supinely upon her laurels, and she permitted herself gradually to relax that discipline and good order, which had been to her not only her shield and buckler, but her bond of union. The people were permitted to fight in twos and threes at first with impunity. They became accustomed to it, and then fought without interruption in gangs; bye and bye, mobs fought with mobs; and finally the whole people became arrayed against each other in regular armies, till they had to retire to the plains of Pharsalia, where the doom of the greatest republic the world had ever known was sealed forever.

§ 272. Are we not relaxing the laws—which leads to anarchy, and, from personal violence to popular usurpation? Are we not relaxing our financial vigilance,—which leads to corruption at the fountain head, and from private peculation to public defalcation? Is there no symptom in all this of a great crisis? I tell you again and again, when you can lay your hands on great delinquents, make *them* an example; when you can grasp great defaulters, punish them; then will you more easily check pernicious discords, and restore to its proper tension and tone the harmonizing power of your laws and your government. Whenever you see men wearing bowie-knives and daggers—hunt them down as you would bears and their cubs, from whom you can expect nothing but injury. The whole State of Kentucky looks to you this day for justice, for this is an awful investigation concerning the loss of two of her citizens. Two of our fellow-citizens have been murdered, and these gentlemen are here to answer for it. Some of the best blood of the country has been spilled as if in the pen of slaughtered hogs; but because the relatives of one of these butchered men employ counsel to aid the prosecution in developing the truth, and guarding against the delusions of sophistry from the greatest array of talent the country can boast, or that wealth unbounded can procure, to elude the punishment due to the offended laws you are told to take but a one-sided view of the evidence, and to decide at any rate against the paid advocate. I have not asked these gentlemen what they are to be paid for eluding justice, because I did not consider that a sort of evidence which ought to influence your verdict.

Gentlemen, one question is, are we to tolerate this bowie-knife system under the false pretense of self-defense? I say, let your verdict act like the ax laid to the root of the tree, and many a prayer will bless you for your timely check of its growth. Many a woman is made a mourning widow, many a child made a pitiable orphan, and many a father childless by the use of this accursed weapon. You have it in your power to prevent the recurrence of such scenes.

§ 273. We have had an exhibition here in miniature of those Roman scenes which prepared the public mind for the downfall of that great people. There was a vast amphitheater where the Roman people could be crowded together, and in the presence of some hundred thousand persons of both sexes, a man would be brought into the arena, and a ferocious tiger turned in upon him. He might, or he might not, possess skill or courage to meet the formidable beast and evade the deadly spring; but, if not so fortunate, when the tearing of his vitals was seen, and the craunching of his bones heard, the solitary shriek of the victim's wife, as it arose upon the air, would instantly be drowned by the acclamations and thunders of applause bestowed upon the ferocious beast, prolonged by its renewed efforts to suck the blood,

tear the flesh, and grind the bones of its prey. As *we* have no amphitheater, a hall of justice is made to answer for a miniature arena; and as we can not have tigers, nor men who will submit to be their victims, we have forensic gladiators, and witnesses whose private feelings and characters may be wounded, lacerated, and tortured to the infinite delight and encouraging shouts and plaudits of a fashionable auditory, while the victim is helpless and gloomy in his unmerited prostration. Yes, it is all for the amusement of enlightened minds, and it is intended, perhaps, for the edification of the rising generation. But, I protest, I can not yet perceive that it is any more for the honor of the applauders, than it is necessary for the good of the country, that these gentlemen should be honored and glorified for their dexterity in the use of the bowie-knife and dirk. In the time of public danger, or foreign invasion, is it these bowie-knife gentry, these pistol men in private life, that mount the breach and face the danger? Are they the brother Jonathans that face John Bull and eye him and his scarlet coats with defiance? Where are they then? Why, like the gnats and mosquitoes, who glisten in the sunshine and the calm, but when the storm rages, and the thunder growls, and the lightning flashes, and the earth is rocked to its center, they are stowed away from the danger; though they are sure to emerge from their hiding-place to annoy with their stings when the succeeding calm and sunshine invite them out once more. Brave men may be voluptuous and effeminate in private life, but in the hour of danger, they put on a new nature. But these fighters in time of peace, clothe themselves in the skin of the lamb in time of war. Sardanapalus, who sat all the while with his women and eunuchs in times of peace, spinning and knitting, and telling long stories no doubt, and sometimes wearing petticoats to make himself more effeminate, when conspired against by Belesis and Arsaces, gave up his voluptuousness, and at the head of his army gained three renowned battles; and though beaten and besieged at last in the city of Ninus, to disappoint his enemies, burned himself, his eunuchs and his concubines, with his palace and all his treasures. Alexander the Great, who was kind, courteous, familiar, and confiding with his officers in private life, when leading the Macedonians, moved to battle like a pillar of fire, irresistible in his might. When the great Frederick led on his brave Prussians, they fought and fell and fought and fell, as long as any were left. And thus men imbibe the spirit of their chief. If led by a brave man, they are brave; if led by a coward, they are poltroons, and if led by the bowie-knife-and-pistol gentry, I make no doubt they would be either assassins, or nothing better than mosquitoes, to be dispersed by the very first report of the cannon. Even at home, in our own rural districts, we see the influence of leading men on whole neighborhoods. Let a virtuous and enlightened man, whom all

will look up to as a pattern, settle in your neighborhood, and every one will partake of his good influence.

§ 274. Why was it that Nelson, in his death, did more for the glory of his country than ever he did in his life? Because he ascended to heaven in the arms of victory, like Elijah, who tasted not of death.

Let us never dream of selecting for our leaders or our examples, those who have so little moral courage as so trust to bowie-knives and pistols for the preservation of their manhood, instead of to their blameless conduct in peace and bravery in war.

Gentlemen, I beg of you in the name of Him who sits upon the cloud and rides upon the storm, mete out the measure of justice to these men, and vindicate the honor of Mercer county. But do not stigmatise your county by doing, as Mr. Prentiss would have you to do, by shouting "Glory! glory! go, ye righteous; go to your homes, in honor and in innocence." Whatever you may do, I shall content myself with the conviction that in my professional capacity, I, at least, have done my duty.

I have been deputed by the widowed mother of the murdered Rothwell, and at the instance of his mourning sisters, to implore your justice. I have closed my mission. Between you and your country—between you and your God, I leave their cause.

[Concluded at ten o'clock.]

ARGUMENT OF HON. JUDGE ROWAN.

§ 275. *Gentlemen of the Jury:* I solicit your already jaded patience, I will not say for a short time, for I know not how long it may employ me to make the appropriate comments upon the facts, the law, and the arguments of counsel in this case. I will promise you, however, not to be unnecessarily tedious. I have, in the patience and attention you have already displayed, a pledge that you will bear with me for at least a moderate length of time. My unfortunate clients (confiding alike in their own conscious innocence and your intelligence and unbiased state of feeling), were willing that you might have decided their case without argument, but their will did not prevail. The Commonwealth's attorney, Mr. Bullock (in whom I am proud to find the son of honored parents, whose friendship I enjoyed in days past), has evinced an entire competency to the duties of the station with which he has been recently honored, and which, permit me to say, he honors by the commendable candor and high talents with which he performs his official duties.

I regret that I can not speak in the same commendatory terms of the candor of his aged and very highly talented adjunct. That gentleman represents the *vengeful* feelings of the very near relations of the ill-fated

Rothwell and Meeks, by whom he has been employed to convict, if possible, the accused. He has just closed a philippic of four hours against them, as remarkable for vigor of intellect, as for vehemence and impassioned zeal. He implores you, with great earnestness, to check (by a verdict of conviction in this case) the habit of wearing arms, and especially bowie-knives, which has, as he says, latterly so much prevailed and multiplied assassinations throughout our country. He considers the frequency of these melancholy incidents as infallible evidence of the growing degeneracy of public morals, indicating the rapid decline and eventual subversion of our free institutions.

§276. It is the corruption of the people, he tells you, that saps the foundation of a free government, and he refers to the history of Greece and Rome to confirm and illustrate his doctrine. He asserts that he has set, and that all good men ought to set their faces against the degeneracy of the times.

Gentlemen of the jury, I concur with him in the belief that corruption is the great destroyer of free governments, but do not believe with him that its prevalence is so alarmingly evinced by the *incidents* to which he has so glowingly referred. While corruption displays itself upon the surface only of the body politic, it is, like boils on the surface of the natural body, but an evidence of the exertion of the recuperative energies to throw off the pucant matter.

§277. The right of the people to carry arms is little less than *identic* with their freedom. Without arms, they can not vindicate their freedom. Without the right to possess and wear them, they will very soon be without the spirit to use them, even in defense of their liberty. I feel no apprehension for the liberty of my country from that source. I fear nothing from the carrying of bowie-knives; brave men *do not* fear them, and cowards seldom use them. It is wrong to reason against the *use* of any good thing, from its occasional, or even frequent, *misuse.* While our institutions are pure, and especially our courts of justice, we have nothing to fear; they will vindicate the just use, and punish the misuse of bowie-knives, or any other arms which our free citizens may choose to wear. But I can refer him to an instance of the growing degeneracy of morals, more recent, and greatly more alarming, than any, or than all the instances he has named. The recent instance, to which I allude, of the alarming degeneracy in the public mind and morals, is the composure, and even complacency, with which we have listened in the temple of justice, to the mercenary ebullitions, and sanguinary efforts, of the gentleman himself. It is in proof that he has received from Mr. Redding, the brother-in-law of the unfortunate Rothwell, a fee of one thousand dollars to convict, if possible, the accused.

§278. He has not appeared in this case as the Commonwealth's attorney, nor under any appointment by the government, but as *hired*

counsel—hired, too, by the incensed witness, Redding, upon whose testimony, mainly, it was hoped and desired by both to produce the conviction and ignominious death of the accused. Gentlemen of the jury bear with me for a few moments while I, also, attempt to repress corruption by denying it the right of access to the forum and to the sanctuary of justice. Let me tear from its face the illusive and imposing mask under which it hopes to win its way to your favor and exert a bad influence upon your judgement and your feelings. I shall attempt to convince you that his appearance in this case, against the accused, is in contravention of the law of the land and the moral sentiment of all civilized communities—reprobated as well by the social sympathies of our hearts, as by the precepts of our holy religion.

And first, of the legality of the gentleman's posture in this case. Our constitution guarantees to every man, a *fair* and *impartial* trial by a jury of his peers, and proclaims that no man can be deprived of his life, liberty, or property, unless by the *judgment* of his *peers* or the *law* of the land; by the law of the land, we understand, as well the protective as the punctory laws of our code. The punctory part relates to offenses and their punishment. The guilty are punished, and the innocent are protected. In ascertaining and punishing guilt, the laws are construed and applied to the case of the accused by the functionaries of the government. In the making of laws, there are no *hired* legislators—they are all *elected* by the people—so, in the enforcing of the laws, there are no hired *prosecutors*, judges, jurors or sheriffs. I mean hired by individuals. They are all *appointed* and paid by the government. The machinery of judicial proceedings is altogether *official*. The agents are all *official*. There is no clubbing of official powers with that of any other individual, to bear down, oppress, or destroy another individual. The government, instead of assisting individuals to oppress, restrains them from oppressing each other.

§ 279. The government acts toward every man upon the presumption that he is innocent, until his guilt be ascertained by *official agency* according to the laws of the land. This presumption, that every man is innocent until his guilt be fairly and legally proven, is the most essential element in the corporate structure of civil society, one, without which its parts could not cohere nor exist for a single day—it is not the only cement, but the very *basis* of the civil union. It is the *postulate*, without which the jurist, the moralist, and the divine would plead, write, or preach in vain; without this presumption, war, anarchy and rapine would usurp the places of law, order and justice; upon it the whole fabric of civil society stands poised, widening out like an inverted cone, until it embraced those morals and manners, and those sympathies and charities of the heart, together with those radiations of mind, which embellish, and sweeten human life. It is a presumption

which no man can contravene without poisoning the fountains of human happiness, and thereby proclaiming himself an enemy to mankind. This principle is necessary, not only in the nascent state of society, as its basis, but in every moment of its existence, in every act of its progress—neither law, morals, nor religion, could live without it. In consonance with this great principle, the officers of the Government all proceed in reference to the accused. He stands in the box, shielded, as with the fabled ægis of Minerva, by this presumption, until his guilt is proven, beyond a reasonable doubt, and *fairly* proved. The Commonwealth's attorney, the judge, the sheriffs, act upon it. Their oaths for official fidelity require them to do so. They have no motive to act otherwise; they represent the Commonwealth, and she is as much bound to protect the innocent as to punish the guilty. It gives me pleasure to say that the Commonwealth's attorney (Mr. Bullock) has discharged his duty, fairly, faithfully and ably. He has acted upon the presumption, which I have been urging, that the accused should be considered innocent throughout the whole *progress* of their trial, and until its conclusion should evince the contrary. The distinguished counsel, who represents the avenger of blood in this case, has, with his usual ability, and with somewhat unusual zeal, displayed great devotion to the interests and inclinations of his client.

§280. He was bound by his undertaking to have the accused convicted and executed, unless they should be able to prove themselves innocent. His duty and his energies were to destroy them, guilty or innocent. The duty of the Commonwealth's attorney was to suppose them innocent until their guilt should be ascertained—the duty of the former gentleman was to suppose them guilty until their innocence should be evinced by a verdict of acquittal. The gentlemen drew, as you will perceive, their motives from directly opposite sources. They acted from different motives, and have thereby subjected the accused to a cross-fire throughout the whole proceeding, and such must always be the case when hired counsel are permitted to appear against the accused. The appearance of the gentleman in this case violates the rights of the accused, and especially their great right to be presumed innocent, and profanes the sacredness of the temple of justice, and all the sacred usages and forms of proceeding. It corrupts the streams of justice in their very fountains. It introduces and consecrates the sanguinary and long exploded claims of the next of kin to the slain. Gentlemen of the jury, according to the rude and barbarous usage of man in his aboriginal state, the next of kin had a right to kill the slayer of his father, brother, etc., without regard to the character of the *occision*—without inquiring whether it had been inflicted justifiably, excusably, by misfortune, or of malignant design. This practice prevailed even in our day among the Indians of North America, and

perhaps still prevails in many of their tribes. It crept into the codes of many semi-civilized nations as they advanced from barbarism. To weed out this vengeful and sanguinary principle, and to protect all but deliberate murderers, from its impassioned and baneful effects, the great law-giver of the Jews directed a competent number of cities of refuge to be erected, and so distributed throughout Judea, as to yield to the unfortunate homicide, the requisite security from the next of kin to the slain.

§ 281. The same principle insinuated itself into the code of England, but as she has advanced in civilization she wisely and humanely tamed and rendered it harmless in the shape of a civil action, denominated an appeal of murder, which she permitted the next of kin to institute against the homicide; and she humanely encumbered the action with such technicalities, and subjected it to such delays in its progress, as rendered it harmless to the accused, by affording time for the subsidence of the bad passions of the avenger; while she, in the meantime, proceeded to give the accused a fair and impartal trial by a jury of his peers. But in the appearance and efforts of the hired counsel in criminal cases, we behold the re-appearance of that odious and exploded principle, in a more aggravated form than it was ever displayed among the barbarians, the Jews, or the Anglo-Saxons. With them, the unfortunate homicide had to fear only the aroused passion of the avenger. It would subside. It might, possibly, be mitigated or appeased; at most, *none* but the next of kin was to be dreaded—none other dare act; but where counsel are hired by the accused, when his vengeance is at its highest (and it is always in that state of feeling that he employs counsel), his feelings are transferred into those of counsel, and *set* (to use a figure from dyeing) more or less unfadingly, by the size or quantum of the fee.

§ 282. There the accused had the passion of revenge *only* to fear—here he has to encounter that passion, combined with the passion of avarice, the most sordid of our nature. But if the avenger might lawfully employ the talented gentleman who represents *him*, and not the Commonwealth, in that case, might he not have employed any given number of our most distinguished lawyers and advocates, and at once overwhelm the accused by their combined talents, eloquence and weight of character. The limits of his vengeful efforts are not to be found in the law, but in his purse. The security of the accused is no longer to be found in the laws and the institutions of the Government, but in his own wealth and the poverty of the avenger. Guilt or innocence, upon this principle, is to be decided not by the constitution and laws of the land, but by the comparative wealth or poverty of the avenger and the accused; and thus, instead of appealing to Heaven, for a decision of guilt or innocence, as in days of yore in the trial by

battle, between the avenger and the accused, we shall have the question decided by a conflict of their purses. And thus our beautiful system of criminal jurisprudence will be so subverted and degraded that the liberty and life of the accused will depend, not upon his innocence, but whether he, or the avenger, can bid highest—the one to preserve, and the other destroy it, by the instrumentality of hired lawyers, who, in competition with each other, for employment, will be seen hovering about the avenger and the accused, ready to be employed by either, and soliciting employment from both, regardless of the merits of the case, and regardful only of the amount of the fee which may be obtained. Gentlemen, I leave you to contemplate the moral degradation, the wide-spread corruption, which would follow the practice if it were to prevail, which I am resisting as unfair and unlawful.

§ 283. The venerable gentleman has told you that he and myself practiced law together and abreast for near half a century. It is true, and for the first twenty-five years of that period, he like myself declined all applications to appear against the lives of our fellow men. His first departure from that course was, as he tells us, in the case of the Commonwealth vs. Smith, charged with the killing of Dr. Brown. That was a long time ago, and I am sorry to tell you that he has been at it ever since, and seems determined to keep at it. I take much pleasure and feel some pride in being able to say that I never have taken a fee or appeared as a lawyer against the life or liberty of my fellow man and that no amount of fee could, at any period of my life, have tempted me to do so. I refused a fee of one thousand dollars to do so when I was not worth that many cents. Apart from its being unfair and unlawful, as I verily believe it to be, I do, and always have, reprobated the practice, because of its tendency to indurate the heart and deprave the moral feeling. But I am now contending that it is *unlawful;* and further to illustrate this point, let me suppose that Redding had given to the Judge, the Commonwealth's attorney, and the sheriff, and even to you, gentlemen of the jury, the one thousand dollars which he has given to his talented lawyer in this case (I beg pardon of the Judge, the Commonwealth's attorney, the sheriff, and of you, gentlemen, for the supposition—I make it only for the argument), to animate them, as he would term it, in the just performance of their official duties. To the sheriff, that he might summon an *impartial* jury, who would convict the accused; to the Judge to decide most justly and impartially against the accused every question of law, which might arise in the progress of the case; to the Commonwealth's attorney, that he might invert the presumption of law as to the *innocence of the accused*, and urge, with ardor and zeal, their conviction; and to the jury, that they might evince their love of justice by promptly rendering a verdict of conviction. What would be the public opinion of such conduct in reference to him and

those officers who had received his money? Would not all mankind reprobate it, and fasten shame and degradation upon all concerned in a transaction so corrupt? They certainly would. But let us inquire why they would do so.

§ 284. Would it not be because of the influence of the money upon the fate of the accused? The mere passage of one thousand dollars, or ten times that sum, by transmission, from one hand or pocket to another is, in itself, and, apart from its effect and influence, a matter entirely immaterial and indifferent. It is then *not* in its naked matter of fact aspect, but in the effect and influence of those matters of fact, that the public reprobate it.

The odious effect of money so distributed consists in the pollution which it inflicts upon the pure streams of justice, to the prejudice of the accused. The pith of its effect is in its unfairness toward them. Now, if the trial of the accused can only be *fair*, when all the proceedings against them are *legal*, and all the *actings official*, apart and free from all *force* but that of the law, and all motives to action but those of official duty, and if they are entitled by the constitution to a fair and impartial trial, we can be at no loss to see why the *effect* or *influence* of money exerted against the accused should be deprecated by them, and reprobated by all honest men. Money, therefore, can not be given by the avenger to the Commonwealth's attorney (nor to any of the judicial officers), because of its unfair influence against the accused.

§ 285. Now, what is the difference in point of effect, that is, fairness and impartiality, between giving the one thousand dollars to the Commonwealth's attorney and giving it to the very talented and very experienced lawyer to whom it was given, and to whom you have listened for more than four hours. By giving that sum to the *former*, its effect, under the odious denomination of corruption, would have been let into the prosecution—by giving it to the *latter*, its effect, aggravated by an alien and unofficial volume of mind united with experience, sagacity, and weight of character, has been brought into the case, and their condition thereby rendered worse than if the one thousand dollars had been given by Redding to the Commonwealth's attorney. It is, gentlemen, in the contemplation of sober reason, unfair, and, therefore unlawful, that the effect and influence of this one thousand dollars should be thrown into the scales against them. It is corruption to an *undefined* extent—I say undefined extent, because, though we can ascertain the amount of the money, we can not ascertain precisely the degree of unfairness it produces—but as any, the least degree of it, is excluded by the laws of criminal procedure, we can, with confidence say that the influence of the one-thousand-dollar fee, most gratuitously and sagaciously exerted by the hired lawyer against the accused, is palpably unfair.

§ 286. There is, gentlemen of the jury, in the human heart an inherent love of fairness, which, when unbiased by passion, it is sure to display whenever occasions for its display are presented. It pervades all ranks and grades of mankind. It is evinced in all their settled modes of contest—when a fight occurs among the multitude, you will hear the exclamation of "fair play" from the mouths of all who are not engaged in it; and very many, in every crowd, are ready to maintain fairness at all hazards. Hence the popular apothegm, "Fair play is a jewel." Pugilism and dueling have their rules of fair play. The sports of the people, as well as their fights, have some settled rules of fairness, and even war between nations has its laws of fairness; these rules of fairness are legibly and indelibly written upon the human heart, and we perceive them intuitively; we feel their force in every fibre of our frame, in every pulsation our blood; they are venerated everywhere, and in reference to every subject.

§ 287. Gentlemen of the jury, to give you some idea of the degree in which this principle was cherished by our rude ancestors, when the accused had a right to wage battle with his accuser, let me refer you to the rules of fairness by which the combat was regulated and conducted, and *mark* that even in this mode of trial, the accused was presumed to be innocent until convicted—that is, until vanquished by the accuser. You will find the rules to which I allude in the second volume of Montesque's Spirit of Laws, commencing at page 201; but I shall read only two or three of the rules, from page 203: "Before the combat, the magistrates ordered three bans to be published. By the first, the relations of the parties were commanded to *retire*. By the second the people were *warned* to be *silent;* and the third prohibited the giving of *any assistance to either* of the parties, under severe penalties—nay, even on pain of death, if, by this assistance, either of the parties should happen to be vanquished." Observe, gentlemen, that the relations were to retire. Do you ask me why? Surely lest influenced by the feelings of kindred ties, some of them might assist their relative, and therein violate the principles of fairness. The crowd were to be *silent.* Why silent? lest by their *hisses* or their *plaudits* they might animate the one or depress the other, or exert a distracting influence upon either. Now, let me ask you, does the attitude of the gentleman, and his one-thousand-dollar power, exerted against the accused, quadrate with this rule? What rule of fairness, within the verge of human conception, justifies his position here, and his exertions against them? Does he know how much the *assistance,* given by him to the accuser, may conduce to the vanquishment of the accused? Does he feel conscious that if by this assistance of the Commonwealth (the accusing party), he shall conduce to the conviction of the other party, he incurs, under the spirit of this last rule, the penalty of death?

§ 288. Gentlemen of the jury, such was the mode, and such the principles of fairness, observed by our ancestors in trying such a case as the one in which we are now engaged—a mode upon which we look back with reprobation; but our reprobation of it is greatly mitigated by the luster of the moral jewelry which lingers about it; and think you, gentlemen of the jury, that the wise and more civilized statesmen and jurists, who rejected that barbarous mode of trial and substituted the mode which we are now pursuing, rejected with it those principles of fairness which constituted all that was attractive and valuable about it?

Think you that they interred the jewelry with the body of the defunct mode? No, gentlemen—they transferred those jewels to our code; *their* splendor gilds and sets off its symmetry. It is that very splendor which is now being dimmed, that symmetry which is now being marred, by the unfairness of the mercenary and unauthorized efforts of the representative of the avenger of blood. By the theory of criminal trial with us the accused are placed in the custody of the law, protected from all extraneous force, and subjected only to that of its own power, exerted through its own responsible and unprejudiced official agents, throughout every stage of the proceeding, from the inception of the trial to its *finale*. Even after conviction and sentence pronounced, the execution must be done by the proper officer and in the manner prescribed by law.

§ 289. If the proper officer vary the manner prescribed, as by hanging one sentenced to be beheaded, or by beheading one sentenced to be hanged, he is guilty of murder; and if one that is *not an officer* execute the culprit, even according to the manner prescribed in the sentence, he is guilty of murder. (See this law in Hale's Pleas of the Crown, 1st vol., p. 501.) Strange that a man ascertained to be guilty and doomed to death should be protected by the law from all unofficial assaults, and that the same law should allow the life of a man presumed to be innocent to be assailed by the hired representative of the avenger of blood, even in the very temple of justice! By our constitution and laws the accused are allowed to defend themselves against *official* assailment, and even furnished with the means of doing so; they shall be heard by their counsel, and if they are unable to employ counsel, counsel shall be assigned them by the court; they shall be confronted by the witnesses against them—they shall have compulsory process to compel the attendance of witnesses in their behalf. The jury, the judge, the sheriff and the Commonwealth's attorney shall be unbiased—all shall be unbiased—and yet the hired counsel of the *avenger*, and he alone, is to be irresponsible, and may aim his poisoned arrows with impunity, nay, lawfully as he would have it, at the hearts of the accused—he is to be the only licensed homicide in the whole judicial coterie—he alone among all in the court-house may, *per fas, aut nefas*, kill the accused if he

can with impunity. Can the law, I would ask you, gentlemen of the jury, license such a procedure against the accused? Ought it to do so? Would it be fair that it should? No, gentlemen, no; it neither is, nor ought to be the law. It is a vicious and foul excrescence, which, like mistletoe upon the oak, deforms and distempers the trunk upon which it fastens itself.

§ 290. It is an erroneous notion, that when a man has a license to practice law he may annoy and harrass whom he pleases, in his professional character. No man has a right in virtue of his law-license to harrass one man by assailing him with even a *civil suit*, in the name of another, without a warrant of attorney from that other. (See Monroe's Rep. 189.) Then let me ask the gentleman where is his warrant of attorney to prosecute in this case—he has no authority from the Government, which alone could give it. The commission of the Commonwealth's attorney is his authority to prosecute, but the gentleman has no authority whatever. The judge can not give it; he can confer the power only in the absence of the Commonwealth's attorney, and then only according to the provisions of the Act of Assembly in that case provided. But if he could confer the power, he can not *decently* appoint a man who had taken a fee of one thousand dollars to convict the accused, if possible, guilty or innocent. He would be bound in honor to appoint some disinterested gentleman of the profession, whose weight of character would be a pledge to the accused, and to the community, that he would conduct the prosecution fairly and justly.

Now, I ask if it be reasonable to suppose that the law which denies to the licensed lawyer the *bad privilege* of annoying his neighbor in a civil action, without warrant of attorney from the plaintiff, would allow him without a warrant of attorney from the Government or from any authoritative power whatever, to obtrude himself into a prosecution and exert all the powers of his mind not merely to annoy or harrass, but to destroy the life of the accused?

§ 291. Can it be believed that the law would guard the citizens so scrupulously, in reference to their *property*, against the avarice of the bar, and leave their *lives* a prey to that cormorant passion?

There is no statutory inhibition against such a course, by a hired lawyer against the life of his fellows—and only because the inhibition was to be found in the statutes penned by the finger of Heaven upon the human heart. The Legislature could not suppose that gentlemen of the bar would give in to a practice so obviously contrary to the laws of nature—a practice reprobated alike by the unvitiated feelings of the human heart and the spirit of Christianity. Grotius, p. 421, after having commended nations for giving commissions to their national vessels, authorizing them to destroy pirates, commends, also, the practice of appointing by commission, prosecutors of crime, 'when not any

one, who has a mind to it, is allowed to be a prosecutor, but only some *particular* men, who are *appointed by public authority.* That so no man may contribute toward the effusion of his *neighbor's blood*, but only he who is obliged to it by his office. Agreeable to this is that canon of the Council of Elibous: "If any *believer* be an *informer*, and another by *his* information be either *proscribed* or put to *death*, we have thought fit to forbid him the sacrament, even to the last." Gentlemen of the jury, comment upon this passage is unnecessary. It speaks the language of humanity, as well as of Christianity. Its import applies to the prosecution of the life of one man by another, who has no commission from his Government to do so. Here the talented gentleman who is hired to prosecute pretends to no such authority. The circumstance that the accused are strangers, from a sister State, should (if nothing else could), have restrained him. Gentlemen, the word "stranger" addresses the ear of every generous and benevolent man, and more especially of every Christian, in a tone of peculiar emphasis. It is a word of consecrated import—consecrated by the Founder of our most holy religion. He enjoined upon all His followers sympathy for, and courtesy toward, strangers—"I was a stranger and ye took me not in," etc. Gentlemen of the jury, I set out with telling you that it was in the first place unlawful for a lawyer to appear for money against the life of his fellow man; and second, that it was immoral for him to do so. I have been laboring (and I hope not without effect) to prove the first point, viz., the unlawfulness of the act. I have, to some extent, in discussing it, anticipated the second; but it was unavoidable, for the laws are rules of moral duty, though they do not embrace defense, and enforce the *imperfect* obligations of morality, such as charity, benevolence, gratitude, etc. They enjoin only the duties of perfect obligation.

§ 292. I contend that the counsel who is now hired to convict his fellow men, in a *capital* case, violates in the *very act of being so hired*, all the *imperfect* obligations of morality; and if his efforts produce conviction, he violates the most important of all the rules of *perfect* moral obligation. "*Thou shalt not commit murder*," is the rule to which I allude; and I urge that there are more modes than one of committing that crime. A man's life may be destroyed by false swearing, or by erroneous and impassioned pleading, as well as by the stiletto; and the man who deliberately destroys life, by false swearing or by erroneous and impassioned pleading, is not less guilty at the bar of conscience than the man who deliberately perpetrated the same deed by the dagger. The accused are prosecuted for murder; suppose them to be innocent, and suppose that by the efforts of the hired counsel they shall be convicted and executed—would he not be guilty, in a moral point of view, and at the bar of conscience, of the very crime he had imputed to them? You must answer in the affirmative—and he (but

for the illusion into which he seems to have fallen upon this subject), would be constrained to answer, as David did to the prophet, "that man is surely guilty," etc.—and might it not, in the words of Nathan, be replied, "*thou art the man.*" I wish I could disenchant and redeem his mind from the illusion in which the sorceries of avarice have enthralled it. I wish I could convince him and the *few* among our lawyers, who, influenced by his example (and the example of one or two other lawyers of distinction), have been seduced into the practice of receiving fees to assail the lives of their fellow men; but I almost despair—the habit with him has become too inveterate; yet, in the hope of restraining the younger members of the bar from a practice which detracts so much from their professional, and (according to my notion), so much degrades their personal character, I will pursue the subject—for it is in this view, mainly, that I have devoted so much attention to it. I will not deny, however, that I had the further view of endeavoring to convince you, gentlemen of the jury, that you ought to distinguish between the efforts of Mr. Bullock, the accredited organ of the Government, and those of the gentleman who has (influenced by a thousand-dollar fee) obtruded himself into this prosecution; and to regard those of the one as a stream emanating from the pure fountain of public justice, but a little discolored by the excitement from which even official posture is unable to redeem our frail nature. Those of the other as a turbid and muddy stream of large volume emanating from the fœtid marshes of exuberant avarice, betraying its source by the noxious effluvia which it emits in its course. The one as the fountain of health and of life to the innocent; the other, as the Bohan Upas, destroying indiscriminately by its poisonous breath all whom chance or accident shall have thrown within its grasp.

§ 293. But, dropping the figurative, let me discuss further, in plain prose, the moral position of the lawyer who appears for fee against the life of his fellow man. He is employed to devote all his talents and attainments, to the *destruction* of the accused; that is the object at which the avenger of blood aims. To achieve that object he gives the one thousand dollars; for that sum the lawyer engages to take the life of the accused, if by the weight of his character and force of his talents he can possibly do it; if the death of the accused could have been effected *justly*, by the operation of the laws and the agency of the public functionaries, then the one thousand dollars would not have been given; the purpose of the avenger would have been attained without so large an expenditure on his part. It was then to destroy the accused, guilty or innocent, that the counsel was engaged. The engagement must have been either to convict or acquit the accused. But the avenger would not have given one thousand dollars to counsel to procure their acquittal. It must, then, have been given to destroy them—to take their lives, and

it must have been received by the lawyer to effect the purpose for which it was given, namely, to take the lives of the accused, or, to convict them, which is *identic* with taking their lives.

Gentlemen of the jury, if this is the fair conclusion, and I feel so sure that it is that it can not be resisted, then, I would ask you, I would ask casuists, I would even ask the venerable and distinguished lawyer himself, to tell me what is the difference of the *moral guilt* between *taking a man's life* for *his money*, and *taking money* to *take his life?* I declare, solemnly, that if there be a difference in the *moral guilt* I have not brains to comprehend or perceive that difference. I can readily perceive, that in reference to the exterior aspect of the two cases, the former would seem to have the advantage of the latter, in the fact that with it are associated a boldness and daring of which the latter is entirely destitute. The highwayman in taking the life of another for his money hazards his own life. He may himself be slain, and if he should not he may be apprehended, convicted, and expire on the gallows.

§ 294. He incurs the hazard of all these events. There is in chivalry, a charm, a fascination, I had almost said a witchery, which gilds, and to some small extent mitigates crime itself. But in the latter case there is not one mitigating, not one redeeming trait. The hired lawyer knows before he contracts to take the lives of the accused, that they are not only without arms, but bound hand and foot by the cords of the law; aye, and dumb too. He has nothing to fear from them. He has but to compound with his own conscience, and without any hazard whatever, fall to work upon his victims. But still it would seem to me that the heart of the lawyer thus engaged, must become strangely callous to enable him to proceed in the work of death, with the levity and sportiveness with which it has been conducted in this case. And yet the gentleman tells us, and quotes Burns in affirmation of the sentiment, that "the heart is ai, the part ai, that is right or wrong." Does the gentleman expect us to take as a *fac-simile* of a *right heart*, the feelings and sentiments which he has displayed throughout the management of this case? It is not by such sentiments and feelings that the Scottish Bard illustrates his conception of a heart that's right; let me refer the gentleman to the following delicious morceau upon the subject of the heart from the same poet:

> "The sacred low of weel placed love,
> Luxuriously indulge it,
> But never tempt the illicit rove
> Tho' nothing shou'd divulge it;
> I waive the quantum of the sin
> The hazard of concealing,
> But ah, it *hardens* all within
> And petrifies the feeling."

§ 295. Here we see how the heart is *hardened*, and the feelings *petrified*,

by indulging a passion less sordid than *avarice.* Burns thus shows how the heart may be rendered wrong. Let me refer the gentleman to another poet, who, like Burns, ministered at the altar of nature. He thus instructs us how to keep the *heart aright ai:*

"Be thine the feeling of the mind,
That wakes at honor's, friendship's, call,
Benevolence, that unconfined—
Extends her liberal hand to all;
By sympathy's untutored voice
He taught her social laws to keep;
Rejoice, if human heart rejoice,
And weep if human eye shall weep.
Who feels for others' woes,
Shall feel each selfish sorrow less,
His breast, who happiness bestows
Reflected happiness shall bless."

Which, gentlemen of the jury, is the *right heart,* the one displayed by the lawyer, who permits himself to be employed to degrade and destroy the accused, or the one portrayed and recommended by the poet just quoted? I will not insult you by affecting not to know what your answer will be, or rather what it is. I should ask your pardon for having asked you the question. The precepts of the poets of nature, like those of the Gospel, in reference to the feelings of the heart, are but principles of fitness resulting from the nature of man, and his social relations. Human life is at best but a tissue of hopes and fears, of cross-purposes and inquietudes, of alternated sickness and health, of sorrows and joys, and the reciprocation of kind offices and sympathies of the heart by men in their social condition, alleviate the sorrows, mitigate the woes and increase and heighten the joys of each. Man is not a solitary animal—he can not live alone; his organic bias and natural aptitudes are *all* social; but with them all, without the fine sensibilities of the heart, society would be a curse to him, for without them there would be no conscience—and without conscience there could be no virtue, and without virtue there could be no happiness.

§ 296. Hence, those who permit inordinate avarice, or the extreme of any other passion, to petrify their hearts and harden their feelings, are warring with the purposes of nature, in reference to the social condition of man—man's long state of infantile imbecility and helplessness, and his dependence, during all that time, upon the sympathies of the heart for existence and sustenance, indicate the high estimate which nature places upon them. Infancy is the period of the heart's pupilage in the divine science of sympathy. Our first lessons are received in the nursery; they fall from the lips of maternal affection upon our infant hearts, as gently as the dews of heaven descend upon

the tender grass. It is thus the virtues are planted in the heart, and take root, and grow in its sensibilities—it is *here*, in the nursery, that valor, too, the associate and protector of his sister virtues, germinates and unfolds its nascent energies—stern and vigorous, bold and daring as it becomes, it is like the other virtues, the offspring of weak but lovely woman. By a wise arrangement of nature, the ladies are made to grow, and to admire it, because they constantly need its protecting influence. They respect it in their husbands, and cultivate it in their sons. The little boy, but just emerged from his cradle into his first pantaloons, while he listens to the tale of female distress, or injured innocence from the lips of his fond mother, feels the germ of valor glow in his bosom, and distends his little chest, and while she tells him that the fair damsel was rescued from brutal violence by some chivalrous knight, struts across the floor in steps of measured pride, and pants to be a man, that he also may signalize himself by deeds of valor and benignity. The mother rejoices to see in the flashing eyes of her lovely boy the scintillations of his father's spirit—a spirit in the full and protecting radiance of which, and the blessing of heaven, she and her little ones have thus far rested securely.

§ 297. Gentlemen of the jury, it is thus the heart is trained, and its sympathies and feelings schooled in each successive generation to the performance of the social duties and the practice of the virtues. Yes, gentlemen, it is from the physical weakness of woman, that man derives his moral strength; and shall her lessons be set at naught, and contemned with impunity? Will not the gentlemen who receive money to destroy the lives of their fellow men be signally rebuked by public sentiment? Will not the ladies take cognizance of the subject, and place their withering veto upon a practice so repugnant to all their feelings and inculcations? The venerable gentleman has humorously, wittily, and even prettily, protested against a change of venue in this case, from the jury to the assemblage of beauty, taste, and intelligence, with which this trial is honored, and the bench of the judge adorned—and assigns, as a reason for this protest, first, that the venue has been once changed and can not be changed again. And, secondly, that he would not be at home before that fair tribunal, by reason of the want, on his part, of imposing personal presence, and the aptitudes, manners, and attractions, suited to such an assemblage. This little sally on his part, was intended for the ladies, and designed to divert their attention from the *repulsive* posture which he occupied, and to conceal its moral deformity from their view. I tell the ladies that every question involving morals belongs in an emphatic manner to them, let the law of the case be decided as it may by courts of law—the *morale* of it must, directly or indirectly, be finally settled by their tribunal in its appellate character. But I have occupied too much of your attention

upon this preliminary point, and perhaps have been too divergent and diffusive in the discussion of it. But, impressed as I am with its importance to the profession of the law and to the community, I could not pretermit it.

§ 298. What I have said is not in any spirit of unkindness toward the venerable and very talented gentleman who has heen employed by the avenger against the lives of the accused. I have no unkind feeling toward him. I claim no right to rebuke him personally. I have no motive to do so; but I have a right to reprobate the practice, and I regret I can not do it in the abstract. My observations are intended to be applied, not to him *personally*, but to the practice *personified* by *him*. It is true, and pity it is 'tis true, that he is not the only distinguished lawyer in the Union who has permitted himself to be employed against the lives of his fellow men. A few, and I am glad to say very few, others, have lent the sanction of their talents and weight of character, to this odious and inhuman practice. I feel concerned that it should be put down, and regret that our courts have permitted it. The judge should denounce it as unlawful and unfair, and refuse to permit it. The prosecuting attorney should feel himself disparaged by any attempt to associate with him a lawyer hired, not to represent the Government, but the revengeful spirit of the avenger of blood. He should feel that he is the organ of the law, ministering at the altar of justice, and to maintain the sanctity of his position and his own competency, he should exclaim to the mercenary representatives of the avenger, "*procul—O procul estate prophani;*" and such I am sure would have been the course of the prosecuting attorney in this instance, had he not felt restrained by that diffidence which is inseparable from youthful talents, in the inception of its official course. But let me tell that young gentleman that the competency which he has displayed in the management of this case will leave him without apology or excuse should he, hereafter, submit to the like intrusion.

§ 299. Gentlemen of the jury, you must have perceived that I commenced with the topic with which Mr. Hardin closed. He would have you convict and sacrifice the accused for the purpose of putting down, if for nothing else, the practice of wearing bowie-knives, and thereby checking the torrent of corruption which, as he would have you believe, emanates from that practice, and threatens the subversion of our free institutions. I would have you believe that the practice of taking money to take the lives of his fellow men in our courts of justice, as he does professionally, is greatly more unseemly and corrupting in its tendencies, than that of wearing bowie-knives; that the latter is a matter of constitutional right, while the former violates the constitution and laws of the land, and every precept of Christian morals. You have heard us both, and will judge between us. What

I have said, however, upon this point, is intended by me rather as a kind of nuncupative legacy to the junior members of the bar, many of whom are attending this trial, and are the sons of my old friends, than for your consideration as jurors in this case.

§ 300. I would say to them, that their license to practice law invests them with no powers to violate the social duties; that by becoming lawyers they have not ceased to be men; that the high and honorable profession which they have chosen imposes upon them increased obligations to cherish and promote those feelings of the heart upon which the virtues, and of course the happiness of mankind, so generally depend; that every political community consists of an indefinite number of domiciliary communities, the number of which are united to each other by the ties of affection, not similated, but natural, emanating from the heart—the relations of the members of the political body are artifical—that the artificial ought not, indeed, can not, absorb or extinguish the natural. In the family circle the virtues and charities which exalt, embellish and adorn our nature, are reared under the fostering care of maternal kindness, moistened and bedewed from the sacred fount of the maternal *storge*, as I have already told you. That in their sacred domiciliary circles, the hearts of all are reciprocally united to that of each other, by ties which though of gossamer texture, are stronger than hempen cords; and that whenever a citizen is destroyed, a husband, a father, a son or a brother, is torn from this family cluster by a disruption of all the ligaments which bound their hearts together; that the heart of each bleeds with agony, and that of the mother is broken.

Now if there is any meaning in the divine precept "Do unto others as you would that they should do unto you," how can any lawyer who is a husband, father, son, or brother (and every lawyer must come under some one or other of these denominations), reconcile it to himself to take a fee to take the life of a man sustaining the relations I have mentioned, and thus incur not only the moral guilt of homicide, but with it that of inflicting in many instances widowhood and orphanage, and agony of feeling in every instance upon some circle of domiciliary affection; for every man (I repeat) belongs to a circle of that kind. I would say, therefore, in conclusion upon this point, to every junior of the profession, touch not, handle not the price of such complicated cruelty—degrade not your profession, harden not your feelings by an act so revolting and remorseless.

§ 301. I will not, gentlemen of the jury, apologize to you for having detained you upon this preliminary point so long—a point not involved in the cause you are sworn to try, but yet, as I think, of sufficient importance to the community to plead in its importance my excuse for the time I have directed to it. The question in issue, and the only

question, is, were the accused placed under the necessity, by the conduct of the unfortunate Rothwell, Meeks, and others, of taking the lives of those two misguided men in defense of their own? Gentlemen, the moment the testimony was closed on the part of the Commonwealth, I perceived distinctly from your countenances that you had, even upon that *ex parte* and adverse testimony, decided the question in favor of the accused. I have perceived, also, that up to the moment when I arose to address you, your decision remained unshaken, unaltered, and. therefore, it was that I lingered so long on the threshold of the real subject of your inquiry; my clients, I knew, would excuse *me;* they felt no apprehension; they had obtained all they desired—an enlightened, an impartial jury; their acquittal, they knew, would follow, of course. But if the case had needed the utmost and the ablest discussion, they saw and heard the efforts in their behalf of my friend, Colonel Robertson, an aged, experienced, and talented lawyer; of young Mr. Thompson, whose display in this case may be considered by his friends as a pleasing presage and sure pledge of his future professional eminence; and they must have been delighted, as you, and I, and all around us were, with the sunshine luster shed upon the law and facts of this case by the transcendent genius of their friend and fellow-Mississippian, Mr. Prentiss. I must, however, more because it is expected of me than needed by the case, re-touch some of the topics which they analyzed so well and discussed so ably. But I do it with my intellectual vision dimmed by the reflected light of the genius which has beamed upon them, as our ocular vision is sometimes blinded for a time by the strongly reflected rays of the sun. Indeed, were it not that Mr. Hardin (of whose posture in this prosecution I have discoursed you), has given some distorted views of the testimony, and the facts, and in some degree misconstrued, as I think, the law, I would not have said a word to you upon the main subject, believing, as I have already told you, that your verdict had been, long since, *virtually* formed in their favor, and that so far as speaking might be thought necessary, more had been said, and better said, than anything I could say.

Gentlemen of the jury, let me, before I make any comments, exhibit a condensed view of the leading facts of the case. They are, that Judge Wilkinson, with his two friends, was at the Galt House in Louisville, on his way to Bardstown to marry Miss Crozier, an accomplished young lady of that place, whose affection and consent he had previously won. The day fixed for the marriage was the Tuesday next succeeding the day of the catastrophe which gave rise to this prosecution; his brother, Dr. Wilkinson, and his young friend, Mr. Murdaugh, had come with him as *friends* on this occasion, and they remained in Louisville a few days to replenish and fit their wardrobe for it; in the doing of which, they became acquainted with the witness, Mr. Redding, a

tailor of that place. He made a coat for the Doctor—it did not fit him —a dispute arose between him and Judge Wilkinson upon that subject—some blows were exchanged—they separated—the Judge, his brother, and friend, went to their lodgings at the Galt House. This happened about 4 o'clock, P. M., on the day of the catastrophe. Redding was much enraged at what he supposed was the ill-treatment he had received from the Judge, who had snatched up a poker and aimed a blow at his head with it, which, as he warded it off, took effect *without hurt* or injury of any kind upon his arm.

§ 302. Redding went to the Mayor's office to obtain process against the three, for the Doctor and Murdaugh had, during the scuffle between him and the Judge, drawn their Spanish knives. The clerk of the court told him that he could not issue process until furnished with their names—he promised the clerk that he would get the names and return. He, and his unfortunate brother-in-law, Rothwell, went together in the evening about dark, or a little before, to the bar-room of the Galt House, to obtain the names (as he says), of the Mississippians. Having obtained them upon a slip of paper from Mr. Everett, he remained in the bar-room for some fifteen or twenty minutes, when Judge Wilkinson entered, whereupon, Redding accosted him, by asking him if he was not the man, or gentleman, who had struck him with a poker, and commenced abusing him in a most vituperative manner—calling him rascal, liar, scoundrel, coward, poor pitiful Mississippi judge, and stating that he could whip them all three, if they would lay aside their weapons, and go into a room or the street. The Judge replied, only, that he would have nothing to do with a man of his profession—that if he laid his hand upon him he would kill him, and after listening for some time, as he walked backward and forward across the room, to the foul abuse of Redding, retired, accompanied by Mr. Everett, to his own room, on the second floor. After remaining in his room for about fifteen minutes, they came down into the bar-room to be in readiness for supper, which was nearly ready. When the Judge retired, Redding exclaimed, "The damned coward has fled," and when the Judge returned to the bar-room with the Doctor and Murdaugh on their way to supper, Redding having retired during the Judge's absence, immediately entered the bar-room after them, and exclaimed in a high voice, "They are all *three* here *now*," and accosted Murdaugh, saying, "You are the gentleman who drew a knife, or a bowie-knife, upon me at my shop to-day." Murdaugh replied, "Whoever says I drew a bowie-knife upon you, is a damned liar," and displayed in his right hand a white-handled Spanish dirk knife telling him to stand off, and swearing that he would kill the first man that laid his hands upon him; whereupon, Meeks seized the wrist of his knife-hand, exclaiming, "You *are* the damned little rascal!" Striking him over the head with the butt-end of a *cow-hide*

when several persons rushed up, and Rothwell struck him over the head with a hickory club, and cut his head badly. Murdaugh took the knife into his left hand and stabbed with it at Meeks, who retreated, striking Murdaugh with the cow-hide—Murdaugh stuck to Meeks, although stricken and pressed by others, until his right hand, extricated from the grasp of Meeks, had gained the knife, and with it he gave the fatal stab to Meeks. During this time, Dr. Wilkinson was knocked down and beaten by Holmes and others, almost to a jelly; Judge Wilkinson had also been struck, and stabbed with a narrow-bladed knife, or a sword cane, which some one of the friends of Redding used on the occasion. While the Doctor lay helpless and nearly lifeless on the floor in another part of the room, Rothwell joined those who were beating him, and commenced upon him with his hickory club. While beating him, the Judge to relieve, or rather save his brother, stabbed Rothwell with a bowie-knife in two places, one stab in the side, and the other more toward his back than front. He also, with the same knife, stabbed Holmes through the arm. The Judge having relieved his brother, retreated (keeping him and Murdaugh before him), through the passage and up stairs to his room, keeping between the mob and them, and protecting them and himself by brandishing his bowie-knife. They were pursued to the stair case and struck with chairs, and as they ascended, shot at by Oldham. Redding disappeared as soon as the affray commenced, and was not seen until it closed. The accused were unknown to any of those who assaulted them—had never seen nor conversed with any of them. The friends of Redding, who had, all except Rothwell (who accompanied Redding), dropped in at the Galt House seasonably, were Holmes, Halbert, Oldham, Johnson, Meeks, etc. The first five were among the stoutest men in the Valley of the Mississippi.

Redding was armed with a dirk, which he had borrowed on that evening on his way to the Galt House; Rothwell had a large seasoned hickory stick, Oldham had a loaded pistol and a bowie-knife, Meeks a cow-hide with a knot tied upon the small end of it, and a Spanish knife—the knife, however, was surrendered to Oliver, his friend, before the onset. After Judge Wilkinson had left Redding and retired to his room, these men assembled in the passage, and Rothwell proposed that they should go to the Judge's room, take out "the damned rascals and give them *hell*." Mr. Everett, one of the proprietors of the house, left the bar, in which he was, when the rush was made by these men upon the Mississippians (which was instantly upon the annunciation by Redding that they were all three present), under the full conviction that a scene was to ensue, which he had no inclination to witness.

§ 303. Gentlemen of the jury, these are the leading facts which have

been proved in this case. I have omitted many incidental and subordinate facts, to avoid consuming your time by a tedious repetition. They have been stated with accuracy, and commented upon with ability, by my associate predecessors in the defense.

Now, we allege, first, that there was a regularly formed concertion between Redding and his associates to beat and degrade the defendants, if not to destroy them; and, secondly, whether such conspiracy had, or had not been formed, the accused were placed under the necessity, by the conduct of Rothwell and Meeks of destroying them, to save their own lives, and so were justifiable by the law of nature, and the laws of the land, in doing the *acts* with which they are charged in these indictments.

And, gentlemen, first of the conspiracy. You find that Redding was much enraged by the affair at his shop; that he was further inflamed by Johnson, the butcher, who spoke to him of the insult he had received, in aggravated terms, vaunted of his own manhood by declaring that "he was as good a piece of stuff as ever was wrapped up in so much *hide*," and declared that they would get *Bill Holmes and his party* and give them the devil. Redding at the instant declined the proposal, but declared that he would have *satisfaction*. He and Johnson left the shop and went together to the mayor's office, when Redding applied for process, and promised *to return with their names* and obtain the process. Here Johnson and Redding separated. The latter went to the shop of his brother-in-law, the unfortunate Rothwell, took him along with him, and returned (by what route we can not know exactly), to his own shop, which is but a short distance from the Galt House. Where Johnson went we do not know; the next place we meet with him is at the head of the market-house, in company with Bill Holmes, Halbert, etc. The same coterie is afterward, late in the evening, seen on Main street, near the Galt House; these men are all at the Galt House and unite in making the attack on the Mississippians.

§ 304. Now, gentlemen of the jury, weigh these facts, ponder upon them, and ask yourselves if they could all be the result of accident. Mark that Redding declared he would *have satisfaction*. Johnson and Meeks urged him to it and prescribed the mode, which was ultimately adopted, to get Bill Holmes and his party to drub or lynch them. Did Redding pursue the plan of obtaining satisfaction which he had proposed? Did he, when Everett gave him the names of the Mississippians, return to the mayor's office, as he had promised the clerk? On the contrary, did he not linger at the bar until Judge Wilkinson came in, which was some time? And after he had seen the Judge, and vented his venom upon him, did he then, after the Judge had retired to his room, return to the clerk and sue out the process in furtherance of his ostensible purpose? No, gentlemen; and why did he not? Evidently

because either his proposition to seek satisfaction at law was "a mere pretense, to cover the conspiracy proposed by Johnson, namely, to get Bill Holmes and his party and give them hell," or, if he was sincere in his proposition, he was led to abandon it and adopt that of Johnson; that it was his primary or ultimate design can not be doubted, for Bill Holmes and his party were there and united with Redding and his party in making the onset. Meeks, Johnson and Rothwell were of Redding's party. How came they all to meet at the Galt House that evening, and about the same time of the evening—and what is remarkable, animated by the same spirit, a spirit of hostility toward the Mississippians? How came they all to understand the *watch-word* pronounced by Redding upon their entering the bar-room? For you remember that the moment they entered he exclaimed, "*They are all three here now*"—and instantly the rush was made. Mark, gentlemen, their malicious design was against the Mississippians, and they were three. The words *all*, *three* and *now* are to be construed in reference to the interview which had taken place between the Judge and Redding about fifteen minutes before. *Then* there was but *one;* the *three* are here *now*. *Their* vengeance would not be slaked, their purpose to punish and degrade *all* would not have been accomplished by action *then;* but *now*, as they are all *three* present, their purpose may be effected. Mark, too, gentlemen of the jury, that Redding was the only man of the conspiracy who knew the Mississippians personally. They had conspired to act upon the men who had insulted Redding; but they did not know them. *Redding* did; no other man in the house could have given the signal but Redding. They alone of all the men in the house could understand the signal. How could they understand it unless by previous concert. Messrs. Redding and Johnson, therefore, are not to be believed when they swear that there was no conspiracy against the Mississippians, no concert to do violence to them on that evening, and that illustrate most forcibly the proposition cited by Mr. Hardin, and to which I agree, namely, it is not always that which is sworn that is evidence—what they have sworn in relation to this matter is most emphatically not evidence of the proposition to which they depose.

§ 305. Their condition is certainly a very unenviable one. The lawless conspiracy which they formed to destroy the accused resulted in the death of two of the co-conspirators; and to avoid the imputation of the moral guilt of the murder of their friends they are obliged to deny the conspiracy, upon oath, notwithstanding they can not flatter themselves that there is in existence one honest man who can believe them—alas for the frailty of human nature.

There is, gentlemen, fortunately for the interests and happiness of mankind, an impress upon truth which we discern, as it were, by intuition. Man is a rational being—he acts from motive, and when he ain s

at any end, whether good or bad, he selects and adapts the means to the end. The means to be suitable must be homogeneous, otherwise instead of promoting his design they will neutralize their force by antagonism and fail in their efficiency. A good purpose is promoted by good means—a bad purpose by bad means. Here we may learn the purpose of the agent from the complexion of the means he has employed to achieve it, and hence we can ascertain the character of the means from the known character of the purpose. Therefore, when a witness swears positively against the inference which every rational mind would draw from established or known facts, he is not to be believed. The known or established facts can not lie. When those facts consist of acts done by men, as the agents were rational, we can infer their motives from their acts—and if the acts were simultaneous and concurrent, by agents living remote from each other, and pursuing different avocations, we can, we must, infer that they agreed or *concerted* to act *together* and at the *same time*, though they should all swear positively to the contrary. In the moral as in the physical world, homogeneous matter alone coalesces. Now, it was quite unnatural that Bill Holmes should have left his beat and with his party gone to the Galt House to beat and degrade three Mississippians who had never wronged him in word or deed, whom he did not know, and of whom he had never heard.

§ 306. It was equally so in relation to all the others except Redding, who alone knew them, and had, or supposed he had, cause of complaint against them. Holmes and the others must, therefore, have been informed of the grievance of Redding, and must have agreed upon the time, place and manner of avenging it, by their joint agency; therefore, what the two witnesses have sworn is negatived by the unvarying laws of nature, as displayed in the agency of man. What they have deposed upon this matter not only lacks the congruity and symmetry of truth, but is stamped with the unglossed impress of a vile and execrable counterfeit. Yes, gentlemen, if every man concerned in that nefarious transaction were to swear that there was no concert, no conspiracy, they would not under the state of facts disclosed in this case, they could not be believed. You have heard the law read from Foster (page 256), relative to the killing of a conspirator by the person conspired against. If the conspiracy be not to take his life, but only to beat him, he may lawfully kill the conspirators. It is not, as in the case of an assault by an individual, necessary that the person assaulted should flee to a wall, or have no mode left of saving himself from death or great bodily harm before he may lawfully kill the assailant, but he may slay the conspirators upon the first assault, and without retreating—so abhorred by the law is a conspiracy. One reason of this abhorrence is evident—in a conspiracy *many* are united against *one*, or a *few*, and no

calculation can safely be made upon forbearance or retreat. There is, too, unfairness as well as wickedness in combination for such unlawful purpose.

§ 307. Gentlemen, obvious and plain as the conspiracy in that case must appear from the facts to which I have referred you, and the proof direct of several witnesses on the part of the defense, Mr. Hardin has the modesty to deny it and to urge upon you that it can not have existed without the knowledge of Redding and Johnson (*par nobile fratrum*), and that, as they have sworn it did not exist, therefore there was no conspiracy—that I have attempted to show you is a *non sequitur*. In the same spirit of modest assurance, that gentleman, as if unwilling that the case should be without a conspiracy, furnishes you with one, the coinage of his own fruitful fancy. He tells you that when Judge Wilkinson got to his room, after his interview with Redding, he related to his brother and Murdaugh the abuse which he had received from Redding, and forthwith formed a conspiracy with them to descend to the bar-room and murder Rothwell and Meeks, or perhaps Redding. The gentleman did not give personal specification to the infant of his brain. Why, Mr. Hardin, do you think this conspiracy was formed by those gentlemen? Because they told Mr. Everett to send them up pistols, and because they came down armed, the Judge with a bowie-knife and each of the others with a Spanish dirk-knife—and because instead of entering the dining-room by a *private door* they chose to pass to supper through the bar-room, and through the large folding doors that were labeled "*dining-room door*"—and because they came down to supper two or three minutes before the supper-bell was about to be rung.

Gentlemen, let me request your attention for a moment to Mr. H.'s conspiracy. Mark, gentlemen, that he relies upon inference in support of his proposition; he does not pretend to have any proof of it as a distinctive fact. Now, an inference to be availing must be rational. They wanted pistols, therefore they meditated an attack. Upon whom was the attack meditated? Not against Mr. Redding—the Judge alone had, only fifteen minutes before, awed him, and might have killed him had he been so inclined; not upon Bill Holmes and his party combined with Redding and his friends. It is unreasonable to suppose that three feeble men, strangers in a strange country, should conspire to kill some eight or ten of the stoutest men in the land, and that, too, without any assignable motive. With the exception of Redding they were all strangers. Again, those men, Holmes, etc., were there either as conspirators with Redding or they were not. If as conspirators, then the pistols were necessary for defense; if they were not, then in that character they were not wanted to assail them, and I have shown that they were not wanted to assail Redding; that purpose would have been absurd and foolish; besides, he was not assailed. Then they were wanted

for defense against the real conspirators, Holmes, Rothwell, etc., and the demand of them is an additional proof of the real conspiracy by Redding, Holmes, etc., against them. It is proved that the Judge, as well as everybody in the room, had inferred from the appearance, manner and conduct of those men, that they had assembled to inflict violence upon the three Mississippians.

§ 308. But, gentlemen of the jury, is it reasonable to suppose that these three gentlemen, strangers from a distant State, one of them to be married within four or five days, would form a conspiracy to assault some eight or ten giant Kentuckians. They have been proved to be intelligent, well-bred gentlemen, of pacific habits. One of them has been a Judge of the Superior Court in the State of his residence, and, of course, a conservator, not a breaker, of the peace, and a member of the Legislature, and to be now a commissioner, appointed by his State, to negotiate for her a loan in Europe. I repeat the question: Is it reasonable to suppose that such men, under any circumstances, and especially under such as I have named, would form such a conspiracy? Gentlemen, when the excitement was raging in Louisville upon this unhappy subject, I asked Mr. Coleman Daniel, a very respectable, honest and wealthy mechanic of that city, if he, also, was excited against the strangers. He replied, "No, sir; it would be hard to persuade me that an intelligent gentleman, who had come all the way from the State of Mississippi to this State to be married, would, upon the eve of his marriage, of choice, and without a necessity for it, get into such a scrape." Your answer will be like his. You will say with him, that no man of common sense, and still less a well-bred gentleman, would willingly present himself at the altar of Hymen with his eyes blackened and his face lacerated and bruised.

§ 309. When a man is about to be married his mind is far otherwise disposed; his feelings are joyous and pacific, attuned by his prospects to purposes of happiness, harmony and peace—not to jars, tumults and broils. Virtue enlarges her empire in his soul, by presenting new topics of thought and new subjects of aspiration. He feels that his nature is undergoing an ameliorating process, and anticipates from the event to which his heart is devoted ten thousand felicities, all of which will perhaps never be realized—but I am too old to recollect much about this matter—I will barely say that the anticipated pleasures of the lover are not realized only because they are too sublimated for the matter of fact condition of even the happiest state of matrimonial life—and the matrimonial is the only happy condition of life. It can not therefore be believed for a moment that Judge Wilkinson would sacrifice all his prospects of matrimonial bliss to a scheme so wild, so visionary, so sanguinary, and so impracticable; the very nature of such a conspiracy as Mr. Hardin ascribes to the three Mississippians is too

absurd to be entertained seriously by even that gentleman himself. He, notwithstanding, still persists in urging it upon you, and as an additional proof of it he urges their having chosen to pass through the bar-room to supper. Here, gentlemen, Mr. Hardin expatiated at great length upon the structure of the Galt House—its public and private ways, its high-ways and by-ways, its dining and supping as well as its culinary regulations, and especially called your attention to a private entrance into the dining-room through which the Judge, the Doctor and Murdaugh might have passed to supper in *safety*, and would, as he contends, have done so if they had not formed a conspiracy in their room before they left it to kill Rothwell and Meeks, etc. He does not seem to understand the principle upon which mobs are formed—that it is a principle of cowardice which aims to effect its bad purpose without hazard or exposure to personal danger. It confides in numbers for security, and therefore all mobs are of *several* against *one* or of *many* against a *few*. A mob of *one* against *several* is a solecism, and a mob of *three* against a *dozen* is equally absurd; and in this case the absurdity is aggravated by the consideration, that the three men were of frail physical structure and entire strangers. Again, such a combination must have had for its principle of cohesion and action the most determined *courage* in each, and, of course, must have been a natural affinity between brave spirits, for the purpose, not of assault, but of mutual defense. Mr. Hardin's conspiracy is destitute of all the essential ingredients necessary to its formation—it is without soul and body both.

§ 310. There was neither *cowardice* nor number there—the elements of such an existence as he fancies were absent. Gentlemen, I repeat emphatically, that cowardice is the element and basis of all *deliberate* mobs—that they originate in and emanate from a principle of cowardice—hence, brave men as members of a mob or conspiracy, not relying upon their own firm spirits, but infected by the principle of their union, play the dastard, and, hence, the man who shall be assailed by a mob must, if he hopes to escape its danger, meet and defy it. He must, to save his life, expose it; he must beard and conquer the danger—he need not hope to soothe it by addressing its reason,—it has none; it is all passion, and passion never listens to reason. An appeal to its magnanimity would be equally unavailing. It is a coward and has no generosity or magnanimity. Flight inspirits it and increases the danger. I repeat, then, that his only hope is in defying it. I speak, gentlemen, not only from observation through life, but from experience in the early part of my life.

Now what is to be rationally inferred from the facts upon which Mr. Hardin relies as the basis of his concluding argument in favor of his alleged conspiracy? Why, evidently, that the Judge and his two friends had strong reasons to believe that a mob had assembled in the

bar-room to assault, abuse, and degrade, if not destroy them. What were they to do? Were they to take council from fear and remain in their room supperless, or slip down the stairs quietly, and silently, and creep to supper through the private door to the dining room, of which Mr. Hardin speaks, or say to themselves and each other, "We will arm ourselves with pistols, if we can get them, and if we can not get pistols, we will arm ourselves with the knives which we have worn in traveling, and we will go to our supper as usual, and by the usual way—the way pointed out to strangers by the index upon the door." What less could they say, what less ought they to have said? What other course could they have taken and retain their own self-respect, and the respect of honorable men? There is no proof that they knew of this private access to the supper-table, even if they had been capable of skulking through it. Mr. Hardin may have known it, for he tells you that he spends half his time at that house, and it would seem from the very detailed account he has given of the culinary and table regulations, that his powers of explanation had been whetted by his gastronomic impulses. But I will suppose, for the sake of argument, that they knew of this private way and door to the supper room; what then? Had they not a *right* to go along the public way—to enter the supper room by the public door? And if they had a *right* to do so, you can not infer criminality from the exercise of *their right*. But, gentlemen, I contend that they could not, as men of honor, under these circumstances, have gone to supper by any other way.

§ 311. When Judge Wilkinson left the bar-room only fifteen minutes before, Redding exclaimed, "See, the damned coward has fled." What would have been said by Redding and his co-conspirators if they had remained in their room or glided stealthily from it to the supper-room by the *private* way? What would the community have said, and more particularly the people of Mississippi? How could they have returned to their own State? And which is of more importance than all other considerations, what would their own consciences have said to them? The reproaches of their fellow men they could avoid, to some extent, by retirement and seclusion. But they could have no refuge from themselves. But, gentlemen, there was another obligation stronger, if possible, than any, than all I have mentioned, upon Judge Wilkinson, to take the course through the bar-room to the public door of the supper-room. It is in proof that he was to be married on the Tuesday following, to a beautiful and accomplished young lady. Could he, if he had skulked, have dared to present himself to her, and to her venerable mother, the widow of a gentleman of known gallantry, and the sister of Gen. Hynes, who is the pink of valor—whose fame is identified with that of Jackson, Adair, and the other heroes of the

victory at New Orleans, and next in splendor of fame to *the two* I have named.

I repeat, how could he have dared to form a marriage connection with such a lady, and such a family. If, having acted otherwise than he did act, he had dared to present himself, he would have been rejected with scorn and contempt. I speak from a long and intimate acquaintance with the family. Gentlemen, had he hesitated (and I am proud to believe he did not), all these considerations would have presented themselves to his mind, and his soul would have rebuked him for his hesitancy. There was but one course for them to pursue. There was but one sentiment which could animate them. That course was the pathway of *honor*. That sentiment is (with them and all honorable men), *that others are as much bound to fear and avoid us* as *we them*. There is, there can be, no obligation on one man to fear another.

§312. Men politically equal—equals in right and duties—ought not in the moral, as equals in the natural world can not control or detrude each other from their positions; and, therefore, equals ought not to fear each other. Conscious of this, a sensible man will not annoy another, and a brave man will not submit to annoyance. This sentiment is very pithily inculcated by Fingal, upon his grandson, Oscar: "Never *search thou for battle*, my son, nor *shun it* when it comes." Gentlemen, can you think of a consideration which would have (I will not say justified) palliated the conduct of Judge Wilkinson and his friends had they acted conformally to the philosophy of Mr. Hardin. This part, and indeed every part of the case, I would very willingly submit to the decision of the ladies.

§313. They admire men who can protect them, and of course detest cowards. It is as I have said in another part of the case, their high prerogative, to give law to the world, upon the subject of character. They ordained in the infancy of the world that valor was the *sine qua non* of excellence in the character of man. That ordinance has continued, and will continue unreversed till the end of time. To that ordinance in all its import, the accused conformed throughout the complicated scene we have been examining. Away then with the rules of action which Mr. Hardin has been prescribing for the accused, under the circumstances of this case. They had learned other lessons. They consulted nature, and obeyed her oracular responses. They had been taught to assert and vindicate their own rights, while they scrupulously observed the rights of others, and abstained from violating them; that they could not consistently with self-respect, be deterred from exercising their own rights, more than they could consistently with honor, and honesty, violate the rights of others. These responses of nature were embodied in the ordinance which I have just told you was enacted by the ladies in olden time, or rather when time was very

young. Conformably to that ordinance, the accused came as they had usually done, to their supper, through the bar-room. They acted, as I have no doubt they agreed, or conspired (if Mr. Hardin likes the word), to do, before they left the room. That was to meddle with nobody, but to defend themselves to the utmost against any and every assault that might be made upon them. And, gentlemen, they meddled with nobody—they assailed nobody—but they *were* assailed, and they *did* defend themselves bravely, nobly, efficiently. I might here ask, why those men remained so long in the bar-room, if there was no concert among them, to make the assault which was so nobly arrested. But upon the subject of the conspiracy, I have said enough, perhaps too much.

Gentlemen, Mr. Hardin tells you that he has lately returned from the State of Mississippi, and from the graphic and glowing description he has given you of the battle scenes he stumbled upon, in a short excursion which he made from Vicksburg into the country, one would be almost tempted to believe that a horror of dirks, pistols, and bowie-knives had seized upon his feelings and distempered his imagination. Hence he can see nothing commendable in the character of the people of that State. He portrays them as irritable, vindictive, and sanguinary—as a lordly people who look down with contempt upon mechanics and the laboring classes of mankind. He kindly supposes in their behalf, that the climate in which they live may produce these obnoxious biases of character.

§314. If they are attributable to the climate, it is unphilosophic to complain of them, for it was settled in the case of Nebuchadnezzar that the heavens must rule. But do the facts, as he has represented them, exist in reality, or are they the offspring of his own heated fancy in this case? He must allow me to suppose them factitious. I, too, visited that State more than once, and continued long enough to become acquainted, to some extent, with the people, their manners, habits, and customs. On my last visit, which was about three years ago, I spent near a month at the seat of government during the session of the Legislature. During that time I saw and became acquainted with many of her citizens, and among others with Judge Wilkinson, and Mr. Prentiss, the gentleman, with the witchery of whose eloquence and power of argument we have just been delighted, instructed and, let me add, convinced. They were both members, and leading members, of the Legislature. I saw nothing of the ferocious or sanguinary about the people of that State. They treated me with the utmost civility and politeness, and with marked hospitality. The members of the Legislature, and many of the respectable citizens who were on a visit to the capital, overlooking all political party distinctions, united in pressing upon the distinguished stranger (as they were pleased to denominate

me), from Kentucky a most splendid public dinner. Gentlemen, I have been much concerned through life in legislation, and, of course, my acquaintance with political men, legislators and others has been extensive, and I can say that I never in my life saw a more respectable, orderly and intelligent legislative assembly convened, either in my own or any other State; nor did I ever see a more intelligent, polite, hospitable and high-minded people than the people of that State. They detest knaves and cowards, and are prompt to fraternize with honorable men—to support, assist and uphold men of that character, without inquiry into their vocations—mechanics, agriculturists, or laborers, makes no difference with them.

§ 315. If he be honest and honorable in his transactions, and industrious and temperate in his habits, whether poor or rich, it makes no difference. If poor, they enable him to become rich. Gentlemen, the people of Kentucky should be the very last to make or sanction such imputations against the people of Mississippi; for all Kentuckians of good character who have gone to that State (and very many have gone), have been kindly received, and when they needed, generously assisted with loans, both of money and credit, whereby they have become rich. They went there, most of them, mechanics or laborers; they are now rich planters.

The gentleman says, they look down upon poor mechanics—it is true they do so, but it is to discern their merit; and if they possess it, to lift them up—to elevate, support, and sustain them in their exaltation. But the other day they looked *down* upon Mr. Henderson, a shoemaker, saw his merit, and elevated him to a seat in the United States Senate. But that is not the only instance. They *looked down* upon Mr. Prentiss, who had traveled from the far East, and was engaged in teaching school among them—an *obscure* pedagogue—no, I can not say he was *obscure*, he could not be obscure anywhere—the eruptive flashes of his great mind, like those of Ætna, threw a blaze of light around him, which attracted (or rather exacted), their gaze and admiration. They sent him as their representative to the Congress of the United States. Mr. Prentiss must pardon me for thus going into his private history—I was myself an humble pedagogue. The difference in our condition is, that in my case the people of Kentucky honored *me;* in his, the people of Mississippi honored themselves. They looked down upon Judge Wilkinson—they discerned his talents and his worth, and elected him to the Legislature, elevated him to the bench, and conferred upon him the commission to negotiate a loan in Europe for the purpose of internal improvement, as you have heard from the proof in the cause. Instances are innumerable—I will not go into detail. But they carry bowie-knives, and the blade of a bowie-knife is so long, and so broad, and the edge is so sharp, and it has such a terrific glitter, that they

must be a bloody-minded, hot-headed people. Besides, they fight the most desperate duels. Gentlemen, arms of some kind are worn more or less in all countries.

§ 316. They are in all countries used by the coward to assassinate, and by the brave for defense against assassins. If you want to put down the use of bowie-knives, extinguish robbers and assassins, and the use will fall of itself. But as long as good men may be assailed in their persons or property, by dishonest and dastardly men, the latter must be allowed the appropriate means of defense; and the arms for defense can not be considered appropriate unless they are at least equal in efficiency to those of the assailants. But the wearing of arms, whether bowie-knives, pistols, or whatever else, does not at all alter the rights of the citizens. For assault they should not be wanted; for defense, when occasion requires, they are of great value. The right of self-defense remains, under all circumstances, the same. It is a primary element of our identity. Nature gave it—art can not take it away. As derived from nature, it is limited to the use of no particular species of arms, and embraces every species. It is limited only by the obligation of benevolence on the part of the assailed, toward the assailant; and benevolence does not require him to love his fellow man more than himself. A man's right of self-defense does not result from the degree of criminality in the one who assails him. It is personal, inherent, and inseparably united with his *own exclusive individuality*—a person may in many instances exert this right to the destruction of an *innocent* man. A madman, for instance, who is incapable of *crime*, but capable physically of destroying a man, may be slain justifiably, in the exertion of this right—so may a somnambulist, under the same circumstances. In the case of a shipwreck, when two of the passengers are struggling for a plank, which will sustain but one of them; the one may justifiably kill the other to save his own life. This, gentlemen, is the law of nature, in relation to all animal existences, and the municipal law, in relation to man. (See Grotius, p. 25.)

§ 317. Then, gentlemen, why this denunciation of bowie-knives and pistols, for it can make no odds, if the killing was done *justifiably*, whether it was done with the one or the other, or with a simple jack-knife. The question is not whether either, or what weapon was used; but whether with or without weapons, the killing was justified, or excused by the law. All that has been said, therefore, by Mr. Hardin upon the subject of carrying and employing arms, is foreign to this case. It must have been intended *ad captandum*, or rather *ad exitandum*. Equally foreign to the case is all that he has said about Mississippi, and the Mississippians—whether the killing was done by a citizen of Kentucky, or by citizens of any other State. The question still is, was the killing *criminal* or *innocent*? That it was innocent in these gentlemen

because necessary to protect themselves from a band of conspirators—from a mob—we have urged, and I am now insisting.

But, gentlemen, as Mr. Hardin has spoken so much at large upon the depraving consequences of the habit of carrying arms, let me give you my opinion upon that subject. I am now an old man—I was in this country when every man carried his rifle and his tomahawk, and his knife, wherever he went. He carried his arms to defend himself against the Indians, whose incursions were constantly apprehended—and during all that time there were no homicides—no man killed by his fellow—no man apprehended danger from his fellow man. How happened this? The rifle, the tomahawk, and the scalping-knife, were, at least, as formidable instruments of death, and as depraving as the bowie-knife and pistol; yet it never entered the mind of any one that men were more depraved or more ferocious by the practice of carrying arms. The true reason is, that there was not then in Kentucky a single coward. The men, aye, and women too, were all brave—a coward could not remain in Kentucky. The danger from the Indians was too continuous, imminent and proximate. He could not breast it. He could not bear the scorn and derision of the men and of the women, and children too, and had to leave the country.

§ 318. After the Indian war had closed—which was in 1794—the people of Kentucky laid aside their arms. People from every quarter rushed in crowds into Kentucky, and jars and bickerings resulted for a time, from the intercourse of people of different habits. They were settled, mostly, by an appeal to the prowess of pugilism. There were some suits of slander, and of assault and battery. Kentuckians gradually amalgamated with the immigrants, and we got along very well for many years—among the professional men there was occasionally a duel. There were no homicides, no assassinations, until the Legislature of Kentucky, in an evil hour, influenced, unconsciously, by a mistaken policy, enacted what is generally denominated the "anti-dueling law." That law required every officer in the State, civil and miltary, from a constable up to the governor, including members of the Legislature, and lawyers, and from a sergeant to a major-general, to swear solemnly that he would neither give nor accept a challenge to fight with any deadly weapon, within or out of the State of Kentucky. It was a law most evidently for the benefit of cowards, who, without the oath, would never have fought nor accepted a challenge to fight a duel; but who, by the administration of the oath, were palmed upon the community, and upon themselves too, as men of spirit. Before the passage of this law, a man who might chance to be irritated with another, would, before he published a libel or slander against him, pause and reflect, that if he persisted he would be challenged, and *must* either *fight* or be disgraced, and would wisely desist. He knew

that the same consequence would follow from any personal violence to which his irritation might prompt him, and the effect was the same. But upon the passage of this law, dastards, when they had taken the oath, or aspired to offices which they could not fill, without taking the oath, filled their bosoms with dirks and their pockets with pistols, annoyed society with the insolence of mock heroism, insulted their brave competitors, and when about to be chastised, retreated to the *wall*, and killed the gentlemen they had wantonly insulted, *a la mode* Mr. Hardin's law. The vicious and depraved portion of the people having been thus licensed to wear arms, the remaining portion were constrained to wear them in self-defense.

§ 319. The consequence is, that the community has been very much annoyed, and vulgarized by the short-sighted policy of the Legislature. Sirs, the pistol was in the times I speak of, and had been for ages throughout the civilized world, not only the most effectual polisher of manners and morals, but a most efficient, though sad, peacemaker. It held all who aspired to be gentlemen, and were of course amenable to its tribunal, under a strong recognizance for their good behavior. It is a tribunal instituted by nature, as an auxiliary, to the political institutions of society. It was a misdirected humanity which influenced Kentucky, and the States of the Union who, following her example, have attempted to suppress it. The object was to prevent the effusion of blood. The effect has been to increase it tenfold. Just as the legislation to repress gaming by fines and penalties, has increased it one hundred fold, when a short act, making all sums *fairly* won, recoverable by law, would have diminished the evil, and improved the morals of the people.

Do not mistake me, gentlemen, as to dueling; I am no advocate for it. I would not sanction it by law, but I would reluctantly connive at it as an evil less, greatly less, than that legion of evils which supply its place. As I prefer a high and honorable to a low and degraded spirit—fair, open, manly and honorable conflict to dastardly and cruel assassination, so I would leave it, as England and all wise nations have it, by reluctant connivance. Perhaps my notions upon these subjects are erroneous, but they are my deliberate views, and I do not wish to conceal them. Every duel is a lesson, more or less impressive, as it shall eventuate in favor of good morals and polished manners; and although the fall of one or both of the combatants must inflict pain and sorrow upon their immediate connections, yet the effect is wonderfully beneficial to the community in every view, and strengthening to virtue. The price paid by the community is very great, but the purchase is inestimably valuable. The good effects of this lamentable practice can not be obtained at a less price, nor in any other known mode; nor can it be suppressed by human legislation.

§320. But, gentlemen, to return to the case from which I have been diverted by Mr. Hardin's discursiveness. I trust that you have been satisfied that the accused were assailed by a band of conspirators, and that they were justifiable by the law of the land in acting as they did, and leave that part of the subject with you.

Mr. Hardin's conspiracy, on the part of the defendants, is too unfeasible and preposterous to require further notice than has been wasted upon it. Indeed, it is unworthy of the attention it has received. I therefore dismiss it also, and will now consider the case of the defendants (for argument's sake), as though there had been a conspiracy against them, upon the insulated ground of self-defense. I will suppose that they entered the bar-room, on their way, and by the *public* way, like other citizens and boarders, to the supper table; that immediately upon their entry they were assailed, respectively, as it has been proven they were.

The question is, was Mr. Murdaugh justifiable in taking the life of Meeks, and was Judge Wilkinson justifiable in taking the life of Rothwell?—for, against the Doctor there is no proof. The proof in reference to what Rothwell was doing when he was stabbed by the Judge, is not entirely free from apparent discrepancy. Mr. Pope says he (Rothwell), was standing close to where Dr. Wilkinson was lying on the floor, under the blows of Holmes and others; that he was apparently leaning over the prostrate Doctor, when he was stabbed by the Judge; Mr. Hardin would have you believe that his proximity to the Doctor, and his stooping position over him, were produced by his endeavoring to pull Holmes off the Doctor and release him. But Pope tells you that he was among the first to assail Murdaugh with his club. In that he displayed no amicable, or pacific disposition toward the Doctor, for it is evident from all the testimony, that his feeling toward Murdaugh, may be fairly taken as the *sample* of his feeling toward each of the others.

§321. He did not attempt to rescue Murdaugh from the rush that was made upon him; on the contrary, he struck him with his cudgel. It was not, therefore, to release the Doctor from the giant grasp of Holmes, that he was leaning over him. For what then, gentlemen, let me ask you, was he standing stooped over him? General Chambers gives the answer. He had struck the Doctor with his hickory stick, and was balancing it in his hand to repeat the blow, when the Judge stabbed him. General Chambers did not speak of his stooping, yet he may have been, and probably was stooping, as Mr. Pope states, and the General not have noticed it. Pope may not have noticed the stick in his hand and the stroke inflicted with it upon the Doctor just before he was making the effort to readjust his grasp of it for another blow. To strike the Doctor, who was lying on the floor under Holmes, he must

have stooped, to avoid striking Holmes. Pope saw him standing near the prostrate Doctor, but did not see him strike, nor did he notice the stick in his hand. General Chambers saw him in the same position (with the exception of the stoop), strike at the Doctor, and preparing to strike him again—they both saw the stabs inflicted. The testimony, then, of both the gentlemen is correct, and may be easily reconciled. They both saw the same transaction, but did not both see all of it. And the testimony of each, instead of contradicting, corroborates that of the other. Much took place in the scene, which was not seen by anybody, and much of what was seen, was seen imperfectly, amid the turmoil and confusion, and apprehension which the affair produced—some things were seen by one and not by another—and some important facts were not seen by any. Mr. Raily who was a stranger to all the parties, saw some man striking with a sword-cane—who struck, or who was struck with it, he did not know, but he saw the scabbard end of the cane fall off and leave the sword bare. No other witness saw that. Judge Wilkinson was stabbed in the back obliquely, between the shoulders, to the depth of three inches, with an instrument *narrower* in the blade than any weapon known to be employed on that occasion, unless it were the sword-cane. The wound, according to the opinion of Dr. McDowel, who examined it, looked as if it might have been made with such a sword—such too, was the character of a wound which Rothwell had received in his breast, and nobody knows how, or from whom he received it; and which, according to the testimony of the doctors, was the *immediate* cause of his death. Judge Wilkinson, too, received several blows, as was apparent from contusions on his face and head; and yet, with what weapon, or by whom inflicted, nobody knows but he or they who inflicted them. I mention these facts, gentlemen, to show you that as much occurred which was not seen at all, so, of what was seen, many parts might have escaped observation or been seen very imperfectly. All the witnesses, however, saw that the Doctor was knocked down and beaten most unmercifully. Oldham claims the credit of knocking him down—Holmes is proved by all who saw the transaction, to have been upon him and engaged in beating him, assisted by Rothwell, when the latter was stabbed by the Judge.

§ 322. Halbert claims the credit of having contributed several blows. You see what a giant Oldham is, and it is proved that Halbert and Holmes were larger, and Rothwell as large as he, and all of them at least as stout—can you hesitate to believe that the Doctor must have perished under their violence, if the Judge had not come to his rescue at the very moment when he stabbed Rothwell? Holmes was also stabbed with a bowie-knife through the right arm—the Judge only used a knife of that kind on that evening, and, therefore, must have stabbed Holmes, though nobody saw him stabbed, or knew who stabbed

him. By the use of his bowie-knife upon Rothwell and Holmes, he saved the life of his brother, and in all probability his own life and that of Murdaugh.

It is very probable, that, infuriated by the death of Meeks, they would, with the aid of their maddened associates, have killed the Judge and Murdaugh, as well as the Doctor.

But it is contended by the counsel for the prosecution, first, that the Doctor's life was not in danger; and, secondly, that if it was, the Judge could not lawfully kill the assailants to save his life. Upon the first of these points, I will not detain you. It is a matter, upon which you have heard the evidence, which all converges to prove, that his life was in imminent danger, and that it was only saved, as I have stated, by the seasonable and intrepid interposition of the Judge. He had been already beaten to a mummy, and was, at the instant of his rescue, being farther beaten by the cudgel of Rothwell, and the box-like knuckles of Holmes.

The second is a matter of law upon which I did not suppose there could have existed a doubt in the mind of any lawyer, nor, indeed, of any human being of properly organized midriff; for it seems to me that nature proclaims in the unvitiated feelings of every man's heart what the law is upon this subject—the lecture given by the father to his sons, and illustrated by the bundle of rods in the spelling-book of Old Dilworth, inculcates the true law upon this subject. But, gentlemen of the jury, let me call your attention to the law of England, and of this country, and of all communities, barbarous as well as civilized, upon the same point; for it is a law of nature, and, of course, universal. In Blackstone, 21 n. p. 184, speaking of the right of *self-defense*, that author states that "they can not, therefore, 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;" and having in the next page laid it down as a law of universal justice, "that a man, when the attack is so fierce that he can not retreat without manifest danger of his life, or *enormous bodily harm*, may, in his defense, kill the assailant *instantly*." In page 186, he states that, "under this excuse of self-defense," referring to what I have read, "the *principal civil* and *natural relations* are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary *defense* of each other respectively, are *excused*, the act of the *relation* assisting being construed the same as the act of the party himself." Now, I ask if the relation of brother with brother is not a *natural* relation? If it is, then it is comprehended in the law I have just read to you from Blackstone. The counsel for the prosecution seem to think because this relation is not specifically

named by Blackstone that it is not within the principles laid down by him. They have *erred* (they will pardon me), in construing his words.

§ 323. There are but two kinds of relationship which can exist among mankind. The first is the *natural;* the second, political or civil. The author illustrates the last, viz., the civil, first, by the example of master and servant; and the *natural*, by the examples of parent and child, husband and wife. He does not pretend to enumerate all the relations of either kind, but gives examples, *one* of the *civil*, and *two* of the *natural.* They outrage nature by giving to the artificial relation of master and servant the ascendancy over the natural and endearing relation of brothers and sisters with each other. I say they outrage nature; for what man in his senses can believe that the servant is under greater and stronger obligations to defend the master, and the master the servant, than a brother is under to defend his brother or his sister? Feeling, it would seem to me, decides the question at once by intuition; but upon the supposition (for argument), that my interpretation of Blackstone is wrong, still the gentleman will have gained nothing, for the relation of brother with brother is at least a *civil* relation. A brother, in the absence of other heritable relations, can, under the law of the land, inherit the estate of his deceased brother. But I go farther, and assert that the relation of citizen to citizen is a *civil* relation, within the meaning of Blackstone, and a mere citizen may, to save the life of his fellow citizen, slay the man who assails it. And I will add to authority of Blackstone that of Lord Hale. That great and good judge, in the first volume of his Pleas of the Crown, at page 484, speaks thus upon this point:

§ 324. "If A, B and C be of company together and walking the field, C assaults B, who flies, C pursues him, and is in danger to kill him, unless *present help.* A thereupon kills C in defense of the life of B. It seems that in *this case* of such inevitable danger of the life of B, this occision of C, by A, is in the nature of *se defendendo,*" etc. And again, the author in the same page proceeds, "If A be traveling, and B come to rob him, if C fall into the company, he may kill B in defense of A, and, therefore, *much more* if he come to *kill him*, and such his intention be apparent. For in such case of a felony attempted, as well as of a felony committed, every man is thus far *an officer*, that at least his killing of the *attempter*, in case of *necessity* puts him in the condition of *se defendendo*, in defending his neighbor." So you see, gentlemen of the jury, that the counsel for the prosecution have misconceived or misrepresented the law. I hope they misconceived it. Let me refer you to a law from recollection, not under the denomination of *a law*, but *a fable.* I read it when a boy in Dilworth's spelling-book: "Two friends" (I quote from memory), "setting out on a journey together, agreed, in case of any danger, to stand by and assist each other. They

were assailed by a large bear. One fled and climbed a tree. The other, not being able to escape, nor, alone, to defend himself, fell down and pretended to be *dead*. The bear came up and smelled him, and from his silence and motionless posture, supposing him to be really dead, walked off and left him unharmed. When the bear had disappeared, his companion descended from the tree and asked him what the bear had whispered in his ear, he replied that the bear had cautioned him against confiding (through the balance of his life), in the promises of a *false friend*." This fable inculcates the same principle of natural and municipal law, which is promulgated in the passages from Blackstone and Hale, which I have just read to you, namely, that you may justifiably, nay, that you ought to defend the life of your fellow-citizen by taking the life of him who attempts to destroy it. Hence. I argue, that it was not only the right, but the duty, of each of these three gentlemen, who were friends in their own State, and in their travel to this State, to defend the life of each other by taking the life of those who assailed it.

§325. Suppose they had traveled by the old route from the place of their residence to this State, and had been assailed by the same persons, with the same violence and ferocity, at an intermediate tavern, instead of at the Galt House. To make the case stronger, suppose that tavern had been in the wilderness, within the Indian territory, where there was neither government nor laws, might not the Judge in that case have defended the lives of his friends and associates? They will perhaps yield that he might, because of the absence of legal protection. I reply that if he might on that account, his right to do so, must be derived from the law of nature, and government leaves all her citizens in the full possession of the natural right of self-protection, where she can not or does not protect them. Well, at the Galt House they were as unprotected by the laws as they would have been in the case supposed; therefore, both by the municipal law and the laws of nature, the Judge had a right to kill Rothwell to save Dr. Wilkinson from great bodily harm, or the loss of his life, even if he had been unconnected with him by the ties of brotherhood; and, therefore, each might have destroyed the assailant of the life of the others. And if the party assailing them were acting upon concert between themselves for that purpose, each of the assailed might, the moment one was assailed, have killed as many of the conspirators as he could, and he would have been justified by law in doing so. But I have spoken of the conspiracy, and am considering the cases, as though none had been formed. When the person assaulted *honestly* believes that his life is endangered by the assault, he may kill the assailant. The law to that effect has been read by Col. Robertson and stated by Mr. Prentiss. Mr. Hardin scouts at this statement of the law, and ascribes to the

inexperience of the young man, as he is pleased to style him, his erroneous notion of the law. Gentlemen, you find it both in words and import as Col. Robertson read and as Mr. Prentiss has stated it.

§ 326. It could not in the nature of things be otherwise; the man assailed has not time under the pressure of the assault, to consult others as to the degree of danger to his life resulting from any particular stage of the assault, or degree of its violence. No one else could judge so well, no one so much interested in judging correctly as himself; he might lose his life by intermitting his defensive energies, while he sought the opinion of others—his life was committed by nature to his *own* protection, to the protection of his *own mind* and muscles, and not to the opinion of others. And man, I repeat, in the absence of the protection of the law continues, in this respect, in the condition in which nature placed him. It is upon the *honest*, not *feigned* belief of *danger* to his life, or of great bodily harm that he may destroy his assailant. Mr. Hardin says, it will not do that the assailed honestly believe the danger to be present and urgent, it must be really so. Let me suppose a case. A and B quarrel, high words pass, A swears that he will kill B, draws a pistol from his pocket, and presents it cocked to his breast; B instantly thereupon draws his pistol, and shoots A through the heart, and upon examination it turns out that the pistol of A was empty when he drew it and presented it to the breast of B. In this case it is evident that B was in no *real danger* from the pistol of A. Shall B be condemned and executed for the murder of A because his *life* was in *no real danger*, or shall he be acquitted upon the ground, that *he believed* his life to be in *danger*, from the pistol of A, and therefore justifiable in killing him under that belief? Can any man, even Mr. Hardin, entertain a doubt upon this case? Mr. Prentiss, therefore, stated the law as it really is, and as it must from the necessity of our nature, always continue to be.

§ 327. Men are not equal in moral and physical courage; a timid and a brave man would destroy their assailants upon different degrees of danger, the former upon less imminent danger than the latter, but each upon an *honest belief* of its threatening imminence, upon an *honest belief* that his life was in danger; shall the one expiate the weakness of his nerves upon the gallows, while the other is justified, and applauded? Each was under the same obligation to preserve his life, and each exercised honestly all the faculties with which the great author of life had endowed him. The doctrine of Mr. Hardin is at war with the nature of man, and the principles of his social condition. Then if Judge Wilkinson believed honestly that his brother was in danger of great bodily harm, or of losing his life from the assaults made upon him, he had a right to kill the assailants, even if the danger were not as imminent as he supposed it to be—for a person who kills the

assailant of his relation, stands in contemplation of law, in the place, the assailed would have stood himself, had he killed the assailant. But why talk of the belief of danger in this case, when there is no reasonable man who has heard the testimony can doubt of its reality? The Doctor had already, when rescued by the Judge, suffered enormous bodily harm. He had been deprived of the power of self-defense, and was falling an easy victim to the violence which Holmes, Rothwell and Halbert were inflicting upon him. Rothwell had struck him with the club, as General Chambers proves, and was stamping him with his feet, as Mr. Pearson proves, when the Judge stabbed him. But Mr. Hardin thinks he should be punished for stabbing him in the back. *The gentleman has high notions of chivalry*, and is shocked at its violation in this instance by the Judge. He forgets that this assault was not commenced in a chivalric spirit, nor upon any principle of *fairness* known to chivalric men.

§328. When the Judge came to the relief of his brother, that brother *one* and alone, was under the fists, feet and clubs of *three* of the largest and stoutest men in the State; and yet Mr. Hardin will have it that the Judge should have waited until the three had killed his brother, and until it was convenient for Rothwell thereafter to present his breast. Or, perhaps, according to Mr. Hardin's notion of gallantry, the Judge should have asked him to present his breast, that he might approach him *a la mode*. If such be his taste, he may consider the first thrust to have been an efficient request to that effect; and the second to have been made when he had, according to the intimation of the first, turned towards the Judge, to inquire into its meaning. But a sufficient excuse to the cavilings of Mr. Hardin upon the point of mobocratic chivalry is that the Judge was inexperienced in broils, knew nothing of either their practice or theory, that his education and habits of life were anti-pugilistic. He had neither muscular aptitudes nor mental aspirations for distinction in that line, and if he had possessed all the excellence in chivalry of which Mr. Hardin can conceive, the occasion did not afford an apt theater for the display of it. And, again, he was acting under the spur of relentless necessity, which left him no choice of modes of action, no leisure for the observance of etiquette. He had but one purpose, and that was to save the life of his brother. That object he achieved with the greatest possible economy of the blood of the aggressors. He might justifiably have slain with his bowie-knife many others, and it is wonderful, under the circumstances, that he did not. It is evident, from the proof, that he did not aim to hurt any but Rothwell and Holmes, and it is equally evident from the proof that by killing one and wounding the other he saved the life of the Doctor, and very probably his own life, and that of Murdaugh.

§329. Gentlemen, I have not called your attention to the proof

in detail—I shall not attempt to collate and analyze it. That task has been performed ably and eloquently by the gentlemen whom I follow on the same side. You must have perceived the artifices by which Mr. Hardin attempted to evade and blunt the force of the testimony of many of the witnesses on the side of the defense. You could not fail to observe, and I hope with indignance, his attempt to disparage those of our witnesses whose testimony he could not twist to his purpose. Let me call your recollection to the instance of Dr. Graham, a gentleman of known integrity and high standing in your county.

§ 330. The testimony of that witness satisfied everybody who heard it that the accused were assailed ferociously, and placed under the necessity of acting as they did. How did Mr. Hardin dispose of it? Why, by telling you that he is the owner of the Greenville and Harrodsburgh Springs; that the Mississippians spend their money freely, and that it is a great object with the Doctor to conciliate them and get their custom. Mr. Raily, who is as respectable a man as any in the community, and as respectably connected as any man in Virginia or Kentucky, whose father was full cousin to Thomas Jefferson, and whose high intelligence was evinced by the clear manner in which he gave his testimony, is branded by Mr. Hardin with cowardice, because, as he told you, he ascended when the affray commenced to the sill of one of the windows upon which, being an entire stranger, he stood and looked on. Mr. Hardin derided that act of prudence as an act of embarrassed timidity, and compared him standing there to a turkey-buzzard perched on the top of an old dead tree. General Chambers, whom he knew to be an honorable, intelligent and upright man, and one who would not be very patient under any disparagement, he prudently passed. In the same way he passed Mr. Pearson, a gentleman of cultivated mind and manners, and of unimpeachable integrity. And then, again, he selected Mr. Trabue as a man of such iron nerves that he could look upon blood and carnage with the composure of a stoic, and urged you to regard him and Mr. Pope as the only witnesses who were composed enough to observe calmly and accurately the actings and doings of those concerned in the horrific scene, and thereby intimating, by implication, that Montgomery, Chambers, Graham, Pearson and others, were so embarrassed and confused by their fears as to be incapable, for the time, of correct observation.

I barely mention these things to show you that his zeal to convict the accused displays itself vindictively, in some way or other, toward all the witnesses whose testimony thwarts his main purpose.

I fear none of the testimony, and wish you to consider it all, and give credit to as much of it as you can. I have before said all I mean to say upon the credibility of the witnesses. It is not agreeable to me to awaken unpleasant sensations in witnesses by unkind comments upon

their evidence, and therefore I forbear to comment upon that of Redding, Johnson and Oldham.

Gentlemen of the jury, I have been endeavoring to convince you that Judge Wilkinson, under the incontrovertible facts proven in this case, was (apart from the foul and nefarious conspiracy by which he and his friends were attempted to be beaten and degraded), justifiable, under the most rigid operation of the law, in taking the life of Rothwell, and that if he had not done so to save the life of his brother he would have justly drawn upon himself the contempt, scorn and derision of all honorable men, and what is worse, if possible, of the ladies too, for they admire a kind not less than a stout heart in man.

§ 331. Gentlemen of the jury, I leave Judge Wilkinson with you. I have not been as much concerned about the legal as the moral aspect of his case. His is not a common case, for in common cases a mere *legal acquittal* is the desire of the accused and the aim of his counsel; but to a high-minded, honorable man, like the Judge, a mere acquittal upon the dry law of the case has but little to recommend it. A gentleman who would at any and all times sacrifice his life to preserve his honor, can be but little pleased with any efforts of his counsel which, by overlooking his honor, aim at saving his life. My aim, (and such I am sure has been the aim of his counsel who have preceded me), has been to manifest to you and to the public that Judge Wilkinson and his friends have, throughout this unhappy affair, acted up to the most punctilious requisitions not only of natural and municipal law, but of the strictest honor and sternest morality. We have entertained no fear of a conviction throughout the case. We represent men who do not place a very high estimate upon *mere animal life* otherwise than as it subserves the higher purposes of human existence—men whose lives are in their *honor*, and can only be reached by sullying it—and I have dwelt longer on the Judge's case in the view to rescue him from the sluts attempted to be thrown upon his honor by the imputations and envenomed innuendoes of Mr. Hardin than for any other purpose. The case of each of the three is, in its *legal aspect*, the case of all; for they were all assailed by the same vile coterie, and for the same nefarious purpose, and they all resisted with a bold and unquailing spirit, each as he best might under the circumstances of attack. The act of each necessarily tended to the protection of all, and none had cause to reproach the other with the want of energy or spirit.

Let us pass from the Judge to Mr. Murdaugh, and in doing so we pass over the *Doctor*. There is no proof that he uttered a word, and it is abundantly proved that he was disabled by brutal violence from performing an act in this drama. Let it be remembered to his credit that he did not quail—he did not supplicate the merciless mob, and would have died in dignified silence had he not been bravely rescued by his brother.

Mr. Hardin says of Murdaugh, that when accosted by Redding he held up his hand, showing to all the blade of his white-handled knife, and declared with an emphatic oath that he would kill any man who laid hands upon him. This conduct, he thinks, evinced a sanguinary intent—a bloody purpose. No doubt of it; but it was a purpose of defense, not assault. He did not conceal his knife to plunge it by surprise into the breast of the first assailant, but openly and bravely showed it to all, and warned them at the peril of their lives to stand off.

§ 332. But Mr. Hardin finds in his reply to Redding, namely, that if he or any other man said that he had drawn a bowie-knife upon Redding in his shop, he told a damned lie, the same, or rather a continuation of the same evil spirit which he had evinced in brandishing his drawn knife. That he evinced in the latter, as in the former instance, a brave and determined spirit, I readily admit; and the mob who assailed him were silly not to have perceived and been restrained by it. It was a fearless and defying spirit which he was happy in possessing and wise in displaying—a spirit which, instead of thirsting for blood, panted to avoid the effusion of it. Gentlemen, all that is ascribed to Mr. Murdaugh by Mr. Hardin, according even to his most unjust interpretation of it, did not justify the assault made upon him by the unfortunate Meeks and Rothwell. Words do not, in law, justify blows. They, however, according to all the testimony, made the assault upon him, before he had done anything towards them more than to warn them what would be the consequence in case they did assault him. But the nature of the assault did not, in the opinion of Mr. Hardin, justify him in the defense which he made. Meeks seized his knife-hand and commenced cowhiding him, while Rothwell belabored him over the head with a large hickory club, gashing his head at each blow, as you perceive by the scars. Where now is the spirit of chivalry which produced in the mind of Mr. Hardin such strong reprobation of the stroke which Judge Wilkinson gave Rothwell? Was it chivalric for the two—Meeks and Rothwell—to beat Murdaugh *at the same time*, one with a cow-hide and the other with a cudgel? The one to hold him by his knife-hand and degrade him with a cow-hide while the other was beating him to death with a club, and others (for such is the testimony), beating him with their fists? Surely this was not only cruel, but cowardly—especially in the opinion of so gallant a knight as Mr. Hardin—but according to the views of that gentleman, Mr. Murdaugh should have *run* as far as he could before he killed his assailant, and he did not attempt to *escape* by *running*.

§ 333. He read you the law to that effect from Blackstone. Gentlemen, I have always contended that the law which he has read, and which I admit to be the law of England, should, though adopted by our constitution, be construed *by us* according to the genius and spirit of *our*

free institutions. It should not *here*, where we are all equal, and where there is no distinction but that which exists between the good and bad, be construed to require a man *to run* from his fellow man, for with us a *free man* has no *superior*.

"The laws of several nations," says my Lord Hale, in volume 1, page 489, "in relation to *crimes and punishments differ*, and yet may be excellently suited to the exigencies and conveniences of every several State, so the laws of England are *suited to the conveniences of the English government*," etc. And even in England, in some cases, they give to the law the construction for which I contend; even there when one man assails another upon the King's *highway* the assailed need not retreat or run. Every law should be interpreted not only according to the nature and genius of the government, but to the circumstances in which the accused is placed at the time. The reason he need not run *there* is because he is on the King's highway, and authorized by the *virtual* presence of His Majesty to protect himself as fully as the King, were he *really* present, could protect him. Gentlemen, the *free citizens* of America are as much authorized in every part of the Republic to defend their lives as the *subjects* of the King of England are upon His Majesty's highways. The *paths* of *freemen* are all sovereign highways or the highways of sovereigns. Freemen are always in the real presence of majesty—they are themselves *in loco regis*. They are themselves sovereigns, and there never was a law which required a sovereign to run from a sovereign. The very idea is absurd. Another reason why the law of England requires a subject to run when assaulted out of the real or putative presence of the King, is that *there* the *man* is sunk and merged in the *subject*. Here with us the man is exalted to the sovereign—every freeman has around him a zone of inviolability, an odor or aroma of sovereignty. There, there is a graduated series of subserviency in the organic structure of the government, from the King down through the *titular ranks* to the lowest vassal. *Here* there is, as I have already told you, no disparity between men. There the King is the fountain of all honor and possesses exclusively all the attributes of sovereignty. Here the people are the fountain of honor and the sole sovereigns. There the subject may be degraded without dimming the luster of the diadem—here the citizens can not be degraded without sullying the sovereignty of the nation.

§ 334. How long, gentlemen, think you, would the freedom of the people last, after they had been fully trained to *running* (according to Mr. Hardin's view of the law), each from the other? But *cui bono* require him to run? for when his flight is impeded by a wall or any other impediment he may slay his pursuer. Why may not his honor, the spirit of freedom, and the pride of his own conscious self-worth, constitute the wall or impediment? Can it be expected of men whose

spirits have been trained to run from their equals, who have *no honor of their own*, that they will rush to the standard of their *country's honor*! But what is their country's honor? In what does it inhere, and where is it garnered up? Let the gentleman answer me these questions, and then tell me that when he is exposed by the assault of his fellow-citizen to the danger of losing his life, or of great bodily harm, he should run from his assailant.

§ 335. Sirs, the honor of the country is garnered up in the breasts of her citizens. It is the oxygen gas that sustains, animates and warms their souls, and spurs or allures them on to enterprises of goodness and of greatness. It is a sparkling nectar quaffed only by *freemen*. It is the elixir of moral life. Gentlemen, be assured that the man who will run from a domestic, will run from a foreign enemy, for man is a unit. Teach him by your laws to run away and you will in vain expect him to advance upon his country's enemies. In England the King makes war at his pleasure and fights through it with an army of vassals reduced by discipline into a mechanical compaction. There, the army is a mass of automatons, a mere machine. Here, the people declare war and fight through it with armies of freemen. There, the sovereign declares war and fights its battles with armies of vassals. Here, the sovereigns declare war and themselves constitute the soldiers who fight its battles. *There*, bravery or cowardice in the soldiery is a matter of indifference. *Here*, bravery in the soldiery is essential—is a *sine qua non* to success. Is it wise, then, I would ask you, gentlemen, to construe our laws so as to enfeeble or extinguish this spirit of our citizens—a spirit upon which not only our free institutions but our very independence as a nation depends? What would we say of the wisdom or foresight of the farmer who, instead of destroying the weeds which infested his corn as it grew in his field, would destroy his corn and leave them to grow and flourish? But this construction of the law for which I am contending is not necessary for the justification of Mr. Murdaugh. His case does not need it. He was so hemmed in by the conspirators and the bar that he could not run if he *would*, and my word for it he *would* not if he could. Gentlemen, these three strangers are not of the running blood. They are not from a State where the running breed is much esteemed—where that spirit is countenanced and propagated. The State of their residence is not yet old and degenerate enough to patronize that description of men; besides, the sun, whose influence is mighty in the concoction of the fluids of animal as well as vegetable life, does not in that climate much favor the concoction and growth of dastardly spirits. But he could not, gentlemen, as you must be convinced, have even given back.

§ 336. He did all that he could, and more than many men would have done; for, under the lash of the cow-hide, and the blows of the cudgel, and

fists of his assailants, he took the knife out of his right hand which was held by Meeks, into his left hand, and by such exertions as he could, with it extricated his right hand from the grasp of Meeks, and with it resumed the knife, and by killing Meeks rescued himself from the vile band of conspirators who had assailed him, and thus saved his life. Was he, under the facts of the case, justifiable in doing so? Could he have done less, or having done less, could he have saved his own life? I think I hear each man of you say to himself that you applaud him for what he did, and only regret as good citizens that from his feeble structure and the overpowering, odds against him he was unable to have done more. I predicate my supposition of your regret that he was unable to do more upon what I know to be the abhorrence which every good man feels of lawless conspiracies and of mobs. Mr. Hardin has charged a mobbish spirit upon the Mississippians. He has overlooked the mob against the Ursuline Nuns, in the land of steady habits, and the frequent and triumphant mobs in New York and Baltimore, and fastened his eye upon the mob which took place at Vicksburg some years ago. He multiplies that into many, and clothes it with terrific horrors.

§ 337. With him I reprobate all mobs, but I detest more especially those that are formed against helpless innocence, as in the case of the defenseless Ursulines, or against the tranquility and good order of society, as in New York and Baltimore; but it is the province of intelligence to analyze and graduate even crimes. I conceive that there were some palliating circumstances in the affair at Vicksburg. It was not a deliberate, cold-blooded conspiracy of the *bad* against the *good citizens* of the place. It originated in the sudden and misguided zeal of orderly citizens against a conspiracy of gamblers—it was an evil not unmingled with some of the elements of virtue and goodness. Those gamblers had killed a native citizen of Kentucky, who was a stranger there, enjoying the hospitality of the place. Irritated with their vocation, and excited to madness by the tragic manner in which they had violated the laws of the land and principles of hospitality in the assassination of Doctor Bodly, suddenly, and in a paroxysm of resentment, they hung some two or three of the gamblers. Judging, therefore, of the Vicksburg mob from its object and its cause, I find in it many mitigating circumstances; but am far, very far from approving it. I repeat that I reprobate all mobs—even those which are raised and exerted on the side of virtue and the laws—but what has that mob to do with this? How can it mitigate the conduct of the mob in this case, or aggravate the condition of the defendants? Does the gentleman wish you to appease the *manes* of the *gamblers* who perished in that case by sacrificing the lives of Messrs. Wilkinson and Murdaugh in this, because they are Mississippians, though not residents of Vicksburg?

Or is he attempting to palliate the foul conspiracy in this case by offsetting it against that, and thereby to weaken the defense of the accused? That can not be his object—it would be too absurd. His object must have been to excite your indignation against the conduct of the Missisippians in *that case*, and transfer the odium of it to the accused because they are from that State.

§ 338. But let me tell him that if he hopes to gain anything by exciting the passions of this jury he miscalculates. He is not now amid the fervors which this case excited where it happened. He can not here produce the volume of passion which the false and erroneous misrepresentations of the conspirators produced there, and to the propagation and extension of which, he, by the force of his acknowledged talents, exerted before the examining court, contributed. *Here* he can not, as *there* he did, to a considerable extent, excite the mechanics and working classes against the gentlemen slave-holders and cotton-planters. Thanks to a just Legislature, we are now before a tribunal uninfected by passion and without any predisposition to take, even by contagion from him, the maddening infection.

He can not hope to disparage the accused before any rational tribunal by inveighing against the habit of wearing arms. Strangers and travelers have been allowed, in all countries and by all people, to wear them—and even citizens of the meekest and purest characters have worn them in their own country, aye, and used them too, upon occasions far less urgent than that of the accused. It is wise sometimes to wear them in large commercial cities. Even in Louisville it is prudent for strangers to wear arms. The knives of the defendants saved their lives at that place beyond doubt. Now the resident population of that city is as worthy, as peaceable, and as orderly, as the people of any place whatever; but there is there, as in all other commercial cities, a floating mass of people who prowl the streets, especially at night, from whom all who might be supposed to have money or other valuables have much to apprehend. When I say the wise and meek have carried arms, and used them too, I allude to the Apostles—you all remember that the Apostle Peter drew his sword and smote off the ear of the high priest. This is an instance in which arms were not only worn, but used to protect a friend.

§ 339. Gentlemen of the jury, I repeat what I said before, that the wearing of arms by citizens within the jurisdiction of their State, and in the bosom of society, is an evidence of the weakness and degeneracy of their Government. The object of Government is to protect the good and the virtuous against the bad and the vicious portion of mankind. When the *good* wear arms it is evidence that they can not confide in the Government for protection, and are obliged to rely upon their own vigilance and energies to save themselves from the bad. And whenever

good men use their arms efficiently and successfully, and tragically if you please, against the mob or a conspiracy by which they are assailed, instead of the animadversion of the Government they are entitled to its thanks and its gratitude.

Sirs, I speak the language of soberness and truth when I tell you that the fall of Meeks and Rothwell, which we all deplore, by the arms of the assailed, has done more, by tenfold, to repress and put down mobs and conspiracies in Louisville, and throughout the State of Kentucky, than the execution of those ill-fated men by the Government for the killing of one or all of the accused, had the accused fallen by their hands. There would be no mobs if it were certain that one or more of those who form the mob would certainly be killed. The principle of combination in a mob is, as I have before told you, *cowardice*. Each would *fear* that *he* might be slain, and thus, and for the same reason, every other man of them would abstain from the combination. Those assailed, therefore, by a mob should be considered by the people of every State as authorized by the Government to kill as many as possible of the assailants; and so, indeed, they are to be considered, under a wise and just interpretation of our laws, which, when they can not protect the citizen leave him to protect himself under the paramount authority of the law of nature.

§ 340. I say boldly, but calmly, that Murdaugh and the Judge are entitled to the commendation instead of the reprehension of all good men, who believe as I do, and I am sure you must, that they acted each in defending himself and friends against the assaults of an infuriated mob—but I was speaking of the case of Murdaugh, so far as it presents itself as an individual case, and urging that in view of the position he occupied, and the aggregate force and physical violence with which he was assailed, he was strictly, and under the sternest construction of the law justifiable in killing the unfortunate Meeks.

And, gentlemen of the jury, I can not pass over a fact in this case, to which I have as yet paid no special attention; I mean the attempts to degrade Mr. Murdaugh, and with and through him, the Judge and the Doctor, by the stripes which Meeks repeated upon him with the cow-hide. Recollect the testimony of Oliver, from which it appears that such was the determination of the conspirators to degrade, as well as beat the accused; that Meeks prepared the cow-hide for his grasp, by knotting the small end of it. You can not doubt, but that it had been settled by the conspirators that he was to apply the cow-hide to their backs while they used their cudgels, knives, and other weapons in protecting him while going through the process. Hence the rush of the conspirators around Murdaugh when Meeks had seized his knife hand, and commenced upon him with the cow-hide, and hence the readiness with which he surrendered to Oliver the knife with

which he had armed himself before the task of using the cow-hide had been assigned to him. And hence it was that *he* was selected to use it, being the *smallest man* among them, to enhance, by his *smallness of stature*, the contemplated degradation.

§ 341. Now, gentlemen, Mr. Hardin, a Kentuckian, tells a Kentucky jury, aloud too, in the hearing of perhaps a thousand Kentuckians, and, what is more astonishing, in the presence and hearing of near two hundred ladies, matrons and maids, that Mr. Murdaugh was in no danger of being *hurt* by a *small cow-hide* in the hand of a *small man*—that he was in no danger of being wounded, maimed or killed by the cow-hide, and that therefore he had no right to kill Meeks for applying it to his back; and he quotes the aforesaid law of England, which requires a *liege subject* to give back, and flee from his fellow-subject until obstructed by a wall, or some insuperable impediment, before he kills his assailant, and then he can kill only to save his own animal life, and not the life of *himself* from the degradation of being cow-hided!!! Sirs, how did you relish the law and the reasoning of Mr. Hardin upon this subject? Do you believe with him, that the man, like the hog, consists in mere animal structure? that, like that animal, he suffers only from violence, inflicted upon his natural organic nature? that his pleasures and his pains consist alone in animal sensation, and that all the attributes of excellence in his character are essentially in bone and muscle?

§ 342. Ask any of those matrons, who adorn the bench above you, what she would think of a young man who was addressing her daughter, with his back striped by the prints of the cow-hide? Ask her daughter what she would think of such a suitor! Can you doubt the reply? Would not such a man be loathed and scorned by both mother and daughter? Sirs, there are sins against individuals as well as sins against Heaven, which can only be expiated by blood—and the *law of Kentucky* is, that the man who is attempted to be *cow-hided*, not only *may*, but must, if by any possibility he can, *at the time*, kill the man who attempts thus to degrade him. I do not refer to a law of Kentucky, enacted by the Legislature of the State; I mean a law paramount to any enacted by the Kentucky Legislature—a law that emanates from the hearts of the people of Kentucky and is sanctioned by their heads—a law that is promulged in the *os ad cœlum* of every Kentuckian, and proclaimed in the sparkling of every eye of both sexes and all ages—a law, the force of which every one feels, the import of which every one perceives by intuition. It is a law of *Kentucky instinct*. None are so ignorant as not to know this law; few are so dastardly as to deny its injunctions.

§ 343. Gentlemen, in Kentucky, as in all the slave States, the cow-hide has a meaning and associations which are not known in England and those of our own sister States where slavery does not prevail; it is employed only to correct slaves—slavery and freedom are antipodes.

The first, with us means the *nadir* of human degradation; the latter, the zenith of human rights, or rather of political and civil rights. The slave is considered a mere animal, a biped, without any of the attributes of political character. Whether this relative position of the slave and citizen is right or wrong, is not now to be discussed. The relation of slave and free citizen exists, and we can not help it; the destiners so ordered it, and the sentiment, which I urge as the *Kentucky law*, is but a promulgation of the principles of fitness, which result from that relation. It is a sentiment identified with our souls, hearts and heads, and constitutes an essential element of our moral entity.

§344. Gentlemen, I wish to be understood upon this point. I understand the term man to mean a moral being, and his animal body, to be a mere casket, made to contain and preserve the *jewel*, the *morale*, which is really and essentially the man. That the moral man being immortal, and of celestial origin, and enclosed in a machine so fearfully and wonderfully made, is under a high obligation to vindicate the safety of that machine so essential to the performance of his moral functions, during his occupation of it; and I consider the obligation of man to preserve his moral nature from degradation, stronger than to preserve his animal structure from destruction. Degradation is the destruction of the moral, as decollation is the destruction of the physical man. Now, sirs, the health of our moral nature is generally more necessary to our comfort and usefulness, than the health and integrity of our organic structure; moral health consists mainly in sanity of intellect and unsullied honor. It is not the wound inflicted upon his body that a man, who feels and knows how to estimate his own intrinsic dignity and conscious self-worth, regards; he rates that comparatively at nothing. It is the wound inflicted upon his character and upon his conscious self-worth—his moral entity, that agonizes him; and there is no wound of that kind that agonizes and ulcerates like the *cow-hide*—it is incurable, and subjects him like the disease of the leper among the Jews, to be driven from the society of men. It does not, and perhaps can not, kill the body, but it destroys the man; and by as much as the man is more important and more valuable than the body he occupies, by so much more is it justifiable to destroy the assailant of the former, than the latter; and yet Mr. Hardin, who here admits that a man, to save his animal life, may kill the assailant, and denies that he may, to save his moral life, or rather himself, do the same. Sirs, I repudiate, with all my soul, the doctrine that a man consists of his mere animal hulk; that he is a mere automaton. That is the definition of man in his vassalid condition, of a slave, whose actions are controlled not by his own will, but by that of his master, and might perhaps be true of an oyster or a snail, but not of man in a state of freedom. As a slave, his entity consists in his mechanical utility to his proprietor. Fear with

him is the stimulant, the only motive to action, and the fear of the laceration of his body with the cow-hide; but man in his native freedom, or in the freedom of self-government, is an etherial, refined, invisible and sublimated substance. He is the moral being that occupies the clay tenement, and *wills* its motives and its actions, but not limited in his *powers* and *aspirations* by its limited aptitudes. The mere animal man can not leave the surface of his kindred earth; but the real man, the moral and immortal essence, can not, will not, stay upon earth's dirty surface; will not be confined within the narrow limits of his organic tenement — except in reference to the physical needs and brases of its nature, as, to all moral purposes, he ranges at large, limited only by the calibre of his intellectual energies. Newton ranged among the stars, and Milton made himself familiar with both the supernal and infernal regions.

§ 345. But let us appeal to occurrences in human life. Have you not, gentlemen, all, or some of you, especially in early life, been embarrassed, agitated and confused upon entering into a room in which there were ladies? What produced the embarrassment? Had there been no lady in the room you would not have been thus affected. The lady was in a remote corner of the room, say twenty feet from you, and yet she embarrassed you. How, in what manner, and by what process? She did not approach you; she continued at the distance of twenty feet from you, and yet acted upon you. But nothing can act where it is not, and therefore she acted out of, or beyond the limits of her animal identity. Sirs, the ladies with whose audience we are honored during this trial, have been exerting a benign influence upon all within this house, proximate or remote. There is, gentlemen, radiating from the physical structure of every individual, moral energies, feebler or stronger, in proportion to the calibre of his intellect, which, like the light and heat emanating from the sun, act upon distant and distinct subjects. Shall, then, this aura, this aroma of the soul—shall the divine essence of volition, be tarnished, sullied, degraded and annihilated by the stripes of a cow-hide, because the process does not threaten the destruction of the body? But, gentlemen, this subject is more distinctly and emphatically one of intuitive perception than of reasoning. In its metaphysical aspect it is different, at least to me.

But I do believe there never was a Kentuckian who would not rather perish than submit to be cow-hided. It is not a matter to be reasoned about—it is a settled sentiment, inveterate and hereditary, not to be altered by any law of England, or of this country either. The man who does not, if he has it in his power, kill the man who attempts to cow-hide him, had better be slain himself. Public sentiment, I repeat, expects and commands him to do it, and surely it is not necessary to any good political, moral or religious purpose, that the privilege should

be accorded to any freeman to cow-hide his neighbor. It is unqualified ruin to the man who submits to it. It throws him into exile in the midst of society; he is shunned by even the refuse and offal of society, loathed and abhorred. The finger of scorn and derision is pointed at him from every quarter, and even by cowards.

§ 346. Gentlemen, the stroke of the cow-hide over the head and shoulders of Mr. Murdaugh was an assault upon his life more deadly than any—than all the assaults made by the mob on that evening. He could not run from the cow-hide; that would have been disgraceful and dishonorable; and what a man can not do honorably he can not do at all. He was obliged, therefore, to kill him, for that, if for no other cause. That was in itself a *legion* of causes. But without that, he had, as the proof evinces, abundant justifying cause.

But, gentlemen, let us test the matter by the good old rule, of asking ourselves how we would have acted—what we would have done in the like case—what would we do to the man who would attempt to cow-hide us? What, sirs, would we have our sons do in such a case? Let me answer for myself, and I think my answer will be yours. I am now an old man, and the blood circulates languidly in my veins; but languid, as the chilliness of age has made me, I declare solemnly in the face of high heaven, and this numerous crowd, that I would, if I could, kill the man who would attempt to cow-hide me; and I should think it the greatest misfortune of my life not to have it in my power to do so at the time; for I could not present myself to my wife and my children after having submitted to disgrace; and I would have my son to do so, too—to do as Mr. Murdaugh did. I would rather he should have perished in attempting to defend his honor than live disgraced. In the first case, I should feel bereaved and mourn his death, but cherish and respect his memory; in the last, I should be mortified and humbled among men. I should have suspected that his mother, of whose fidelity a doubt had never crossed my mind, had dealt foully with me, and disinherit him; and so say you all, gentlemen, in reference to yourselves and your sons; so says every Kentucky father.

§ 347. Do not mistake me, gentlemen; I rate human life as high as any man in existence. I would not trifle with it; I would not have it destroyed on slight causes. It is only when a man is in danger of enormous bodily harm, or of losing his life, that I would allow him to shed the blood of the assailant; but to *spit* in a man's face, to pull his nose, or to cow-hide him, is, in my estimation, the most enormous bodily harm—a harm from the consequences of which he can only redeem himself effectually by instantly demolishing the assailant if he can. To the list of injuries and assaults which I have mentioned, I would add a kick with the foot on the *seat of honor;* but in front of these, and by far

the most to be abhorred, is a stroke with the cow-hide. In fine, gentlemen, a man must preserve his *honor*. It is the verdure of his soul; it is the anticeptic of his nature, the strengthener and guardian of his morals. It must, I repeat, be preserved at all hazards. So says public sentiment, the tribunal from which there is no appeal.

§ 348. But I will not further detain you. I have already detained you, I fear, too long; and yet, long as I have detained you, I have not (nor has any of my coadjutors), made any appeal to your *feelings*. No attempt has been made to excite your sympathies—no invocation to your mercy. Here the cases did not need, and the high character of the accused forbade any such resort; all they wanted they obtained in you, gentlemen, an intelligent, honorable and impartial jury. They have been, and so have been their counsel, more concerned about the moral than the legal aspect of the case. They knew that they stood acquitted and justified by the law of the land whenever its impartial voice could be heard. They did not, therefore, deprecate its sternest, its most rigid action upon their case; but, like all honorable men, they have been keenly alive to the moral aspect of their posture. Their anxiety is, and has constantly been, that the public mind should, through this trial, which they are now undergoing, be *disabused* in reference to their conduct. You can not but have perceived that no concern for the *mere personal safety* of the accused has been displayed throughout the trial. The counsel who have preceded me have argued the case with wonderful ability, but evidently with no apprehension of a dangerous result. In fine, gentlemen, this case has been argued, through you, to the people. My arguments, had I felt concern for the safety of the gentlemen I represent, would, I feel sure, have been more analytic and consecutive than they have been. The gentlemen who had preceded me had reaped the field, and left only a few straggling stalks to be gleaned; and after such reapers no man could gather a respectable sheaf. I have not, therefore, attempted to take up, analyze and apply the testimony; that had been done ably and demonstrably by my distinguished and talented coadjutors, and I could not think of disgusting you and tiring out myself by reiterating it.

I feel that I have been irregular and discursive, much more so than had been my wont in years gone by, and I ascribe it, in some degree, to the causes I have just named. You, perhaps, may ascribe it to the growing weakness of senility, and to guard against further exposure of weakness from that or any other cause, this shall be my last forensic effort. But before I close it, let me suggest that it would be courteous to these already much injured strangers, and in keeping with just notions of national hospitality, to render your verdict (which I know well will be one of acquittal), without retiring from the box. I barely

suggest it. *I ask nothing* from you but the performance of your duty. I only suggest that it is your *privilege* to give in your verdict without retiring. You will exert that privilege or not, at your pleasure.

ARGUMENT OF THE PROSECUTING ATTORNEY.

Mr. Bullock, prosecuting attorney, then rose and spoke in conclusion as follows:

§ 349. *May it Please the Court, and Gentlemen of the Jury:* You, gentlemen, have not disappointed the expectations I had formed of the attention you would give to the questions of law, the evidence, and the arguments of counsel in this great and important cause. I feel a pride in considering that so intelligent a jury could have been so easily and with so little exception, selected from our jury panel. I feel no less pride in confiding to you the scales of justice, which I know you feel it is your duty to hold up steadily and with an even hand. It is no small part of my duty to see that nothing be thrown into either scale, which the law says can not be admitted, as the measure of justice.

I have listened with great admiration to the splendid effort made for the defense by one who has risen in this court for the first time, though distinguished and honored throughout the Union for his unrivalled powers of eloquence. But, gentlemen, however much we may be fascinated, we must reflect that the brilliant flowers of language addressed to the passions, have no sympathizing response in the laws of the land. All that has been said to delight the fancy and to distract your attention from the simplicity of the facts must be discarded, that your cool reason and dispassioned judgments may have free scope. And I would ask you, gentlemen, whether, in your efforts to arrive at a just conclusion, you will be guided by the coruscations of the gentleman's fancy, or the sunlight of sober truth and reason.

§ 350. Gentlemen of the bar will figure to themselves many foundations for their assertions, which exist nowhere but in their own imaginations. It is a misfortune to these gentlemen, as it frequently is to others, that the law is not to be meted out to them according to their peculiar notions of the standard of measure. It is, no doubt, considered by them, too, a misfortune, that when they wish to make evidence appear improbable, that does not exactly suit their views; they can not beat down a witness by facts, but are driven to the necessity of exerting talents so transcendant as those of Mr. Prentiss, in blackening, vilifying, degrading, and insulting those who are defenseless and unarmed with equal talents, or equal opportunities of displaying them. Indeed, it seems to be a matter of complaint in this defense that these gentlemen should at all be suspected of offense, much less brought here under the implication of crime. However, the counsel for the defense may think it necessary to resort to such tortuous paths, I, at

least, shall not follow their example. I shall endeavor to redeem a pledge I made on the outset, that I would not consume your time by traveling out of the straight path of the evidence and the law.

If Mr. Prentiss, or any other gentleman, believes that in speaking of Mississippians, I alluded to their country disparagingly, I hasten to remove the unjust supposition; and I can, with confidence, say that in the performance of my duty, I know no difference between a Kentuckian and the inhabitant of a sister State. When I used the appellation it might have been in reference to the greater relaxation of the law there respecting the use of arms, but certainly not with a view of raising a prejudice against these gentlemen on this trial.

Gentlemen, you are not to ask whether they are Mississippians or whether they are Kentuckians. You are to decide according to law and evidence, regardless of passions, prejudices or sympathies, or the complaisance due to sister States. You are also to disregard the peculiar laws and customs of those sister States, and to decide according to the laws recognized in Kentucky alone.

§ 351. I will here touch upon a point not urged by Mr. Hardin. It is on the subject of character. One of the most felicitous passages in Mr. Prentiss' speech was that in reference to the character of these gentlemen, and I am willing to accord to it all that weight which the law allows, but no more. However high these gentlemen may stand in the estimation of the citizens of their own State, yet their character is enitled to no more consideration than the law allows of in cases of doubt. But where no doubt exists, are you to consider character, however exalted, an impunity from punishment, or suffer it to wipe away from the insulted majesty of the law, the stain fastened upon it by the blood shed by their hands in the Galt House? Starkie, second volume, page 214, lays down this rule: "Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence may arise from his former conduct in society. Such presumptions are, however, remote from the fact, and are entitled to little weight, except in doubtful cases." (*a*)

If these gentlemen are entitled to that triumphant acquittal—to the acquittal by acclamation invoked from you—why have their advocates, who are lawyers of great learning, thrown the character of their clients into the defense, when they knew you could weigh that subject only when guilt or innocence is doubtful. 'Tis only (and they well knew it) where the scales are equipoised that character, like the sword of the Gaul upon the Roman battlements, can be thrown in to make either preponderate. Another thing they urge is that Judge Wilkinson, placed in such delicate circumstances as he was in regard to his

(*a*) As to character of defendant, see *post*, § 566-7-8.

contemplated marriage, would be the last to engage willingly in a fight or angry controversy. Unfortunately the Judge's own conduct offers a refutation to this argument. He displays none of that forbearance and unwillingness to embroil himself in fight, when, without provocation, upon a slight and imaginary insult, he attacks the poor tailor in his own shop.

§ 352. Judge Rowan and Mr. Prentiss would have you believe that the common law of England should be made to bend to the peculiar circumstances of their defense. Will you, gentlemen, change the law? Will you warp and bend the common law of England, adopted by our constitution, and to which we owe protection of life, personal liberty and property? I am well assured you will not take upon you to judge how the law ought to be bent, when you are told and must feel persuaded that you are bound to take it as it is. Were you, indeed, in another place, delegated to the halls of your Legislature, you might individually make the attempt, unavailing though it might be; but here you can not—you ought not. Some such notions as those of the gentlemen gave rise, I have no doubt, to the act of Assembly, which I will now read—second volume Dig. L. Ky., page 1295: "Whereas It is represented to the present General Assembly that doubts exist," etc., "Therefore, Be it enacted," etc., "That nothing in the before-recited act shall be construed to change or alter the definition and punishment of murder by the common law," etc.

Here there is the re-enactment of the common law, and here your own Legislature tells you that you must not be led away by the sophistry of counsel to believe so foolish a thing as that you are permitted to bend the law to suit their purposes. Is the law to be warped because they conceive there is a degradation in being struck with a cow-hide? It is also a degradation to be called a fool or a liar, but the law says words are no excuse for even an assault, and where are you then to draw the line of demarcation?

§ 353. There is a spirit of licentiousness abroad, which, if not checked, may lead to consequences not to be contemplated without horror. This licentiousness has already been suffered to go too far. But why need I stand here to tell you of what you all know, or to defend the laws, for they defend themselves? Neither is it necesssary that I should stimulate you to the keeping of your oaths, or to admonish you that you have sworn solemnly to administer the law in justice no less than in mercy. I am bound to take it for granted that you will do so. I have, indeed, an admission from the gentlemen that the common law of England governs the case, and not adventitious notions of what ought to be the common law.

I know it is the customary resort of lawyers to ask you as jurors to place yourselves in the situation of the accused, and say how you

would act under similar circumstances. My answer would be that with similar motives, similar passions, similar disregard of the laws, as well as similar circumstances, I would act precisely as they did.

These gentlemen have taken what I consider an unwarrantable liberty in denouncing the practice of lawyers taking money in aid of the prosecution from the friends of the deceased. Yet where would now be the fame of the greatest lawyer Kentucky has ever boasted of had the precepts of the gentleman's own ethics applied to his own practice. He can not see the difference between a man who kills a man for his money and the man who takes money to kill another. That gentleman himself has defended many horse-thieves and highway robbers, and accepted from their polluted hands a portion of their spoils as a reward of his services in snatching them from the fangs of offended law and justice. I need refer to no stronger case than that of John Hamilton, who murdered in cold blood for his money the unfortunate Dr. Saunders. Has not Judge Rowan himself thus fed and clothed his family, fattened and grown rich upon the spoils of thieves and murderers? But, still, I blame him not. "It was his vocation, Hal" Why, then, insult my friend Mr. Hardin on this subject? I need say no more; the argument, of course, goes for nothing.

§ 354. To return to the subject of these gentlemen's readiness to arm themselves for battle. Have we not proved that Murdaugh and Dr. Wilkinson, upon the slightest provocation, were prompt in pulling out their weapons almost upon every and all occasions. Does this argue a disposition willing to be driven to the wall before self-defense renders the use of such weapons lawful?

§ 355. Let me, before I proceed further, endeavor to wipe from the fair fame of Mr. Redding the foul and unjust stigma with which it has been branded. When I attempted to obtain from respectable witnesses, merchants of Louisville deservedly of high standing, men who could have testified to his character in proof of its being esteemed as elevated as that of any man in the community to which he belongs, I was met with the assurance from the other side that they did not intend to question or impeach his character. Yet how unfairly and unhandsomely do they come in after the evidence had closed, with all the vituperation of secure malignity, to stigmatise him as a perjurer and murderer.

[Here Col. Robertson rose to say that they committed no breach of promise, not having assailed Mr. Redding's previous character, but his false testimony before this court.]

MR. BULLOCK: What has he stated that is not corroborated by others whose veracity is unquestioned? He stated that he was assaulted in his own store. Are his details of that transaction unsupported by other evidence? He goes to the Mayor's office. Is that untrue? He asks for a

warrant; is told he must have the names; is offered a warrant with names, to be filled up—declines it—says he would prefer going for the blanks or getting an officer to arrest the parties, knowing only one name—goes by Market street—tells his brother-in-law what happened—is accompanied by him to the Galt House—says that in the bar-room he got the names—asked Judge Wilkinson if he was not the gentleman who had struck him in his own shop. All these things are leading facts, and is he not corroborated in stating them? But an attempt is made to show a disposition to assault Judge Wilkinson in that very observation in question, "I think, sir, you are the gentleman who assaulted me with the poker in my own house or shop." What is there remarkable in that? Does it not corroborate and fit in with his statement about the names, the blank warrant, and many other things? In getting the names he was uncertain of the persons, and to assure himself asks one if he was not the person who had struck him. What could be more natural, to see that he was right?

§ 356. Mr. Hardin has read to you from Foster that no words, however opprobrious, are sufficient to justify an assault—may I not ask, how much less sufficient to justify a killing? However refined and subtile Judge Rowan's notions may be of the nature and value of life, the notion entertained of it by the law is a surer guide. The law says that by it alone you must be guided, and not by vague and indefinite distinctions.

Mr. Prentiss has made a most ingenious argument to prove that a conspiracy existed against these gentlemen; but unfortunately he lays his principal foundation stone upon Jackson's testimony, which we have proved to be a running quicksand and unworthy of trust or confidence. The opposite side contend that Johnson and Redding are not entitled to credit. Well, suppose that were the case—though I am far from admitting it—but suppose the case, what then? Can we not make them a present of their testimony and throw it aside with that of Jackson and Oliver, however unwilling to let them into such company, have we not abundance of evidence as to the leading facts—and how will the gentlemen contradict that evidence? Oldham tells you that while the affair was going on he was talking to some one about bringing a boat down the river from the mouth of the Kentucky, and that he had gone there to see that gentleman upon that subject, and had no knowledge of any conspiracy and consequently no idea of joining in it. Johnson tells you plainly how he got there—he had parted from Redding at the jail and had gone in search of an officer; that he went to the Galt House merely to see the arrest. Rothwell, it is well known, accompanied Redding as his brother-in-law. Halbert boarded in the Galt House, and had as much right to be there as Wilkinson or any one else. Holmes, who was his bosom friend and comrade,

was there on his invitation as his guest. Might not the gentlemen as well ask how came Trabue, Montgomery and others there? Had Montgomery who raised a chair, been killed, these gentlemen might as well be defended for that killing as for that of Meeks and Rothwell.

§357. Another argument is, that these gentlemen were going down to supper—and I do not myself think they were bound to go through any other than the bar-room passage; yet if their object was merely to go to supper, why did Murdaugh come wrapped in his overcoat? I have no doubt that the witness who expected there would be a fight, attended the Galt House for no other reason than that which is so common throughout Kentucky as well as everywhere else, to be looking on wherever there is a fight; for people, in spite of all we can say, will have the curiosity to see what is going on even in the jaws of danger.

I thank Judge Rowan for the fine definition he has furnished of the value of human life, because I may quote what he advances on the subject in proof of the value of these gentlemen's lives, to show that the lives of Rothwell and Meeks were to them and their friends no less valuable—no less precious. And will Judge Rowan say that we must throw the shield of the law between these gentlemen and their temporary loss of liberty, yet deny its protection of the lives of Rothwell and Meeks, to the Commonwealth, when threatened with the loss of two valuable citizens. I tell you, gentlemen, it matters not whether you believe the law ought to be other than it is, you are bound to administer it though the heavens should fall—you are bound to administer it as it is, for you are sworn to do it. How does Mr. Murdaugh stand on that point? who showed the first weapon? who brandished his dirk, and seemed to court the combat?

§358. In reference to the opinions of Mr. Prentiss and Judge Rowan, that a man's right to self-defense is founded upon his own notions of right, I have a few observations to make. If that were really the law, in the name of common sense, could any man ever be convicted? Does the law quoted by them actually establish such an absurdity? Far from it. Their doctrine is too wire-drawn for their purpose. The words of the law say there must be satisfactory proof that the danger was imminent. I have said before that the law presumes the guilt of the slayer until his innocence is shown. There must be evidence of that innocence where there is ground to presume guilt. We have proven the fact that Rothwell and Meeks were killed. Must not these gentlemen who killed them prove their innocence?

In reference to a point made against me, if I said, as is alleged, that a man has no right to kill another who is slaying his brother, I meant to say that he had no more right from the circumstance of relationship than he had without it; but I did not intend to deny the right of any

man to prevent a killing by slaying him who is in the act of committing a felony. Now, when Judge Wilkinson made the fatal stabs with his knife, is the fact proven that his brother was in such apparent and imminent danger of immediate death as to justify his interference upon the principles of the case read by the gentleman from Lord Hale?

Gentlemen, you have been detained a great while on this trial. It is justly considered an important trial; the manifest anxiety of a crowded court evinces it. You have been told that owing to peculiar circumstances you are to bend the law of England common to this country; that because a cow-hide has been used, which here is considered a degradation; that because of these things you are, at the request of these gentlemen's advocates, not alone to acquit the prisoners, but to acquit them with plaudits, and to excite the applause of the crowd. You are told all this, though it is known you have a grave and solemn duty to perform; though it is presumed you have heard of the majesty of the law, and though you see before you that majesty represented with such dignity by the presiding Judge of this court. These things are not to be overlooked. If the law is to be vindicated, if it has been broken, if it has been violated, render your verdict in its vindication. If you believe these gentlemen innocent, acquit them, but do it with propriety. But I would entreat you to deliberate; and whether you vindicate the offended laws or restore the innocent to society unscathed, in rendering your verdict remember that this is not a theater, but a solemn court of justice. Gentlemen, the case is with you.

[Concluded at fifty-five minutes past three o'clock.]

The jury remained in consultation exactly fifteen minutes, and upon returning to the court and being called over, gave in the following verdict. On the indictment for the murder of John Rothwell:

"In the case of Edward C. Wilkinson and others, for the murder of John Rothwell, we of the jury, find the within-named defendants, and each of them, NOT GUILTY of the offense charged against them in the indictments. ROBERT ALEXANDER, *One of the Jury.*"

The same verdict was rendered on the indictment for the murder of Alexander H. Meeks.

APPENDIX.

A

The following is a copy of a petition and accompanying certificate presented to the Legislature by defendants in this cause, for change of venue:

To the Honorable the Speaker of the House of Representatives of the Commonwealth of Kentucky:

The undersigned, your petitioners, beg leave most respectfully to represent to your honorable body that they are indicted in the Circuit Court of the County of Jefferson in two separate cases for the crime of murder, and in one case each in the Police Court of the city of Louisville for assault and battery. While your petitioners feel the most thorough conviction that the disaster which led to those indictments was unavoidable on their part, and forced upon them by the necessity of protecting their persons from violence, and, as they believe, their lives from the most wanton sacrifice, at a time when appeal to the laws or refuge to the authorities of the country could not be thought of; while they are assured that from an impartial tribunal they can have nothing to fear, they yet assert, with a confidence in which they think they can not be deceived, that the excitement of the public mind of the city and county where these causes are pending is so intense, so deep and so general, that fair and impartial trials are not reasonably to be expected, and that they look for nothing but injustice and oppression unless the venue of every case is changed by your honorable body to some county not contiguous to Jefferson, nor liable from its position to imbibe the prejudices or catch the contagious feeling of the populace of Louisville. Your petitioners are advised that aid in this matter of the change of venue can only be afforded them by your honorable body, and they therefore pray you will extend that aid by passing a law for that purpose.

Convinced as they are that their apprehensions are not idle or groundless, but the result of a very calm and careful, though anxious survey of the condition of public sentiment with reference to their cause, since the catastrophe out of which it grew to the present time—and, as in duty bound, they will ever pray, etc.

EDWARD C. WILKINSON,
JOHN MURDAUGH,
BEN. R. WILKINSON.

JEFFERSON COUNTY COURT.—This day came the parties whose names

are affixed to the foregoing petition and made oath in due form of law that the matters and things stated in the said petition are true. Given under my hand and seal, this 14th day of January, 1839.

DANIEL C. BANKS, *J. P.*, *J. C.*

B.

On an application of Judge Wilkinson, Dr. Wilkinson and Mr. Murdaugh, to the Legislature for a change of venue, on an indictment found against them in the Jefferson Circuit Court for murder, the undersigned have been called on to express their opinions, whether there is a necessity for such change of venue. They certify that on no occasion have they ever witnessed so much excitement as existed at the time the unfortunate event occurred, and it continued to exist for some time. Since an examination of the testimony before the committing Judge has been heard, there is not so much excitement; that the crowds attending that excitement for a week or more, sufficiently manifested the general feeling in the community. The undersigned are of opinion, that, even at this time, there would be great uncertainty in obtaining a jury who had not heard the testimony or some part of it, and formed and expressed an opinion for or against the accused. And they are of opinion that the ends of justice, as well as it regards the Commonwealth as the accused, would be better attained by a change of the place of trial from this city and county.

R. TYLER,	J. M. CLENDENIN,	H. B. HILL,
J. EVERETT,	JOHN I. GRAY,	JOHN O. COCHRAN,
A. THROCKMORTON,	R. S. WARD,	NATHANIEL WOLFE.
WILLIAM RIDDLE,	ABRAHAM HITE,	

The foregoing contains a true copy of the petitions presented to the Legislature of Kentucky at the last session, for a change of venue, by E. C. Wilkinson, etc., taken from the originals (on file) by me this 26th April, 1839.

JOHN C. HERNDON,
Ass't Clerk H. R.

§ 362. The following is an authenticated copy of the act of the Legislature authorizing the change of venue:

"AN ACT authorizing a change of venue in the case of the Commonwealth against Edward C. Wilkinson, Benjamin R. Wilkinson and John Murdaugh.

1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the Judge of the 12th Judicial District shall be and he is hereby authorized and required to hold a special term of the Mercer Circuit Court for the trial of criminal cases, to commence on the 4th day of March next and continue for and during twelve judicial days if the business require him so to do.

2. That it shall be lawful for the Jefferson Circuit Court and the

Police Court of the city of Louisville, respectively, on the appearance of Edward C. Wilkinson, Benjamin R. Wilkinson and John Murdaugh, in the discharge of their respective recognizances entered into in said court by reason of indictments therein preferred against them for murder and assault and battery, and upon the said accused persons and each of them directing in open court their election and consent to be entered of record, to make an order changing the venue of said cases to the Mercer Circuit Court.

3. That when the said order for the change of venue shall have been made in conformity with the second section of this act, it shall be the duty of the Judge of the Jefferson Circuit Court and Police Court, respectively, to require the said Edward C. Wilkinson, Benjamin R. Wilkinson and John Murdaugh, respectively, to enter into recognizances in such penalty and with such surety or sureties as may in the discretion of such Judges, respectively, seem proper, conditioned for the appearance of the said Edward C. Wilkinson, Benjamin R. Wilkinson and John Murdaugh, severally, at the Mercer Circuit Court on the said 4th day of March next. And it shall also be the duty of said courts to recognize the witnesses for the Commonwealth in said cases to attend at the said Mercer Circuit Court on the said 4th day of March next. And when the said changes of venue shall have been ordered in compliance with the provisions of this act, it shall be the duty of the clerk of the said courts, respectively, and they are hereby required, forthwith to transmit to the Clerk of the Mercer Circuit Court the indictments against said Wilkinsons and Murdaugh, and likewise all bonds, writs, recognizances or other papers filed in said cases, together with full and complete copies of all orders made in said cases by the sheriff of Jefferson county, and the clerks of said courts shall take from the sheriff a receipt for the papers so to him delivered. And it shall be the duty of said sheriff with all possible despatch to deliver said papers to the Clerk of the Mercer Circuit Court and take his receipt for the same; and upon said sheriff producing said receipt to the Judge of the Jefferson Circuit Court, it shall be his duty to make an order allowing said sheriff six cents per mile for each mile by him traveled in going to and returning from the said county of Mercer, which said allowance shall be paid out of the treasury.

4. That if either of said clerks or the sheriff shall fail or refuse to comply with or perform the duties imposed upon them and each of them by this act, the party so offending shall be subject to a fine of one hundred dollars, to be adjudged against him or them by the Jefferson Circuit Court upon motion by the Attorney for the Commonwealth, upon reasonable notice being given of said motion.

5. That the Clerk of the Mercer Circuit Court, upon receiving the papers in the said prosecutions, shall set the said cases for trial on the

said 4th day of March, and issue a *venire facias* and subpœna for witnesses as if the said indictments had been originally found in said court. And the Judge of the Mercer Circuit Court shall have as full and complete jurisdiction of said cases, and as plenary power to try and determine the same, as if the offenses wherewith the said parties stand charged and had been committed in the said county. And it shall be the duty of said Court in his discretion to make all such orders in said cases that he might according to law make where the indictments had been found in said court. And the Judge of the said Mercer Circuit Court shall, upon the finding of the jury, pronounce final sentence of condemnation or acquittal, or set aside the verdict or verdicts that may be rendered on said trial, and grant a new trial or trials, if the justice of the case requires it, in like manner as if the offenses had been committed within the jurisdiction of said court.

6. That the Judge of the Mercer Circuit Court shall be, and he is hereby authorized and empowered, to recognize the witnesses on the part of the Commonwealth, to appear from time to time as the said case may be continued; and shall proceed upon all recognizances in the same manner as if the same had been entered into in said court. And in case the indictment or indictments heretofore found against said Edward C. Wilkinson, Benjamin R. Wilkinson and John Murdaugh, or either of them, shall be found or quashed, or the judgments thereon arrested, the said persons so accused shall not for that cause be discharged, but a grand jury shall be summoned, and the case or cases again submitted to them to be acted upon as if the offense had been committed within the jurisdiction of said court; and upon the finding of another indictment or indictments, the said parties shall be again put upon their trial, and the case or cases proceeded in in all respects as if the said offenses charged had been committed within the jurisdiction of the said court.

7. That the sheriff, clerk and jailor shall perform all the duties pertaining to their respective offices in the progress of said trial as if the said cases had properly originated within the jurisdiction of said court. And witnesses attending the said Mercer County Court, in consequence of this change of venue, upon recognizance or subpœna shall receive the same compensation that is allowed by law to other witnesses going out of their counties upon legal process.

8. That no number of continuances granted by the Judge of the said Mercer Circuit Court at the instance of the Commonwealth shall operate the discharge or acquittal of the said Edward C. Wilkinson, Benjamin R. Wilkinson, and John Murdaugh, or any one of them.

A copy from the original, which has passed both branches of the Legislature. January 28th, 1839.

Attest:

T. J. HELM, *C. H. R.*
JOHN C. HERNDON, *Ass't.*

PART II.

THE LAW OF HOMICIDE.

Excusable, Justifiable and Felonious Homicide.

§ 471. Homicide is the killing of a human being. It is not necessarily a crime at all; but it is either excusable, justifiable or criminal, according to the circumstances. Before proceeding to discuss the different grades of felonious homicide, it will be convenient to consider the law of justifiable and excusable homicide. There is no practical distinction, in this country, between these two classes of homicide,—for the result in both cases is the same, namely, an acquittal and discharge from all punishment and restraint, except that in some of the States, by statutory enactment, a party acquitted on the ground of insanity is restrained of his liberty, for a greater or less period. The distinction between justifiable and excusable homicide was once important in England, because, in the latter case, the law presumed that the party was not wholly free from blame, and therefore he suffered a forfeiture of his goods, at least. (1)

Justifiable Homicide.

§ 472. Preserving the distinction between these two kinds of homicide for the sake of order and convenience, the following are some of the cases in which the taking of human life is held to be justifiable:

1. Killing an alien enemy in battle in time of war;
2. Executing a criminal by an officer, pursuant to a death-warrant, and in strict conformity to law; (a)

(1) 4 Bl. Com. 188; 2 Inst. 148, 315.

(a) 1 Hale, 448; *Com.* v. *Daley*, 4 Penn. Law Journal, 158; 3 Greenl. Ev. § 115.

3. For the prevention of an atrocious crime, attempted to be committed by force, such as murder, robbery, burglary, rape, mayhem or any other felony against the person ; (*a*)

4. When an officer of justice, in the legal exercise of a particular duty, kills a person who resists or prevents him from exercising it. (*b*)

But the right of an officer to take the life of one who resists an arrest, or attempts to escape, is a grave question, and requires careful and somewhat elaborate consideration. See *post*, §§ 527, 528, 529.

Excusable Homicide.

§ 473. Excusable homicide (*c*) is :

1. Where a man engaged in a lawful act, kills another by accident ;

2. Where a man kills another in the necessary defense of himself, or those whom he is bound to protect or defend, viz.: those between whom and himself any of the domestic relations exists, such as that of master and servant, husband and wife, parent and child. (*d*)

§ 473*a*. There is another case of non-punishable homicide, which should be named as excusable, viz.: where the perpetrator, by reason of tender years or insanity, is incapable of committing a crime or forming a criminal intent.

Self-Defense.

§ 474. As the plea of self defense is the most common case of excusable homicide, it is proposed to consider it in this place, with a considerable degree of elaboration. Before proceeding further, however, it is proper to inform the reader that much that is laid down here, from the common law authorities has been materially modified by decisions in the various States.

(*a b*) 4 Bl. Com. 178, 180 ; 1 Russell on Cr. 665, 670.

(*c*) Bick. Cr. Practice, 269.

(*d*) 4 Hale, 484 ; 21 Ind. 23 ; 23 Ind. 231 ; 24 Ind. 151 ; 43 Ind. 371 ; 45 Ind. 518 ; *Stratton* v *State*, 30 Miss. 619 ; 51 Ind. 407 ; 51 Ind. 453 ; 56 Ind. 122 ; 57 Ind. 80 ; *U. S.* v. *Wilberger*, 3. Wash. C. C. 515 ; *Short* v. *State*, 7 Yerg. 510 ; *Sharp* v. *State*, 19 Ohio, 379.

§ 475. One of the cases of excusable homicide, is, where one is assaulted, upon a sudden affray, and in the defense of his person, where immediate and certain suffering would be the consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills his assailant.

"To reduce homicide in self-defense to this degree," it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. The jury must be satisfied that, unless he had killed the assailant, he was in imminent and manifest danger of losing his own life, or of suffering enormous bodily harm. So the law is laid down in 3 Greenl. Evidence, § 116, citing 4 Bl. Com., 182; 1 Russ. on Crimes, 660, 661; Whar. Am. Crim. Law, 385, 397.

§ 476. It is to be observed that Prof. Greenleaf, in his work on evidence, title "Homicide," does not allude to the cases wherein the defendant may kill in self-defense, upon apparent danger of death or great bodily harm, where the deceased being the assailant, and the accused being without fault, has reasonable and probable cause to believe, and does honestly believe from the acts of the assailant, that his life is in danger, or that great bodily harm will be done him unless he defends himself. This is a good defense, as will be shown hereafter; *post*, §§ 479, 480, 481, *et seq.*

§ 477. Blackstone says, "That the party assaulted must 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; 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." (*a*)

(*a*) 4 Black. 185; *Wright* v. *The State*, 44 Tex. 645; *Styles* v. *The State*, 57 Ga. 183; *The State* v. *Dixon*, 75 N. C. 275; *West* v. *State*, 2 Tex. App. 460; *Erwin* v. *State*, 29 Ohio, 186; *Tiner* v. *State*, 44 Tex. 128; *James* v. *State*, 44 Tex. 314; *Marks* v. *Borum*, 57 Tenn. 87; *Lovells* v. *The State*, 32 Ark. 585.

§ 478. Such is the law as laid down in the common law authorities. But this doctrine that a man when murderously assaulted must "turn tail and run," (to use the language of ex-President Lincoln), and keep running until he runs against a stone wall or some other impediment, before he is allowed to slay his assailant, has been received with great disfavor in modern times, and may be regarded as almost entirely exploded in this country. Indeed, even at common law, the party assailed was not obliged to flee at all, if the onset was so sudden, or the danger was so imminent, that giving back would endanger his life, or would, under the circumstances be of no avail. If there ever was a good reason for this "running doctrine," it does not exist at this day. It had its origin at the dawn of the common law, before the invention of gunpowder and revolvers. At that time all "gentlemen" wore swords, and the common people carried Sheffield whittles and staves. No body carried a pistol. Then a party assaulted and in imminent danger of death might save himself by running; now the assailed party would probably increase his danger by retreating from the pistol with its "swift and leaden death." The reason for the old law has, in a manner, ceased—therefore the "running doctrine" should cease. *Cessante ratione legis, cessat ipsa lex.* Upon this question the following decisions have been made in Indiana:

§ 479. "Where a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, *without retreating*, repel force by force; and if, in the reasonable exercise of his right of self-defense, he kills his assailant, he is justifiable; and if the defendant, when assaulted, believed, and had reasonable cause to believe, that the use of a deadly weapon was necessary to his own safety, then he had a right to act upon such reasonable belief." (*a*)

(*a*) *Runnion* v. *The State*, 57 Ind. 80; *Erwin* v. *The State*, 29 Ohio St. Rep. 186; *State* v. *Kenedy*, 20 Iowa, 569; *State* v. *Harris*, 1 Jones (N. C.) 190; *Styles* v. *The State*, 57 Ga. 183; *State* v. *Dixon*, 75 N. C. 275; *State* v. *Collins*, 32 Iowa, 38; *Phillips* v. *Com.* 2 Duvall (Ky.) 328; *Tweedy* v. *State*, 5 Iowa, 433; *Bohannan* v. *Com.* 8 Bush (Ky.) 481; *Maher* v. *People*, 24 Ill. 241; *State* v. *Thompson*, 9 Iowa, 188.

"Retreat is not always a condition which must precede the exercise of the right of self-defense." (*a*)

Reasonable Ground of Apprehension—Selfridge's Case.

§ 480. The position assumed by Hon. S. S. Prentiss in the argument of the Wilkinson case, that, if the defendants believed and had reasonable cause to believe and apprehend, from the acts of the deceased, and those acting with him, that they were in danger of death or great bodily harm [the defendants being without fault], they, the defendants, had a right to use the same means of self-defense against *such apparent danger* as if the same had been *real*, although the position was assailed by Hon. Benjamin Hardin as a novel and dangerous doctrine—is sound law, and was not then a novelty, but has always, to a considerable extent, been recognized in principle, in the adjudicated cases and in the text-books.

§ 481. Thus, if the apprehension of an immediate and actual danger to life, or great bodily harm be sincere, it is a defense, if such apprehension be reasonable. This has often been adjudicated in ancient and modern times. (*b*) In an old English case it appeared that the defendant being in bed, and asleep in his house, his maid-servant who had hired the deceased to help her to do her work, as she was going to let her out about midnight, thought she heard thieves breaking open the door, upon which she ran up stairs to her master and informed him thereof; who, rising suddenly and running down stairs with his sword drawn, the deceased hid herself in the buttery, lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving that she was a thief, cried out, "Here be they that

(*a*) *Creek* v. *The State*, 24 Ind. 151.

(*b*) *Shorter* v. *The People*, 2 Comst. 198; *Patterson* v. *The People*, 45 Barb. 625; *People* v. *Cole*, 4 Parker C. C. 35; Wharton Am. Cr. L. § 1026; *Creek* v. *The State*, 24 Ind. 151; *Campbell* v. *People*, 16 Ill. 17; *State* v. *Collins*, 32 Iowa, 39; *Adams* v. *The People*, 47 Ill. 208; *State* v. *Swift*, 14 La. Ann. 827; *Runnion* v. *The State*, 57 Ind. 80; *Jarrett* v. *The State*, 58 Ind. 293; *Com.* v. *Woodward*, 102 Mass. 155; *Maher* v. *The People*, 24 Ill. 241; *Petri* v. *People*, 65 Ill. 18; *State* v. *Burke*, 30 Iowa, 331.

would undo us." Thereupon the defendant ran into the buttery, in the dark, not knowing the deceased but taking her to be a thief, and thrusting with his sword before him, killed her. This was held to be a misadventure. (*a*)

§ 482. Sir William Hawkesworth, being weary of life and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night, as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, was shot by the keeper. This, says Lord Hale, was holden excusable homicide by the statute *de malefactoribus in parcis*, because the keeper was in no fault. (*b*)

§ 483. The statement of Mr. Prentiss, in his address to the jury in the Wilkinson case (*ante*, § 174), that "*reasonable, well-grounded apprehension* arising from the actions of others, of immediate violence and injury, is a good and legal excuse for defensive action," is consonant to reason and fully sustained by the authorities. Perhaps he should have qualified the statement with the condition, "the defendant being without fault."

§ 484. The illustration of Mr. Prentiss (*ante*, § 206), has, in reason, all the force of judicial sanction, viz.: "If mine enemy point at me an unloaded pistol or a wooden gun, in a manner calculated to excite in my mind apprehensions of immediate great bodily harm, I am justifiable in taking his life, though it turn out afterward that I was in no actual danger."

§ 485. SELFRIDGE'S CASE.—This was one of the earliest cases in this country in which the doctrine of "reasonable apprehension," etc., was distinctly recognized and applied by the court. The acquittal of Selfridge, for the killing of young Austin, was regarded by many as a great outrage upon public justice. The homicide grew out of a political quarrel, in Massachusetts,

(*a*) Levet's Case, Cro. Car, 538; 1 Hale, 42, 174.
(*b*) 1 Hale, 40.

when party feeling ran high between the Federalists and the National Republicans. It is most likely that the acquittal of defendant was wrongful, and that the accused should have been convicted of manslaughter at least. Yet the principles of law as laid down in that case by the learned Judge Parker, as abstract propositions, must be admitted in the main to be good law, viz: "That when, from the nature of the attack, there is reasonable ground for a man to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterward appear that no felony was intended. And there must be not only reasonable ground to believe that there is a design to destroy the defendant's life, but that reasonable belief should be based, not on surmises or inferences, but on an actual, immediate and physical attack from the assailant. A, in the peaceable pursuit of his affairs," he said, "sees B rushing rapidly toward 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 any more criminal than he would have been if there had been a bullet in the pistol?"

This is very good law, but the fact was, that it was the defendant, Selfridge ("A"), that had the loaded pistol, and "B" (Austin), had only a cane.

§ 486. The principle has been carried still further in Tennessee. where the Supreme Court decided that if a man, though in no danger of serious bodily harm, through fear, alarm or cowardice, kill another, under the impression that great bodily injury is about to be inflicted upon him, it is neither murder nor manslaughter, but self-defense. (a)

(a) *Grainger* v. *The State*, 5 Yerger, 459; and see *Young* v. *The State*, 11 Humph. 200; *Rippy* v. *State*, 2 Head, 217; *Carroll* v. *The State*, 23 Ala. 28; *Noles* v. *State*, 26 Ala. 31; *Meredith* v. *Com.* 18 B. Mon. (Ky.) 49.

§ 487. The lawfulness of taking life in self-defense depends upon its necessity (or what *reasonably* appears to be necessary). It is not necessary when it can safely be avoided; and therefore it is the duty of a man in such cases not to take life if he can safely abstain therefrom. But the question to be determined by the jury in these cases, is, not whether taking life might in fact have been avoided with safety, but whether the defendant in the circumstances of agitation and peril in which he was placed, might reasonably have believed and did believe it necessary *to use the defensive action which resulted in the death* of his assailant, in order to save his own life, or avoid considerable personal harm. Perhaps the jury calmly investigating the transaction may be of opinion that is was not necessary to take life; but the question is not what they coolly think, but what the defendant might reasonably have believed in the heat of the conflict. (*a*)

§ 488. On the subject of self-defense, it has been held in Indiana that retreat is not always a condition which must precede the exercise of the right of self-defense. (*b*)

To justify the killing of another on the ground of the fear of bodily harm, there must be reasonable cause for such fear, and it is not sufficient to show that the defendant was in actual fear. The criminal law, while indulging to a humane extent, the mere infirmities of human nature, nevertheless requires of sane men the exercise of a mastery over their fears as well as their passions. (*c*)

To justify a homicide on the ground of self-defense, it is not necessary that the accused should have believed that it was necessary to *take the life* of the assailant in order to defend himself. If the death of the assailant results from the defendant's reasonable defense of himself, he is excusable, whether

(*a*) Bicknell Cr. Practice, 274. It will be seen that the language employed by the learned Judge is somewhat modified above; this is done to conform to some late decisions of the Supreme Court of Indiana. *Hicks* v. *The State*, 51 Ind. 407; Whar. on Homicide, 2 Ed. §485; 1 Hale P. C. 479; *Shorter* v. *The People*, 2 Com. 193; *Pierson* v. *The State*, 12 Ala. 149; *State* v. *Vance*, 17 Iowa, 138.

(*b*) *Creek* v. *The State*, 24 Ind. 151; see *Irwin* v. *The State*, 29 Ohio St. 186.

(*c*) *Ibid.*

he intended that consequence or not, or whether he believed that result necessary or not. (*a*)

§ 489. On the trial of an indictment for murder, it is sufficient to establish a case of self-defense, if the defendant being without fault, believed and had reasonable cause to believe from the acts of the deceased that his own life was in danger, or that he was in danger of great bodily harm. (1) Therefore, on the trial of such an indictment, where the evidence was such as to entitle the defendant to a correct instruction to the jury as to the law on the subject, it was error to charge "that there can be no successful setting up of the plea of self-defense in a case of homicide, unless the necessity for taking life is *actual, pressing and urgent*—in a word, unless the taking of his adversary's life is the only reasonable resort of the party who kills his antagonist, and he is compelled to do so in order to save his own life, or his person from great and severe calamity; or, to charge that "self-defense can only be resorted to in a case of absolute necessity." (*b*)

Homicide by Misadventure or Accident.

§ 490. It is excusable homicide, where a man, doing a lawful act, without an intention of hurt, unfortunately kills another by accident (*c*), as where a man is at work with a hatchet, and the head thereof flies off and kills a bystander; or, if a parent is correcting his child, or a master his apprentice or scholar, the bounds of moderation not being exceeded; or if an officer is punishing a criminal within the bounds of moderation and within the limits of the law, and in either of

(*a*) *Hicks* v. *The State*, 51 Ind. 407.

(1) GREAT BODILY HARM.—It is error, in a homicide case, for the Court to charge the jury that "great bodily harm" is such as would give one reasonable apprehension that his life was in danger. *Greer* v. *The State*, 6 Jerry Baxter Tenn. Rep. 629.

(*b*) *Wall* v. *The State*, 51 Ind. 453; *Runyan* v. *The State*, 57 Ind. 80; *Richey* v. *The State*, 59 Ind. 121; *Agee* v. *The State*, 64 Ind. 340; *West* v. *The State*, 59 Ind. 113; *Kingen* v. *The State*, 45 Ind. 518; *Pierson* v. *The State*, 12 Ala. 149; *McPherson* v. *State*, 22 Ga. 478; *Floyd* v. *State*, 36 Ga. 91; *Chase* v. *State*. 46 Miss. 683; *Stewart* v. *State*, 1 Ohio St. 66; *State* v. *Benham*, 23 Iowa, 154; *State* v. *Burke*, 30 Iowa, 331; *Com.* v. *Drum*, 58 Penn. St. 1; *Creek* v. *State*, 24 Ind. 151; *Campbell* v. *People*, 16 Ill. 17; *State* v. *Collins*, 32 Iowa, 39; *Adams* v. *The People*, 47 Ill. 208; *State* v. *Swift*, 14 La Ann. 827.

(*c*) 4 Bl. Com. 178, 179.

these cases death ensues. (*a*) So, if a man shooting at game lawfully, by accident kill another, it will be excusable. (*b*) If a man intending to kill a person who is attempting to commit a forcible felony upon his person or property, by mistake kill one of his own family, it will be excusable. (*c*) And where a man, to protect his grain from deer at night, gave his servant a gun, with instructions to shoot when he heard any rustling in the grain, and, in the night went himself into the field, and the servant, thinking it was the deer, shot him, this was held to be excusable homicide. (*d*) And when a man, shooting at a mark, by accident kills a bystander, this is excusable homicide, provided proper caution has been used to prevent accidents; for, if the mark were placed near a road or path where persons were in the habit of passing, the killing might be manslaughter. (*e*)

§ 491. The subject of accidental or negligent killing will be considered further, under the heads of murder and manslaughter.

Of Murder.

§ 492. At common law, murder is thus defined, or rather described: "Where 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. (*f*)

§493. It is proposed, first to lay before the reader the principles and rules that applied to murder at common law, and afterwards to notice the different grades of felonious homicide, as established by statutes and modern judicial decisions.

§ 494. First, it must be committed by a person of *sound* mind; but, although this is a part of the common law and statutory definition of murder, yet it is not for that reason to be

(*a*) 3 Greenl. Ev. § 116.
(*b*) Foster, 260; Bicknell Cr. Pr. 269.
(*c*) Foster, 260.
(*d*) 2 East P. C. 266.
(*e*) 1 Hale, 38.
(*f*) 4 Bl. Com 196; Whar. Cr. L. § 930; 3 Greenl. Ev. § 130; *McMillan* v. *The State*, 35 Ga. 75; Lewis C. L. 394; *Com.* v. *Thompson*, 6 Mass. 134; *State* v. *Zeller*, 2 Halstead, 220; *State* v. *Norris*, 1 Hay, 429: Russell on Cr. 482; *Com.* v. *Webster*, 3 Cush. 304; *State* v. *Harris*, 27 La. Ann. 572: 70 Ind. Rep. 126; 54 Ind. 128.

distinguished from other offenses—for in all cases, insanity, with certain restrictions, is a defense. And in prosecutions for felonious homicide, it is not necessary for the State, in the first instance, to make any proof of the defendant's soundness of mind; (a) because the law presumes every person to be of sound mind, until the contrary is made to appear. The law in regard to insanity in cases of homicide will be considered hereafter.

§ 495. Next, there must be of course an *unlawful killing*, that is, without warrant or excuse; and the killing may be by shooting, stabbing, drowning, suffocation, poisoning, starvation, exposure, beating, and an infinite variety of other means by which human life may be destroyed. But if a person be indicted for one species of killing, as by poisoning, he can not be convicted by evidence of a totally different species of death, as by shooting with a pistol, or starving. But when they only differ in circumstances, as if a *wound* be alleged to have been given with a sword, and is proved to have been done with a staff, an ax or a hatchet, the difference is not material. (b)

§ 496. "A reasonable creature" simply means a human being. But a child in the womb, is not a human creature "*in being*" within the law. The child must have been born (c); and every part of it must have come from the mother in order that the killing of it will be felonious homicide. (d) The umbilical cord which attaches to her need not be parted; (e)

(a) Nor is it necessary to aver in the indictment that the accused was of "sound mind,' although those words are used in the statute defining murder. *Fannestock* v. *The State*, 23 Ind. 231. When the plea of insanity is interposed, the jury should acquit the defendant, if from the evidence they should have a reasonable doubt whether the defendant was sane when he committed the homicide. *Polk* v. *The State*, 19 Ind. 170. See *post* "Insanity," 1 Arch. Cr. Pr. and Pl. 8th Ed. 16; *Bradley* v. *The State*, 31 Ind. 492; *Stevens* v. *The State*, 31 Ind. 486; *Chase* v. *The People*, 40 Ill. 358; *People* v. *McCann*, 16 N. Y. 58.

(b) 4 Bl. Com. 196; 2 Hale, 185; *Beavers* v. *The State*, 58 Ind. 530; *Carter* v. *The State*, 2 Ind. 617; *People* v. *Colt*, 3 Hill, 432; Roscoe Cr. Ev. 706; *Com.* v. *McAfee*, 108 Mass. 458; *State* v. *Fox*, 1 Dutcher, 556; *State* v. *Smith*, 32 Me. 369; 3 Greenl. Ev. § 135; *Dukes* v. *The State*, 11 Ind. 557; *People* v. *Guedell*, 43 Ill. 226; *Rex* v. *Hughes*, 5 Car. & P. 126: *Stockdale's Case*, 2 Lewin C. C. 220.

(c) *Rex* v. *Brain*, 6 Car. & P. 349; 3 Iowa, 274; *Rex* v. *Crutchley*, 7 C. & P. 814.

(d) *Rex* v. *Brain*, *supra*.

(e) *Rex* v. *Reeves*, 9 Car. & P. 25; *Rex.* v. *Enoch*, 5 Car. & P. 539; *Rex* v. *Poulton*, 5 Car. & P. 329; 3 Greenl. Ev. § 136; 2 Bishop Cr. L. § 541: *Canfield v. The State*, 56 Ind. 168.

nor is it required that the child should have breathed, if otherwise it had life and an independent circulation. (*a*) While on the other hand, supposing it to have breathed before being fully born, and then death to have ensued by unnatural means before the delivery was completed, it could not be the subject of this offense. (*b*)

§ 497. There is no need, however, that the full period of gestation should have elapsed; therefore, if a person intending to commit an abortion, does an act which causes the child to be born before the natural time, and so, less capable of living, whereby it dies after birth from this premature exposure to the external world, he is guilty of murder. (*c*) It is said not to be murder where a woman sunders the head from her infant's body before birth is complete. (*d*) "If a woman be quick with child, and by a potion, or otherwise, killeth it in her womb; or, if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive, and dieth of the potion, battery or other cause, this is murder. (*e*) And if one counsels, before birth, a mother to kill her child after birth, and she does it, he is thereby an accessory before the fact, to the crime of murder. (*f*)

§ 498. "*In the King's Peace.*"—This allegation is no longer necessary, and requires no further comment.

§ 499. *Malice aforethought.*—We come now to the most important part of the definition of murder, viz: "with malice aforethought." It is this which distinguishes murder from the inferior grade of felonious homicide called manslaughter, which is "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

(*a*) *Rex* v. *Brain*, *supra*; *State* v. *Winthrop*, 43 Iowa, 519.

(*b*) 2 Bishop Cr. L. § 541; 3 Greenl. Ev. § 136.

(*c*) *Reg.* v. *West*, 2 Car. & K. 784; *Rex* v. *Senior*, 1 Moody, 346; 2 Bishop Cr. L. § 542; 1 Roscoe Cr. Ev. 695.

(*d*) *Rex* v. *Sellis*, 7 Car. & P. 850: 2 Bishop Cr. L. § 542.

(*e*) Lord Coke, 3 Inst. 50; 1 Hale P. C. 433.

(*f*) Parker Case, 2 Dy. 186, pl. 2; 3 Inst. 51; 1 Hale P. C. § 475; 2 Bish. Cr. L. § 542.

of some unlawful act. (*a*) Supposing the homicide to be criminal, that is to say not excusable nor justifiable, then the only remaining question, (often a difficult one), is whether the offense amounts to murder or only manslaughter; and this makes it necessary to consider these two grades of offense together.

§ 500. *Malice prepense, or aforethought,* is that which distinguishes murder from the inferior grade of felonious homicide. This term is not restricted to spite or malevolence towards the deceased in particular; but embraces also that general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of a just sense of social duty, and fatally bent on mischief. (*b*) And whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes it was done in malice; and it behooves the prisoner to show from evidence, or by inference from the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder. (*c*) In showing this, the idea or meaning of what the law terms *malice,* is to be carefully kept in view; and the evidence is to be directed to prove not merely that he entertained no ill will toward the deceased in particular; but to show that in the fatal act he was not unmindful, but duly considerate of the lives and safety of all persons. (*d*)

§ 501. *Malice* is either express or implied. The former is indicated by external circumstances showing the unlawful intention to kill, such as lying in wait, prior threats, an old grudge, or a concerted scheme to do bodily harm. (*e*) And a

(*a*) 4 Bl. Com. 191; 1 Hale P. C. 466; Wharton Cr. L. —; Lewis U. S. Cr. L. 348 *et seq;* 2 R. S. Ind. 1876, 426; *Perry* v. *State,* 44 Texas, 473; *Murray* v. *State,* 1 Tex. App. 417; *Murphy* v. *The State,* 31 Ind. 511; *The State* v. *Throckmorton,* 53 Ind. 354; *Hoss* v. *The State,* 18 Ind. 349; *Stewart* v. *The State,* 1 Ohio St. 66; *State* v. *Kennedy,* 20 Iowa, 569.

(*b*) 4 Bl. Com. 198; Foster, 256, 257; 2 Starkie Ev. 516; *United States* v. *Ross,* 1 Gall. 628; 3 Greenl. Ev. § 144.

(*c*) *Rex* v. *Greenacre,* 8 C. & P. 35; 4 Bl. Com. 200; *York's case,* 9 Met. 103: 3 Greenl. Ev. 144.

(*d*) 3 Greenl. Ev. § 144: *Dennison* v. *The State,* 13 Ind. 510: *Murphy* v. *The State,* 31 Ind. 511; *Cowgill* v. *The State,* 37 Ind. 111; *Wall* v. *The State,* 51 Ind. 453; *People* v. *Rector,* 19 Wend. 606: *Riley* v. *The State,* 9 Humph. 646: *State* v. *Kissenkemp,* 17 Iowa, 25; 11 Ga. 615.

(*e*) 1 Hale, 451.

man may commit such a willful act as shows him to be an enemy to mankind in general, and thereby indicates indiscriminate malice, such as discharging a gun into a multitude of people. (*a*) So, if a man resolves to kill the next man he meets, and does it, this is murder, although he did not know the man, and had never seen him. (*b*) Where no malice is openly indicated, the law will sometimes imply it; as if a man kill another unlawfully without any provocation; (*c*) or if two persons mutually agree to commit suicide together, and accordingly take poison, or attempt to drown themselves together, and only one of them dies, the survivor is guilty of murder, as accessory to the death of the other. (*d*) [See note 1.]

§ 502. It was formerly understood to be the law, and it is generally held at this day, that in manslaughter there is no intention to kill; and it was decided many years ago, by the Supreme Court of Indiana, that "malice aforethought means the intention to kill;" and that "to constitute malice aforethought it is only necessary that there be a formed design to kill." (*e*) This decision was made in 1842, under the Revised Statutes of 1838, which defined murder as at common law; and is in accordance with established authority. Since that time, by statute in Indiana, a distinction is made between murder in the first degree, and murder in the second degree; the former being committed purposely and with *premeditated*

(*a*) 1 Hawk. chap. 29, sec. 12.

(*b*) 4 Bl. Com 200.

(*c*) 1 Hale, 455.

(*d*) R. & R. 523; 8 C. & P. 418.

(1) The purpose to kill may be inferred from the deliberate use of a deadly weapon, so used as to be likely to produce death. *Murphy* v. *The State*, 31 Ind. 511. The intent to *kill* is far different from the intent to *murder*, and neither intent is *conclusively* presumed from such a use of a deadly weapon; for evidence may show that the intent was not felonious or malicious. Moore Cr. Law, § 842; *Clem* v. *The State*, 31 Ind. 480; *Bradley* v. *The State*, 31 Ind. 492; 2 Bishop Cr. Law, § 680; *Clark* v. *The State*, 8 Humph. 671; *Perry* v. *The People*, 14 Ill. 498; *State* v. *Gillick*, 7 Iowa, 287; *State* v. *Neely*, 20 Iowa, 109; *Contra:* 1 Greenl. Ev. § 18; *Com.* v. *York*, 9 Met. 93; *Com.* v. *Webster*, 5 Cushing; *State* v. *Smith*, 2 Strob. 77; *Rex* v. *Thomas*, 7 Car. & P. 817: *United States* v. *McGlue*, 1 Curt C. C. 1; *Greene* v. *The State*, 28 Miss. 687; *Murphy* v. *The State*, 31 Ind. 511; *Miller* v. *The State*, 37 Ind. 432. And the intent to kill is not presumed if the deadly weapon be employed in a manner not likely to be deadly in a particular instance. Moore Cr. Law, § 842; 2 Bishop Cr. Law, 5th ed. § 681: *State* v. *Roane*, 2 Dev. 58; *State* v. *West*, 6 Jones (N. C.) 505.

(*e*) *Beauchamp* v. *The State*, 6 Blackf. 300-1; *Perry* v. *The State*, 44 Texas, 473; *State* v. *Evans*, 65 Mo. 574; *State* v. *Smith*, 77 N. C. 488.

malice, and the latter "purposely and maliciously, but without premeditation." Manslaughter is defined substantially as at common law. (See *post*, Part III, § 607 *et seq.*, where all the statutes of Indiana in relation to felonious homicide are set out.) This distinction between murder in the first, and in the second degree, and the judicial decisions thereon, have materially modified the law as formerly laid down; and there is a current of modern decisions in regard to manslaughter widely different from the common law doctrines.

§ 503. It was formerly held (and is so now, perhaps, generally outside of Indiana), that there is no such offense as an assault and battery with intent to commit manslaughter. (*a*) And that on an indictment for an assault and battery with intent to commit murder, the defendant must be acquitted unless it appears that, if death had resulted from the defendant's act, it would have been murder, and not manslaughter merely. (*b*) (See note 1.)

§ 504. But in more recent times the Supreme Court of Indiana has held that, in manslaughter there may be intention to kill, arising in the sudden transport of passion, but it may, and in this grade of offense must be unaccompanied by malice. (*c*) Also, that a man may be guilty under the statute of aiding and abetting the crime of manslaughter; (*d*) and that under an indictment for murder in the first degree, the defendant may be convicted of murder in the second degree, or of man-

(*a*) Bicknell Cr. Pr. 292.

(*b*) 2 Wharton Cr. L. 1279.

(1) VOLUNTARY MANSLAUGHTER, OR NOT.—The prisoner was shooting a small pistol about the house where the prisoner resided, on the 25th of December—he was shooting "Christmas guns." The prisoner finally went into the house and said to one of the inmates, that if the deceased did not kiss him he would kill her. He then loaded his pistol and went into the deceased's room, and told her if she did not kiss him he would shoot her. He then put his arms around her, and the pistol went off, killing the deceased. The pistol was not loaded with a leaden ball, and all the parties were friendly. The prisoner expressed great astonishment at killing the deceased. The court, believing that the killing was done unintentionally, holds that the facts do not constitute voluntary manslaughter, but refrains from expressing any opinion as to the offense being involuntary manslaughter. *Nelson* v. *The State*, 6 Jerry Baxter, Tenn. Rep. 418—cases cited: *Morley* v. *The State*, 1 Sneed, 407; *Lee* v. *State*, 1 Cold. 62-67.

(*c*) *Dennison* v. *The State*, 13 Ind. 510.

(*d*) *Goff* v. *Prime*, 26 Ind. 196; *The State* v. *Brown*, 64 Mo. 367; 29 Ohio, 186; *Erwin* v. *State*, 29 Ohio, 186.

slaughter; and under an indictment for aiding and abetting the crime of murder in the first degree, the defendant may be convicted of aiding and abetting the crime of manslaughter. (*a*) Although a person unlawfully and *purposely* kill a human being, yet if it be done in a sudden heat of passion, caused by a sufficient provocation, and in the absence of express malice, the malice will not be implied from the act, but the offense will be manslaughter; but words only, however abusive and insulting they may be, can not constitute such sufficient provocation to rebut the presumption of malice, arising from the act in such a case, and reduce the offense from murder to manslaughter (*b*). (See note 1.)

§ 505. It was further held, that the word ***voluntarily*** in our statutory definition of manslaughter means, "by the free exercise of the will, done by design, purposely" (*c*); and that on the trial of an indictment for an assault and battery with intent to commit murder, where the court below instructed the jury, in effect, "that there can be no purpose to kill in manslaughter; and that if such a purpose be shown to exist and death result, the killing is murder;" it was held that this instruction was erroneous (*d*).

§ 506. An indictment will lie for an assault, or an assault and battery, with intent to commit ***voluntary*** manslaughter; and on an indictment for an assault and battery with intent to commit murder in the first degree, if the evidence justify it, there may be the same conviction as under an indictment for an assault and battery with intent to commit manslaughter. (See note 2.)

(*a*) *Goff* v. *Prime*, 26 Ind. 196.

(*b*) *Murphy* v. *The State*, 31 Ind. 511; See also *ex parte* Moore, 30 Ind. 197.

(1) ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.—Manslaughter being a felony in Tennessee, an attempt to commit manslaughter is an offense, and an indictment for an assault with intent to commit manslaughter is good, under section 4630 of the Code. *The State* v. *Williams*, 5 Jerry Baxter Tenn. Rep. 655.

(*c*) *Murphy* v. *The State*, 31 Ind. 511; *Bruner* v. *The State*, 58 Ind. 159; *Creek* v. *The State*, 24 Ind. 157; *Dennison* v. *The State*, 13 Ind. 510; *State* v. *Throckmorton*, 53 Ind. 354.

(*d*) *Murphy* v. *The State*, 31 Ind. 511..

(2) INVOLUNTARY MANSLAUGHTER.—The punishment of the crime of involuntary manslaughter is provided for by statute in Kentucky; it is therefore to be punished by fine and

Indictment for Voluntary Manslaughter.

The Supreme Court of Indiana, in the case of *Bruner* v. *The State*, 58 Ind. 160, have made a decision as to voluntary and involuntary manslaughter, of a character so important as to require special notice. It appears that in a quarrel, the defendant, Bruner, struck Koch, on the head with a dogwood stake three-and-a-half inches at the butt, twenty-one inches long and tapering from the butt to a point; from which blow Koch died nine days afterward. The evidence showed that the blow was the primary cause of the death; yet that the wound was not necessarily fatal if he had received proper medical attention and treatment at the proper time; and the indications were that Koch had received a light blow, rather than a heavy one. There was no external injury, no fracture of the skull, and no rupture of the blood vessels. The defendant testified that he had no intention to kill Koch, but just to knock him down.

The defendant was indicted for voluntary manslaughter; *i. e.*, that the defendant did "unlawfully and feloniously kill one Bernard Koch without malice, but voluntarily upon a sudden heat, by then and there striking and injuring him, the said Bernard Koch, upon the head with a stake, etc., of which he died," etc.

The Supreme Court say, that it appeared that the defendant, if guilty at all, was rather guilty of involuntary manslaughter, than of voluntary manslaughter, *wherewith he was charged in the indictment.* "At all events it is certain, we think, that the evidence furnished so much reason for doubt of the appellant's guilt of the crime wherewith he was charged [voluntary manslaughter], and for belief in his probable guilt of involuntary manslaughter in the killing of Bernard Koch, that the

imprisonment, which is the common law punishment for offenses for which no punishment is provided by statute. *Conner* v. *The Commonwealth*, 13 Bush (Ky) Rep. 714.

On a trial for murder, the jury found the defendant guilty of manslaughter "*in the second degree.*" Motion in arrest of judgment, because there is no such offense in Mississippi as manslaughter *in the second degree.* But held by the Supreme Court, that the words in italics are surplussage, and that the verdict is good and judgment should be pronounced for manslaughter. *Traube* v. *The State*, 56 Miss. Rep. 153.

court below should have instructed the jury as requested by the defendant, in regard to what constituted involuntary manslaughter, and if they believed from the evidence that Bruner in the killing of Koch was guilty of involuntary manslaughter, it would be their duty to acquit him of the crime charged in the indictment."

The Court below of its own motion gave the jury the following instruction:

"The question of involuntary manslaughter does not enter into this case. If the prisoner intended the blow, and the blow produced death, and it was an unlawful blow, then the defendant is guilty of manslaughter voluntarily. The unlawful act necessary to constitute involuntary manslaughter is an unlawful act wherein the party killed is accidentally killed, when the killing is collateral to the act committed."

This instruction, the Supreme Court say, is erroneous, because it was for the jury and not for the Court to say whether "the question of involuntary manslaughter entered into the case;" and that if the jury believed from the evidence that Bruner, in the killing of Koch, was guilty of involuntary manslaughter, then they should acquit him of the crime for which he was on trial.

Sudden-Heat—Provocation.

§ 507. In considering voluntary manslaughter, it is to be observed that it must be committed on a sudden heat; and this sudden heat must arise upon a sufficient legal provocation. Mere words, however opprobrious, will not be such a provocation as will reduce the killing from murder to manslaughter; there must be considerable personal violence, or if it be slight, it must be accompanied with circumstances of indignity or insult. (*a*) If a man should merely jostle another in the street, and should be instantly killed therefor, it would be murder. But if A should publicly spit in the face of B, or pull his nose, or offer him any other great personal indignity,

(*a*) 4 Bl. Com. 191; *Miller* v. *The State*, 37 Ind. 432: *Murphy* v. *The State*, 31 Ind. 511; *Beauchamp* v. *The State*, 6 Ind. 299; *State* v. *Barfield*, 8 Ire. 344; *Felix* v. *State*, 18 Ala. 720; *Rapp* v. *Com.* 14 B. Mon. 614.

and B should thereupon immediately kill him, the *books* say it would be manslaughter. (*a*) So, if there be provocation by blows not sufficiently violent in themselves to reduce the killing below the crime of murder, yet if they be accompanied by very aggravated words and gestures, this may make it manslaughter only. (*b*)

§ 508. It is said, "that to reduce a homicide upon provocation to manslaughter, it is essential that the fatal blow appear to have been inflicted *immediately* upon the provocation being given." (*c*) But it is manifest from an examination of the adjudicated cases and the text books, that this word "immediately" is not to be understood with literal exactness; for the cases are numerous where there was a considerable lapse of time between the provocation and the killing, in which the act was held to be manslaughter, by reason of the sudden heat arising from provocation. (*d*)

§ 509. If between the time of the provocation and the act of killing, there be sufficient time for passion to subside, or as it is generally expressed, sufficient "cooling time," and then the person who has been provoked kills the other, this will be deemed deliberate revenge, and not heat of blood; and therefore it will be murder. (*e*)

§ 510. Where the prisoner and the deceased were on intimate terms, and were at a public house drinking, and a scuffle between them ensued, and the deceased struck the prisoner and gave him a black eye, and the prisoner called for the police and went away, and in about *five minutes* afterward returned and stabbed the deceased with a knife, which he usually carried about him, Lord Tenderden said it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offense

(*a*) 4 Bl. Com. 191.

(*b*) 1 C. & K. 556.

(*c*) Bicknell Cr. Pr. 280; 7 C. & C. 817.

(*d*) Bicknell Cr. L. 280, 281; *Moore* v. *The State*, 30 Ind. 197.

(*e*) 7 C. & P. 817; *Reg* v. *Kirkham*, 8 C. & P. 115: *People* v. *Sullivan*, 3 Seld. 396; *Dennison* v. *The State*, 13 Ind. 510; *Maher* v. *The People*, 10 Mich. 212; *Miller* v. *The State*, 37 Ind. 432; *State* v. *Jones*, 20 Mo. 58: *Felix* v. *State*, 18 Ala. 720; *State* v. *Dunn*, 18 Mo. 419; *State* v. *Craton*, 6 Ire. 164.

from murder to manslaughter, and that if there had been any evidence of an old grudge between the parties the crime would probably have been murder. But he left it to the jury to say whether there had been time for the passion of the prisoner to cool, and reason to gain dominion over him; if not, that they should find him guilty of manslaughter only (*a*).

And where the prisoner was at the house of the deceased's mother, who asked the deceased to turn him out, and the deceased did so and gave him a kick as he went—upon which the prisoner said he would make him remember it, and went home, about three hundred yards, and passed through a bedroom into a kitchen adjoining, and there got a knife, and returned and met the deceased bringing him his hat, and they talked and walked together, and the deceased gave the prisoner his hat, and the latter swore he would have his rights, and stabbed the deceased twice, saying he had served him right, and then ran home:—TINDAL, C. J., told the jury that the question was, whether the provocation were so recent that the prisoner could not be regarded as master of his understanding, in which case it would be manslaughter only, or whether there had been time for the blood to cool and reason to resume its sway, in which case the offense would be murder. The jury found the prisoner guilty of murder. (*b*)

§ 511. If a man find another in adultery with his wife, and immediately kill him, this is manslaughter merely; (*c*) but if the slayer is what Shakespeare calls a "wittol cuckold," it is submitted that the offense would amount to murder. (*d*)

§ 512. In considering whether the killing upon a sudden heat amounts to murder or manslaughter, the instrument used by the slayer must be taken into consideration; if a deadly weapon be used, the provocation should be great; if it be a weapon or other means not likely to produce death, a less provocation will be sufficient to reduce the offense from mur-

(*a*) 5 C. & P., 324; *Reg.* v. *Kirkham*; 8 C. & P. 115; *People* v. *Sullivan*, 3 Seld. 396.

(*b*) 6 C. & P. 159; *Dennison* v. *The State*, 13 Ind. 510; *Field* v. *The State*, 50 Ind. 15; *Rex* v. *Howard*, 6 C. & P. 157.

(*c*) 1 Hale 486.

(*d*) Webster Un. Dic., "Wittol."

der to manslaughter. The resistance on the part of the defendant should bear some reasonable proportion to the provocation given by the deceased. (*a*) If, upon a slight provocation, one beats another in a cruel and unusual manner so that he dies, it is murder and not manslaughter. An unlawful imprisonment of the defendant, by the deceased, was held to be sufficient provocation to make a killing with a sword manslaughter only. (*b*) And where a soldier insulted a woman, by words, and she struck him on the head, and he hit her on the breast with the hilt of his sword, and ran after her and stabbed her in the back, this was, at first, deemed murder, but it appearing that the woman had struck the soldier with an iron patten, which drew a great deal of blood, it was held to be manslaughter only. (*c*)

§ 513. Where a boy, after fighting with another, ran home to his father bleeding, and the father took a small cudgel and ran three-quarters of a mile to the other boy and struck him one blow with the cudgel, and thereby killed him, this was held to be manslaughter. (*d*)

§ 514. In a case in Indiana, it appeared that the deceased and the prisoner were both residents of the city of New Albany, and were friends, no trouble or difficulty having previously existed between them. The parties met at a saloon in New Albany, where they engaged in playing cards and drinking beer, until they were both intoxicated. They quarreled about politics and the battle of Pittsburg Landing, using coarse and abusive language to each other. The prisoner being excited and angry left the card table and said he would go home. The deceased insisted that he should not go, and asked him to drink with him and settle the difficulty, which the prisoner refused to do, and started to go out. The deceased, who was much the stronger man, thereupon seized hold of the prisoner, and a struggle ensued between them, the deceased forcing the prisoner into a chair, and insisting that he

(*a*) 1 Str. 499; Foster, 292.
(*b*) 1 East P. C. 233.
(*c*) Foster, 292.
(*d*) 12 Co. 87.

should not go until they had another drink. The prisoner again refused to drink with the deceased, and told him to let him alone. He again started to leave, but the deceased caught him a second time, and in a very rough manner forced him back. The prisoner got away again from the deceased, and started to leave through the front door of the saloon, followed by the deceased, when the prisoner called on persons present to take notice that he demanded of the deceased to let him alone, and proceeded toward the front door; but the deceased followed him, and caught hold of him just as he had reached a screen that stood across the door-way near the door. A scuffle ensued between them, when the prisoner, in attempting to jerk away from the deceased, partially fell and knocked down the screen which lodged without falling entirely down, but leaving the prisoner under it. The deceased then caught him by the legs and attempted to draw him back into the room, but he kicked loose, and as he was crawling out of the door-way the deceased kicked at him, but whether he hit him or not, the witnesses could not tell. The prisoner then left, much excited. The prisoner walked hurriedly home, a short distance from the saloon, and very soon came out of the house with a revolver in his hand. He returned rapidly to the saloon, the revolver in his hand, and shot and killed the deceased. His absence from the saloon did not exceed five minutes. It was proved that intoxication had the effect on the prisoner to excite his passions and greatly impair his reason. Soon after he left the saloon there were marks of violence and blood observed on his face and neck. The case coming before the Supreme Court, on appeal from a decision in *habeas corpus*, the court intimate, without so expressly deciding, that the offense was manslaughter. But they do expressly decide, that it is not clear that the proof was evident, or the presumption strong, that the killing was malicious, and that the prisoner was entitled to be let to bail. *Ex parte, Moore*, 30 Ind. 197.

Of Involuntary Manslaughter — Unlawful Act — Negligence.

§ 515. When a person is engaged in any unlawful act, and unintentionally kills a person, it is either murder or manslaughter according to the character of such unlawful act. If such unlawful act be rape, arson, robbery, burglary or poisoning, it would be murder in the first degree by statute in Indiana. So, if a man unlawfully, purposely, and with deliberate and premeditated malice, shoot at A and miss him, and kill B, this will be murder. (*a*) So, if, in like manner, he strike at A, and by accident he strike and kill B, it will be murder. (*b*) If a man unlawfully shoot at another's poultry, and by accident kill a man, it will be manslaughter. (*c*) If a man throw a stone at a horse, and the stone hit a person and kill him, it will be manslaughter. (*d*) When A strikes a horse on which B is riding, and the horse springs out and runs over a child and kills it, this is manslaughter in A, but misadventure in B. (*e*)

If one puts out poison to kill rats, and a man is killed by eating it, this, in general, would be excusable homicide; but if the poison were so placed as to be likely mistaken for food, it might be manslaughter. (*f*) If a man breaking an unruly horse, ride him amongst a crowd, and the horse kick a man and kill him, this is murder, if the rider brought the horse into the crowd with intent to do mischief, or even to divert himself by frightening the crowd. (*g*) Such criminal negligence is evidence of universal malice; but if the rider brought the horse into the crowd incautiously only, this would be manslaughter. (*h*)

§ 516. Where an act, lawful in itself, is dangerous, a homicide occurring thereby will not be excusable, unless it appear that the party doing the act used such caution as to make it improbable that any injury would follow it. Without such

(*a*) Foster, 261; 1 Hale, 441.
(*b*) 1 Moody C. C. 93.
(*c*) Foster, 248.
(*d*) 1 Hale, 39.
(*e*) Whar. on Homicide, 45, 47.
(*f*) 1 Hale, 431.
(*g*) 1 Hawk, chap. 31, § 68.
(*h*) 1 East P. C. 231.

caution the homicide would be manslaughter at least; thus, if a workman throwing rubbish from a house, should kill a person passing by, it will be murder, manslaughter or excusable homicide, according to the degree of care used. If he did it without any previous warning and when it was likely that persons were passing, it would be murder. (*a*)

If he did it without warning at a time when it was not likely that any persons were passing, it would be manslaughter. (*b*) If he did it in a retired place where persons were not passing, or likely to pass, it would be misadventure merely. (*c*) But suppose he previously gave warning. In that case, if it happened in a small village where few persons pass, it would be excusable; if in a populous city, at a time when the streets were full, it would be manslaughter.

§ 517. If a man drive a cart over another, and kill him, having timely notice of the probable mischief, and not using sufficient care and caution, it will be murder or manslaughter. If he purposely drove furiously amongst a crowd, it would be murder; if he drove in a street where persons were much in the habit of passing, it would be manslaughter. (*d*) If he so drove in the street, where people did not usually pass, it would be excusable homicide, provided he took the care usually taken by persons in similar circumstances. (*e*)

If a man within shooting distance, should shoot a rifle toward a crowd of people and kill one of them, it would be murder. (*f*) If he shoot it merely to unload it, but in a place where persons are likely to pass, and somebody be killed thereby, it will be manslaughter. (*g*) If in a place where nobody was likely to pass, it will be excusable homicide if anybody be killed by it. So, if a man, knowing that people are passing along a street, wantonly throw a stone with intent to hurt some of the persons passing, and a person be killed by it, it will be murder, although the stone was not intended to hit any

(*a*) 3 Inst. 57.
(*b*) Foster, 262.
(*c*) 1 Hale, 475.
(*d*) 1 East P. C. 263.
(*e*) *Id.* 261.
(*f*) 1 Hale, 475.
(*g*) 1 Str. 481.

particular person (*a*) But if thrown heedlessly, without intent to hurt any one, into a place where people were in the habit of passing, if anybody be killed thereby, it will be manslaughter. (*b*) And if thrown into a place where people were not likely to pass, killing thereby would be excusable. Where a boy took out the forestick of a cart, whereby the cart was upset, and the cartman, who was loading sacks of wheat therein, was killed, this was held to be manslaughter. And where a child of tender years was killed by a person giving it an improper quantity of intoxicating liquor, this was held to be manslaughter, although he did it merely for sport. (*c*) Where a man found a pistol in the street, and without knowing whether it was loaded, pointed it at a woman and shot her, this was held to be manslaughter. (*d*)

§ 518. But it is submitted, that, in order that a party shall be deemed guilty of manslaughter for the unintentional killing of a human being, in the commission of some unlawful act, the killing should have some immediate and consequential relation to the unlawful act. For example, suppose that the owner of a steamboat is running it on Sunday in carrying passengers and freight, in violation of a State statute, and without any fault or negligence on the part of those in charge of the boat, a collision occurs in which some of the boat's passengers are killed. Surely this could not be adjudged manslaughter on the part of those running the boat by reason of their running it unlawfully on Sunday; because the killing and the unlawfulness of the running of the boat are in legal contemplation too remote. Again, if a man be cutting cord wood on Sunday, in violation of law, and the ax fly off the helve and accidentally kill a bystander, this would certainly be misadventure and not manslaughter. In order that, in the two cases above mentioned, there should be criminal responsibility, it should be made to appear that the deaths ensued in consequence of the negligent or wrongful manner of performing the act, without regard to whether it occurred on Sunday

(*a*) 1 Hale, 475.
(*b*) 1 Hale, 485.
(*c*) 3 C. & P. 211.
(*d*) Foster, 264, 265.

or some other day. Accordingly it is laid down by Mr. East, P. C. 260, that if an act unlawful in itself, as shooting at game, be prohibited to be done, unless by persons of a certain description, the case of a person not coming under that description offending against such statute, and in so doing unfortunately killing another, will fall under the same rule as that of a qualified man, and must equally be attributed to misadventure. So, if two friends are hunting on posted lands forbidding hunting on the premises, or in violation of an act forbidding hunting on lands of another without the consent of the owner, and one of them, in shooting at a squirrel, accidentally and unfortunately happens to kill his friend, it is a case of homicide by misadventure; and the idea that it is to be punished as a felonious homicide is abhorrent to reason and common sense.

§ 519. *Of Negligence in Involuntary Manslaughter.*—Negligence in the performance of a lawful act may amount to unlawfulness, so that a homicide resulting from such negligence will be manslaughter. If the act be in itself lawful, but done in an improper manner, whether it be by excess or by culpable ignorance, or by want of due caution, and death ensues, it will be manslaughter. (*a*) That which constitutes murder when done by malice aforethought, is manslaughter, when resulting merely from culpable negligence. It is manslaughter where death is occasioned by excessive correction given to a child by the parent or master; (*b*) or by ignorance, gross negligence or culpable inattention or maltreatment of a patient on the part of one assuming to be his physician or surgeon; (*c*) or by the negligent driving of a cart or carriage, or the like ill-management of a boat; or by gross negligence in casting down rubbish from a staging or the like; (*d*) and generally it may be laid down that when one, by his negligence, has contributed to the death of another, he is responsible. (*e*) The caution which the law requires in all these cases is not the

(*a*) *Reg.* v. *Hughes*, 1 Dears. & Bell, 248.
(*b*) 1 Hale P. C. 473, 474; Foster, 262.
(*c*) 1 Hale P. C. 429; *Rex* v. *Webb*, 1 Webb & Robb. 405; 3 Greenl. Ev. § 129.
(*d*) 1 East P. C. 262; Foster, 262; Hale P. C. 472; 3 Greenl. Ev. § 129.
(*e*) *Reg.* v. *Swindall*, 2 C. & K. 232.

utmost degree which can possibly be used, but such reasonable care as is used in the like cases and has been found by long experience to answer the end. (*a*)

§ 520. *Railway Negligence.*—A switch tender was indicted for manslaughter, in neglecting to properly move a switch, whereby loss of life ensued. It was held that it was not necessary to prove that the neglect was willful or of purpose, and that the question whether due care was shown was exclusively for the jury. (*b*)

It is laid down in Whar. Am. Cr. L. § 1014*f*, that "a schoolmaster, who, on a boy's return to school, wrote to his parent proposing to beat him severely in order to subdue his obstinacy, and on receiving his father's reply assenting thereto, beat the boy for *two hours and a half*, SECRETLY *in the night*, and with a *thick stick* (*!*) until he died, is guilty only of manslaughter, no malice being proved. (*c*) [Upon what principle this was not adjudged to be *murder*, the author of this work is unable to determine.]

§ 521. Wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting is guilty of a felonious homicide. (*d*) But if the duty is only a moral one, and the dereliction is only an omission to do, in distinction from an actual doing, there is no legal responsibility. Yet there is the same responsibility in the one case as in the other, where a positive act, instead of a mere omission, is the cause of the death. If a man neglects to supply his legitimate child with suitable food and clothing, or suitably provide for his apprentice, whom he is under a legal obligation to maintain, and the child or apprentice dies of the neglect he is guilty of a felonious homicide. (*e*) But his wife, if she does the same thing, even toward her own offspring, does not incur this guilt, because the law casts the duty of maintenance

(*a*) 1 Russ. 482; 3 Greenl. Ev. 129.
(*b*) *State* v. *O'Brien*, 3 Vroom, 169; Whar. Am. Cr. L. § 1010*a*.
(*c*) *R.* v. *Hopley*, 2 F. & F. 202; Whar. Cr. L. § 1014*f*.
(*d*) 7 Cox Cr. Cases, 301; Bish. Cr. L. § 599.
(*e*) *Rex* v. *Squire*, 490, Bish. Cr. L. § 600.

on him alone, and not at all on her, who stands in this respect, in no other relation than a mere servant. (*a*) If one has his idiot brother abiding in his house, who, by his neglect, perishes from want, this is not an omission which casts on him a criminal liability; because he is under no obligation, in law, to maintain his brother; and an omission, without a duty, will not create an indictable offense.

§ 522. The person in charge or controlling the running of a stage coach, a hackney coach, railroad train, steamboat, ferry-boat, or the like, who by his gross negligence, or plain omission of a duty imposed by law, causes the death of a human being, is guilty of manslaughter, at the least.

Of the Defense of One's Dwelling, Property, Etc.

§ 523. A man may repel force by force in the defense of his person, habitation or property, against one or many who manifestly intend and endeavor by violence or surprise to commit a known felony on either. (*b*) In the defense of one's habitation he is not bound to retreat. And when an attempt is made to commit a personal injury, arson or burglary on the habitation, the owner or any part of his family, or even a lodger with him, may lawfully kill the assailants in order to prevent the mischief intended.

§ 524. The well-known maxim, that "every man's house is his castle," is so far recognized by the law that a man is justified in opposing even to death those who seek to break into it by violence. (*c*)

§ 525. But the principle above laid down does not extend to a case of defense to a mere trespass, where the attack is not in itself felonious, nor designed to invade the dwelling-house. (*d*) If a man deliberately kill another to prevent a mere trespass on his property, whether that trespass could or could not

(*a*) *Rex* v. *Saunders*, 7 Car. & P. 277; Bish. Cr. L. § 600
(*b*) *U. S.* v. *Mingo*, 2 Curtiss, C. C. R. 1; *Evans* v. *The State*, 4 Mis. 762.
(*c*) *Pond* v. *The People*, 8 Mich. 181; *Com.* v. *Drew*, 4 Mass. 391; 4 Bl. Com. 222.
(*d*) 20 Iowa, 569; 10 Minn. 223.

be otherwise prevented, it is murder; (*a*) and consequently an assault with intent to kill can not be justified upon the ground that it was necessary to prevent a trespass on property. (*d*) If such killing take place in passion and in the heat of blood, the killing is manslaughter, but under no circumstances can it be less. For the rule of law is, that where such trespass is barely against the property of another, *not his dwelling-house*, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do so and with it kill the trespasser, this will be murder, because it is an act of violence beyond the provocation; but if the injury be inflicted with an instrument and in a manner not likely to kill, and the trespasser should happen to be killed, it will be no more than manslaughter—the law so far recognizing the adequacy of the provocation arising from the trespass. (*b*) But while the owner of land in possession, may not lawfully, in the first instance, slay a mere trespasser, yet it seems that if after having forbidden the trespasser from entering, the latter persists, the owner may use reasonable force to prevent the trespass, and if thereupon the trespasser assault the owner with a deadly weapon, and the owner kill him, he is justifiable. (*e*)

§ 526. *Turning Out of One's House.*—A man has a right to require another to leave his house, but he has no right to put him out by force till gentler means fail; and if he attempt to use violence in the first instance and is slain, it will not be murder in the slayer, if there be no previous malice. (*c*) So, it will be at least manslaughter, if the owner of a house kills a visitor, who comes in peaceably, though forbidden, and who refuses to leave when ordered out. (*d*)

(*a*) Whar. Am. Cr. L. § 1025; *State* v. *Morgan*, 3 Ire. 186; Whar. Hom. 215, 232; *Com.* v. *Drew*, 4 Mass. 391; *Monroe* v. *The State*, 5 Georgia, 95; *Oliver* v. *The State*, 17 Ala. 588; *Carroll* v. *The State*, 23 Ala. 28; *Noles* v. *The State*, 26 Ala. 31; *Harrison* v. *The State*, 24 Ala. 67; 18 Georgia, 194.

(*b*) *Claxton* v. *The State*, 2 Humph. 181; Whar. Am. Cr. L. § 1025.

(*c*) *State* v. *Sloan*, 47 Mo. 604: *Greschia* v. *State*, 53 Ill. 295; *McCoy* v. *State*, 3 Eng. 451; Whar. Cr. L. § 1025.

(*d*) *State* v. *Smith*, 3 Dev. & Bat. 117; *McCoy* v. *State*, 3 Eng. 451.

(*e*) Ad. Torts.

The Killing of, or by, Officers of Justice.

§ 527. Officers of justice are not justified in taking human life, unless they are at the time in the act of executing lawfully a duty imposed by law, and under such circumstances that if the officer had been killed, such killing would have been murder. (*a*) If the officer be resisted in the lawful execution of his duty, he may repel force by force; and if, in so doing, he kill the party resisting, it is justifiable homicide, [provided there is a necessity for such extreme action]. (*b*) An officer, resisted, need not retreat in any case, for it is his duty to execute the law; but there must be some apparent necessity for the killing by the officer; and if the party were killed after his resistance had ceased, or if there reasonably appeared to be no need of violence by the officer, the killing would be manslaughter at least, and might be murder if the circumstances indicated malice. (*c*)

Where a person having lawful authority to arrest a man, attempts to do it, and the man flies, or first resists and then flies, and is killed in the pursuit by the person making the arrest, it may or may not be justifiable, according to the circumstances. If the charge against the party were treason or felony, and he could not otherwise be apprehended, the killing would be justifiable. (*d*) But if the party were charged with merely a breach of the peace or other misdemeanor, or if the process were issued in a civil suit, unless it were occasioned by means not likely to kill—such as knocking him down, or striking with a common cane, or other weapon not deadly; in which case, it would be manslaughter only. (*e*)

§ 528. In cases of felony the killing is justifiable before an actual arrest is made, where in no other way the escaping felon can be taken. In such cases, that is to say in cases of felony, if the felon flies from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavors

(*a*) 1 Hale, 490.
(*b*) 2 Hale, 218.
(*c*) 1 East P. C. 297.
(*d*) 1 Hale, 481; Foster, 271; 1 Hawk.chap. 28, § 11..
(*e*). Foster, 271; 2 Hale, 117; 1 East P. C. 312; Doug. 207.

for preventing an escape; and if in the pursuit the felon be killed, when he can not otherwise be taken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it was done of necessity or not. (*a*) But the justification of homicide happening in the arrest of persons charged with misdemeanors or breaches of the peace, is subject to a different rule from that laid down in respect to cases of felony, for generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he can not otherwise be taken, and though there be a warrant to apprehend him; but under certain circumstances it may amount only to manslaughter, if it appear that death was not intended. (*b*) In some instances, however, of flight, in cases of flagrant misdemeanors, such as that of a dangerous wound, the killing may be justified if the party can not be otherwise overtaken; but this is founded upon a presumption that the offense may turn out to be a felony. (*c*)

§ 529. In a case before the Supreme Court of Indiana, the defendant, Agee, was indicted for an assault with intent to murder, for shooting at an officer who was attempting to arrest him on a charge of *bastardy*, (which is held to be a civil proceeding, although a warrant is issued in the name of the State). The court ruled, that if the person attempting to make the arrest had a valid warrant for the arrest of the defendant, with full authority to execute the same, still the officer would have no right to shoot the defendant merely for the purpose of arresting him, at a time when the defendant was fleeing; and if the officer had shot the defendant and killed him, merely for the purpose of preventing him from fleeing and escaping an arrest, the officer would have been guilty of murder; and where the defendant was fleeing and the officer attempted to

(*a*) 1 Gab Cr. L. 482, 484, 487 · 1 East P. C. 298.
(*b*) 1 Hale P C 481; Foster 271 · 2 Bish. Cr. L. § 578.
(*c*) 1 East P. C. 302; 1 Gab. Cr. L. 484.

take his life, or to do him great bodily harm, by shooting at him with a deadly weapon, then the defendant would have the right to repel force with force; and if the defendant under such circumstances used no more force than was reasonably necessary to repel such attack, the defendant would be excusable. (*a*) The reader must note the difference between cases of arrest in civil process or misdemeanors, and arrest for felony. (*b*)

§ 530. But in misdemeanors and breaches of the peace (as well as in cases of felony), if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified. (*c*) But this must be understood with the qualification that the officer will not be justified in taking human life wantonly in case of slight resistance, nor will the officer be justified in taking human life in case of serious resistance, unless there be apparent necessity for such killing. Jailors and their officers are under the same protection that other ministers of justice are; and, therefore, if, in the necessary discharge of their duty they meet with resistance, whether from prisoners in civil or criminal suits, they are not obliged to retreat, but may immediately repel force by force. And if the party so resisting happens to be killed, this, on the part of the jailor or his officer, or any person coming in aid of him, will be justifiable homicide. (*d*) But an assault upon a jailor which would warrant him (apart from any personal danger), in killing a prisoner, must, it seems, be such from whence he might reasonably apprehend that an escape was intended which he could not otherwise prevent; for jailors, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; and therefore the law as laid down by Hawkins, is, that if a criminal endeavoring to break the jail, assaults the jailor, the latter may kill him in the affray. (*e*) And in regard to the degree of force which the

(*a*) *Agee* v. *The State*, 64 Ind. 340.
(*b*) *Ante*, § 528.
(*c*) 1 Hale P. C. 117; 1 East P. C. 302, 303.
(*d*) Foster, 321.
(*e*) 1 Hawkins P. C. 81, § 13; 1 Hale, P. C. 496.

jailor may lawfully employ to prevent an escape accompanied by violence against the jailor, the law, in reason, will not make a nice discrimination as to the means he may employ; for the reason that when criminals resort to violence against the jailor to make an escape, the jailor may reasonably apprehend the utmost degree of desperation and violence on the part of the prisoners, and he may not know to what extent the prisoners may have secretly armed themselves in order to regain their liberty.

Of Insanity.

§ 531. Although the defense of insanity is not peculiar to cases of homicide, but applies alike to all other offenses, yet, as questions of criminal responsibility depending on mental condition, arise perhaps more frequently in homicide than in any other class of offenses, it is deemed proper to discuss the subject in this work.

§ 532. It is not proposed in these pages to enter into a scientific analysis of the various phases of mental alienation, after the manner of the medical jurisconsults; but to state in general terms and in plain and concise language the result of the authorities, as to criminal responsibility, in cases of alleged mental incompetency. But it ought to be premised that the defense of insanity, although it lies somewhat under popular prejudice, yet, in reason and in law, when properly sustained by evidence, it is as perfect a defense as it is possible to conceive. While on the one hand there have been wrongful acquittals by reason of alleged insanity, yet on the other hand there have been many wrongful convictions of unfortunate beings, really irresponsible by reason of mental disorder, condemned to a felon's doom, as a propitiation at the altars of ignorance, stupidity, and popular prejudice.

§ 533. The doctrine is thus generally laid down: "A man can not be excused from punishment on the ground of insanity, unless incapable of distinguishing between right and wrong with reference to the criminal act at the time he did it." (*a*)

(*a*) 5 C. & P. 168; Bick. Cr. Pr. 276.

But it will be seen (*post* §§ 537, 538, 539, *et seq.*), that this criterion is materially modified by judicial decisions in recent times. (1)

§ 533*a*. The books of authority say: That "although there be a temporary deficiency of reason, or aberration of mind, at the time of an act, yet if there be a partial degree of reason, and a competent use of it, to have restrained the passions which produced the crime, if there be thought and design, a faculty to distinguish the nature of actions, and to discern the difference between moral good and evil—then the party will be responsible for his actions." (*a*)

§ 534. "The instruction to be given to the jury in reference to the defense of insanity is: If the accused knew the difference between right and wrong in respect to the act in question; if he were conscious that such act was one which he ought not to do; and if that act were at the same time contrary to the law of the land, then he is punishable." (*b*)

§ 535. "In cases of insane delusion: If such delusion be partial only, and about one or more particular subjects or persons only, and if there be no insanity in other respects, the party is in the same situation as to responsibility as if the facts in regard to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take his life, and he kill that man, as he supposes, in self-defense, he will be exempt from punishment. (*c*) [If his delusion were that the deceased had inflicted a serious injury upon his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."] So the law is laid down in the reply of the judges to the questions proposed by the House of Lords, 1843, 4 Bl. Com. Appendix B, Wendell's edition. But it should be here remarked that the

(1) See *post*, §§ 540, 541, 542, 543, 544, 545.

(*a*) 1 C. & K. 129, 130; Bick. Cr. Pr. 276.

(*b*) Answer of the Judges to the questions proposed by the House of Lords, June, 1843; 4 Bl. Com. Wendell, App. "B."

(*c*) *Ibid;* Bick. Cr. Pr. 277.

correctness of that part of the opinion included in brackets, has been seriously questioned by eminent authorities.

§ 536. The authoritative exposition of the law of insanity as laid down with great deliberation and care by the English judges in reply to the questions propounded by the House of Lords, has been very generally adopted by judicial decisions and by the text writers both in England and America. Yet within the last few years the authority of these opinions has, in some respects, been much shaken. Still the opinions thus given, may be regarded as the generally-received doctrine, especially that "a knowledge of the difference between right and wrong, with reference to the act, is the criterion of criminal responsibility."

§ 537 But while the courts and the learned expositors of the law still adhered to the criterion of a "knowledge of right and wrong" to determine criminal responsibility, they were often confronted with such cases as this: A man who has always conducted himself with propriety in all the relations of life, kind, affable, humane and just, suddenly or within a brief period, changes the habits of his life and seems to be transformed in every essential particular from his former self. He undergoes a complete revulsion of his affections, and those who were the objects of his tenderest love and affection become objects of antipathy and aversion. He is recognized by his family and friends as an insane man, and is the object of constant solicitude. And yet he manifests no appreciable intellectual lesion. He reasons well, and talks with eloquent and forcible volubility. He talks more, and with more acuteness than he ever did before. Suddenly, without motive, and without provocation, he kills some one, perhaps his best friend, under circumstances of apparent atrocity and inhumanity. He can give no reason for the act, except that he *had* to do it—*he couldn't help it.* He says he knew it was wrong, and that it was against law, human and divine. Here is a case of undoubted insanity. But how is it to be classified? What shall be done with the man? He knew the difference between right and wrong with reference to the act. Shall he be hanged?

§ 538. By the older authorities, the question propounded at the close of the preceding section must be answered in the affirmative; but in later times the current of judicial authority clearly establishes the doctrine, that although the alleged criminal may have the power to discriminate between right and wrong, and knows that the act is wrong, yet in many such cases the accused is irresponsible—by reason of some abnormal condition of the affective faculties of the mind, amounting to insanity. Whether this condition should be denominated "moral insanity," "impulsive insanity," or "insanity of the affective faculties," is immaterial; and the writer will therefore content himself by laying before the reader a number of judicial decisions on this subject, in several of the States.

§ 539. Chief Justice Gibson of Pennsylvania, in 1846, in a case before him, said: "There is a *moral* or *homicidal* insanity consisting of an irresistable inclination to kill, or commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to *consequences which it sees but can not avoid*, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a single individual. But that it may be so, is proved by the case of the young woman, who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady, is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order, as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show by clear proofs its contemporaneous existence, evinced by present circumstances,

or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature." (*a*)

§ 540. In a still earlier case in Pennsylvania, Judge Lewis, a jurist of great ability and eminence, said: "Moral insanity, or irresistible impulse, arises from the existence of some of the the natural propensities in such violence that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist of an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is, therefore, to be received with the utmost scrutiny. It is not generally admitted in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought never to have been admitted as a defense, except in cases where it appears that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield. When its existence is fully established, this species of insanity relieves from accountability to human laws.(*b*)

§ 541. It has been held in Kentucky, that while irresistible impulse as a distinct line of defense is recognized, yet it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings.(*c*) The doctrine, however, has been emphatically repudiated in North Carolina in 1861. (*d*)

§ 542. Judge Story decided that a young woman, who in a violent impulse of puerperal fever threw her child overboard, though at the time perfectly conscious of the enormity of the act, was entitled to an acquittal. (*e*)

§ 543. In the State of Indiana, it has been held that where a person is moved to the commission of an unlawful act by an insane impulse controlling his will and judgment, he is not

(*a*) *Com.* v. *Mosler*, 4 Barr, 266.

(*b*) Lewis, U. S. Cr. Law, 404.

(*c*) *Scott* v. *Com.* 4 Metcalf, 227; *Smith* v. *Com*, 1 Duvall, 224; *Hoppe* v. *The People*, 31 Ill. 385; *Com.* v. *Haskell*, 2 Brewster, 491; *Stevens* v. *State*, 31 Ind. 486; *State* v. *Felter*, 31 Iowa 67; *Mu. Ins. Co.* v. *T. Terry*, U. S. Supreme Court, 1872.

(*d*) *State* v. *Brandon*, 8 Jones, 463.

(*e*) *U. S.* v. *Hewson*, 7 Bost. Law Rep., 361.

guilty of a crime; and if he is a monomaniac on any subject, it is wholly immaterial on what subject, so that the insane impulse leads to the commission of the act; and on the trial of an indictment for murder, and the defense of insanity was interposed, the court charged the jury "that if they believed from the evidence that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such an act was one which he ought not to do, and if that act was at the same time contrary to the law of the State, then he is responsible for his acts," it was held by the court that the instruction was not law; (*a*) [because the defendant might have been moved to the commission of the act by an insane impulse controlling irresistibly his will and judgment—and therefore the defendant would not have been responsible, notwithstanding he knew the difference between right and wrong as to that act.]

§ 544. Insanity is a disease which may impair or totally destroy either the *understanding* or the *will*, or both; and in a criminal case all symptoms of such disease, and its effect upon these faculties, should go to the jury, and they must determine, as a matter of fact, the mental condition of the defendant; and an instruction to them which limits their inquiry to the condition of the power to apprehend by the *understanding* is erroneous. (*b*)

§ 545. The following has also been ruled in Indiana, on the subject of insanity: So far as a person acts under the influence of mental disease he is not criminally responsible; and the jury in a criminal case must be satisfied beyond a reasonable doubt of the defendent's mental capacity to commit the crime charged. (*c*)

§ 546. It has been considered that there are four kinds of persons who may be said to be *non compotes:* 1. An idiot; 2.

(*a*) *Stevens* v. *The State*, 31 Ind. 485.

(*b*) *Bradley* v. *The State*, 31 Ind. 492.

(*c*) *Stevens* v. *The State*, 31 Ind. 485; *Polk* v. *The State*, 19 Ind. 170. Also, *Bradley* v. *The State*, 31 Ind. 492.

One made *non compos* by sickness; 3. A lunatic; 4. One that is drunk. (*a*) By statute in Indiana, the phrase "of unsound mind," includes idiots, *non compotes*, lunatics, and distracted persons. (*b*) The classification, by the old authors, of the different kinds of insanity, under the heads of lunacy, idiocy, etc., is not considered at the present day as either accurate, or full enough to embrace all the various forms of mental defect, or aberration.

An idiot is a fool or madman from his nativity, who never has any lucid intervals; and such a one is described as a person that can not number twenty, tell the days of the week, does not know his father or mother, his own age, etc.; but these are mentioned as instances only, for, whether a person is an idiot or not, is a question of fact for the jury. (*c*)

§ 547. A person made *non compos mentis* by sickness, or as it is otherwise expressed, a person afflicted with *dementia accidentalis vel adventitia*, is excused in criminal cases from such acts as are committed while under the influence of the disorder. Several causes have been assigned for this disorder, as violence of fever, concussion or hurt of the brain, and the like. (*d*) A lunatic is laboring under a species of insanity, but he is afflicted by his disorder only at certain periods and vicissitudes, having intervals of reason, called "lucid intervals." Such a person, during his frenzy, is entitled to the same indulgence as to his acts, as one whose insanity is fixed and permanent. The name of *lunacy* was taken from the influence which the moon was formerly supposed to have in all the disorders of the mind. (*e*) [See note 1].

(*a*) Co. Litt. 246: Beverly's case, 4 Co. 124; Lewis U. S. Cr. L. 600.
(b) 2 R. S. Ind. 1876, 313.
(*c*) Bac. Ab. Idiots, etc. [A]; Lewis U. S. Cr. L. 600.
(*d*) Lewis U. S. Cr. L. 601.
(*e*) *Ibid.*

(1) INSANITY.—On the trial of an indictment for murder, where the insanity of the prisoner was set up as a defense, the court instructed the jury, that the fact that some or all of the ancestors of the person had been insane, did not of itself prove that person insane; and that in the absence of *direct* and preponderating evidence of insanity at the time of the killing, it could not be be justified on that plea. *Held*, erroneous, because of the use of the word *direct*. *The State* v. *Simms*, 68 Mo. Rep. 305.

Intoxication.

§ 548. In what cases evidence of drunkenness in the accused, is to be heard; in what cases, if any, it amounts to a complete defense; whether such evidence is to be heard to qualify the character of the alleged offense, or to mitigate and reduce its grade or punishment, will next be considered. Beginning with the earliest doctrines on this subject, and thence tracing them down to this day, we find that according to Sir Edward Coke, (*a*) "a drunkard who is *voluntarius dæmon*, hath no privilege thereby, but what hurt or ill he doth, his drunkenness doth aggravate it."

§ 549. Judge Story says, in regard to drunkenness: "The law will not allow a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of his crime." (*b*) So says Lord Hale, (*c*) Parke, B., (*d*) and Alderson, B. (*e*)

§ 550. The whole current of authorities, both in England and America, ancient and modern, is to the same effect—modified, however, by some comparatively recent decisions, in regard to intent, mistake, etc., as will be hereafter noticed.

§ 551. Thus: A man who, by means of intoxication, voluntarily puts himself in condition to have no control of his actions must be held to intend the consequences. The safety of community requires this rule. Intoxication is so easily counterfeited, and when real, is so often resorted to as a means of nerving the person up to the commission of some desperate act, that the law can not recognize it as an excuse for the commission of crime. (*f*)

§ 552. But, the drunkenness of the party is often an important consideration in criminal cases where the guilty

(*a*) 1 Inst. 247.
(*b*) *U. S.* v. *Drew*, 5 Mason, 28.
(*c*) 1 Hale, 7.
(*d*) *Rex* v. *Thomas*, 7 C. & P. 817.
(*e*) *R.* v. *Meakin*, 7 C. & P. 297.
(*f*) *U. S.* v. *Drew*, 5 Mason, 28; *Pirtle* v. *The State*, 9 Hump. 663; *Com.* v. *Hawkins*, 3 Gray, 463; *People* v. *Garbutt*, 17 Mich. 9; 2 Cooley's Blackstone, Book 4, 27.

knowledge or intent constitutes the principal ingredient of the crime, so as to make the peculiar state and condition of the defendant's mind at the time, and with reference to the act done, the important subject of inquiry. (*a*) So held in Ohio as to passing counterfeit money. (*b*) So, in England, as to the appropriation of another's property, which might be larceny, or trespass merely, according as the specific intent to steal was absent or present. (*c*) On the other hand, it has been held in Indiana that in a prosecution for *larceny*, proof of the voluntary intoxication of the accused is *not admissible* in his behalf. (*d*) But this was a case of stealing a horse at night, and there was no claim that the horse was taken by *mistake* or under *claim and color of right.* But suppose the case had been, that the defendant, being very drunk, had a horse hitched to a rack close by another horse very like his own, and that he, in his obfuscated condition, took and rode off the other man's horse, and was arrested in the act. He claims that he made a mistake. He should certainly be allowed to prove his condition at the time, to rebut the alleged *animus furandi.*

§ 553. Again in cases of homicide: While intoxication, *per se*, is no defense to the fact of *guilt*, yet when the question of intent or premeditation is concerned, evidence of it is admissible to determine the degree, (*e*) and to show that there was no specific intent, or that there was no positive premeditation. (*f*) In New York, on a trial for murder with a club, in a sudden affray, it was held admissible to prove that the prisoner was intoxicated at the time, and the court ruled that if the prisoner, from intoxication, was in such a condition that

(*a*) *Swan* v. *The State*, 4 Hump. (Tenn.) 141; *U. S.* v. *Rodenbush*, 1 Bald. 517; *Kelley* v. *The State*, 3 S & M. 518; 1 Bish. Cr. L., § 411; *Rex* v. *Pitman*, 2 C. & P. 423; *People* v. *Eastwood*, 14 N. Y. 565; *Haile* v. *The State*, 11 Humph. 154; *Swan* v. *The State*, 4 Humph. 136; *Pigman* v. *The State*, 14 Ohio, 555; *Mooney* v. *The State*, 33 Ala. 419; *State* v. *Garvey*, 11 Minn. 154.

(*b*) *Pigman* v. *The State*, 14 Ohio, 555.

(*c*) *Rex* v. *Pitman*, 2 C. & P. 423.

(*d*) *Dawson* v. *The State*, 16 Ind. 428. This case is contrary to the weight of authority. It is substantially overruled in *Cluck* v. *The State*, 40 Ind. 263. See, also, Bish. Cr. L. § 411 *Rafferty* v. *The People*, 66 Ill. 118.

(*e*) 1 Whar. Am. Cr. L. 41.

(*f*) *Ibid.*

there was no motive or intention to commit the crime of murder, the jury should find a verdict of manslaughter. (*a*)

§ 554. In those States where there are two degrees of murder, depending on the presence or absence of premeditation, evidence of drunkenness is admitted, as tending to show a want of premeditation, so as to reduce the offense from murder in the first degree to murder in the second degree. (*b*)

Delirium Tremens, etc.

§ 555. Settled insanity, produced by intoxication, affects the responsibility in the same way as insanity produced by any other cause. (*c*) *Delirium tremens*, when complete, destroys the moral as well as the intellectual responsibility. (*d*)

Irresponsibility by Reason of Tender Years.

§ 556. In regard to capital crimes, the law conclusively presumes that an infant under the age of seven years has not sufficient discretion to be guilty of such offense. (*e*) At the age of fourteen years and upwards the criminal actions of infants are subject to the same modes of construction as those of adults; for the law presumes them *doli capaces* and capable of distinguishing between right and wrong; but during the interval between the ages of *seven* and *fourteen* an infant is deemed to be *doli incapax*, and is therefore presumed to be unacquainted with crime. Yet, if the evidence shows that the offender had sufficient knowledge and discretion, he may be convicted and punished. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction, and if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus, it is said that an infant of eight years old may be guilty of

(*a*) 1 Whar. Am. Cr. L. 41; *Rogers* v. *People*, 3 Parker C. R. 632.

(*b*) 1 Whar. Am. Cr. L. § 41, citing many cases; *contra*, *State* v. *Cross*, 6 Jones, Mo. 332.

(*c*) 1 Whar. Cr. L. § 33 (*a*); Ray Med. Ju. Ins. 438.

(*d*) *U. S.* v. *Drew*, 5 Mason, 28; *U. S.* v. *Clarke*, 2 Cranch C. C. Reps. 158; *Bailey* v. *The State*, 26 Ind. 422.

(*e*) 1 Hale 27, 28; 4 Bl. Com. 23.

murder and shall be hanged for it; (a) and where an infant between eight and nine years of age was indicted and found guilty of burning two barns, and it appeared upon examination that he had malice, revenge, craft and cunning, he had judgment to be hanged, and was executed accordingly. (b) But it is safe to affirm that capital punishment has never been inflicted on one so young in the United States.

Of the Evidence.

§ 557. Under this head it is proposed to discuss, chiefly, those topics on the law of evidence, that are peculiar to cases of homicide; the law of evidence as applicable generally to criminal and civil proceedings, not coming within the purview of this work.

Dying Declarations.

§ 558. Evidence of dying declarations is admitted only in prosecutions for felonious homicide; and such evidence is admitted in those cases only where the cause of the death of the declarant is the subject of the dying declarations. (c) Such evidence is admitted partly from the necessity of the case; and partly from a consideration that a statement made by a person in a dying condition, when all expectation of recovery is gone, and when it is presumed that all hope, fear and passion as to earthly matters, have been removed by the shadow of death—has all the solemnity and binding force on the conscience, as the solemnity of an oath. But the latter consideration, namely, the solemnity of the occasion, is not the only reason for the admission of dying declarations; for, upon an indictment for perjury a dying declaration is not admissible to disprove a fact on which perjury is assigned. (d) And on an indictment for endeavoring to procure an abortion, the dying declarations of the woman are not admissible, though they relate to the cause of her death. (e) And where a man has been robbed, and dies before the trial of the robber, his

(a) *Dalt. Just.* c. 147.
(b) Dean's case, 1 Hale 25, note *u*.
(c) 2 B. & C. 608; 14 Ind. 573.
(d) 4 D. & R. 120.
(e) 2 B. & C. 608*n*.

dying declarations respecting the robbery are not admissible. (*a*) But on an indictment for the murder of A by poison, which was also taken by B, who died in consequence thereof, the dying declarations of B were held admissible. (*b*) So, also, the dying declarations of an accomplice have been held to be admissible. (*c*) Dying declarations made by the deceased in favor of the defendant are admissible. (*d*) Where a dying declaration is reduced to writing, that writing must be produced; a copy, or parol evidence of the contents, will not do unless the original be destroyed or lost. (*e*) It is no objection to the admission of a dying declaration that it was elicited by questions and answers. (*f*) And the exact words of the dying declaration need not be proved. It is sufficient to prove the substance of the declaration. (*g*) 23 Ind. 40.

§ 559. The dying declaration of a person who expects to die, respecting the circumstances under which he received a mortal injury, are constantly admitted in criminal prosecutions where the death is the subject of criminal inquiry; though the prosecution be for manslaughter; (*h*) though the accused was not present when they were made, and had no opportunity for cross-examination, (*i*) and against or in favor of the party charged with the death. (*j*) For it is considered that when an individual is in constant expectation of immediate death, all temptation to falsehood, either of interest, hope or fear, will be removed and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice. (*k*) When every hope of this

(*a*) 4 C. & P. 233.
(*b*) 2 M. & Rob. 53.
(*c*) East P. C. 354, 356.
(*d*) 1 M. & Rob. 551.
(*e*) 7 C. & P. 230.
(*f*) 7 C. & P. 238.
(*g*) 8 Blackf. 101; See Bick. Cr. Pr. in Ind. 160, 161.
(*h*) *State* v. *Hanna*, 10 La. An. Rep. 131.
(*i*) 1 Phil. Ev. 223; 1 Stark. Ev. 101; *People* v. *Green*, 1 Den. 614; 1 Park C. C. 11; *State* v. *Brunatto*, 13 La. Ann. 45.
(*j*) *U. S.* v. *Taylor*, 4 Cranch C. C. R. 338.
(*k*) 1 Leach 502; 1 Gilb. Ev. 280; *Walston* v. *Com.* 16 B. Mon. 15; 31 Texas, 579; *Hill* v. *The State*, 41 Georgia, 484; *State* v. *Nash*, 7 Iowa, ——.

world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions.

§ 560. *Evidence does not Conflict with Provision of Constitution.*—The constitutional provision, that the accused shall be confronted by the witnesses against him, does not abrogate the common law principle that the declarations *in extremis* of the murdered person, in such cases, are admissible in evidence. (*a*)

Questions to which Dying Declarations are Restricted.—Dying declarations are admitted, from the necessity of the case, to identify the prisoner, and to establish the circumstances of the *res gestæ*, or to show transactions from which the death results; when they relate to former and distinct transactions, they do not come within the principle of necessity. (*b*) Therefore, it seems, that dying declarations by a party that the prisoner had, two or three times previously attempted to kill him, are not admissible. (*c*) And so when they go to show old malice on part of the prisoner to the deceased. (*d*) Yet it is competent to detail collateral remarks, on the part of the declarant, made at the time of the uttering of the declarations as to the homicide, where such collateral declarations tend to sustain the declarant's mental capacity. Thus in a case in the Supreme Court of New Jersey, in 1857, Chief Justice Green said: "If it be true, as was proved by experts called by the defense, that the injury sustained by the deceased was calculated to derange the mental faculties, it was competent for the State to meet the objection *in limine*, and to show by his acts and words, that he was laboring under no hallucination, and that his mental faculties were unimpaired. (*e*)

§ 561. *Cases in which such Declarations have been held Admissible.*—Dying declarations, however, are not admissible

(*a*) 2 Howard Miss. 655; 11 Ga. 355; 8 Ohio St. R. 131; N. S.; 7 Iowa, 347; 25 Wis. 384.
(*b*) *R.* v. *Mead*, 2 B. & C. 605; 1 Whar. Am. Cr. L. § 670.
(*c*) 7 Humph. (Tenn.) 542.
(*d*) *Mose* v. *The State*, 35 Ala. 421.
(*e*) *Donnelly* v. *The State*, 2 Dutcher, 496.

unless it appear to the court that they were made under a sense of impending dissolution, (*a*) and a consciousness of the awful occasion, (*b*) though the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made. (*c*) When the party expressed an opinion that she should not recover, and made a declaration at that time, but asked a person on the same day whether he thought "she would rise again," it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible. (*d*) But it is not necessary to prove expressions implying apprehensions of immediate danger, if it be clear that the party does not expect to survive the injury, which may be collected from the general circumstances of his condition; (*e*) as when the party was a member of the Catholic church, and had confessed and been absolved, and received extreme unction, before making the declaration. (*f*)

§ 562. In a case before the twelve judges of England, it was held that the declarations of the deceased made on the day he was wounded, and when he believed he should not recover, were evidence, although he did not die until eleven days after; and although the surgeon did not think his case hopeless, and continued to tell him so until the day of his death. (*g*)

§ 563. On this subject the following decisions have been made in Indiana: An expression of *opinion* [only] by the declarant, as to who it was that fired the fatal shot, based on previous threats, and his account, *in extremis*, as to what had previously occurred between the deceased and the accused, are not admissible in evidence. (*h*) And when a written

(*a*) *R* v. *Woodcock*. 1 Leach, 500; *Rex* v. *Welborn*, 1 East P. C. 358; 1 Greenl. Ev. § 158; 2 Russ. Cr. 752; 7 Hump. (Tenn.) 542; *Moon* v. *The State*, 12 Ala. 764; 17 Ill. 17; 8 Ohio 131; 32 Miss. (3 Georg.) 433: 13 Flor. 637; 50 Mo. 370.

(*b*) *R.* v. *Pike*, 3 C. & P. 598

(*c*) *Rex* v. *Mosely*, 1 Moody, 97; 2 Russ. Cr. 757.

(*d*) *Rex* v. *Fagent*, 7 C. & P. 238.

(*e*) *Murphy* v. *The People*, 37 Ill. 447.

(*f*) *Ibid.*

(*g*) *Rex* v. *Mosley*, 1 Moody, 97.

(*h*) *Binns* v. *The State*, 46 Ind., 311.

memorandum of declarations made *in extremis* is not signed, parol evidence of such declaration is admissible. If the declaration has been signed, the writing should be produced, or accounted for. (*a*)

§ 564. "In order to admit proof of statements as dying declarations, the proof must clearly show that the declarant *was in fact at the very point of death*, (*b*) and that he was fully conscious of that fact, not as a thing of surmise and conjecture, or apprehension, but as an inevitable fact. It is not neceesary that the deceased should have declared in terms that he expected to die at once, if his condition was such that, of necessity such an impression must have existed in his mind. On the other hand, no matter how strong the expression of this certainty of death may have been, if there be any evidence of hope, in the language or actions of the deceased, his statements will be rejected." (*c*)

If the expression in the foregoing opinion, "that the *declarant must in fact be at the very point of death*," was intended to be taken literally, it is certainly against the whole current of authorities. While it is certain that the declarant must be *in extremis*, or a moribund condition, and he must be conscious of the fact, and have given up all hope, and expect to die very shortly, yet it is going too far to require, as the case seems to require, that the declarant should in fact be at the very point of death, with the death-rattle in his throat, in order that his declarations may be received in evidence. There are numerous instances in the adjudicated cases when the declarations were admitted where they were made many hours or days before the declarant reached the "very point of death." It will be observed, too, by examining the above-mentioned case fully, that the syllabus is not borne out by the body of the decision. See later cases: *Watson* v. *The State*, 63 Ind. 548, and *Binns* v. *The State*, 46 Ind. 311.

(*a*) *Binns* v. *The State*, 46 Ind. 311.
(*b*) But see *post*, in this section.
(*c*) *Morgan* v. *The State*, 31 Ind., 193.

Of the Corpus Delicti, and Finding the Dead Body.

§ 565. On this subject Lord Hale says: "I would never convict any one of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." (*a*) The death in such a case should be distinctly proved, either by direct evidence of the fact, by inspection of the body, (*b*) or by circumstantial evidence strong enough to leave no reasonable doubt. (*c*) The fact of death should be shown either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or if found in a state of decomposition, or reduced to a skeleton, that it should be identified by dress or circumstances, as in the Webster case, where the teeth formed the chief means of identification; and in an English case, where the same test was successfully applied to a body after a lapse of twenty-three years. (*d*) Several remarkable cases have occurred where persons have been convicted and executed for the murder of parties who afterward turned out to be alive. These cases are well calculated to vindicate the policy of the law as to proving the *corpus delicti*.

Should the death be proved by eye witnesses, it is not essential that the body should have been seen after death, as in case of killing or mortally wounding a man, and then throwing the body into the sea. (*e*) In Missouri it has been held that a confession on the part of the accused, that he drowned his wife, was sufficient proof of her death, without any evidence that she was seen after death. (*f*) In Indiana it has been decided that in a prosecution for murder, the *corpus delicti* may be proved by circumstantial evidence, and it is not necessary that the body of the deceased be found. (*g*) And also that on a trial for murder, where evidence was given of the finding of a skeleton of a human being, of the sex of the

(*a*) 2 Hale P. C. 290; 5 Humph. 383.
(*b*) 1 Stark. Ev. 575, 3 ed. ch. 5.
(*c*) *People* v. *Rulloff*, 3 Parker C. R. (N. Y.) 401.
(*d*) *Rex* v. *Clewes*, 4 C. & P. 221; 1 Whar. Cr. L. § 746.
(*e*) *Rex* v. *Hindmarsh*, 2 Leach Cr, L. 569.
(*f*) *State* v. *Lamb*, 28 Mo. 218.
(*g*) *Stocking* v. *The State*, 7 Ind. 326.

person charged to have been murdered and corresponding to his size, it was decided that this was sufficient evidence of the *corpus delicti* to justify the admission of circumstantial evidence to identify the skeleton as that of the murdered party, as well as to show the cause and manner of his death. (*a*)

Evidence of Character.

§ 566. Evidence of the defendant's good character is admissible in his behalf in all prosecutions for murder and manslaughter, as well as in all other crimes; and that, not only in doubtful cases, as has sometimes been loosely said, but in every case, whether the evidence against the defendant be direct or circumstantial, strong or weak, cogent or doubtful. (*b*) The good character of the party accused, when established by evidence, ought *always* to be submitted to the consideration of the jury together with the other facts and circumstances of the case. (*c*) It is not proper for the judge to charge the jury that "in a plain case a good character would not help the prisoner, but in a doubtful case he has a right to have it cast into the scales and weighted in his behalf;" the true rule being, that in all cases a good character is to be considered of weight. (*d*) Whether it be a doubtful case or a plain case can not be determined until the whole evidence is put in; and character is an ingredient which may render that doubtful which would otherwise be clear. If it be a *plain* case of *guilt*, *i. e.*, *granted* that the defendant is *guilty* of the crime wherewith he is charged, then, of course, the evidence of good character would be of no avail. But so long as the question of his guilt or innocence is in dispute, the jury should consider all proper evidence in his behalf, whether it be his own good character, or the prosecutor's bad character, or evidence of *alibi* or self-defense.

§ 567. Evidence of this description is admitted, on the

(*a*) *McCulloch* v. *The State*, 48 Ind. 109.

(*b*) Arch. Cr. P. 104; 2 Russ. Cr. 784; *Rex* v. *Stannard*, 7 C. & P. 673; *Com.* v. *Webster*, 5 Cush. 324; *Davis* v. *State*, 10 Ga. 101; 1 Whar. Cr. L. § 636.

(*c*) 2 Russ. Cr. 785.

(*d*) *State* v. *Henry*, 5 Jones N. C. 65.

principle that it is not likely that one who has always conducted himself peaceably and morally will commit an atrocious crime, and "at a single bound leap the wide gulf that separates vice from virtue." As observed by Mr. Prentiss, in his celebrated speech in the Wilkinson case, "good character always has been, and always will be, a wall of strength around its possessor, a seven-fold shield to him who bears it. In proportion to the excellence of a man's character, is, and ever ought to be, the violence of the presumption that he has been guilty of a crime." (*a*)

§ 568. In proving the defendant's good character, witnesses are not allowed to speak, of their own personal knowledge, of his good conduct, but of his "general reputation," or "general character," (used in the sense of reputation). And such evidence of good character should have relation to the nature of the offense charged; as in larceny, for honesty and fair dealing; in perjury, for truth; and in murder or manslaughter, or assaults with intent to commit them, for peace and humanity, and the like. (*b*)

Evidence of the Character, Conduct, and Threats of the Deceased.

§ 569. *As to the Bad Character of the Deceased.*—Evidence of this sort is generally inadmissible in behalf of the accused. (*c*) But it has been thought admissible to show that the deceased was possessed of preponderating strength, that he carried arms, and that his character was so far desperate as to necessitate the most extreme precaution on the part of a person attacked by him, notice of this being brought home to the defendant. (*d*) It is no excuse for a murder that the person murdered was a bad man; but the character of the deceased

(*a*) *Ante*, § 201.

(*b*) 1 Whar. Am. Cr. L. § 636, *et seq.*

(*c*) *Com.* v. *York*, 9 Metcalf, 110; *State* v. *Field*, 14 Maine, 248; *State* v. *Jackson*, 17 Mo. 544; *Wise* v. *The State*, 2 Kansas, 419; *State* v. *Brien*, 10 La. Ann. Rep. 453; *People* v. *Murray*, 10 Cal. 309.

(*d*) *Pritchett* v. *State*, 22 Ala. 39; *DeForest* v. *The State*, 21 Ind. 23; 9 Yerger, (Tenn.) 342; 25 Ga. 699; 6 Jones, (Mo.) 588; 1 Metc., (Ky.) 370; 2 Kans. 419; *Fannestock* v. *The State*, 23 Ind. 231.

may sometimes be given in evidence, to show that the defendant had good reason in believing himself in danger, when the circumstances of the case are equivocal. (*a*) But notice to the defendant of this bad character is required. (*b*)

§ 570. Upon this question it has been held in Indiana, in *Dukes* v. *The State*, 11 Ind. 557, that when the question arises whether the accused acted upon grounds that justified him in the deed, it would seem that the character of the deceased might be considered, especially when the deceased knew his character and knew him at the time he committed the act; and that in justifying homicide, in defense of one's person, property, etc., the defendant may give in evidence any facts tending to show the character of the attack which he resisted, the intention with which it was made, and that he had reasonable grounds to believe it was necessary to go to the extent he did in resisting it. To the same effect is *DeForest* v. *The State*, 21 Ind. 23.

§ 571. *Threats by Deceased.*—It is admissible on behalf of the party accused, to show threats which would be likely to induce him to reasonably believe that his life was in danger; but it is frequently laid down, that such threats, without overt acts must be shown to have been communicated to him prior to the homicide. (*c*)

On the contrary, it has been decided in Indiana (*d*) that threats made by the deceased against the defendant should be admitted in evidence, whether they were communicated to the defendant or not. To the same effect are rulings in Kentucky, Illinois, Georgia, Ohio and other States. (*d*) [See Note 1.]

(*a*) *People* v. *Murray*, 10 Cal. 309.

(*b*) *People* v. *Henderson*, 28 Cal. 465; 1 Whar. Cr. L. §641.

(*c*) 2 Whar. Am. Cr. Law, §1027; *Keener* v. *The State*, 18 Ga. 194; *Alkins* v. *The State*, 16 Ark. 568; *State* v. *Gregor*, 21 La. Ann. 473; *People* v. *Lombard*, 17 Cal. 316; *Newcomb* v. *The State*, 37 Miss. 383; *Powell* v. *The State*, 19 Ala. 577; *Hoye* v. *The State*, 39 Ga. 718; *Pridgen* v. *State*, 31 Tex. 420; see, also, 15 B. Monroe (Ky.) 539.

(*d*) 37 Ind. 57; 15 B. Monroe (Ky.) 539; 16 Ill. 18; 18 Ga. 194; 19 Ohio, 302.

NOTE 1.—THREATS AND CHARACTER OF DECEASED.—In trials for homicide evidence of the violent and dangerous character of the deceased is admissible, without reference to the question whether there is any evidence in the case, showing that at the time of the killing the defendant was in danger, real or apparent, of death, or great bodily harm at the hands of the deceased. And threats made by the deceased against the accused, and not

The Indictment.

§ 572. The prolixity and great particularity of the two indictments, in the Wilkinson case, are very striking to those who are not familiar with the old practice and rules of law in regard to indictments. (*a*) These indictments were drawn with great care, according to the common law forms, and notwithstanding their great verbosity, there is scarcely an allegation in them that could safely have been omitted under the former practice. In most of the States of the Union, and in Great Britain, the rules of practice and pleading in criminal causes have been greatly improved and simplified; and many of the allegations formerly required in indictments are declared by statutes to be unnecessary.

The Revised Statutes of Indiana, 1852, prescribed a number of "simplified forms in criminal actions" (2 R. S. 1876, 368); but these forms were held unconstitutional and void by reason of a defect in the title of the act. (7 Ind. 516; 11 *Id.* 307; 9 *Id.* 408) But there are other statutory provisions which materially change and simplify the rules of criminal pleading. Among them are the following:

"SECTION 54. The indictment or information must contain:

"*First.* The title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties

"*Second.* A statement of the facts constituting the offense, in plain and concise language, without repetition.

"SEC. 55. The indictment or information must be direct and certain, as it regards the party and the offense charged.

"SEC. 56. The precise time of the commission of the offense need not be stated in the indictment or information; but it is sufficient if shown to have been within the statute of limitations, except when the time is an indispensable ingredient in the offense.

communicated to him before the killing, are admissible in all cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character. *Little* v. *The State*, 6 Jerry Baxter (Tenn.) Rep. 491. See also *Jackson* v. *The State*, *Id.* 452.

(*a*) *Ante*, §§ 5, 6.

"SEC. 57. In an indictment for an offense committed in relation to property, it is sufficient to state the name of any one, or names of several or joint owners.

"SEC. 58. The words in an indictment must be construed in their usual acceptation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

"SEC. 59. Words used in the statute to define a public offense, need not be strictly pursued, but other words, conveying the same meaning, may be used.

"SEC. 60. The indictment or information is sufficient if it can be understood therefrom:

"*First.* That the indictment was found by the grand jury of the county, or the information presented by the prosecuting attorney of the circuit in which the court is held;

"*Second.* That the defendant is named, or described, in an indictment, as a person whose name is unknown to the grand jurors; or, in an information, to the prosecuting attorney;

"*Third.* That the offense was committed within the jurisdiction of the court, or is triable therein;

"*Fourth.* That the offense charged is clearly set forth, in plain and concise language, without repetition; and,

"*Fifth.* That the offense charged is stated with such a degree of certainty, that the court may pronounce judgment upon a conviction, according to the right of the case.

"SEC. 61. No indictment or information may be quashed or set aside for any of the following defects:

"*First.* For a mistake in the name of the court or county in the title thereof;

"*Second.* For the want of an allegation of the time and place of any material fact, when the venue and time have been once stated in the indictment, or information;

"*Third.* That dates and numbers are represented by figures;

"*Fourth.* For an omission of any of the following allegations, viz.: 'With force and arms,' 'contrary to the form of

the statute,' or 'against the peace and dignity of the State of Indiana;'

"*Fifth.* For an omission to allege that the grand jurors were empaneled, sworn, and charged;

"*Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged; nor,

"*Seventh.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

§ 573. Notwithstanding the foregoing statutory provisions, it will be seen, by the adjudicated cases, that greater certainty and particularity are often required in indictments, than at first blush would seem to be necessary under these statutes. Indeed, it has been decided that the Legislature has not the power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of the offense (45 Ind. 338). While conciseness is a cardinal excellence in criminal pleading, yet there is generally more or less danger of carrying it too far. Therefore, the pleader should not make it an object to draw his indictment in the fewest possible words. It is better to err in the opposite direction at the expense of unnecessary prolixity. It is always safe to follow approved precedents; and, therefore, unless a short form has been settled by the Supreme Court, and your *facts are identical*, with those of the adjudicated case, it is best to follow the old forms substantially, omitting only such allegations as are plainly unnecessary. The indictment against *Judge Wilkinson et al.*, *ante* §§5, 6, is a good form, which may be used with propriety at this day, with very little change. It should be borne in mind that those short indictments which the Supreme Court have held good, were subjects of grave dispute, while other short indictments, seemingly in accordance with the modern practice, have been held bad, as in the case of *Sheppard* v. *The State*, 54 Ind. 25. Care should be taken to modify the old forms to conform to the

statutory definitions of the various grades of felonious homicide; for example, in Indiana, instead of the phrase "with malice aforethought," used at common law in charging the highest degree of felonious homicide, the following words should be used in an indictment for murder in the first degree: "Feloniously, purposely, and with premeditated malice." See *post*, §606, pl. 1.

In Part III of this work will be found a number of short forms, which have been held sufficient by the Supreme Court of Indiana.

In regard to the requisites of indictments for felonious homicide, it has been held that it is not necessary in an indictment for murder to aver that the accused was a person of sound mind. (*a*) It was decided in 7 Blackf. 20, that the part of the body to which the violence was applied, must be stated in the indictment, but the proof need not correspond with the statement. It was afterwards held, however, that it is not absolutely necessary that the part of the body struck by the ball should be specified in the indictment. (*b*) It is not necessary to describe the depth or breadth of the wound. (*c*) Unless the indictment contain the technical word "*murdered*," it is an indictment for manslaughter only. (*d*) To aver that the defendant held the gun "in both hands," is equivalent to averring "in both *his* hands." (*e*) The indictment need not name the particular kind of poison administered, in a case of murder by poisoning; and if it do, it will not be necessary that the proof correspond. (*f*) The kind of gun and shot need not be specified, nor the wound described. (*g*) The signature of the prosecuting attorney is not necessary to the validity of an indictment. (*h*) The words "*malice aforethought*," are not equivalent to the phrase "premeditated

(*a*) 1 Blackf. 395, 396.
(*b*) *Whelchell* v. *The State*, 23 Ind. 89.
(*c*) *Dias* v. *The State*, 7 Blackf. 20.
(*d*) *Ibid.*
(*e*) *Ward* v. *State*, 8 Blackf. 101.
(*f*) *Carter* v. *State*, 2 Ind. 617.
(*g*) *Dukes* v. *State*, 11 Ind. 557; *Dillon* v. *State*, 9 Ind. 408.
(*h*) *Dukes* v. *State*, 11 Ind. 557.

malice," and therefore, when, in an indictment, it is charged that the killing was done with "malice aforethought," it amounts to murder in the second degree only. (*a*)

§ 574. An indictment, averring that the defendant feloniously, willfully, and of his malice aforethought, "*did kill, murder and put to death* [a certain person], with a pistol and knife," was held to be insufficient in California, because it did not sufficiently specify the manner and facts of the killing. (*b*) To the same effect is a decision in Indiana. (*c*) The date of the death of the deceased, as well as that of the stroke or wounding, should be stated, (*d*) so that it shall appear on the face of the indictment that the injured party died within a-year-and-a-day after the stroke, for if the death did not occur within that time the law presumes that it resulted from some other cause. (*e*) When it is averred in the indictment that the deceased was killed with *a knife*, this averment need not be strictly proved as charged; it will be sufficient to show that the deceased was killed by any other instrument capable of producing the same kind of wound or hurt. (*f*)

§ 575. But, if the indictment allege a stabbing, and the evidence prove a shooting, the variance will be fatal, the species of death being different in these two cases. (*g*) Where the indictment charged the killing to have been done by blows upon the head, and the evidence showed that the death was caused by the deceased falling on the ground, in consequence of a blow received from the defendant, it was held that the indictment did not properly state the cause of the death. (*h*) And when the indictment averred that the killing was done with a brick, and it was proved that the defendant knocked the deceased down with a blow of his fist, and that he fell against a brick which caused his death, it was held to be a variance. (*i*) And where the indictment charged that

(*a*) *Finn* v. *The State*, 5 Ind. 400.
(*b*) *People* v. *Aro*, 6 Cal. 207.
(*c*) *Shepherd* v. *The State*, 54 Ind. 25.
(*d*) *State* v. *Conley*, 39 Maine, 78.
(*e*) *People* v. *Kelley*, 6 Cal. 210.
(*f*) 9 Coke, 67*a*.
(*g*) 1 Moody C. C. 318.
(*h*) 1 Moody C. C. 139.
(*i*) 1 Moody C. C. 113.

the killing was done by shooting with a pistol loaded with gunpowder and a leaden bullet, and it was proved that there was no bullet in the wound, and none in the room where the act occurred, and that the wound might have been made with the *wadding* of the pistol, it was held that the indictment was not proved. (*a*) [*Sed quere?*] An indictment charged the killing by choking and suffocation with moss and dirt; and it appeared by the evidence that the death was produced by inflammation which was the effect of the choking; this was held sufficient, upon the ground that the proximate cause of the death having been truly stated, it was not necessary to state in the indictment the intermediate process arising from such cause. (*b*) Where an indictment charged a murder by cutting the throat of the deceased, and a surgeon proved that the real throat was not cut (the wound not extending far enough around the neck), it was held that there was no variance, because the word *throat* used in the indictment must be understood to mean what is commonly called the throat. (*c*) It is not necessary in Indiana to state in which hand the instrument of death was held, and if such averment is made in the indictment, it will be no variance, although the evidence shows that the instrument was held in the other hand from that which is averred in the indictment. (*d*)

Once in Jeopardy.

§ 576. Although the law on this subject is equally applicable in all offenses, yet, by reason of its great importance in homicide cases, it is deemed useful and proper to present the law on this topic in these pages.

§ 577. According to the common law, where there has been a final verdict, either of acquittal or conviction, upon a valid indictment, the defendant can not again be placed in jeopardy for the same offense. But, according to modern doctrines, to be noticed hereafter, there are other cases of *jeopardy*, that bar

(*a*) 5 C. & P. 126.
(*b*) R. & R. 345.
(*c*) 6 C. & P. 401.
(*d*) Bick. Cr. Pr. 261.

a further prosecution, besides "a final verdict of acquittal or conviction."

§ 578. It is declared in the 5th article of the amendments to the Constitution of the United States, that no person "shall be subject for the same offense, to be twice put in jeopardy of life or limb." Similar provisions are to be found in all the constitutions of the thirty-eight States of the Union. In some States the language is "life or liberty." In Indiana: "No person shall be put in jeopardy twice for the same offense." In Kentucky: "No person shall, for the same offense, be twice put in jeopardy of life or limb." The same language is used in the constitution of Tennessee. In Mississippi: "No person's life or liberty shall be twice placed in jeopardy for the same offense." In Ohio: "No one shall be twice put in jeopardy for the same offense." Same in Illinois. In Missouri: "No person after being once acquitted by a jury, shall be again for the same offense put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted, fail to render a verdict, the court before which the trial is had, may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court; or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner, on a proper indictment, or according to correct principles of law."

§ 579. *First*, of jeopardy by acquittal or conviction. The general principle stated, *ante* § 577, is recognized as far as it goes, in all the States; and the criterion laid down, generally, is: Would the evidence necessary to support the second indictment, have been sufficient to procure a legal conviction on the first? (*a*) But the former acquittal, in order to be a good bar, must have been upon a charge within the jurisdiction of the court where the party was acquitted. For example, an *acquittal* by a justice of the peace upon a charge of an

(*a*) 1 B. & B. 473; 9 East, 437; 2 C. & P. 634.

assault and battery with intent to commit murder, is beyond the jurisdiction of a justice of the peace, and therefore void, and can not be pleaded in bar of an indictment afterward found for the same offense. (*a*) The reason of this is, that on a charge before a justice of the peace for a *felony*, the justice sits as an examining court, and can only discharge, commit or hold the accused party to bail, to answer in a higher court; and he has no jurisdiction to *acquit* or *convict*. It has been said by an eminent jurist of Indiana, (*b*) that an indictment for an assault and battery with intent to murder, is barred by a former acquittal before a justice of the peace for an assault and battery, alleged to be for the same assault and battery described in the indictment; citing Foster, 229. But the Supreme Court of Indiana have recently decided otherwise; and have held that an "assault and battery (a misdemeanor), when committed in connection with an attempt to murder, is merged in the felony known as "an assault and battery with intent to murder;" and an acquittal or conviction of the misdemeanor, though by a court of competent jurisdiction, is no bar to the prosecution of the felony; but if the intent to murder be not established, such acquittal or conviction will bar a conviction of the assault and battery. (*c*) It was further held, that on a trial for simple assault and battery, one can not be convicted on evidence showing him guilty of an assault and battery with intent to commit murder.

§ 580. An acquittal upon an indictment for burglary *and* larceny may be pleaded to an indictment for a larceny of the same goods; but if the first indictment were only for a burglary with intent to commit larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny. (*d*) An acquittal on a charge of murder is a bar to a subsequent prosecution for manslaughter, for the same killing, because the defendant might have been lawfully convicted of manslaughter under the former indictment for murder. (*e*)

(*a*) 4 Blackf. 156.
(*b*) Bick. Cr. Pr. 119.
(*c*) *State* v. *Hattabaugh*, 66 Ind. 223.
(*d*) Hale, 245; 14 Ind. 572.
(*e*) 2 Hale, 246; 9 C. & P. 364.

An acquittal upon an indictment for manslaughter is a bar to an indictment for murder, for the same act of homicide. (*a*)

§ 581. But, as stated, *ante* § 577, there are other cases of jeopardy, that bar a further prosecution, besides an acquittal or conviction; and these will now be noticed. In several of the States it has been held that where a jury in a capital case has been discharged without the consent of the accused, before rendition of the verdict, after the trial has commenced, such discharge may, under certain conditions, bar a second trial for the same offense, under the same or another indictment, upon the ground that the defendant has been "once in jeopardy."

§ 582. Upon this subject the Supreme Court of the United States has held that "courts of justice are invested with the authority to discharge a jury, without the consent of the defendant, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the discharge, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." (*b*)

§ 583. In Virginia, mere inability to agree is not such a necessity as will justify the court in discharging a jury, and in such a case the defendant can not again be put in jeopardy. (*c*) But in a case in which the jury had been in deliberation for nine days, one of the jurors suffered materially in health, and for that reason the jury were discharged, it was held in Virginia that a second trial was regular. (*d*)

§ 584. In Tennessee the jury were empaneled on Thursday evening, at 2 o'clock, and they came in once or twice during the same evening and declared that they could not agree, but they were kept together all that night by the court, and at 9 o'clock the next morning they were discharged by the court, the jury declaring that they could not agree. The term of the court did not conclude until the day following. It was

(*a*) 4 Co. Rep. 46*b*; 1 Stark. 305; Fos. 229.
(*b*) *U. S.* v. *Perez*, Wheaton, 579.
(*c*) *Williams* v. *Com.*, 2 Grattan, 568.
(*d*) *Com.* v. *Fells*, 9 Leigh, 613.

held that this was not such a case of necessity as authorized the court to discharge the jury; and it was said that it was not within the power of the court to discharge the jury without the consent of the prisoner, except in case of sickness, insanity, or exhaustion among themselves. (*a*)

In California it has been decided that the jury can not be discharged without the prisoner's consent, except in cases of legal necessity, or from some cause beyond the control of the court, such as death, sickness or insanity of some of the jury, of the prisoner, or of the court; and that a discharge of the jury without some such reason protects the defendant from another trial. (*b*)

§ 585. In Mississippi the decision of the Supreme Court of the United States (*ante* § 582; *U. S.* v. *Perez*, Wheaton, 579), was followed. (*c*) But it was afterwards held in that State that a discharge merely because the jury were unable to agree worked an acquittal; yet it is otherwise when the term of the court is about to expire, and there is no possibility of agreement. (*d*)

In Illinois the view of the Supreme Court of the United States seems to obtain. (*e*)

In Ohio, first by decision of the Supreme Court (*f*), and afterwards by statutory enactment: "When the jury have deliberated long enough to leave very little doubt that their opinions are inflexibly formed," and are unable to agree, the court, at its discretion, may discharge the jury.

§ 586. In the State of Indiana it has been held: The discharge of a jury in a criminal case, because of their inability to agree upon a verdict, after a protracted deliberation, does not entitle the defendant to a discharge on the ground that he has been once in jeopardy. (*g*)

(*a*) *Mahaia* v. *The State*, 10 Yerger, 532; See *State* v. *Rankin*, 4 Cold. (Tenn.) 145.
(*b*) *People* v. *Webb*, 38 Cal. 467.
(*c*) *Moore* v. *The State*, 1 Walker, 134.
(*d*) *Josephine* v. *The State*, 39 Miss. 613; *Woods* v. *The State*, 43 Miss. 364.
(*e*) *State* v. *Stone*, 2 Scam. 326.
(*f*) *Dobbins* v. *State*, 14 Ohio St. R. 493.
(*g*) *The State* v. *Nelson*, 26 Ind. 366.

In this case, after deliberating three days, the jury failed to agree, and stated to the court that there was no probability that they could agree. Whereupon, over the defendant's objection, the court discharged the jury. And afterwards, the defendant was, on motion, discharged from further custody upon the indictment, the prosecuting attorney objecting. This discharge was evidently made upon the assumed ground that the defendant had been once *in jeopardy;* and the court then proceeds to give a very lucid and elaborate opinion on that subject. The judgment of the court below was reversed, the court holding that the defendant should be tried again, saying, "differing from the spirit of what has heretofore been held in Indiana, and from the doctrine held in Pennsylvania, Tennessee, Virginia, North Carolina and Alabama, we are, however, in accord with the Supreme Court of the United States, and of Massachusetts, Mississippi, New York, Illinois and Kentucky." (*a*) In other cases the Supreme Court have decided that the jury reporting that they could not agree might be discharged against the defendant's objection, when they had been out for eighteen hours, (*b*) and nineteen hours, (*c*) and that such discharge did not bar further proceedings against the defendant.

§ 587. In all criminal prosecutions, the defendant, under the oral plea of "not guilty," may show a former conviction for the same offense. (*d*) A defendant in a criminal prosecution, may plead specially a former acquittal, or a former conviction, in bar, and have the issue or issues joined on such plea, tried separately and apart from the question of the innocence or guilt of the crime charged in the pending indictment; (*e*) and it is optional with the accused whether he will plead a former acquittal or conviction specially, or give the same in evidence under the plea of not guilty; (*f*) and if the issue or issues

(*a*) *U. S.* v. *Perez*, 9 Wheaton 579; *Com.* v. *Bowden*, 9 Mass. 494; *Com.* v. *Purchase*, 2 Pick. 521; *People* v. *Goodwin*, 18 Johns. 187; *Moore* v. *State*, 1 Walk. (Miss.) 134; *Stone* v. *State*, 2 Scam. 326; *Com.* v. *Olds*. 5 Let. 137.

(*b*) 27 Ind. 131.

(*c*) 26 Ind. 346.

(*d*) *Lee* v. *The State*, 42 Ind. 152; *The State* v. *Leving*, *Id.* 541.

(*e*) *Clem* v. *State*, 42 Ind. 420.

(*f*) *Ibid.*

joined on a plea of former acquittal or conviction are found against the defendant, he may still enter a plea of *not guilty.* (*a*) When a legal indictment has been returned by a competent grand jury to a court having jurisdiction of the person and the offense, and the defendant has pleaded, and a traverse jury has been duly empaneled and sworn, and all the preliminary requisites of record are ready for the trial, the prisoner has been once put in jeopardy; (*b*) and in such a case, the prosecuting attorney can not, even with the consent of the court, enter a *nol. pros.*, and indict the defendant again for the same offense. (*c*) But where the indictment is so defective in form, that if the defendant were found guilty he would be entitled to have any judgment which could be entered thereon reversed; or if the judge discover any defect after the trial has commenced, which would render the verdict against the prisoner void, or voidable—then the judge on his own motion may stop the trial, and what may have transpired will be no bar to the future proceeding, and the prosecuting attorney may *nol. pros.* the indictment and procure a new one. (*d*)

§ 588. If, upon an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying anything as to the higher grade, the finding is, by implication, an acquittal of the higher grade. (*e*) When two or more persons are killed by the same act, the State can not indict the guilty party for killing one of the persons, and after a conviction or acquittal indict him for killing the other. (*f*) A criminal cause was submitted to the court for trial, and the judge, after hearing the evidence, took the case under advisement on the 16th day of December, but (without a finding), died on the 28th of April following; *held*, that this did not work a discharge of the defendant. (*g*)

(*a*) *Ibid.*
(*b*) *Joy* v. *The State*, 14 Ind. 139; 4 Blackf. 345; 7 *Id.* 191; 5 Ind. 292.
(*c*) 14 Ind. 139.
(*d*) *Ibid.*
(*e*) *Clem* v. *The State*, 42 Ind. 420.
(*f*) *Ibid.*
(*g*) *Bescher* v. *State*, 32 Ind. 480.

Where the jury, after ample time spent in consultation, is unable to agree upon a verdict, this constitutes good cause for their discharge, without the consent of the accused; but the discharge of the jury "without good cause," and without the consent of the defendant, is equivalent to a verdict of not guilty. (*a*) But if the jury be discharged on account of the illness or death of a juror, or of the judge, or because the term of the court has expired, the prisoner has not been in jeopardy, and may be tried again. (*b*) However, it was held in a murder case, that where one of the jurors became sick, and asked to be discharged (the prisoner refusing to consent to such discharge), and the court, without any sworn statement from the juror as to his condition, or the evidence of a physician on the subject, discharges the jury, such discharge will be a bar to a retrial of the prisoner. (*c*)

See further on this subject, the criteria laid down by the Supreme Court of Indiana, in *The State* v. *Hattabaugh*, 66 Ind. 223.

Of Bail—Habeas Corpus.

§ 589. The Constitution of the State of Indiana provides that "murder or treason shall not be bailable when the proof is evident or the presumption strong." There are similar provisions in the constitutions of all the States. If the indictment is either for murder in the first degree or murder in the second degree, (*d*) *prima facie*, the defendant is not entitled to bail. Sometimes the prosecuting attorney consents to bail in a certain amount, and the court on such consent admits the prisoner to bail. But in the absence of such consent the defendant must remain in imprisonment unless he is admitted to bail, on motion in the court wherein the indictment was found, or in vacation by the proper judge upon application by writ of habeas corpus. (*e*) The prosecuting attorney must be notified of the time and place for the hearing, and the court, or judge, having summoned the witnesses shall investigate

(*a*) 26 Ind. 346.
(*b*) *State* v. *Nelson*, 26 Ind. 366.
(*c*) *Rulo* v. *The State*, 19 Ind. 298.
(*d*) So held in —— Ind.
(*e*) 2 G. & H. (Ind.) 398.

the criminal charge; and discharge, let to bail, or recommit the prisoner, as may be just and legal, and shall recognize witnesses when proper. (*a*) Upon such investigation, for the purpose of being let to bail, the presumption is against the prisoner. He is the actor or plaintiff in the proceeding, and therefore the burden of proof is on him. He introduces his evidence first, there being cast on him the *onus* of showing that it is a bailable case. He must therefore introduce the evidence upon which the State intends to rely for a conviction; but he may cross-examine or impeach the witnesses. (*b*) On an appeal to the Supreme Court from a decision refusing to allow the prisoner to be bailed, the Supreme Court will weigh the evidence without regard to the finding below. (*c*)

The judges of the Criminal Courts of Indiana are authorized to issue writs of *habeas corpus* in favor of persons in custody for an alleged "violation of the criminal laws of this State," and to admit to bail, or discharge the prisoner, the same as the judges of the Circuit Court. (*d*)

§ 590. We submit the following form of a petition in such a case:

STATE OF INDIANA, } ss:
VIGO COUNTY. }

To Hon. Thomas B. Long, Sole Judge of the Vigo Criminal Circuit Court [or Civil Circuit Court]:

Your petitioner, John Jones, respectfully represents that he is restrained of his liberty and imprisoned in the jail of said county, by Louis Hay, sheriff, and *ex officio* jailor of said county, upon a commitment on an indictment by the grand jury of said county against the said petitioner for the alleged crime of murder in the first degree, in killing one Richard Roe, at said county, on the first day of January, 1880. Your petitioner says he is not guilty of said crime of murder [*or, that the proof is not evident, and the presumption is not strong against him as to his guilt of said crime of murder*], and he says that, therefore, he is entitled to be admitted to bail; and for that purpose he prays Your Honor to order the issuance of a writ of *habeas corpus*, directed to said sheriff, commanding him to bring the body of your petitioner before Your Honor, in order that the evidence for and against him

(*a*) 2 G. & H. (Ind.) 319.
(*b*) *Ex parte* Heffren, 27 Ind. 87.
(*c*) *Ibid*; *ex parte* Moore, 30 Ind. 197.
(*d*) Acts of 1875, Reg. S. 53.

may be examined, to the end that your petitioner may be admitted to bail, if the evidence shall warrant the same. JOHN JONES.

STATE OF INDIANA, } ss:
VIGO COUNTY, }

John Jones, the above-named petitioner, being duly sworn, states on oath that the matters stated in the foregoing petition are true, in substance and in fact. JOHN JONES.

Subscribed and sworn to before me on this first day of May, 1880.

[*Signed by the Officer.*]

The petition being presented to the judge, he endorses thereon an order for the clerk to issue the writ, returnable at a designated time and place. The writ in this case is served by delivering it to the sheriff, and upon it he makes his return, producing the body of the prisoner before the judge at the time and place named in the writ. The notice to the prosecuting attorney should be in writing, and may be signed by the prisoner or his attorney, and served as in case of ordinary notices. Each party causes his witnesses to be subpœnaed, and the examination proceeds as above stated.

Of Prosecutions by Affidavit and Information. (1)

§ 591. By an act approved March 29, 1879, (*a*) felonies may be prosecuted in the Circuit and Criminal Courts of Indiana, by affidavit and information, in the following cases:

"*First.* When any person is in custody on a charge of felony and no grand jury is in session.

"*Second.* When an indictment has been found by the grand jury, and has been quashed.

"*Third.* When a cause has been appealed to the Supreme Court, and reversed on account of defects in the indictment.

"The affidavit and information may be amended in matter of substance or form at any time before the defendant pleads, and the information may be amended at any time to conform to the affidavit. When the affidavit is amended it shall be sworn to."

It seems that under this act, the facts necessary to give the court jurisdiction to prosecute the defendant in this way should be clearly set forth *both* in the affidavit and information; that

(*a*) Acts of 1879, 143.

(1) See Appendix I.

is to say, "that the said C D [the defendant], is in custody of the sheriff of said county in the jail thereof, on a charge of the same felony, hereinabove set forth," and the like.

As *murder* is included in the word *felony*, it appears that by this act a party may be prosecuted, convicted and hanged, without having been indicted by a grand jury, which, to say the least of it, appears to the older members of the profession to be a "startling innovation," especially in view of Blackstone's encomium upon the "excellent forecast of the founders of the English law in contriving that no man should be called to answer for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury."

Of Principal and Accessory.

§ 592. At common law, one may be a principal in the commission of a felony either in the first or second degree. A principal in the first degree is one who is the actor or actual perpetrator of the crime; as, one who with his own hands strikes a murderous blow. A principal in the second degree is one, who, not being the chief actor, is present, aiding and abetting in the commission of the criminal act; and this presence need not always be an actual immediate standing by, within sight or hearing of the criminal act; but there may be also a constructive presence, as, for example, where one commits a robbery or murder, and another keeps watch or guard at some convenient distance for the purpose of giving assistance. (*a*) But in case of murder by poisoning, a man may be a principal felon by preparing or laying the poison, or persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning was committed. (*b*) And the same rule will hold in regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their object; as by laying a trap or pit-fall for

(*a*) 4 Bl. Com. 33; Bick. Cr. Pr. 13, 14.
(*b*) Foster, 349; 4 Bl. Com. 34, 35.

another, whereby he is killed; letting out a wild beast with intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues. In these cases the offending party is guilty of murder as a principal in the first degree. He is not guilty as an accessory, for that necessarily presupposes a principal. And as he is certainly guilty either as principal or accessory, and can not be so as accessory, it follows that he must be guilty as principal; and that in the first degree, because there is no other criminal or superior whom he aids, abets or assists. (*a*)

§ 593. An accessory is one who is not the chief actor in an offense, nor present at its performance, but is some way connected therein, either before or after the fact committed. An accessory *before the fact*, is one who being absent at the time of the commission of the criminal act—that is, being neither actually nor constructively present, procures, counsels, commands or abets another therein. (*b*) If a person be in such a position that the immediate actor may be encouraged by the hope of any ready help or assistance from him, even though it be merely to give the alarm, if necessary, such person is not an accessory before the fact but is a principal, constructively present. The procurement, aiding or abetting, may be through the intervention of a third person, (*c*) but it must be continuing; for if the procurer of a felony countermand his order he will not be guilty. (*d*) So, if he order or advise one crime and the principal designedly commit another or a like crime against another person, the former will not be responsible. (*e*) But the accessory will be liable for all the consequences of the criminal act by him commanded or advised; as, if A procure B to burn C's house, and in doing so, the house of D is also burned, A is accessory to the latter crime as well as the former. (*f*)

§ 594. The use of different means, from those which were advised, will not excuse the accessory; as, if one hire another

(*a*) *Ibid.*
(*b*) 1 Hale, 615.
(*c*) 5 C. & P. 535.
(*d*) 1 Hale, 618.
(*e*) 1 Hale, 617.
(*f*) Plow. 475.

to *poison* a man, and he *shoots* him instead. Here the hirer is guilty as accessory to the murder. (*a*)

While all who are present aiding and abetting him who inflicts the mortal blow in case of murder are principals, yet it is not every intermeddling in a quarrel or affray from which death ensues that constitutes an aiding and abetting to the murder. If, for instance, two men fight on a former grudge and of settled malice, and with intent to kill, of which the spectators are innocent, and they of a sudden take sides with the combatants and encourage them with words, and death ensue, it will not be murder in such persons. (*b*) In order that a bystander may be guilty as a principal in the second degree, something must be shown in his conduct which unmistakably evinces a design to encourage, incite, approve of, or in some manner afford aid or consent to the act. (*c*) And in a case in Indiana, (*d*) the Supreme Court held that it was error to instruct the jury that a party being present, "who aided, abetted or *consented*" to the homicide was a principal in the second degree; and that although the court below used the proper technical legal language defining a principal in the second degree, as laid down in the books, yet as the word *consent* in this connection has a different meaning in law, from its popular use and acceptation, the jury might have been misled by the charge of the court.

§ 595. There is practically no importance in the distinction between principals in the first degree and principals in the second degree in the State of Indiana; for it is provided by statute that any person who aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were a principal. (*e*) And by another statute the same punishment is to be inflicted upon aiders and abettors as upon the principal. (*f*) And, again: accessories before or

(*a*) Foster, 369.
(*b*) *State* v. *King et al.*, 2 Rice's S. C. Digest, 106.
(*c*) *Conaughty* v. *The State*, 1 Wis. 169.
(*d*) *Clem* v. *The State*.
(*e*) 2 R. S. (1876) 388, § 66.
(*f*) 2 R. S. (1876) 447, § 49.

after the fact, and aiders and abettors may be indicted and convicted before or after the principal offender is indicted and convicted. (*a*) But where an accessory to the crime of assault and battery with intent to murder is tried before the principal, and a verdict of guilty is rendered against him, but before judgment the principal is tried and acquitted, the accessory, on the production of the record showing the acquittal of the alleged principal, is entitled to be discharged. (*b*) Under recent rulings of the Supreme Court of Indiana a man may be guilty as an accessory before the fact to manslaughter.

§ 596. An accessory after the fact, is one who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. (*c*) Any aid given to one known to be a felon in order to hinder his apprehension, trial or punishment, would make such aider an accessory after the fact. (*d*) But suffering a prisoner to escape being an omission only, would not make the party an accessory after the fact, (*e*) and the aid given must have been adapted, to hinder the apprehension, trial or punishment of the criminal. (*f*) But it is lawful to supply a felon in prison or on bail, with necessaries for his sustenance, (*g*) or with medical or surgical attendance; (*h*) or endeavor to procure a pardon, or agree not to give evidence against him, or fail to discover the felony. (*i*) At common law an exception was made in favor of a felon's wife, as she was presumed to act under his coercion. But by statute in Indiana, (and it is presumed in other States), the exception is extended to others of the domestic relations: "husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, or master or apprentice." (*j*) This statute of Indiana omits the ingredient, "knowing him to have committed a felony;" but it requires that the party should have "an intent that the felon should escape detection

(*a*) 2 R. S. (1876) § 51.
(*b*) 42 Ind. 214.
(*c*) 1 Hale, 618.
(*d*) 2 Hawk. chap. 29, sec. 26.
(*e*) 1 Hale, 619.
(*f*) 9 C. & P. 335.
(*g*) 1 Hale, 620.
(*h*) 1 Hale, 332.
(*i*) *Ib.* 618; Mood. 8.
(*j*) 2 R. S. 1876, Ind. 447, § 50.

or punishment," which seems to amount to the same thing as averring his knowledge of his guilt.

Among the acts that will make a party an accessory after the fact are the following: That he concealed the felon in his house, (*a*) or shut the door against his pursuers until he should have an opportunity of escaping, (*b*) or took money from him to allow him to escape, (*c*) or supplied him with money, a horse or other necessaries in order to enable him to escape, (*d*) or bribed the jailor to let him escape, or supplied him with materials to break jail. (*e*)

§ 597. In order to prove the case against a party indicted as an accessory after the fact, it must appear among other things, first that the felony was complete, and secondly that the accessory after the fact knew that the felon was guilty. (*f*)

Of the Local Jurisdiction.

§ 598. In general, the indictment must be found, for murder or manslaughter, in the county in which the offense was committed. But by statute in Indiana, if any mortal wound is given or poison administered in one county, and death by means thereof ensue in another, the jurisdiction is in either county. (*g*) It is further provided, that when a public offense has been committed partly in one county and partly in another, or the acts or effects constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county. (*h*) It is presumed that under this statute it would be held that if the defendant being in one county and the deceased in another, should shoot across the county line and kill the party, the defendant might properly be indicted in either county.

As to local jurisdiction in felonies generally, in particular cases, see 2 R. S. Ind. 1876, 372, 373.

(*a*) 2 Hawk. chap. 29, sec. 1.
(*b*) 1 Hale, 619.
(*c*) 1 Hale, 4, 1.
(*d*) 2 Hawk. chap. 29, sec. 26.
(*e*) 1 Hale, 621.
(*f*) Chit. Cr. L. 264; 1 Hale, 622; *Harroll* v. *State*, 39 Miss. 702.
(*g*) 2 R. S. Ind. 1876, 374, sec. 9.
(*h*) *Id.* § 4.

Of the Competency of Jurors.

§ 599.* In Indiana, it is required that a petit juryman shall be either a householder or freeholder, and a qualified voter, to be competent to serve in any court in such county in which such person shall be such householder or freeholder and qualified voter; and it is not lawful to select any person as a juryman to serve in any Circuit, Superior or Criminal Court of this State, who has served as a juror in either of said courts in such county during the year immediately preceding such selection; and, if such person be selected it is cause of challenge. (*a*) It is provided by statute in Indiana, that "when the jurors are called each may be examined on oath by either party, whether he has formed or expressed an opinion of the guilt or innocence of the defendant, and upon such examination and other questions put by leave, the court may determine upon the competency of the juror. Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant." (*b*) Soon after the enactment of this statute in 1852, the courts were inclined to construe it strictly; and, if the juror answered that he had either formed or expressed an opinion, that was the end of it, in general, and the juror was set aside. (*c*) But gradually the courts have receded from such view, and it has been held, that although the jurors have heard talk, and may have read newspaper accounts, and are inclined to think one way, if what they have read is correct; yet, if they have not talked with the witnesses, nor formed nor expressed an opinion, and have no ill-will against the defendant and can give him a fair trial, they are competent jurors. (*d*)

Again, it was afterwards held that an opinion based upon mere rumor, not upon a knowledge of the facts, nor from hearing evidence, nor from conversing with the witnesses, is not a good cause for challenge, unless the opinion be firmly fixed. (*e*)

Still later, in a case where jurors answer that they have formed opinions as to the guilt or innocence of the defendant

(*a*) Acts of 1873, 159.
(*b*) 2 R. S. (G. & H.) 408, § 84.
(*c*) Bick. Cr. Pr. 132.
(*d*) 7 Ind. 332.
(*e*) 15 Ind. 347.

from rumor and newspaper statements; and upon further examination they answered that it would require neither more nor less evidence to satisfy them of the existence or non-existence of the material facts involved in the case, by reason of their already-formed opinion, the court held that such jurors were competent, and the defendant's challenge for cause was properly overruled. (*a*)

§ 600. Again, in *Clem* v. *The State*, 33 Ind. 418, which was a case for murder, two of the jurors declared that they had formed what they called "a partial opinion" from reading newspaper accounts of the facts, and from rumor, and one of them said he had expressed an opinion, which, it appeared, was a mere impression, not made up from conversation with witnesses; and the same jurors further stated that if sworn as jurors said opinion would have no influence upon them, and that they could act solely upon the evidence offered upon the trial; and it was evident that they had no fixed opinion upon which they rested. It was *held* that they were not, for this cause, incompetent as jurors. To the same effect is the case of *Hart* v. *The State*, 57 Ind. 102.

On a trial for murder, one of the jurors answered, on his *voir dire*, that, from the evidence given on a former trial of the same party for the same offense, as reported in the newspapers and read by him, he had formed and expressed an opinion, to change which would require some evidence, but which would readily yield thereto; *held* that the juror was competent. (*b*)

Of Reasonable Doubt.

§ 601. Where there is reasonable doubt whether the guilt of the defendant is satisfactorily shown, he must be acquitted; and where there is reasonable doubt in which of two or more

(*a*) *Morgan* v. *The State*, 31 Ind. 193; see 23 Ind. 231.

(*b*) *Guetig* v. *The State*, 66 Ind. 94; 4 Blackf. 101; 7 Blackf. 578; 15 Ind. 347; 23 Ind. 231; 27 Ind. 430; 31 Ind. 193; 33 Ind. 418; 40 Ind. 263; 52 Ind. 68; 58 Ind. 182; 57 Ind. 102; 62 Ind. 307; 2 Dev. & Bat. 196; 2 Green (N. J.) 195; Moore Cr. L. § 301. But, *contra*, see *Fouts* v *The State*, 7 O. St. 47.

It appears that, at this day, by a sort of judicial legislation, the Supreme Court of Indiana have brought the law of this State, upon this question, in accord with common sense and the spirit of the times. Henceforth opaque ignorance is not to be deemed the chief qualification for a juror.

degrees of an offense he is guilty, he may be convicted of the lowest degree only. (*a*) In a case of circumstantial evidence, if the jury are not satisfied beyond a reasonable doubt of the guilt of the accused, he ought to be acquitted, whether he disprove the unfavorable circumstances or not. (*b*) And circumstantial evidence will not be sufficient for a conviction unless it has a tendency to exclude every reasonable supposition inconsistent with the defendant's guilt; but the evidence need not be strong enough to show that it was impossible that any other person could have committed the crime. (*c*) And although the evidence may not be sufficient to produce absolute certainty of the defendant's guilt, nor even to prove that he had any motive to commit the crime, it may still be sufficient to satisfy the jury beyond a reasonable doubt, and if so, it will warrant a conviction. If the jury have a reasonable doubt as to the existence of any one of the circumstances constituting the chain of circumstantial evidence, that circumstance ought not to have any weight in determining their opinion as to the defendant's guilt or innocence. (*d*)

To warrant a conviction, circumstantial evidence must be such as to produce in the minds of the jury such certainty as a discreet man would be willing to act upon in his own grave and important concerns. (*e*) The Supreme Court of Indiana have undertaken the very difficult task of defining a *reasonable doubt*, in these words: "To be satisfied beyond a reasonable doubt, the jury must be so convinced by the evidence that they would be willing to act upon such a conviction in a matter of the highest importance to themselves, *where there was no compulsion resting upon them to act at all.* (*f*) The part which we have put into italics is by no means satisfactory and has often been criticized. In later decisions the present Court seem inclined to drop the italicized part of the definition, holding in effect that an instruction to the jury defining a reasonable doubt as above, but omitting the italicized words, is not

(*a*) 2 R. S. 1876, p. ——, sec. 104.
(*b*) 5 Blackf. 576.
(*c*) 5 Blackf. 579.
(*d*) 5 Blackf. 579.
(*e*) 16 Ind. 9; 23 Ind. 170.
(*f*) 31 Ind. 492.

error; and that the defendant, if he desires a fuller instruction on the subject of reasonable doubt, should specially request such instruction. (*a*) As to what *is* a reasonable doubt is a question of common sense and reason, and can not be ascertained by artificial rules or definitions. Moral evidence can not be weighed with the nicety and certainty with which coins and bullion are weighed at the mint. For erroneous instruction defining a reasonable doubt, see *Wright* v. *The State*, 69 Ind. 163.

Statute of Limitations.

§ 602. An indictment for murder may be found at any time after the commission of the offense—that is, there is no limitation. (*b*) Manslaughter must be prosecuted by indictment found within two years after the commission of the offense. (*c*) If the defendant be indicted for murder, and it appears to the jury that he was guilty of manslaughter only, he must be acquitted, if the evidence shows that the indictment was found more than two years after the commission of the offense. When, however, the offender has been absent from the State, or has concealed himself so that process could not be served on him, or has concealed the fact of the crime, the time of such absence or concealment shall not be included in computing the period of limitation. (*d*) In such cases the facts which give jurisdiction, notwithstanding the lapse of time, must be alleged in the indictment; (*e*) and such facts must be alleged with certainty. A general allegation that the defendant concealed the fact of the crime, is not sufficient. The particular acts done by him, whereby he concealed such crime must be alleged. (*f*) To bring the case within this exception to the statute of limitation, it must be a concealment of the fact of the crime, unconnected with the fact that the accused committed it; and the concealment must be the result of positive acts, done by the accused, intended to prevent a

(*a*) See ——
(*b*) 2 G. & H. 393.
(*c*) *Ibid.*
(*d*) 2 G. & H. 393.
(*e*) 14 Ind. 52.
(*f*) 14 Ind. 232.

discovery of the commission of the offense. (*a*) The construction given to these provisions is, that the time of the defendant's absence from the State or concealment, etc., which may occur during the period of limitation, must be added to that period. (*b*)

Of the Examination of Witnesses.

§ 603. There is nothing more important in the conduct of a criminal trial than a skillful and judicious examination of the witnesses. Much depends on the natural acumen and experience of the counsel, and it is impossible to lay down rules beforehand to meet all emergencies that may arise on the "occasion sudden." It is scarcely necessary to say that the counsel ought to be fully acquainted with the testimony that each of his own witnesses will give before he puts him on the stand; and he ought to know, as far as possible, the evidence to be introduced by the other side. In short, he ought to know, so far as practicable, all the facts of the case, *pro* and *con*. He will thus be able to see the bearing and relevancy of the evidence as it is unfolded, step by step. He will understand what to offer, and what to withhold; when to object, and when to hold his peace. The following rules for the examination of witnesses were published by the celebrated DAVID PAUL BROWN, of Philadelphia, and by him were entitled:

Golden Rules for the Examination of Witnesses.

FIRST, AS TO YOUR OWN WITNESSES.

§ 604. I. If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner toward them which may be calculated to repress their assurance.

II. If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance—Where do you live? Do you know the parties? How long

(*a*) 14 Ind. 120. (*b*) 14 Ind. 52.

have you known them, etc? And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and discreet in your approaches, lest you may again trouble the fountain from which you are to drink.

III. If the evidence of your own witnesses be unfavorable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony, chiefly from the effect which it may appear to produce upon the counsel.

IV. If you perceive that the *mind* of the witness is imbued with prejudices against your client, hope but little from such a quarter; unless there be some facts which are essential to your client's protection, and which that witness alone can prove, either do not call him or get rid of him as soon as possible. If the opposite party perceive the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend. You can not impeach him—you can not cross-examine him—you can not disarm him—you can not indirectly, even, assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purpose of explanation, you must bear in mind, that, instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this, by all means.

V. Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination—take from your opponent the same privilege it thus gives to you—and, in addition thereto, not only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

VI. Never ask a question without an object, nor without being able to connect that object with the case, if objected to as irrelevant.

VII. Be careful not to put your question in such a *shape*, that, if opposed for informality, you can not sustain it, or, at all events produce strong reason in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

VIII. Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception *in making them*, or a deficiency of real or moral courage in *not making them good.*

IX. Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest; and make *him* also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

X. Modulate your voice as circumstances may direct. "Inspire the fearful and repress the bold."

XI. Never begin before you are *ready*, and always finish when you have *done*. In other words, do not question for questions' sake, but for an answer.

CROSS-EXAMINATION.

§ 605. I. Except in indifferent matters, never take your eye from that of the witness. This is a channel of communication from mind to mind, the loss of which nothing can compensate.

> "Truth, falsehood, hatred, anger, scorn, despair,
> And all the passions—all the soul is there."

II. Be not regardless either of the voice of the witness; next to the eye this is perhaps the best interpreter of the mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone, or

accent, or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut streets at a certain time, the question is asked: "Were you at the corner of Sixth and Chestnut streets at six o'clock?" A frank witness would, perhaps, answer: "I was near there." But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, "No;" although he may have been within a stone's throw of the place, or at the very place within ten minutes of the time. The common answer of such a witness would be: "I was not at the *corner at six o'clock.*" Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise, with a skillful examiner, to the question: "At what hour were you at the corner?" or, "at what place were you at six o'clock?" And in nine instances out of ten it will appear that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations—but be watchful, I say, of the voice, and the principle may be easily applied.

III. Be mild with the mild, shrewd with the cunning, confiding with the honest, merciful to the young, the frail or the fearful, rough to the ruffian and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind—not that *you* may shine, but that *virtue* may triumph and your *cause* may prosper.

IV. In a *criminal*, especially in a *capital* case, so long as your cause stands well, ask but *few* questions; and be certain never to ask *any*, the answer to which if against you, may destroy your client, unless you know the witness *perfectly* well, and know that his answer will be favorable *equally* well; or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

V. An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always *leads to* or *excuses* an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of

witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning but by the light of truth; or if by cunning, it is the cunning of the witness and not of the counsel.

VI. If the witness determine to be witty or refractory with you, you had better settle that account with him at *first*, or its items will increase with the examination. Let him have an opportunity of satisfying himself, either that he has mistaken *your* power or his *own*. But in any result be careful that you do not lose your temper. Anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

VII. Like a skillful chess-player, in every move fix your mind upon the combinations and relations of the game; partial and temporary success may otherwise end in total and remediless defeat.

VIII. Never undervalue your adversary, but stand steadily upon your guard. A random blow may be just as fatal as though it were directed by the most consummate skill. The negligence of one often cures, and sometimes renders effective, the blunders of another.

IX. Be respectful to the court and jury, kind to your colleagues, civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward *either*.

PART III.

ABSTRACTS OF DECISIONS, COMMENTARIES, ETC.

§ 606. It is proposed, in this part of the work, to give all the statutes of the State of Indiana, defining felonious homicide; and abstracts of decisions of the Supreme Court, in homicide cases, embracing all the decisions from 1st Blackford to 70th Indiana Reports, inclusive, (seventy-eight volumes), except a few unimportant points. Most of the matters in these abstracts are peculiar to homicide cases, but in some instances they are alike applicable to all criminal cases. This is not a digest merely; but resort has been had to a large extent to the body of the decisions, in order to give the reader a correct view of the point actually decided, and the reasoning of the court thereon; thus clearing up that which often appears to be obscure and unintelligible in the *syllabus*. Among these abstracts are interspersed many notes and commentaries, by the author, explaining the decisions. Also several forms of indictments, in homicide cases, that have been passed upon by the Supreme Court, are given. In addition to the above there are abstracts of numerous decisions in cases of homicide, in other States.

ABSTRACTS OF STATUTES

AND

DECISIONS OF THE SUPREME COURT OF INDIANA

RELATING TO HOMICIDE,

FROM 1ST BLACKFORD TO 70TH INDIANA REPORTS, INCLUSIVE.

Murder in the First Degree.

1. If any person of sound mind shall, purposely and with premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery (*a*) or burglary, or by administering poison, (*b*) or causing the same to be done, kill any human being, such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death. 2 R. S. (Davis), 423.

2. If either party to a duel be killed, the survivor shall be deemed to be guilty of murder in the first degree, and shall suffer death. 2 R. S. (Davis), 425.

3. Any person convicted of treason, or murder in the first degree, may, instead of being sentenced to death, in the discretion of the jury, be imprisoned in the State prison during life. *Ibid.*

4. If any person shall by previous appointment made within, fight a duel without the State, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured shall die within this State, such person so offending shall be deemed guilty of murder in the first degree, in the county where such death shall happen, and shall suffer death or be imprisoned in the State prison during life. 2 R. S. (Davis), 426.

5. If the life of any person be lost [by the commission of arson] the offender shall be deemed guilty of murder in the first degree, and suffer death, or imprisonment in the State prison during life. 2 R. S. (Davis), 246.

(*a*) *Moynahan* v. *The State*, 70 Ind. 126.

(*b*) *Bechtelheimer* v. *The State*, 54 Ind. 128.

Murder in the Second Degree.

§ 607. 6. If any person shall purposely and maliciously, but without premeditation, kill any human being, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the State prison during life. 2 R. S. (Davis), 426.

7. So, it is murder in the second degree, with the same punishment, if death ensue to any person, by reason of the offender's willfully and maliciously placing obstructions on the track of a railroad, etc. *Idem*, 438. And by an act of March 1, 1855, it is murder in the first degree where a person on a railroad train, car or locomotive is killed by shooting, or by throwing a stone, stick, club or other substance whatever.

Manslaughter.

8. If any person shall unlawfully kill any human being, without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in commission of some unlawful act, such person shall be deemed guilty of manslaughter, and upon conviction thereof shall be imprisoned in the State prison not more than twenty-one, nor less than two years. 2 R. S. (Davis), 426.

Decisions as to the Characteristics of the Various Grades of Homicide.

§ 608. 1. INSTRUCTIONS.—The following instructions, the same being relevant to the case, were given to the jury: If homicide be committed in a sudden heat, by the use of a deadly weapon, no provocation by mere words will reduce the killing to manslaughter. The question should never be—was there anger merely? but, was there legal provocation to such anger? The use of a dangerous weapon under a provotion by words only, or under no provocation, is always evidence of malice aforethought. To constitute malice aforethought, it is only necessary that there be a formed design to kill; and such design may be conceived at the moment the fatal blow is given, as well as a long time before. Malice aforethought means the intention to kill; and when such means are used as are likely to produce death, the legal presumption is that death was intended. *Held*, that these instructions were correct. *Beauchamp* v. *The State*, 6 Blackf. 300, 301. (*a*)

2. SELF-DEFENSE.—If a man, on returning to his own house, find himself barred out and excluded therefrom by another, and then repeatedly demands, and is denied admission, he has a legal right to break in the door; and if he encounter resistance on thus entering,

(*a*) The above decision was made in 1842 under the Revised Statutes of 1838, which defined murder as at common law, and made no distinction between murder in the first and second degrees. For later decisions under the present statutes, see *infra*.

and be first stricken by the unlawful occupant, with a deadly weapon, and then, meeting force with force, he take the life of such occupant, such killing would be excusable homicide in self-defense. *De Forrest* v. *The State*, 21 Ind. 23.

3. MANSLAUGHTER—INTENTION TO KILL.—In manslaughter there may be intention to kill, arising in the sudden transport of passion; but it may, and in this grade of offense, must, be unaccompanied by malice. *Dennison* v. *The State*, 13 Ind. 510.

Of the Forms and Requisites of Indictments for Felonious Homicide.

§ 609. 4. Where a statute creates an offense, which did not exist at common law, the indictment should conclude *contra formam statuti: Aliter*, where the statute is merely declaratory of the common law. *Fuller* v. *The State*, 1 Blackf. 63, 64. (*a*)

5. It is sufficient to describe the grand jurors, in the indictment, as "good and lawful men;" those words including every qualification required by law. *Jerry* v. *The State*, 1 Blackf. 395, 396.

6. An indictment for murder may be good, without stating the accused to be a person of sound memory and discretion; and though the killing must be shown to be unlawful, the word "unlawful" itself, need not be used. *Idem.*

7. A count in an indictment for murder, stated that the defendant made an assault on one G B, and that the defendant with a certain ax, etc., the said G B, in and upon the *left* side of the head, and over the *left* temple of him the said G B then and there feloniously, willfully, and of his malice aforethought, did strike and beat, giving to the said G B, then and there, with the ax aforesaid, in and upon the *right* side of the head of him the said G B, and over the right temple of him the said G B, one mortal wound, etc., of which said mortal wound the said G B, etc., on, etc., died, and so the jurors aforesaid, upon their oath aforesaid do say, etc. *Held*, that the count in the description of the offense, was repugnant and inconsistent with itself in a material part, and was void. *Dias* v. *The State*, 7 Blackf. 20.

9. Such count must state the part of the body to which the violence was applied; but the proof need not correspond with the statement. *Ibid.*

10. If an allegation in such count be sensible and consistent in the place where it occurs, and be not repugnant to antecedent matter, it can not be rejected as surplusage, although it be repugnant to a subsequent allegation. *Ibid.*

(*a*) Now, by statute, the expression against the form of the statute, or statutes, is unnecessary in any indictment. So, also, as to the phrase "against the peace and dignity of the State of Indiana."

11. An objection to such count, for repugnancy in the description of the offense, can not be removed by striking out the allegation which is inconsistent with a previous one, unless, after striking out the subsequent allegation a legal description of the offense will still remain. *Ibid.*

12. In an indictment for murder, when it is alleged to have been caused by a wound, it is not necessary to describe the depth or breadth of the wound. *Ibid.*

§ 610. 13. An indictment in such case concluded as follows: "And so the jurors aforesaid upon their oath do say, that the said S. D. (the prisoner), in manner and form aforesaid, feloniously and willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute," etc. *Held*, that this conclusion was insufficient, for not designating the person murdered [*i. e.*, in the *conclusion*. It will be seen that the first part of the indictment does not designate the person assaulted, beaten and mortally wounded, of which mortal wound the party designated died," etc.] *Ibid.*

14. Although an indictment charge that the defendant feloniously and willfully, and of his malice aforethought, did strike the deceased, etc., giving him, etc., a mortal wound, etc., yet if it do not contain the technical allegation that the defendant feloniously *murdered* the deceased, it is an indictment for manslaughter only, and not for murder, the word *murder* being a term of art, which can not be supplied in an indictment by any other word. *Ibid.*

15. An indictment for murder alleged that the defendant, with a certain gun, which he in both hands then and there held, etc., feloniously did shoot, etc. *Held*, that the omission of the word *his* before the word *hands* was no objection to the indictment. *Ward* v. *The State*, 8 Blf. 101.

16. Poison, Description of.—An indictment charging the defendant of murder by administering poison, need not state the particular poison administered, and if it do so state, it will not be necessary that the proof correspond. *Carter* v. *The State*, 2 Ind. 617.

17. If the offense is punishable by a single statute only, and the conclusion of the indictment is against the *statutes*, the conclusion will be considered good. *Ibid.*

18. Against the Form of the Statute.—An indictment for murder in the first degree was found in the Decatur Circuit Court, at the April term, 1851, and concluded *contra formam statuti*. By the statute of 1843, the punishment of that crime was death; by the act of 1846, the punishment is either death or imprisonment at hard labor during life, at the discretion of the jury. *Held*, that the conclusion of the

indictment in the singular, to-wit, *contra formam statuti*, was correct. *Bennett* v. *The State*, 3 Ind. 167. (*a*)

19. INDICTMENT FOR MURDER IN THE SECOND DEGREE. — The second count did not aver that the homicide was committed with premeditated malice, or in the perpetration, or attempt to perpetrate, a rape or arson, etc.; nor did it allege that the homicide was maliciously perpetrated, but on the contrary, it stated that it was committed without malice; nor did it aver that the killing was upon a sudden heat, or in the commission of an unlawful act. *Held*, that no indictable homicide was charged. *Dukes* v. *The State*, 11 Ind. 557.

§ 611. 20. The following indictment was held to be good, for murder in the second degree:

"THE STATE OF INDIANA, } In the Clinton Circuit Court,
CLINTON COUNTY, } October Term, 1858.

The grand jurors for the county of Clinton, in the State of Indiana, upon their oath, charge that Samuel Dukes, late of said county, on the twenty-first day of July, in the year of our Lord, one thousand eight hundred and fifty-eight, at the county aforesaid, feloniously, purposely, and maliciously, but without premeditation, did kill and murder *John G. White*, a human being, by then and there feloniously, purposely, and maliciously but without premeditation, shooting the said *John G. White* in the abdomen, with a certain gun loaded and charged with gunpowder and leaden shot, which gun he, the said *Samuel Dukes*, in his hands, then and there had and held, and discharged and shot off, at and against the said John G. White. And so the jurors aforesaid, upon their oaths aforesaid, do find and say that the said Samuel Dukes, did feloniously, purposely, maliciously and without premeditation, kill and murder the said John G. White, on the day and year last aforesaid, at the county aforesaid. [*Signed by the prosecuting attorney and endorsed a true bill by the foreman*]. *Dukes* v. *The State*, 11 Ind. 557.

21. If the name of the defendant appears in the body of the indictment, the omission to name him in the title, is a defect which can not tend to prejudice his rights on the merits. *Ibid.*

22. The kind of gun and shot need not be specified, nor the wound be described. *Ibid.*

23. An indictment containing one good count should not not be quashed, and the judgment on conviction will be given on the good count. *Ibid.*

24. Upon a paragraph for murder the defendant may be convicted of manslaughter. *Ibid.*

25. The signature of the prosecuting attorney is not essential to the validity of an indictment. *Ibid.*

(*a*) By statute in Indiana this technical averment is no longer necessary. "No indictment or information may be quashed or set aside * * * for an omission of the following allegations," viz., "with force and arms," "contrary to the form of the statute," or "against the peace and dignity of the State of Indiana." 2 R. S. (Davis) 386, § 61.

§612. 26. FORM OF INDICTMENT FOR MURDER.–The following form for an indictment for murder in the first degree, was held good by the Supreme Court, *Dillon* v. *The State*, 9 Ind. 408. After stating the venue, court and term, etc.;

"The Grand Jury, etc., upon their oath charge that *Abner Dillon*, of said county, on the twentieth day of July, eighteen hundred and fifty-six, at the said county of Miami, did purposely and with premeditated malice, then and there unlawfully and feloniously kill and murder *Margaret Dillon*, in the peace of the State, then and there being, by then and there beating and striking her, the said Margaret Dillon, upon the head, back and abdomen with a shovel, and by then and there inflicting divers mortal wounds and injuries upon the head, back and abdomen of her, the said Margaret Dillon, which caused the death of the said Margaret Dillon. O. BLAKE, *Prosecuting Attorney.*"

The above form was held good by the Supreme Court, not because of the form prescribed by the statute (2 R. S. 356.) [All these forms were held void in the case of *The State* v. *Wilson*, 7 Ind. 516]; but by reason of certain other statutory provisions as to the requirements of an indictment, which materially modify the common law requirements. See 2 R. S. (Davis) 383, §54; also, 384, 385, 386, 387, §§55, 56, 57, 58, 59, 60, 61.

27. DEPTH, ETC., OF WOUND.—In an indictment for murder a description of the depth, etc., of the fatal wounds is not necessary.

28. The following form of indictment was held good by the Supreme Court, in 22 Ind. 1—*Cordell* v. *The State:*

THE STATE OF INDIANA } In the Floyd Circuit Court
vs. } of October Term, 1864.
THOMAS CORDELL. }

The grand jurors for the county of Floyd, in the State of Indiana, upon their oath, present, that Thomas Cordell, on the 17th day of May, A. D. 1863, at the county of Floyd, aforesaid, did feloniously, purposely, and with premeditated malice, unlawfully kill and murder Patrick Quirk, by then and there feloniously, purposely, and with premeditated malice cutting, stabbing and mortally wounding said Patrick Quirk, with a knife, which he, the said Thomas Cordell, then and there had and held in his hands, contrary to the form of the statute in such case made and provided, and againt the peace and dignity of the State of Indiana. THOMAS M. BROWN, *Prosecuting Attorney.*

[Indorsed:] A true bill.
CHARLES FREDERICK, *Foreman.*

§613. 29. Indictment in three counts. 1st. That the defendant held the child in the flames, vapor and steam issuing from burning brush in the fire-place, until fatal injuries were inflicted. 2d. That fatal injuries were inflicted by blows. 3d. Alleging both the acts. *Held*, that there was no inconsistency in the counts. 14 Ind. 139.

30. Prosecution for assault and battery with intent to commit murder. The indictment charged that A, on, etc., at, etc., did then and there, unlawfully and *feloniously*, in a rude, insolent and angry manner,

touch and strike one B, *with intent*, then and there unlawfully and feloniously, and with premeditated malice, to kill and murder the said B, by shooting him in the back with a gun loaded with powder and shot, which gun the said A then held in his hands, etc.

Held, that the words with intent, etc., as used in the indictment, sufficiently expressed the meaning of the word "purposely," as used in the statutory definition of murder; and that the word "feloniously," in the connection in which it was used in the indictment, was identical in its import with the word "purposely." [The code says: "Words used in the statute to define a public offense, need not be strictly pursued; but other words, conveying the same meaning, may be used. 2 R. S. (Davis) 385, sec. 59.]. *Carder* v. *The State*, 17 Ind. 307.

31. INDICTMENT.—It is not absolutely necessary that the part of the body struck by the ball should be specified in the indictment. *Whelchell* v. *The State*, 23 Ind. 89.

32. When an indictment charges an assault with intent to commit murder, in the first degree, under the statute the defendant may be found guilty of an assault with intent to commit murder in the second degree. *Wall* v. *The State*, 23 Ind. 150 [or, of assault and battery with intent to commit *manslaughter*.]

Of the Evidence in Cases of Homicide.

§ 614. 1. DYING DECLARATIONS.—On a trial of an indictment for murder, the *substance* of the dying declarations of the deceased may be proved. *Ward* v. *The State*, 8 Blackf. 101. See, also, *Horne* v. *Williams*, 23 Ind. 40.

2. POPULAR OPINION.—The court permitted the State to prove that it was the popular opinion that ergot would produce abortion. The evidence showed that ergot was administered to the deceased shortly before her death. *Held*, that the fact proved might show a motive for administering it, and the intention with which it was done, and hence was admissible. *Carter* v. *The State*, 2 Ind. 617.

3. MEDICAL BOOKS are not admissible as evidence, but medical men may give their opinions as witnesses, which opinions may, in a measure, be founded on the contents of standard medical books as a part of their general knowledge. *Ibid.*

4. THE PRISONER'S ACCOUNT of the transaction, on an indictment for murder, related immediately after it occurred, is not admissible in his behalf, although no third person was present when the homicide was committed. *Ibid.* [*Sed quere*, if it is so near the transaction as to be a part of the *res gestæ*.]

5. EVIDENCE.—On the trial of a prisoner for the murder of A, the court permitted a witness to detail statements made to him, the witness, by one B, in the absence of the prisoner, and ten days before the

murder was perpetrated; it having first been proved by the State that the prisoner and B were present at, and participated in, the murder of A. *Held*, that the evidence was properly admitted. *Rice* v. *The State*, 7 Ind. 332.

6. Prisoner's declarations. The defendant could not be allowed to prove his own account of the act, given a short time after it occurred; and any statement of his, to be admissible in evidence for him, must have been a part of the *res gestæ*. *Dukes* v. *The State*, 11 Ind. 557.

7. Where the question arises whether the accused, in the commission of a homicide, acted upon grounds that justified him, in the deed, it would *seem* that the character of the deceased might be a circumstance to be considered, especially where the accused knew his character, and knew him, at the time he committed the act. But it seems that where these facts may not have been known, the evidence would be entitled to little weight. *Ibid.*

8. In justifying a homicide, in defense of person or property, etc., the defendant may give in evidence, any facts tending to show the character of the attack which he resisted, the intention with which it was made, and that he had reasonable grounds to believe that it was necessary to go to the extent he did in resisting it. *Ibid.*

9. It is not error, on the trial of a prisoner for murder, to permit the State to prove, that he attempted, while in jail, to escape, but was retaken *Hittner* v. *The State*, 19 Ind. 48.

10. Criminal Law and Practice—Evidence.—In justfying a homicide in defense of person, property, etc., it is competent for the defendant to give in evidence any facts tending to show the character of the attack he resisted, the intention with which it was made, and that he had reasonable grounds to believe that it was necessary to do what he did, in resisting it, and to this end he may show the relations that existed between himself and the deceased for an indefinite period before the killing. *DeForest* v. *The State*, 21 Ind. 23.

11. Murder—Circumstantial Evidence.—To sustain a conviction for murder upon circumstantial evidence, the facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused. It is not enough that the mystery of the crime can not be solved, from the evidence, except upon the supposition of the defendant's guilt. *Schusler* v. *The State*, 29 Ind. 394.

12. Possession of Weapon by Deceased—Proof of Threats by Deceased.—On a trial for murder in which the witnesses for the defense had testified that the deceased had a bowie-knife in his possession, the night of the murder, and the State had introduced evidence to show that he had no such knife, and the defendant proposed to prove threats made by the deceased when the knife was exhibited, and also when it

was not shown, against the life of the prisoner, or of injury to him, some of which threats were not shown to have come to the prisoner's knowledge: *Held*, that evidence of the possession of the knife by the deceased, a short time before the date of the occurrence which resulted in his death, was proper for the consideration of the jury, whether known to the defendent or not, and either when exhibiting the knife, or at other times. *Holler* v. *The State*, 37 Ind. 57.

13. EVIDENCE—THREATS.—Upon a trial for murder, it is competent for the State to prove threats made by the defendant against the life of the deceased. *Cluck* v. *The State*, 40 Ind. 263.

§616. 14. EVIDENCE.—In a murder case, it is error to admit in evidence against the defendant a transcript of the pleadings and papers in an action of divorce by the deceased against the defendant, pending in court and undetermined at the time of the alleged murder. *Binns* v. *The State*, 46 Ind. 311.

15. DYING DECLARATIONS.—On a trial for murder, declarations of the deceased made when *in extremis*, consisting of the expression of *opinion* [only] as to who it was that fired the fatal shot based on previous threats, and what had previously occurred between the deceased and the accused, are inadmissible. *Ibid.*

16. *Same.*—Where a written memorandum of declarations made *in extremis* is not signed, parol evidence of such declarations is admissible. If signed, the writing should be produced, or accounted for. *Ibid.*

17. EVIDENCE.—On a trial for murder, a statement of the deceased person, made before the commission of the act, and not made in the presence or hearing of the defendant, is not competent evidence *against the defendant*. *Cheek* v. *The State*, 35 Ind. 492.

18. On a trial for murder it is error to exclude evidence tending to show that the person killed by the defendant had entered into a combination with a third person to induce the defendant's wife to elope with such third person, and leave her husband and children, and that facts tending to prove such combination, of late date, had come to the knowledge of the defendant. *Ibid.*

§617. 19. EVIDENCE—DYING DECLARATIONS.—When the statements of a person are offered in evidence as his dying declarations, the proof must clearly show that the declarant was in fact at the very point of death, and that he was fully conscious of that fact, not as a thing of surmise and conjecture, or apprehension, but as a fixed and inevitable fact. *Morgan* v. *The State*, 31 Ind. 193.

20. *Same.*—It is not required that the deceased should have declared in terms, that he expected to die at once, if his condition was such that, of necessity, such an impression must have existed on his mind. On the other hand, no matter how strong the expression of this certainty

of death may have been, if there be any evidence of hope, in the language or actions of the declarant, his statements will be rejected. *Morgan* v. *The State*, 31 Ind. 193.

21. JURORS MAY NOT IMPEACH THEIR VERDICT by their affidavits, on grounds of public policy. *Bennett* v. *The State*, 3 Ind. 167.

22. HABEAS CORPUS TO BE LET TO BAIL.—A prisoner who has applied for such writ, and who is indicted for murder, may, upon the refusal of the judge to allow him to give bail, prosecute a writ of error from such judgment to the Supreme Court. *Lumm* v. *The State*, 3 Ind. 293.

23. A prisoner indicted for murder in the first degree may sue out a writ of *habeas corpus* to be let to bail, and upon proof that he is guilty of a bailable homicide, he should be allowed to give bail. The prisoner should give notice of the application for the writ. *Lumm* v. *The State*, 3 Ind. 293.

§ 618. DISCHARGE OF JURY.—On an indictment against Fleming Wright for murder, the following points were decided:

1. Where a prisoner has been given in charge, on a legal indictment, to a regular jury, and the jury has been unnecessarily discharged, he has been once put in jeopardy, and the discharge of the jury is equivalent to a verdict of acquittal. *Wright* v. *The State*, 5 Ind. 290.

2. The failure to embody in the R. S. 1852, a provision in relation to Circuit Courts, similar to section 325, p. 733, R. S. 1843, (which is substantially enacted in relation to Courts of Common Pleas by the acts organizing them), is a *casus omissus* within the meaning of section 172, 2 R. S. 1852. 383, and said section 325, p. 733, R. S. 1843, is therefore continued in force. *Ibid.*

3. The discharging of a jury before verdict, by the Circuit Court, in a criminal case, against the will of the prisoner, on account of the expiration of the time fixed by law, is, under said section 325, unnecessary, and equivalent to a verdict of acquittal. *Ibid.*

4. A jury, while engaged in the trial of a prisoner for murder, was discharged, against the will of the prisoner, by reason of the expiration of the time fixed by law, for the continuance of the term, and the prisoner was remanded to jail to await another trial. The prisoner soon after, applied to the judge of the Court of Common Pleas, of the county, for a writ of *habeas corpus*. The writ was granted, and, on the hearing, the foregoing facts having been made to appear, the judge remanded the prisoner to jail, to await his trial in the Circuit Court. *Held*, that by the R. S. 1852, (vol. 2, pp. 195, 196, sec. 725), the judge was compelled, upon the prisoner's petition to award the writ; but, *held*, that upon the return of said facts, it was his duty to remand the prisoner to the Circuit Court, and that the latter court might discharge

the prisoner, on motion, or he might plead the discharge of the jury in bar of a second trial. *Wright* v. *The State*, 5 Ind. 290.

§ 619. 5. Under the R. S. 1843, malice was necessary to constitute murder, either in the first or second degree, and the distinction consisted in its being accompanied in the first degree with, and in the second degree without, deliberation and premeditation. *Finn* v. *The State*, 5 Ind. 400.

6. THE WORDS "MALICE AFORETHOUGHT" in the description of murder, do not, necessarily imply that the act was committed with deliberation and premeditation. *Ibid.*

7. Indictment for murder, charging the prisoner with having committed the act "feloniously, willfully and of his malice aforethought." *Held*, that under the R. S. of 1843, the indictment only contained a charge of murder in the second degree. *Ibid.*

8. On the trial of a prisoner on an indictment for murder in the second degree, it is immaterial what the opinion of a juror is in regard to the death penalty. *Ibid.*

9. Assault and battery, which is simply a misdemeanor, is not included in any of the degrees of felonious homicide. *Wright* v. *The State*, 5 Ind. 527.

10. The assault and battery, in a case of felonious homicide, is merged in the felony. *Ibid.*

11. On the trial of the prisoner on an indictment for murder, the jury by their verdict found him guilty of an assault and battery. *Held*, that the verdict was a nullity. *Held*, also, that the defect could be reached by motion in arrest of judgment. *Held*, also, that the indictment still stood against the prisoner, and that he must be again put on trial. (*a*) *Ibid.*

12. VERDICT.—Indictment charging the prisoner, *Thomas Kenedy*, with murder in the first degree. Verdict: "We, the jury, do say and find that *Thomas Kenedy* is guilty, in manner and form as he stands charged in the indictment, and that he shall be imprisoned in the State prison, and kept at hard labor during life." The act of 1843, in force when the verdict was rendered, provided that upon an indictment for murder in the first degree, the jury might find the defendant not guilty of the crime in the degree charged in the indictment, and might find him guilty of such murder in the second degree; or they might find him guilty of manslaughter. *Held*, that the verdict showed, with sufficient certainty, that the prisoner was found guilty of murder in the first degree. *Kenedy* v. *The State*, 6 Ind. 485.

5. When under the act in question, the jury, under a single count charging murder in the first degree, find the prisoner guilty of murder

(*a*) The above case was governed by R. S. 1843, and not the R. S. 1852.

in the second degree, the verdict should specifically name the offense of which he is found guilty. *Ibid.*

§ 620. 13. JURORS.—Under the code of 1852, either party, on the trial of a criminal prosecution, may ask each juror whether he has formed or expressed an opinion of the guilt or innocence of the accused; but if the inquiry is not made, and the jurors are accepted, and properly sworn to try the cause, and render a verdict, they are in legal contemplation, duly empaneled, and their qualifications as jurors can not be contravened on a motion for a new trial. *Romaine* v. *The State*, 7 Ind. 63.

14. FORM OF VERDICT.—INDICTMENT FOR MURDER.—The verdict found the defendant guilty of manslaughter, without adding the words, "as charged in the indictment." *Held*, that the form of the verdict was not objectionable. *Evans* v. *The State*, 7 Ind. 271.

15. THE CORPUS DELICTI in a prosecution for murder, may be proved by circumstantial evidence. It is not essential that the body of the deceased should be found. *Stocking* v. *The State*, 7 Ind. 326.

16. INDICTMENT FOR MURDER.—Trial, and verdict that the prisoner was guilty of an assault and battery, and that he be fined, etc. *Held*, that the verdict was a nullity, and was equivalent to a verdict of *acquittal*. *Held*, also, that the indictment still continued against the prisoner; and that the proper mode of procuring his discharge was by motion therefor, and not by *habeas corpus*. *Wright* v. *The State*, 7 Ind. 324.

17. INDICTMENT FOR MURDER, WITH A COUNT FOR MANSLAUGHTER.—The defendant asked the court to instruct the jury that, if they found from the evidence, that the person inflicting the mortal wound upon the deceased was guilty of manslaughter only, and did not find that the defendant inflicted the mortal wound, and it was not proved beyond a reasonable doubt that he was present, aiding and assisting such person in giving the fatal blow, the defendant could not be convicted; for, in law, there could not be an accessory before the fact in a case of manslaughter. *Held*, that the instruction was calculated to mislead the jury in this, that it seemed to confine the aiding, etc., to the act of inflicting the fatal blow. *Stipp* v. *The State*, 11 Ind. 62. (*a*)

18. *Quere.* Whether there can be an accessory before the fact in a case of manslaughter? (*b*)

(*a*) By reading this case in full the reader will see more clearly the reason of the decision. In the body of the decision the court say: "If the defendant was engaged with the person who gave the blow * * in a common illegal undertaking, he may have been guilty as a principal * * * without having actually assisted in inflicting *the blow* (that caused the death).

(*b*) See other cases, *infra*, as to manslaughter.

§ 621. 19. INSTRUCTION.—On a trial of the defendant in an indictment for murder, it is error to charge the jury, without qualification, that, if the defendant made an unlawful attack, or got into a fight with the deceased, upon a sudden heat, and slew him in the controversy, he would be guilty of manslaughter, at any rate; because, (say the Supreme Court), even under such circumstances, the defendant would be entitled to the benefit of any retreat, flight, or withdrawal from the contest, which he might in good faith have made, or attempted to make, although he was the aggressor in the first instance. *Hittner* v. *The State*, 19 Ind. 48.

20. INSANITY.—In a prosecution for murder, if the jury, upon the whole evidence in the cause, have a reasonable doubt whether the defendant was sane when he committed the homicide, they must also, and for that reason, have a reasonable doubt whether he purposely and maliciously committed the crime; because, without sanity the crime, as defined by the statute, can not be committed. *Polk* v. *The State*, 19 Ind. 170.

§ 621*a*. 21. ERRONEOUS INSTRUCTION.—On a trial for murder in the second degree, the court erroneously instructed the jury that, on conviction of manslaughter, the heaviest punishment they could inflict was confinement for *fourteen* years in the penitentiary, while the statutes fixes it at twenty-one years. Conviction of murder in the second degree, and sentenced to the State prison for life. *Held*, that such instruction might have prejudiced the defendant, and entitled him to a reversal of the judgment. *Hoss* v. *The State*, 18 Ind. 349.

22. Under an indictment for murder the defendant may be convicted of manslaughter. *Carrick* v. *The State*, 18 Ind. 409.

23. In such a case the verdict will be sufficient which merely finds the defendant guilty of manslaughter and assesses his punishment. *Ibid.*

§ 622. 24. REASONABLE DOUBT exists when the evidence is not sufficient to satisfy the judgment of the truth of a proposition with such certainty that a prudent man would feel safe in acting upon it in his own important affairs. *Arnold* v. *The State*, 23 Ind. 170.

(But see this matter materially modified and explained in subsequent cases.)

25. MURDER—SELF-DEFENSE.—On the trial of an indictment for murder in the second degree, the court instructed the jury, that "no threatening actions" of the deceased could justify the defendant in taking life; and in another instruction told them that if the deceased made a violent assault upon the defendant, while he was retreating, and the deceased pursued him, and the defendant had reasonable apprehensions of great bodily harm, and had used all reasonable means

to keep out of the way, he would be justified in repelling the assault, and if, in so doing, death resulted, he ought to be acquitted. *Held*, that neither instruction correctly stated the law. The latter was erroneous, because retreat is not always a condition which must precede the exercise of the right of self-defense. *Creek* v. *The State*, 24 Ind. 151.

26. MANSLAUGHTER.—In manslaughter the killing, if upon a sudden heat, must be voluntarily done, and without malice. *Creek* v. *The State*, 24 Ind. 151.

27. SELF-DEFENSE—FEAR OF BODILY HARM.—To justify the killing of another on the ground of the fear of bodily harm, there must be reasonable cause for such fear, and it is not sufficient to show that the defendant was in actual fear. *Ibid.*

28. FEAR.—The criminal law, while indulging to a humane extent the mere infirmities of human nature, nevertheless, requires of sane men the exercise of a mastery over their fears, as well as their passions. *Ibid.*

29. MANSLAUGHTER—AIDING AND ABETTING.—One may be guilty, under the statute, of aiding and abetting the crime of manslaughter. *Goff* v. *Prime*, 26 Ind. 196.

30. *Same.*—As, under an indictment for murder in the first degree, the defendant may be convicted of murder in the second degree, or of manslaughter, so under an indictment for aiding and abetting the crime of murder in the first degree, the defendant may be convicted of aiding and abetting the crime of manslaughter. *Ibid.*

31. MURDER—HABEAS CORPUS—BAIL.—Upon the hearing of an application by a person under indictment for murder in the first degree, to be admitted to bail, the burden is upon him, to show that the proof of his guilt is not evident. *Ex parte Heffren*, 27 Ind. 87.

32. In order to show this, he must produce the evidence upon which the State intends to rely for conviction. He may, however, cross-examine or impeach the witnesses testifying against him. *Ibid.*

33. MURDER—APPEAL.—On an appeal from a decision below adverse to the application to be admitted to bail, the finding of the judge below is not entitled to the same weighty effect, as if it had been a finding on the final trial of an ordinary cause. The Supreme Court will weigh all the evidence, without regard to the finding of the court below. *Ibid.*

§623. 34. HABEAS CORPUS TO ADMIT TO BAIL.—On appeal from the refusal of a judge to admit to bail a prisoner committed on a charge of murder, the Supreme Court will weigh the evidence and determine the facts, as if trying the case originally. *Ex parte Moore*, 30 Ind. 197; *acc. ex parte Heffren*, 27 Ind. 87.

35. MALICE.—Where one person unlawfully and purposely kills another, malice in the absence of rebutting evidence, is presumed from the act; but when no express malice is shown, and it appears that the

act, though voluntary, was the result of a sudden heat, or transport of passion, upon a sufficient provocation, it rebuts the presumption of malice, which is an essential ingredient in the crime of murder, and reduces the offense to manslaughter. *Ibid.*

36. MURDER—DELIBERATION.—The crime of murder requires the mind to have acted from deliberation and intelligence, and where it is clouded by passion, the result of a sufficient provocation, the killing is no more than manslaughter. *Ibid.*

37. *Same.*—On an application of a person charged with murder in the first degree, to be admitted to bail, it appeared in evidence that the prisoner and the deceased being friends, between whom there had been no previous difficulty, met in a saloon, where they engaged in playing cards and drinking beer until they both became intoxicated and fell into a dispute on politics, which resulted in coarse and abusive language between them, and the prisoner became excited and angry, and, leaving the card table, said he would go home, and attempted to go out, when the deceased, much the stronger man, perpetrated repeated personal violence and indignity upon the prisoner (who several times attempted to go away), sufficient to inflame his passion and provoke him to extreme anger; that the prisoner, thus provoked and greatly excited, escaping at length from the deceased, hastened to his own house, a short distance, and, not being absent from the saloon more than five minutes, returned with a revolver in hand, with which he immediately shot and killed the deceased. *Held*, that it was not clear that there was sufficient time between the provocation and the act, for passion to cool and reason to resume control, or that the proof was evident or the presumption strong that the killing was malicious. *Ibid.*

38. PRESUMPTION OF INTENT TO MURDER.—The intent to murder is not conclusively inferred from the deliberate use of a deadly weapon, and the error of giving an instruction to that effect on the trial of an indictment for murder at the instance of the prosecution, is not cured by giving a contradictory and correct charge upon that subject at the request of the defendant. *Clem* v. *The State*, 31 Ind. 480.

On Insanity.

§ 624. 39. Where a person is moved to the commission of an unlawful act by an insane impulse controlling his will and his judgment, he is not guilty of a crime; and if he is a monomaniac on any subject, it is wholly immaterial upon what subject, so that the insane impulse leads to the commission of the act. *Stevens* v. *The State*, 31 Ind. 485.

40. KNOWLEDGE OF RIGHT AND WRONG.—On the trial of an indictment for murder in the first degree, the court instructed the jury "that if they believed from the evidence that the defendant knew the difference

between right and wrong, in respect to the act in question, if he was conscious that such an act was one which he ought not to do, and if that act was at the same time contrary to the law of the State, then he is responsible for his acts. *Held*, that this is not law. *Ibid.*

41. *Same*—REASONABLE DOUBT.—So far as a person acts under the influence of mental disease he is not criminally responsible; and the jury in a criminal case must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged. *Ibid.*

42. REASONABLE DOUBT.—A juror in a criminal case (this was a murder case), ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused—that is, unless he is so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would be safe to act upon that conviction on matters of the highest concern and importance to his own dearest personal interests, under circumstances where there was no compulsion resting upon him to act all. *Ibid.* See also, 23 Ind. 170.

43. MURDER—INSANITY.—The defendant, in a criminal case, is not required to *prove* his insanity, in order to avail himself of that defense; but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity, falls upon the State. *Bradley* v. *The State*, 31 Ind. 492.

44. "COGNITIVE AND COGNATIVE" FACULTIES. — Insanity is a disease which may impair or totally destroy either the understanding or the will, or both; and in a criminal case, all the symptoms of such disease and its effect upon these faculties, should go to the jury; and they must determine, as a matter of fact, the mental condition of the defendant; and an instruction to them which limits their inquiry to the condition of the power to apprehend by the understanding, is erroneous. *Ibid.*

[The court define *cognitive* as "the comprehending power, the feelings, or capacity for pain or pleasure; and the *cognative*, as the will power." *Ibid.*]

45. Voluntary drunkenness is no excuse for the commission of a crime; but insanity, caused by continued drunkenness, is a good defense in a criminal action. *Ibid.*

§625. 46. MURDER—PRESUMPTION.—The intent to murder is not conclusively presumed from the deliberate use of a deadly weapon. *Bradley* v. *The State*, 31 Ind. 492.

47. MANSLAUGHTER.—Although a person unlawfully and *purposely* kill a human being, yet if it be done in a sudden heat of passion, caused by a sufficient provocation, and in the absence of express malice, then malice will not be implied from the act, but the offense will be manslaughter. *Murphy* v. *The State*, 31 Ind. 511.

48. PROVOCATION.—Words only, however abusive or insulting they

may be, can not constitute such sufficient provocation to rebut the presumption of malice arising from the act in such a case, and reduce the offence from murder to manslaughter. *Ibid.*

49. USE OF DEADLY WEAPON.—If the act be perpetrated with a deadly weapon, so used as likely to produce death, the purpose to kill may be inferred from the act. *Ibid.*

50. VOLUNTARY MANSLAUGHTER.—The word *voluntarily*, in our statutory definition of manslaughter, means, by the free exercise of the will, done by design, purposely. *Ibid.*

51. *Same.*—On the trial of an indictment for assault and battery with intent to murder, the court instructed the jury in effect that there can be no purpose to kill in manslaughter; and that if such a purpose be shown to exist, and if death result, the killing is murder. *Held*, that this was error. *Ibid.*

52. INSTRUCTION—ERRONEOUS.—On the trial of an indictment for murder in the first degree, the court charged the jury that "if the defendant was present at the time and place of the murder, in any way assisting, aiding, encouraging, or contributing towards the murder, she would be guilty as a principal in the crime. *So, if the murder was perpetrated with her knowledge and consent or connivance, she is a principal. Held*, that the giving of the last sentence of the instruction was error. *Clem* v. *The State*, 33 Ind. 418.

[In this case the Supreme Court say that if "Chitty, Hale and Foster have employed this word "*consent*," as implying not merely acquiescence of mind, but also the manifestation of it, it does not follow that it can be employed in an instruction to the jury without error. The jury would understand the language addressed to them in its ordinary sense, etc.]

§ 626. 53. As to assault and battery with intent to commit murder, see *Kunkle* v. *The State*, 32 Ind. 220, disapproving *The State* v. *Swails*, 8 Ind. 524.

54. MURDER OF WIFE.—On the trial of the defendant for the murder of his wife, he offered to prove that she had, for a long time, been having adulterous intercourse with one B and others, and that he (the defendant), had for a long time been cognizant of her adultery. *Held*, that the evidence offered was incompetent in justification or palliation of the offense; that after the lapse of time sufficient for the passion to cool, and for reason to resume her sway, the killing was as criminal and indefensible as if his wife had never been guilty of conjugal infidelity. *Sawyer* v. *The State*, 35 Ind. 80.

55. MURDER IN THE SECOND DEGREE is not bailable when the proof is evident or the presumption strong. *Ex parte Coulter*, 35 Ind. 109.

56. Not necessary to aver the part of the person where the wound was inflicted. *Jones* v. *The State*, 35 Ind. 122.

57. VOLUNTARY MANSLAUGHTER.—An indictment for manslaughter, charging that the defendant did, on, etc., unlawfully and feloniously kill a person named, by, then and there, unlawfully and feloniously cutting and stabbing and mortally wounding said person with a knife, etc., is sufficient. So, also, if it is charged that the instrument used is unknown to the grand jurors. *Willey et al.* v. *The State*, 46 Ind. 363.

58. INVOLUNTARY MANSLAUGHTER is where the killing is done involuntarily, but in the commission of some unlawful act. *Ibid.*

59. An indictment for involuntary manslaughter must show that the defendant was in the commission of some unlawful act, and that the death resulted therefrom. *Ibid.*

60. An indictment alleging that the death resulted from using unlawfully, willfully and feloniously, an instrument on a pregnant female, for the purpose of producing a miscarriage, the use of such *instrument* not being necessary to preserve the life of the woman, is insufficient. See 41 Ind. 303 *Ibid.*

§ 627. 61. MURDER—MANSLAUGHTER—USE OF DEADLY WEAPON—MALICE.—On a trial for murder where there are some circumstances, strongly tending to the conclusion that the crime was murder, and not manslaughter merely; such as the use of a deadly weapon by the defendant, in a manner seemingly cruel and not justified by the danger of the supposed assault by the deceased, and following the deceased and inflicting upon him a blow with a knife, after he had turned and was retreating; and, on the other hand, there was some evidence that tended in some degree to modify such conclusion; as, that the defendant was smarting under indignities inflicted upon him by the deceased, who a short time before had assaulted and chased defendant with a stable fork through the public streets until he took refuge, and the deceased had also applied to the accused degrading and humiliating epithets; *Held*, that a charge to the jury, which, after defining manslaughter as an unlawful killing without malice, express or implied, stated that "if a man use a deadly weapon in killing his adversary the law implies malice from its use, except where the killing is excusable," was, in effect, telling the jury that there was no such thing as manslaughter where a deadly weapon was used, as the implied malice made it murder, if it was not excusable, and that the charge was erroneous.

Held, FURTHER, that where there was doubt as to which of the blows was mortal, this instruction should have been given as requested: "If the blows which caused the death of A, the deceased, were given in self-defense, and other blows were afterwards given, which were not given in self-defense, not mortal, you should find the defendant not guilty." *Miller* v. *The State*, 37 Ind. 432.

62. MURDER—INTOXICATION.—On a trial for murder, no proof of intoxication at the time of the crime, which falls short of showing the defendant to have been utterly incapable of acting from motive, will shield him from conviction. If the reason be perverted, or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. *Cluck* v. *The State*, 40 Ind. 263.

§ 628. 63. MURDER—FORMER ACQUITTAL—SPECIAL PLEA.—To an indictment for murder in the first degree, for the killing of A, the defendant entered a special plea in bar, wherein she alleged that she had been indicted for murder in the first degree for killing one B; that she had been tried by a jury upon said indictment for the killing of B, after having taken issue thereon by a plea of not guilty as charged therein, and that upon such trial she was found guilty of murder in the second degree, and sentenced to the State Prison for life; by which finding and judgment she was acquitted of the charge of murder in the first degree as charged in said indictment; and the crime charged in said indictment for which she was tried and acquitted, "was and is identical in all its parts, incidents and circumstances, with the crime charged in the indictment for the killing of" A; that the evidence whereby alone the State will attempt to prove the indictment in this case is the same and in no wise different from that employed and produced on the trial of the indictment on which she was acquitted of murder in the first degree, and this she is ready to verify, etc. *Held*, that the plea was good. *Clem* v. *The State*, 42 Ind. 420.

64. *Held*, also, that the plea stated in effect that the same act caused the death of A and B, and if the same act resulted in the death of both there was but one crime. *Clem* v. *The State*, 42 Ind. 420.

Held, also, that it was not necessary that the plea should show that A and B were one and the same person. *Ibid.*

65. MURDER—*Acquittal.*—If upon an indictment for murder in the first degree, the defendant is found guilty of an inferior grade of homicide, without saying anything as to the higher grade, the finding is by implication an acquittal of the higher grade. *Ibid.*

66. *Same—Killing of Two Persons by the Same Act.*—Where two or more persons are killed by the same act, the State can not indict the guilty party for killing one of the persons, and after conviction or acquittal, indict him for killing the other. *Ibid.*

67. PLEADING—*Plea of Not Guilty—Special Plea.*—The privilege given by statute (2 G. & H. 413, § 97), that in all criminal prosecutions the defendant may plead the general issue orally, and under it every matter of defense may be proved, does not take away from him the right to plead specially any defense which before that enactment might have been specially pleaded. *Ibid.*

68. *Same—Special Plea in Bar—Trial.*—A defendant in a criminal prosecution may plead specially a former acquittal or a former conviction in bar, and have the issue or issues joined on such plea; tried separately and apart from the question of the guilt or innocence of the crime charged in the pending indictment. *Ibid.*

Same.—If the issue or issues joined upon a plea of former acquittal or conviction are found against the defendant, he may still enter a plea of not guilty. *Ibid.*

§629. 69. *Same—Judgment.*—The judgment upon a plea of former acquittal or conviction, when the issues have been found against the defendant is, that he answer over. *Ibid.*

70. *Same.*—Upon the general issue only can a defendant, in a criminal prosecution, be found guilty and subjected to the penalty of the law. *Ibid.*

71. *Same.*—It is optional with the defendant, in a criminal prosecution, whether he will plead a former acquittal or conviction specially, or give the same in evidence under the plea of not guilty. *Ibid.*

72. *Same—Practice—Demurrer.*—The rule that it is not an available error, that a demurrer has been sustained to a pleading, when there is another pleading under which the same evidence is admissible, is not applicable in criminal cases. *Ibid.*

73. *Same—Demurrer.*—In determining the sufficiency of a plea of former acquittal or conviction, to which a demurrer has been sustained, the court can not regard the evidence that was afterwards given on the trial of the cause upon a plea of not guilty. *Ibid.*

74. INSTRUCTIONS—*Exculpatory Facts.*—On the trial of a criminal cause, it was error to instruct the jury, that if there were other facts not before them, which were exculpatory in their character, and they could have been proved by the defendant, but were not, the jury might consider such failure with the other circumstances offered to show the guilt of the defendant. *Ibid*

75. *Same.*—The jury were instructed as follows: "Remember, that you are each responsible for the verdict you shall render, not forgetting, however, that no man can safely consider himself infallible, that no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinions of others, without what some might call compromise of different views. No man who is unwilling to do this within reasonable limits, and without a sacrifice of conscience, ought to have a place in a jury box, or be a member of any deliberative body."

Held, where the indictment was for murder in the first degree, and the evidence was all circumstantial and tended to prove murder in the

first degree only, and there was a verdict of guilty of murder in the second degree, with a recommendation to executive clemency, that the charge was erroneous. *Ibid.*

§ 630. 76. NEW TRIAL—*Effect of Granting a New Trial.*—The legal effect of granting the appellant a new trial in this cause, must be decided by the court below before it can properly be passed on by the Supreme Court. *Ibid.*

77. STATUTE CONSTRUED—*Technical Error.*—To deprive a defendant on a criminal prosecution of the right to prove a former acquittal or conviction by a special plea, and to have the issue thus tendered tried first, and, if found against him, to have another jury try the issue on a plea of not guilty, is not a technical error within the meaning of Sec. 160, 2 G. and H. 427. *Ibid.*

78. INSTRUCTIONS—*Effect of.*—Although the jury in criminal causes are made the judges of the law as well as of the facts, the charge of the Court is presumed to control their minds to some extent; and when the Court has misdirected the jury, in a material matter of law, such misdirection is ground for a new trial. *Ibid.*

80. *Same.*—When, from the whole case it appears that the jury might have rendered a different verdict, it may well be considered that an errorneous instruction leading to the verdict, influenced them, and is good ground for a new trial. *Ibid.*

§ 631. 81. CRIMINAL LAW—*Murder—Manslaughter—Justifiable Homicide —Instruction.*—On the trial of an indictment for murder, where there is evidence tending to show that the defendant acted in self-defense, it is error to instruct the jury that if the death of a human being be produced by a deadly weapon in the hands of another, the presumption is that the party using such weapon intended, and is guilty of murder, and that to remove this presumption and reduce the killing to manslaughter, it devolves on the defendant to show that it was under great provocation, such as endangered the life of, or would have resulted in great bodily harm to the party using such weapon. *Kingen* v. *The State*, 45 Ind. 518.

82. *Same.*—The use of a deadly weapon, resulting in homicide under circumstances that endanger the life of a person using such weapon, or would result in great bodily harm to him, will justify the killing. *Kingen* v. *The State*, 45 Ind. 518.

83. CRIMINAL LAW—*Murder—Circumstantial Evidence—Corpus Delicti.* —On a trial for murder, evidence was given of the finding of the skeleton of a human being of the sex of the person charged to have been murdered, and corresponding to his size.

Held, that this was sufficient evidence of the *corpus delicti* to justify the admission of circumstancial evidence to identify the skeleton as

that of the murdered party as well as to show the cause and manner of his death.

84. *Same—Voluntary Confession.*—A witness for the State in a trial for murder, testified to several conversations with the accused, in some of which the latter spoke of having killed a man by the name of Morgan, which was the name of the person alleged in the indictment to have been murdered, and in one conversation the prisoner stated that he was free of crime, but it did not affirmatively appear that the declaration of innocence was made in the same conversation in which he confessed the homicide.

Held, that it could not be rightfully assumed by the Supreme Court that the assertion of innocence was necessarily made by the accused in the same conversation in which he said he had killed a man by the name of Morgan. *McCulloch* v. *The State*, 48 Ind. 109.

85. CRIMINAL LAW—*Practice—Argument to Jury.*—On the trial of an indictment for murder, it is error for counsel for State, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant, and for the Court, upon objection by the defendant to such language, to remark to the jury that such matters are proper to be commented upon. 48 Ind. 109; 49 Ind. 33.

86. *Same—Instruction—Homicide upon Provocation.*—On the trial of a defendant on an indictment for murder in the first degree, it was error to instruct the jury, that "to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter." *Ferguson* v. *The State*, 49 Ind. 33.

MURDER IN THE COMMISSION OF A ROBBERY—*Intent.*—Where, in the perpetration of a robbery, the robber takes the life of his victim, he is guilty, under section 2, 2 R. S. Ind. 423, of murder in the first degree, though there may have been no intent to kill. *Moynihan* v. *The State*, 70 Ind. 126.

POISON.—As to killing by administering poison, see 54 Ind. 128, as to the question of intent.

§ 632. 87. INDICTMENT—DIFFERENT COUNTS, charging felonies, may be joined in the same indictment; and every separate count should charge the defendant as if he had committed a distinct offence. *Mershon* v. *The State*, 51 Ind. 14.

88. *Same—Practice.*—When an indictment contains more than one count, it is not error to overrule a motion to require the prosecutor to elect on which count he will proceed. *Ibid.*

89. *Same—Challenge of Grand Juror.*—Any person under prosecution for crime, and in custody or on bail, may, before he is indicted, challenge, for good cause, any person returned or placed upon the grand jury. *Ibid.*

90. *Same—Plea in Abatement.*—When a person is not under prosecution for an offense, he can not be supposed to anticipate that he may be charged with an offense before a grand jury; and in such a case he may plead in abatement of the indictment the disqualification of any of the grand jurors who found it. *Ibid.*

91. *Same.*—An objection to a grand juror, whether on the ground of incompetency of the juror, or corruption on the part of an officer, in selecting and empaneling him, when taken by plea in abatement, must show that the defendant had no opportunity of making the objection by challenge. *Ibid.*

92. *Same—Evidence.*—On the trial of an indictment for murder, where the evidence was uncertain as to the name and identity of a man shown to have been a stranger, and shown to have been seen in the locality before, but not after the night of an affray in which a person, not well identified, was stabbed and taken away apparently in a dying condition, there being no evidence that he was afterwards seen dead or alive, it was not competent to introduce in evidence statements made by said stranger on the day of the alleged murder, but before the affray, as to where he lived, where he was going, who were some of his relatives, that he had sold land, that he had lost a large sum of money which had been restored to him, that he had been intoxicated, etc., neither for the purpose of identifying the man, nor to show that the matters stated were true. *Ibid.*

93. MURDER—*Instruction.*—Where a husband and wife are jointly indicted and tried for murder, it is error to instruct the jury that to acquit either of them on the ground of self-defense, they should have feared and had reasonable cause to fear death or great bodily harm at the hands of the deceased. *Hicks* v. *The State*, 51 Ind. 407.

§ 633. 94. *Same—Self-Defense.*—To justify a homicide on the ground of self-defense, it is not necessary that the accused should have believed that it was necessary to take the life of his assailant in order to defend himself. If the death of the assailant results from the defendant's reasonable defense of himself, he is excusable, whether he intended that consequence or not, or whether he believed such a result necessary or not. *Ibid.*

95. MURDER—*Motion to Require the Prosecuting Attorney to Elect between Counts in the Indictment.*—Where, in an indictment of more than one count, the several counts are evidently based on the same alleged felony and inserted to avoid the consequences of a possible variance, it

is not error to overrule a motion to require the prosecuting attorney to elect on which count he will try the defendant. *Wall* v. *The State*, 51 Ind. 453.

96. SELF-DEFENSE.—On the trial of an indictment for murder, it is sufficient to establish a case of self-defense, if the defendant, being without fault, believed, and had reasonable ground to believe from the acts of the deceased, that his own life was in danger, or that he was in danger of great bodily harm; therefore, on the trial of such an indictment, where the evidence was such as to entitle the defendant to a correct instruction to the jury as to the law on this subject, it was error to charge that "there can be no successful setting up of the plea of self-defense in a case of homicide, unless necessity for taking life is *actual, present and urgent;* in a word, unless the taking of his adversary's life is the only reasonable resort of the party who kills his antagonist, and he is compelled to do so in order to save his own life, or his person from great harm and severe calamity;" or to charge that "self-defense can only be resorted to in a case of *absolute necessity*," *Ibid.*

97. ALIBI.—It is error to instruct the jury, that "evidence of an *alibi* is evidence of a suspicious character." *Line* v. *The State*, 51 Ind. 172.

§ 634. 98. MANSLAUGHTER—*Instruction to Jury.*—On the trial of an indictment for murder, the court, in its charge to the jury stated: "If you should find from the evidence, beyond a reasonable doubt, that the defendant, without malice, either express or implied, and with no intent to murder, unlawfully involuntarily killed the decedent," naming him, "this would be manslaughter," the context of the charge, giving the full statutory definition of manslaughter. *Held*, that the defendant could not complain of the omission, in the portion of the charge quoted of the words, "*but in the commission of some unlawful act..*" *Kelley The State*, 53 Ind. 311.

99. MURDER—*Indirect Cause of Death.*—When wounds have been inflicted by one person upon another, and the latter afterward dies, it is not indispensable to a conviction of the former of murder, or manslaughter, under an indictment based upon the infliction of such wounds, that they were *necessarily* fatal, and were the *direct* cause of death; but if they caused the death indirectly, through a chain of natural effects and causes, unchanged by human action, it is sufficient in this regard. *Ibid.*

100. *Same.*—Where a person has inflicted wounds upon another which are fatal, and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or congestion of the brain so induced, causes the exposure of the injured person to the inclemencies of the weather by which he dies, it must be held that

the person who gave the wounds caused the death by the infliction of them. *Ibid.*

101. ASSAULT, ETC., *with Intent to Commit Manslaughter.*—Under Section 9, 2 G. & H. 438, prescribing a penalty for the perpetration of an assault or an assault and battery with intent to commit a felony, an indictment will lie for an assault or an assault and battery, with intent to commit *voluntary manslaughter*. *The State* v. *Throckmorton*, 53 Ind. 354.

102. *The Same.*—Under an indictment for an assault, or an assault and battery with intent to commit murder in the first degree, if the evidence justify it, there may be the same conviction as under an indictment for an assault or an assault and battery with intent to commit manslaughter.

Therefore, where there was a trial and an acquittal under a count for an assault and battery with intent to commit murder, the judgment could not be reversed for the quashing of a good count for assault and battery with intent to commit manslaughter. *Ibid.*

§ 635. 103. MURDER *Committed in the Perpetration of Burglary.*—Where, after a person has burglariously broken and entered into a house, and while he was yet within the house, and immediately after, a watchman who came to the door by which said person had so entered, had shot at such person, he shot and killed the watchman; *Held*, that the homicide being committed within the *res gestæ* of the burglary, was committed "in the perpetration" of the burglary, within the meaning of Section 2, 2 R. S. 1876, 423. *Bissot* v. *The State*, 53 Ind. 409.

104. CONVICTION *under One Count, and Acquittal as to Another.*—On the trial of an indictment containing two counts, the first charging a homicide committed by the defendant "purposely and with premeditated malice," and the second charging the killing to have been done "purposely and with premeditated malice in the perpetration of a burglary," an acquittal as to the first count, and a conviction on the second did not acquit the defendant on the whole indictment. *Ibid.*

105. MURDER—*Indictment—Certainty—Motion in Arrest of Judgment.*—The grand jury of Sullivan county, Indiana, returned into court the following indictment, viz.:

STATE OF INDIANA, SULLIVAN COUNTY, SS: SULLIVAN CIRCUIT COURT, JUNE TERM, 1875

STATE OF INDIANA
vs.
THOMAS SHEPPARD. } Indictment for murder.

The grand jury of Sullivan county, in the State of Indiana, good and lawful men, duly and legally empaneled, charged and sworn to inquire into felonies and certain misdemeanors, in and for the body of said county of Sullivan, in the name and by the authority of the State of Indiana, on their oaths present, that one Thomas Sheppard, late of

said county, on the 10th day of June, A. D. 1875, at said county and State aforesaid, did then and there, feloniously, purposely and with premeditated malice, unlawfully kill and murder Mason Engle, by then and there and thereby feloniously, purposely and with premeditated malice, firing a large-sized Colt's revolving-pistol, loaded with gunpowder and leaden balls, which he, the said Thomas Sheppard, then and there had and held in his hands, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana. J. L., *Prosecutiny Attorney.*

Held, on motion in arrest of judgment, that the indictment is bad for want of certainty in charging the mode and manner in which the deceased came to his death [because, say the Supreme Court, the indictment does not say that the deceased was wounded by the balls from the pistol, nor that the pistol was ever shot at him, etc]. *Sheppard* v. *The State*, 54 Ind. 25. (*a*)

§ 636. 106. CRIMINAL LAW—*Indictment—Assault and Battery with Intent to Murder—Particular Words and Phrases.*—An indictment charged that the defendant "in and upon one" A B, did feloniously, purposely and with premeditated malice make an *assault*, and then and there, *at and against* the said "A B," did feloniously, purposely, and with premeditated malice, shoot a certain pistol, then and there loaded with gunpowder and leaden ball, which "he, the defendant," then and there had and held in his hand, with intent, etc. *Held*, that the indictment sufficiently charges an assault and battery. *Held*, also, that the word "*against*," as used in this indictment must be taken in its usual acceptation in common language. *The State* v. *Prather*, 54 Ind. 63.

107. MURDER—*Indictment—Attempt to Commit Rape—Surplusage—Purpose to Kill.*—An indictment for murder commenced by charging that the defendant "unlawfully, feloniously, and with premeditated malice did kill and murder one" A B, "a woman over the age of fourteen years, in an unlawful attempt, forcibly, feloniously and against her will," etc., "to ravish and have," etc., "carnal knowledge of her," etc., "by," etc., "purposely, willfully, unlawfully, feloniously and with premeditated malice, administering and causing to be administered unto" her, "a large quantity of deadly poison." Then followed allegations that the defendant had mingled the poison with wine, and had caused her to drink it, with the intention that such poison should create in her an uncontrollable desire for sexual connection, so that the defendant could thus carnally know her himself. The concluding allegations were, that the defendant unlawfully intending to satisfy his sexual passions upon her body, as before set out, "in the manner and by the

(*a*) *Sed quere.* Is this case in harmony with subsequent decisions of the Supreme Court, when they appear to hold that an indictment may be quashed for defects, for which a motion in arrest of judgment will not be sustained?

means aforesaid," etc., "feloniously, willfully, unlawfully, and of premeditated malice did kill and murder her," A B, etc., but there was no allegation in the indictment of any attempt by the defendant to have sexual connection with her.

Held, that the indictment is sufficient as charging a murder by the administering of poison, but not of a murder in an attempt to commit a rape; the allegation in regard to the attempt to commit a rape being treated as mere surplusage.

Held, also, that such indictment sufficiently shows that the woman died of the poison administered to her.

Held, also, that a purpose to kill the woman, on the part of the defendant, is sufficiently alleged. *Bechtelheimer* v. *The State*, 54 Ind. 128.

108. *Same.*—Under section 2, of "an act defining felonies," etc., 2 R. S. 1876, 423, a purpose to kill is an essential ingredient in the crime of murder in the first degree, where the killing is effected by administering poison. *Ibid.*

109. MALICE.—Where a purposed killing is charged in an indictment for murder, by administering poison, it is not necessary to allege that it was done with malice in order to constitute murder in the first degree. *Ibid.*

110. INSTRUCTIONS TO JURY.—Where a defendant was on trial for having committed murder in the first degree by administering poison, it was error for the court to refuse to instruct the jury, trying the cause, that, if they found that the poison was administered to the deceased, a woman, only to excite her sexual passions, and thereby enable the defendant to carnally know her, and without any purpose or intention to kill her, they could not find the defendant guilty of murder. *Ibid.*

111. TRIAL BY LESS THAN TWELVE JURORS.—The trial of a defendant in a criminal prosecution by a jury of less than twelve in number, with, or without, the consent of the defendant, is unauthorized by law, and the verdict void. *Allen* v. *The State*, 54 Ind. 461, acc. 16 Ind. 496, and *Hill* v. *The People*, 16 Mich. 351.

§ 637. 112. MANSLAUGHTER—*Instruction to Jury.*—On the trial of a defendant for manslaughter, an instruction to the jury, in relation to the evidence of the means by which the deceased came to his death, should not assume that the immediate cause, producing death, was the result of an act of the defendant, but should clearly and logically connect such immediate cause with some "unlawful" act of the defendant. *Waybright* v. *The State*, 56 Ind. 122.

113. ASSAULT WITH INTENT TO MURDER—*Evidence—Specific Acts.*—Upon trial of a defendant indicted for assault and battery with intent to murder another, evidence of specific acts of violence, committed by the latter, upon persons toward whom he had ill-will, is not admissible. *Pratt* v. *The State*, 56 Ind. 179.

Miscellaneous.

114. Misconduct of Juror.—The fact that, during the separation of a jury by leave of court, upon an adjournment of a cause which they are trying, a member thereof, on his own motion and at his own expense, by himself, and without becoming intoxicated, partakes of intoxicating liquor, is not sufficient cause for a new trial. *Ibid.*

115. Failure of Defendant to Testify.—An allusion by counsel for the State in a criminal prosecution, made during his argument of the cause before the jury, to the fact that the defendant had failed to testify as a witness on the trial of such cause, is sufficient ground for a new trial, and is not cured by the facts that the court admonished the counsel that such allusion was improper, and instructed the jury that no attention should be paid by them to the same. *Long* v. *The State*, 56 Ind. 182. (*a*)

§ 638. 116. Indictment for Murder.—"The grand jurors of Johnson county, in the State of Indiana, good and lawful men, duly and legally empaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of said county of Johnson, in the name and by the authority of the State of Indiana, on their oaths present, that one Frank Meiers, late of said county, on the 24th day of July, A. D. 1875, in said county and State aforesaid, did then and there, unlawfully and feloniously, willfully and purposely, and with premeditated malice, unlawfully kill and murder Charles Bernauer, by then and there feloniously, purposely and with premeditated malice, cutting, stabbing, and mortally wounding said Charles Bernauer, with a knife which he, the said Frank Meiers, then and there had and held in his hands." * * * "The appellant (the defendant), objects that the foregoing indictment is insufficient, because it did not charge that Bernauer's death resulted from the injuries, alleged to have been inflicted on him, and because it did not describe the parts of the body which were wounded by the appellant's knife. The common law forms of indictments have been abolished in this State, and the substance only of what was necessary to make a good indictment at common law need now be charged. The necessary averments have only to be in plain and concise language, and certain only to a common intent. *McCool* v. *The State*, 23 Ind. 127. We think that, under the rules of pleading in criminal cases, as they are now recognized in this State, the indictment sufficiently charged the means by which the deceased came to his death. *Dillon* v. *The State*, 9 Ind. 408; *Dukes* v. *The State*, 11 Ind. 557; *Jones* v. *The State*, 35 Ind. 122; *West* v. *The State*, 48 Ind. 483." *Meirs* v. *The State*, 56 Ind. 336.

§ 639. 117. Alibi.—An instruction to the jury on the trial of a

(*a*) The act authorizing the defendant, in a criminal cause, to testify, provides that if he do not testify, no allusion shall be made to such omission.

defendant in a criminal case, in relation to uncontradicted evidence offered by him to establish an *alibi*, tending to cast suspicion on such evidence, is erroneous. *Sater et al.* v. *The State*, 56 Ind. 378.

118. *Same—Evidence.*—Evidence of an *alibi*, introduced by a defendant should be subjected to the same, and no other test, that evidence of any other material fact is subjected to. *Ibid.*

119. INDICTMENT—*Murder in the First Degree.*—An indictment for murder in the first degree, charged, that on, etc., at, etc., the defendant "did then and there, unlawfully, feloniously, purposely, and with premeditated malice, kill and murder," one A B, by "then and there feloniously, purposely, and with premeditated malice, shooting and mortally wounding the body and person of said" A B, "with a gun loaded with gunpowder and leaden balls, which he," the defendant, "then and there in his hands had and held," etc. *Held*, on motion in arrest, that the indictment is sufficient. *Veach* v. *The State*, 56 Ind. 584.

120. WITNESS—*Credibility of—Instruction to Jury—Defendant's Testimony.*—On the trial of a cause wherein the defendant testifies as a witness in his own behalf, it is error in the court to instruct the jury, in relation to the credibility of such witness, "that one interested will not usually be as candid and honest as one not so." *Ibid.*

121. BAIL—*Weight of Evidence—Supreme Court.*—On appeal to the Supreme Court from the decision of a judge, on the petition of a person charged with a crime, to be admitted to bail, the evidence will be weighed without regard to such decision. *Ex parte Sutherlin*, 56 Ind. 595.

122. MURDER—*When Defendant admitted to Bail.*—On such petition by a defendant confined in jail on an indictment for murder, if from the evidence the proof of his guilt be not evident, or the presumption thereof not strong, he should be admitted to bail. *Ibid.*

§ 640. 123. PRACTICE.—The overruling of a motion made by the defendant on a trial for murder, that the court instruct the prosecuting attorney, who had closed his evidence, to call certain witnesses, then present, is not error. [Defendant's counsel moved the court to instruct the prosecuting attorney to call as witnesses, two other persons, then in the court house, who were present at the alleged murder, in order that the defendant might have the advantage of cross-examining them; but the court refused so to instruct the prosecutor.] *Ward* v. *The State*, 8 Blackf. 101.

124. IMPEACHMENT OF VERDICT.—A juror's affidavit in such case as to the view he took of the testimony, is inadmissible to impeach a verdict for the State. [The law seems now to be settled that jurors will not be heard in impeachment of their verdict.]

125. CONSCIENTIOUS SCRUPLES OF JUROR—*Indictment for Murder.*—The prosecuting attorney propounded the following question to each juror:

"Whether he entertained such conscientious scruples on the subject of capital punishment as would deter him from finding a verdict assessing the death penalty in any case of murder in the first degree?" One of the jurors answered affirmatively, and he was discharged. *Held*, that such conscientious scruples disqualify a juror. *Held*, also, that a grand juror would be disqualified for the same reason. (*a*) *Gross* v. *The State*, 2 Ind. 329.

126. JURY JUDGES OF THE LAW.—The court instructed the jury that they were the judges of the law and the facts, but it was their duty to believe the law as laid down by the court. *Held*, that the instruction was right. *Carter* v. *The State*, 2 Ind. 617.

127. EXECUTION OF PRISONER, ORDERED AFTER ESCAPE AND RECAPTURE.—The defendant was indicted for murder in the first degree. The jury found him guilty as charged in the indictment, of murder in the first degree, and that he suffer death, etc. The court rendered judgment on the verdict. Previously to the day named for his execution, the prisoner made his escape, and was afterwards retaken by the sheriff, and kept in custody until the next term of the court, at which term the prisoner was again brought before the court by the sheriff, and the fact of his escape, etc., being made known, the court again awarded execution against him on the former judgment. *Held*, that there was no error in this. *Bland* v. *The State*, 2 Ind. 608.

128. A NEW TRIAL FOR NEWLY-DISCOVERED EVIDENCE, is rarely, if ever, granted, if the only object of the evidence be, to impeach the character of a witness. *Ibid.*

129. TO SET ASIDE JUDGMENT.—By our statute, no judgment of any court of record, can be set aside on motion, unless such motion be made at the term at which such judgment was rendered. *Ibid.*

§ 641. 130. EVIDENCE.—Declarations which form a part of the *res gestæ*, and are to be regarded as a part of the transaction in question, do not come under the head of hearsay, but are admissible as original evidence. *Binns* v. *The State*, 57 Ind. 46.

131. *Same.*—A declaration which is simply narrative of a past event, depending solely for its effect upon the credit of the person making it, and not so connected with the transaction in question as to illustrate its character, is inadmissible in evidence. *Ibid.*

132. *Same—Murder.*—On the trial of a defendant indicted for murder, declarations of the deceased made in the absence of the defendant and after the infliction of the injury, subsequently resulting in death, as to the manner in which, and the means by which such injury was inflicted, are not admissible as evidence against the defendant. *Ibid.*

(*a*) Since the above case was tried, the R. S. of 1852 have made provisions for the case of jurors who have conscientious scruples in regard to the death penalty.

133. *Same—Motive.*—Where, in such case, the defendant was on trial for the alleged murder of his wife, it is not competent, as tending to establish a motive for the commission of the murder, to introduce in evidence the record of a decree of a court in an action by the deceased against the defendant for a divorce, ordering the latter to pay money into court, restraining him from selling his property, appointing a receiver, etc. *Ibid.*

134. *Same.*—In such case as tending to show the state of feeling between the defendant and deceased, parol evidence of the pendency of such suit may be given. *Ibid.*

135. *Same—Self-Defense.*—On the trial of a defendant indicted for murder, where the evidence showed that he, being disabled in one arm, had procured a pistol to defend himself against a threatened assault by an able-bodied man, and that, while standing on a public street leaning against a building, surrounded by an excited crowd, he had been threatened by another person, and then struck by a third, the deceased, whom he at once had shot and killed, the court instructed the jury, that "before a man can take life in self-defense, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault. *Held*, that such instruction is erroneous. *Held*, also, that where a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, he kills his assailant, he is justifiable. *Held*, also, in such case, that, from the evidence, the real question presented for the determination of the jury was, did the defendant when assaulted, believe, and have reason to believe, that the use of a deadly weapon was necessary to his own safety? *Held*, also, that no question as to the duty of the defendant to retreat was presented to the jury by the evidence. *Runyan* v. *The State*, 57 Ind. 80.

§ 642. 136. JUROR.—In criminal cases in this State, it is the general rule, in relation to a challenge of a juror by the defendant for cause, that an opinion formed by the juror, as to the guilt or innocence of the accused, based solely upon a newspaper account of the alleged crime, and which, in the belief of the juror will not have any influence upon him, in the trial of the cause, is not sufficient ground for challenge. *Hart* v. *The State*, 57 Ind. 102.

137. MANSLAUGHTER, *Voluntary and Involuntary.*—An indictment for manslaughter, charged, that the defendant, at, etc., on, etc., did "unlawfully and feloniously kill" the deceased, "without malice but voluntarily upon a sudden heat," by "striking and injuring" the deceased, "on the head with a stake," which the defendant then and there, had

and held in his hands, and "of which striking and injuring the" deceased "lingered, and lingering, did die." *Held*, that the indictment is sufficiently certain, in its description of the injury, resulting in death. *Held*, also, that the indictment charged the commission of *voluntary* manslaughter. *Held*, also, that under such indictment the defendant can not be convicted of involuntary manslaughter. *Bruner* v. *The State*, 58 Ind. 159.

138. *Same.*—The unlawful and felonious killing of a human being, "without malice, but voluntarily upon a sudden heat," is voluntary manslaughter. *Ibid.*

139. *Same.*—Where the killing is involuntary, but in the commission of an unlawful act, it is involuntary manslaughter. *Ibid.*

140. *Same.*—One guilty of involuntary manslaughter can not be convicted under an indictment charging him with voluntary manslaughter. *Ibid.*

141. *Same—Jury.*—On a trial of a defendant for manslaughter, the question as to whether the manslaughter committed was voluntary or involuntary is one wholly for the jury. *Ibid.*

Same—Unlawful Act.—One who voluntarily commits an unlawful act, which unintentionally, but not necessarily, results in the death of another, is guilty, not of voluntary, but of involuntary manslaughter. *Ibid.*

142. MURDER—*Threats.*—Where a defendant on trial for murder offers to prove threats made against him by the deceased, afterward coming to his knowledge, and that the latter had challenged him to fight, and had otherwise ill-treated him, he must fix the time at which the alleged misconduct occurred. *Gillooley* v. *The State*, 58 Ind. 182.

143. ASSAULT AND BATTERY WITH INTENT.—An averment in an indictment for assault and battery with intent to murder, that the defendant wounded the injured party by "shooting" him with a pistol loaded with gunpowder and leaden balls, is equivalent to an averment that the injured party was hit by the substance with which the pistol was loaded. *Jarrell* v. *The State*, 58 Ind. 293.

§ 643. 144. *Same—Manslaughter.*—Under an indictment for an assault and battery with intent to commit murder the defendant may be convicted of assault and battery with intent to commit manslaughter. *Ibid.*

Same—Reasonable Doubt.—On the trial of the defendant in such case, the court instructed the jury that, "Evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their most important affairs." *Held* that the instruction was correct. *Ibid.*

146. *Same—Harmless Error.*—An instruction to the jury in such case, as to what is necessary for the State to prove, to convict the defendant of assault and battery with intent to murder, or as to "sudden heat," reducing the killing to manslaughter, though erroneous, is not available as ground for a new trial, where he is convicted of an assault and battery with intent to commit manslaughter only. *Ibid.*

147. *Same—Retreat.*—Where, on such trial, it appears that the injured party being unarmed, had, after attacking the defendant, fled for safety from the defendant, who was armed, and was aided by another, it is not available as a cause for a new trial that an instruction to the jury in relation to the duty of the defendant when the injured party had retreated, did not refer to the fact as to whether such retreat was or was not made in "good faith." *Ibid.*

148. ASSAULT WITH INTENT TO MURDER.—An indictment for an assault upon another with intent to murder him must allege facts, showing not only the attempt, but also the ability of defendant to commit the crime charged. *The State* v. *Hubbs*, 58 Ind. 415.

149. MURDER—"*Unlawful Killing.*"—It is not necessary under the statutes of this State, in an indictment for murder, to aver that the killing was "unlawful."—*Beavers* v. *The State*, 58 Ind. 530.

150. INDICTMENT—*Murder.*—In this State an indictment for murder in the first degree must aver that the killing was purposely done. *Snyder* v. *The State*, 59 Ind. 105.

151. *Same—Requiring Prosecutor to Elect.*—It is within the discretion of the Court to refuse to compel the prosecuting attorney to elect on which of two counts an indictment for murder in the first degree he will put the defendant on trial. *Ibid.*

§ 644. 152. *Same—Admissions of Defendant before Coroner's Inquest.*—On the trial of an indictment for murder, a writing or statement signed by defendant, as his statement, or evidence, given by him as a witness before the coroner's inquest, over the body of the deceased, is admissible in evidence in behalf of the State, over the defendant's objection, unless it be shown to have been made by defendant under the influence of fear produced by threats. And whether the coroner's jury was legally organized or not, would not affect the question of the admissibility of such a statement freely made by the defendant. *Ibid.*

153. *Same—Instruction to Jury.*—On the trial of an indictment, the refusal of the court to instruct the jury, that, if there was a reasonable doubt in their minds as to the establishment by the evidence of any material fact necessary to convict the defendant, they should acquit him, was not cured by a general instruction given, that the defendant was by law presumed innocent until proved guilty beyond a reasonable doubt. *Ibid.*

154. *Same—Statement to Jury of Material Facts to be Proved.*—Where, on the trial of an indictment, the court in charging the jury proposed to call their attention to the material facts in the indictment which must be proved, and did not mention all of such material facts, the instruction was erroneous. *Ibid.*

155. *Same—Instruction assuming Facts.*—Where, on the trial of an indictment for murder by poisoning, the court in its charge to the jury directed "attention to the question whether the defendant gave" the deceased poison "with a criminal intent." *Held*, that this was error because the jury might understand the instruction to assume, that the defendant gave the deceased poison, and left to the jury the question of intent alone. *Ibid.*

156. *Same—Reasonable Doubt.*—An instruction to the jury, on the trial of a criminal action, which is calculated, by its terms, to leave the impression upon the minds of the jury, that the State has made out her case, and that unless the evidence of the defendant raises in their minds a reasonable doubt, they should convict, is erroneous. *Ibid.*

§ 645. 157. INSTRUCTION TO JURY.—Assault and battery, with intent to commit manslaughter. On the trial of an indictment for assault and battery with intent to kill and murder A, the court instructed the jury, that, if they found beyond a reasonable doubt, that the defendant, without malice, either express or implied, but voluntarily, and upon a sudden heat of blood and passion, *unlawfully assaulted and beat* the said A, *in the manner and form charged in the indictment*, this would be an assault and battery with intent to commit manslaughter. *Held*, that the instruction was erroneous. *West* v. *The State*, 59 Ind. 113.

158. SELF-DEFENSE.—To authorize a person to exercise the right of self-defense against an assailant, it is not necessary that the latter should, in fact, contemplate injury either to the person of the former or any member of his family. *Richie* v. *The State*, 59 Ind. 121.

ARREST OF JUDGMENT.—An indictment which is sufficient on motion to quash is sufficient on motion to arrest. *Greenley* v. *The State*, 60 Ind. 141.

159. MURDER—*Harmless Defect.*—An indictment for murder which is otherwise sufficient, is not rendered insufficient by a mere defect or informality which does not tend to prejudice the rights of the defendant. *Ibid.*

160. *Same—Juror—Conscientious Scruples as to Death Penalty.*—On the empaneling of a jury to try a defendant indicted for murder in the first degree, any person called to sit on such jury who entertains conscientious opinions which would preclude him from returning a verdict inflicting the penalty of death, may be challenged for cause; and Sec. 85, 2 R. S. 1876, page 394 of the Act, in relation to criminal pleading

and practice, declaring that such persons shall not sit as jurors, is constitutional. *Ibid.*

161. *Same—Cross-Examination of Defendant—Insanity.*—On the trial of an indictment for murder where the defendant had testified in his own behalf, that the deceased was a married woman with whom he had been having illicit intercourse, and that the killing was committed by him in a passion of love and jealousy, amounting to insanity, on her refusal to longer associate with him, and that he had met her husband, and during his intimacy with the wife it was proper for the State to cross-examine him as to whether, at such meeting, the husband had forbidden him to further associate with her. *Ibid.*

162. *Same—Admissions.*—An affidavit by the defendant for a continuance of such cause, admitting, though excusing, the killing charged, is competent evidence against him. *Ibid.*

§ 646. 163. ASSAULT WITH INTENT TO MURDER.—*Indictment—Duplicity.*—An indictment charged that the defendant did "unlawfully, feloniously, purposely and with premeditated malice, make an assault" upon a certain person, and "at and against and in contact with" such person, "did feloniously, purposely and with premeditated malice, shoot a certain pistol, * * * loaded with gunpowder and leaden balls, which he," the defendant, "in his hands had and held, with the intent," such person, "feloniously, purposely, and with premeditated malice to kill and murder." *Held.* that the indictment is not open to the objection of duplicity. *Jones* v. *The State*, 60 Ind. 241.

164. *Same—Handwriting—Proof by Comparison—Threats.*—On such trial the State proved by a witness an admission made by the defendant, previous to the trial, that a certain written instrument, unconnected with the facts of the cause on trial, was in his handwriting; and then, submitting such instrument, and a writing containing threats of violence towards the prosecuting witness, to an expert, the State proved by him that both, in his opinion, were written by the same person, whereupon the court admitted such writing in evidence against the defendant. *Held*, that the evidence was incompetent. *Ibid.*

165. MURDER—*Manslaughter—Verdict—Venire de Novo.*—On the trial of a defendant indicted for murder, the jury returned a verdict finding the defendant guilty of manslaughter, as charged in the indictment, and that "*he be fined in the sum of one dollar*, and imprisoned in the State prison for a period of fifteen years." *Held*, on motion for a *venire de novo*, that the jury is not authorized to assess a fine in such a case, but that the same should be regarded as mere surplusage, not vitiating the residue of the verdict, and that judgment should be rendered against the defendant imprisoning him as directed by the verdict. *Veach* v. *The State*, 60 Ind. 291.

166. *Same—Erroneous Instruction Cured by Judgment.*—An erroneous instruction to the jury in such case informing them, that in addition to imprisonment, they might assess a fine against the defendant if found guilty, was cured by the court by disregarding the fine, imposed by the verdict and rendering judgment of imprisonment. *Ibid.*

167. *Same—Former Acquittal—Effect of Obtaining a New Trial.*—When a defendant, who has been convicted of manslaughter on an indictment for murder, obtains a new trial, he may on such new trial be convicted of murder, as he, by obtaining the new trial, consented to be put on trial a second time for the same offense, thereby waiving his constitutional right to stand on his implied acquittal of murder on the first trial. *Ibid.*

§ 647. 168. ASSAULT AND BATTERY WITH INTENT—*Verdict.*—On the trial of an indictment for assault and battery upon a person named, with intent to murder him, by shooting him with a gun loaded with powder and shot, a verdict finding "the defendant guilty of assault and battery," is sufficient without the addition of the phrase, "as charged in the indictment." *Rollins* v. *The State*, 62 Ind. 46.

169. INDICTMENT—*Name—Surplusage.*—An inconsistent or repugnant clause or averment, concluding an indictment, such as a misnomer of the defendant, should be treated as mere surplusage, when the other averments of the indictment clearly and sufficiently charged the defendant with the commission of a crime. *Kennedy* v. *The State*, 62 Ind. 136.

170. MURDER—*Verdict Fixing Illegal Punishment—Judgment.*—Where, on the trial of a defendant indicted for murder, the jury returned a verdict of guilty, as charged in the indictment, fixing the punishment at imprisonment in the State Prison, and assessing a fine, the latter should be disregarded by the court, in rendering judgment. And if in such case, judgment be rendered in accordance with the verdict, the Supreme Court may affirm the judgment of imprisonment, and reverse as to the fine, by directing the court below to strike it out. *Ibid.*

171. ASSAULT WITH INTENT TO KILL—*Indictment.*—Where the indictment alleges that the defendant "then and there having the present ability," had "unlawfully and feloniously," attempted "to commit a violent injury upon" another, by "then and there unlawfully, feloniously, purposely and with premeditated malice," shooting, etc., "toward, at and against the body of" the latter, a loaded pistol, etc., "with intent, then and there and thereby, unlawfully, feloniously, and with premeditated malice, to kill and murder the latter. *Held*, that the indictment is good for an *assault* with the felonious intent charged; but is not good as a charge of assault *and battery* with such intent; because it is not charged to have been done, in a "rude, insolent or angry manner." *McCulley* v. *The State*, 62 Ind. 428.

§ 648. 172. MURDER—*Insanity Produced by Disease—Instruction.*—On the trial of a defendant indicted for murder wherein he had introduced evidence tending to prove that he was subject to attacks of epilepsy, and that such disease tends to produce insanity, the court instructed the jury that, "When the defense of insanity is interposed to a prosecution for murder, the jury should carefully and intelligently scrutinize the evidence by which it is sought to be established. If the jury should find from the evidence that there is a reasonable doubt whether the defendant has been subject to attacks of epilepsy, and if this fact (if so found), has been supplemented by testimony of expert witnesses, establishing to the satisfaction of the jury (evidence raising a reasonable doubt being sufficient), that epilepsy is a disease which tends to produce insanity, *this evidence would not be sufficient to raise a reasonable doubt* of his sanity, *at the time* of the alleged commission of the homicide. There must be sufficient evidence to raise a reasonable doubt of actual insanity at the time of the alleged commission of the offense.' *Held*, that the instruction was erroneous. *Held*, also, that an erroneous instruction is not cured by a proper instruction, unless the former be withdrawn. *Guetig* v. *The State*, 63 Ind. 278.

173. ORDER OF INTRODUCING EVIDENCE.—It is within the discretion of the court to allow the State, during the introduction of the defendant's evidence in chief, to call a witness as to original matter. *Merrick* v. *The State*, 63 Ind. 327.

§ 649. 174. CORONER—*Duty of on Inquest—Testimony Must be in Writing.*—When a coroner of this State is holding an inquest upon the body of a decedent, "supposed to have come to his death by violence or casualty," it is his duty under the provisions of sections 8 and 9 of the act of May 27, 1852, "prescribing the powers and duties of coroners," 2 R. S. 1876, 20, to cause all testimony given before him by witnesses to be reduced to writing and subscribed by them. *Woods* v. *The State*, 63 Ind. 353.

175. *Same—Presumption—Parol Evidence as to Testimony Before Coroner—Impeaching Witnesses—Murder.*—The law conclusively presumes that in such case the coroner has duly performed his whole duty, by causing all of such testimony to be reduced to writing, and unless the proper foundation be laid for secondary evidence, parol evidence of the testimony given before the coroner by any such witness is inadmissible, even to impeach evidence given by him as a witness on the trial of a defendant indicted for murder of the person over whose body such inquest was held. *Ibid.*

176. *Same—When Defendant's Evidence before Coroner is Admissible.*—Where the defendant in such case has testified in his own behalf, the written statement of evidence given by him as a witness on such inquest is admissible in evidence to contradict him. *Ibid.*

Miscellaneous.

177. MURDER—*Evidence—Dying Declarations.*—On the trial of a defendant indicted for murder, the dying declarations of the deceased are admissible in evidence when it clearly appears that at the time they were made he was aware that death was rapidly approaching. *Watson* v. *The State*, 63 Ind. 548.

§650. 178. INDICTMENT FOR MURDER.—[After the title of the cause, the court, etc.] "The grand jurors of Sullivan county, in the State of Indiana, good and lawful men, duly and legally empaneled, charged and sworn to inquire into felonies and certain misdemeanors, in and for the body of said county of Sullivan, in the name and by the authority of the State of Indiana, on their oath present that one Thomas Sheppard, late of said county, on the 10th day June, A. D., 1875, at said county and State aforesaid, did then and there, unlawfully, feloniously, purposely, and with premeditated malice, kill and murder one Mason Engle, by then and there feloniously, purposely, and with premeditated malice, shooting at and against, and thereby mortally wounding, the said Mason Engle, with a certain deadly weapon commonly called a revolver, then and there loaded with gunpowder and leaden balls, which said revolver he, the said Thomas Sheppard, then and there had and held in his hands, of which said mortal wound, he, the said Mason Engle, then and there instantly died, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

(Signed), "J. E. L., *Prosecuting Attorney.*"

Held, That the indictment is well drawn and sufficient in every particular. *Sheppard* v. *The State*, 64 Ind. 43.

179. ARREST OF JUDGMENT—*Causes for.*—Such motion lies for only two causes, viz: 1. That the grand jury had no legal authority to present the indictment, for want of jurisdiction in the court; and, 2. That the facts stated in the indictment do not constitute a public offense. *Ibid.*

180. NEW TRIAL—*Misconduct of Counsel—Reference to Former Trial—Evidence.*—A statement, that, on a former trial, the defendant had been convicted, made in the hearing of the jury, by the prosecuting attorney, to opposing counsel, in reply to a remark by the latter calculated to elicit such remark; and remarks of the same character made by a witness in the course of his examination, in fixing certain dates, are not sufficient causes for reversing the judgment. *Ibid*

181. JUROR—*Misconduct of—Affidavit*—An affidavit in support of a new trial, on the ground of misconduct of a juror, should clearly indentify the juror guilty of such alleged misconduct, and should clearly specify the facts alleged, to constitute misconduct. *Achey* v. *The State*, 64 Ind. 56.

182. *Same.*—Affidavits charging that one of the jurors, prior to the empaneling of the jury, had expressed an opinion that the defendant was guilty, and should be hung, should unequivocally allege that the defendant and his counsel were ignorant of that fact prior to the empaneling of the jury. *Ibid.*

183. *Same—Weight of Evidence—Supreme Court.*—Where such a motion, both supported and resisted by affidavits, has been denied by the court, the Supreme Court will not disturb such decision on the mere weight of the evidence afforded by such affidavits. *Ibid.*

§ 651. 184. SELF-DEFENSE—*Resisting Arrest—Officer.*—Agee was indicted for an assault with intent to murder one Houchens, while the latter was attempting to arrest the former for *bastardy*. The court below refused to charge the jury as requested by the defendant, that "in determining whether the defendant is guilty at all in this case, you should take into consideration what Houchens was doing at the time of the shooting by the defendant, providing you find that the defendant shot at Houchens. You should take into consideration the question of whether or not the defendant at that time believed, and as a reasonable man might believe, that the said Houchens was attempting to take the life of the defendant or do him great bodily harm. There is some evidence before you to the effect that said Houchens was attempting, at that time, to arrest the defendant. Even if said Houchens had at that time a valid warrant for the arrest of the defendant, with full authority to execute that warrant, still Houchens would have had no right to shoot the defendant merely for the purpose of arresting him, at a time when the defendant was fleeing; and if the said Houchens had shot the defendant and killed him, merely for the purpose of preventing the defendant from fleeing and escaping an arrest, the said Houchens would have been guilty of murder. And hence, if you should find from the evidence, that at a time when the defendant was fleeing, the said Houchens attempted to take the life of the defendant, or do him great bodily harm, by shooting at him with a deadly and dangerous weapon, then the defendant would have had the right to repel such an attack with force. If the defendant under such circumstances used no more force than was reasonably necessary to repel such an attack, the defendant would be excusable for such force used by him, and should not be convicted therefor of any degree of offense.

185. "The theory of self-defense is, that the party assailed may repel force by force. When a party's life is in danger, or he is in danger of great bodily harm, or when, from the acts of the assailant he believes and has reasonable grounds to believe that he is in danger of losing his life, or receiving great bodily harm from his assailant, the right to defend himself from such danger or apprehension may be exercised

by him, and he may use it to any extent that may be reasonably necessary. And even if the death of the assailant result from such reasonable defense, the party so defending himself is excusable.

Held, that both of said instructions ought to have been given. (Citing *Runyan* v. *The State*, 57 Ind. 80.) *Agee* v. *The State*, 64 Ind. 340.

§ 652. 186. MURDER—*Evidence—Previous Assault—Cautiousness of Deceased—Motive—Opportunity.*—On the separate trial of a defendant, who was indicted jointly with A, B, C, and D, for the murder of one, toward whom all but D harbored ill-will engendered by adverse interests in a certain estate, wherein it appeared by the evidence, that the deceased was murdered of an evening, while entering his residence, which was in town, and that long previous thereto, but after such ill-will had arisen, and while the deceased was living elsewhere, he had been seriously injured by missiles exploded in his house by the defendant, it was competent to prove, that during all of the time elapsing between such explosion and the murder, the deceased had always entered his residence before dark, except on the evening of the murder, and that he and his family never ventured out of the house after dark, but fastened the doors, and slept up stairs. *Jones* v. *The State*, 64 Ind. 473.

187. *Same—Threats toward Deceased's Family, and Propositions of Compromise, after Murder—Malice.*—It was competent, on such trial, as tending to show malice, to prove, that, after the murder the defendant proposed that the family of the deceased, if they would make a certain compromise, in relation to such estate, might return to their former home, unmolested, and vaguely threatening them if they did not comply. *Ibid.*

188. *Same—Declaration of Accomplice—Conspiracy.*—D having pleaded guilty as charged in the indictment, and having testified, that, pursuant to a common purpose to commit the murder, means similar to those used in committing the murder, were prepared by the others, in the absence of C; on the day it was committed, that the defendant had threatened to kill the deceased, and had tried to induce the witness to do the killing; and that A and B having left C, D and the defendant, with the understanding that they two were to kill the deceased, had returned, declared that they had done so, it was competent to give in evidence a conversation had between the witness and C, after such preparations, and before the murder, and in the absence of the defendant relative to the proposed murder. *Ibid.*

189. *Same—Conduct of Defendant toward Witness, after Murder—Impeachment of Witness—Evidence.*—The conduct of the defendant after the murder, in causing the arrest of the witness, D, for another crime, his explanation thereof to D, and his furnishing money to him, to leave the State, was competent on his re-examination, to explain the relation existing between the witness and the defendant. *Ibid.*

190. *Same—Intimidation of Witness.*—It having been developed on the examination of a witness for the State, that her testimony on the preliminary examination contradicted her present testimony, it was competent to prove by her, threats made by the defendant to be communicated, and which were communicated to her by D, prior to her former testimony. *Ibid.*

§ 653. 191. *Same—Weapon carried by Defendant to Intimidate.*—Such witness having testified that the defendant, on informing her that she was to be indicted for perjury, had declared to her, on proposing to him to confess the perjury, that "he had a revolver in his boot for all who went back on him," it was competent to prove that on the day of his arrest he was armed as he had so declared. *Ibid.*

192. *Same—Declaration of Accomplice—Conspiracy.*—Declarations by B, made while armed and in company with the defendant, and during the pendency of a law suit in regard to said estate, which indicated a lying in wait for the deceased, were competent evidence, as tending to establish the conspiracy testified to by D. *Ibid.*

193. *Same—Transcript of Record—Harmless Evidence.*—The transcript of the record of such cause, made on a change of venue thereof, though incompetent, was harmless evidence. *Ibid.*

194. *Same—Threats and Admissions of Third Person.*—Threats made by a third person to kill the deceased, and admissions by him that he had procured D to commit the murder, were not competent for the defense. *Ibid.*

195. *Same—Res Gestæ.*—Declarations by a third person accompanying acts, tending to show that he, and not the defendant, had committed the murder, would be competent evidence for the latter. *Ibid.*

196. *Same—Intimidation of Witness by Other Witnesses—Impeachment of Witness.*—It is incompetent for a witness for the defendant to state what means, if any, had been used by witnesses for the State, to prevent him from testifying, where no ground for their impeachment has been laid. *Ibid.*

197. *Same—Instructions to Jury—Matters of Fact.*—It is proper to refuse to give an instruction which embraces a theory of defense, founded on matter of fact solely, without any statement of the rules of law applicable thereto. *Ibid.*

§ 654. 198. *Same—Crime Procured by Conspirators—Alibi.*—It appearing by the evidence in such case that the murder had been committed pursuant to a conspiracy so to do, by the parties indicted, though possibly by the hand of some one not a party to the conspiracy, it was proper to instruct the jury, that the defendant and his "confederates," (those indicted with him), though not present at the murder, might yet be guilty as conspirators. *Ibid.*

199. *Same—Credibility of Accomplice as Witness*—It was proper to refuse to instruct the jury, in relation to the credibility of a confessed accomplice, who had testified, that, formerly, under the law as it then was, he would not have been allowed to testify. *Ibid.*

200. *Same—Credibility of Witness admitting Former Perjury.*—It was proper to refuse to instruct the jury, in relation to the testimony of a witness who has confessed to having testified falsely on a former trial, that the jury should reject such testimony, if, on the explanation of the witness, that she had testified falsely because of fear inspired in her by threats made by the defendant, it does not seem to the jury reasable that fear could have been inspired by such threats. *Ibid.*

201. *Same—Opinion of Judge—Capital Punishment.*—A defendant on trial for murder can not complain of an instruction which indicates that the court is opposed to capital punishment. *Ibid.*

§ 655. 202. INVOLUNTARY MANSLAUGHTER—*Murder.*—On the separate trial of a defendant, indicted jointly with B and others, for murder, the evidence established substantially that an altercation had taken place between the deceased and B during the evening on which the party was killed; that the deceased having left the parties indicted, got into an altercation with another, displaying a pistol and threatening to shoot any one interfering with him; that subsequently the parties indicted came up to the deceased, who was immediately struck by B; that, though the deceased denied having a pistol, the defendant and the other parties indicted, at the request of B, undertook to assist him in disarming the deceased, and that during the scuffle, and immediately upon B's exclaiming that he had obtained the pistol, it was discharged, killing the deceased.

Held, that B was guilty, if at all, of involuntary manslaughter only.

Held, also, that the defendant was not guilty. *Adams* v. *The State*, 65 Ind. 565.

203. *Same—Instruction—Failure to Instruct Fully*—The court, after reciting the statutory definition of manslaughter, instructed the jury that, "In manslaughter and in murder there is a common element of intent to kill. The distinction is, that in murder, malice either express or implied is present, while in manslaughter it is absent. The intention to kill must grow out of hot blood, in order to reduce an unlawful homicide to the grade of manslaughter." *Held*, that in the absence of a request by the defendant, and a refusal of the court to instruct as to involuntary manslaughter, he can not complain of the instruction. *Ibid.*

204. *Voluntary and Involuntary Manslaughter Distinguished.*—In voluntary manslaughter the killing is intentional; while in involuntary manslaughter the killing is unintentional, but in the commission of some unlawful act. *Ibid.*

205. *Same.*—One indicted for voluntary manslaughter, can not be convicted on proof that he is guilty of involuntary manslaughter. *Ibid.*

206. *Same—Aider or Abettor.*—There can be no aider or abettor in the commission of involuntary manslaughter. *Ibid.*

207. FORMER ACQUITTAL—*Once in Jeopardy—Murder of Unborn Child—Attempt to Produce Miscarriage.*—An acquittal on an indictment charging the defendant with the murder of an unborn child by the use of means intended to produce a miscarriage, is no bar to an indictment for an attempt to produce such miscarriage by the use of the same or any other means. *The State* v. *Elder*, 65 Ind. 282.

§ 656. 208. INSANITY—*Frenzy—Instruction.*—The defendant can not complain of an instruction stating that "frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." *Guetig* v. *The State*, 66 Ind. 94.

209. *Same*—Under the defense of insanity the defendant should be acquitted, if the evidence raises a reasonable doubt of his insanity at the time of the act. *Ibid.*

210. MURDER—*Manslaughter—Malice—Purpose.*—If the killing was done unintentionally during an affray, or intentionally in hot blood engendered by the combat, but without malice, the offense is no more than manslaughter, and an instruction to the jury is erroneous, to the effect that "if the slaying was *intentionally* and *unlawfully* done, the slayer is guilty of murder, notwithstanding his blood may have become so heated as to carry him beyond his original purpose;" because the instruction omits the elements of *premeditation* and *malice*, and therefore it can not amount either to murder in the first or second degree, but to manslaughter only. *Patterson* v. *The State*, 66 Ind. 185.

211. MURDER—*Premeditated Malice.*—An instruction that premeditated malice is where the intention to take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given, but that there need be no appreciable space between the formation of the intention to kill and the killing, that they might be as instantaneous as successive thoughts, and that it is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation, on the part of the slayer, is proper. *Binns* v. *The State*, 66 Ind. 428.

212. COMPETENCY OF JUROR.—On the examination of jurors while being empaneled to try the defendant for murder, a juror answered, that from the evidence given on a former trial, of the same prosecution, as reported in a newspaper and read by the juror, he had formed and expressed an opinion on the merits of the case, to change which would require some evidence, but which would readily yield thereto. *Held*, that the juror was competent. *Guetig* v. *The State*, 66 Ind. 94.

§657. 213. ASSAULT AND BATTERY WITH INTENT TO MURDER.—*Misdemeanor Merged in Felony—Former Acquittal or Conviction.*—The misdemeanor known as assault and battery, when committed in connection with an attempt to murder, is merged in the felony known as assault and battery with intent to murder, and an acquittal or conviction of the misdemeanor though by a court of competent jurisdiction is no bar to the prosecution for the felony; but if the intent to murder be not established, such acquittal or conviction will bar a conviction of the assault and battery. *State* v. *Hattabough*, 66 Ind. 223.

214. *Same.*—On a trial for simple assault and battery, one can not be convicted on evidence showing him guilty of assault and battery with intent to murder. *Ibid.*

BASIS OF REASONABLE DOUBT.—It is error to instruct the jury in a criminal case, that the reasonable doubt of guilt to the benefit of which the defendant is entitled, must be one which "is suggested by or arises out of the *proof made.*" *Densmore* v. *The State*, 67 Ind. 306.

COMMON SENSE.—It is error to instruct the jury, that in weighing the evidence and arriving at a verdict, "what is called common sense, is, perhaps the juror's best guide." *Ibid.*

Erroneous instruction as to reasonable doubt, see *Wright* v. *The State*, 69 Ind. 163.

ASSAULT, OR ASSAULT AND BATTERY, WITH INTENT TO MURDER. — An indictment charged, that "on," etc., "at," etc., the defendant "did willfully, purposely, feloniously, and of his malice aforethought, make an assault on one" M B, "and then and there, with a pistol, which he had and held in his hands, which pistol was then and there loaded with gunpowder and a leaden ball, did then and there willfully, feloniously, purposely, and of his malice aforethought, shoot off said pistol at and against the said M B, with intent then and there and thereby, him the said M B, purposely, etc., to kill and murder, etc.

Held, that for want of an averment of the present ability of the defendant to commit the injury, an *assault* is not charged.

Held, also, that for want of an averment that the touching was unlawful, and in either a rude or an insolent, or an angry manner, no assault and battery is charged. *Howard* v. *The State*, 67 Ind. 401.

MURDER—*Involuntary Manslaughter — Reasonable Doubt — Harmless Instruction.*—On the trial of a defendant, indicted in respective counts for murder in the first degree and involuntary manslaughter, wherein there was a verdict of guilty on the latter count only, the defendant could not complain of an instruction to the jury, that if they had a reasonable doubt as to whether the defendant was guilty of murder in the first or second degree, or only of manslaughter, they "should give the defendant the benefit of such doubt, and convict," if at all, "of the lowest degree included in such doubt." *Patterson* v. *The State*, 70 Ind. 341. [See same case as to intoxication, and assumption of fact].

Decisions in Kentucky, Ohio, Tennessee, Mississippi, and Other States.

§ 660. 1. INDICTMENT FOR MURDER.—An indictment alleging that the defendant did feloniously kill and murder M is not bad for omitting the term "willfully." *State* v. *Harris*, 27 La. Ann. 572.

2. AN INDICTMENT FOR MURDER which charges that * * * "of said mortal wounds said A did immediately languish, and languishing did die," is defective in not specifically alleging when and how long after the wounding the death occurred. Such defect is not cured by the statute of jeofails, but authorizes the quashing of the indictment. *State* v. *Sides*, 64 Mo. 383.

3. THE PART OF THE BODY WOUNDED.—Under the Missouri statute of jeofails, declaring that an indictment shall not be deemed invalid for want of any averment not necessary to be proved, an indictment for murder which alleges that the accused did wound the deceased "in and about divers places of the body," is not fatally defective for failure to state on what part of the body the wound was inflicted. *State* v. *Edmundson*, 64 Mo. 398.

4. "YEAR AND A DAY."—An indictment for murder must show that the death occurred within a year and a day from the killing [wounding], but to allege that the defendant, on a day and a year named, killed the deceased, does show this, for the legal meaning is that the wounding and the death occurred on the same day. *State* v. *Huff*, 11 Nev. 17.

5. OMISSION OF THE WORD "WOUND" from the clause "of which said mortal [wound] he the said T then and there died." *Held*, not a ground for arrest of judgment. *State* v. *Rinehart*, 75 N. C. 58.

6. SEVERAL COUNTS—*Election.*—Where there is uncertainty as to the mode in which a homicide was committed it is good pleading to frame the indictment with as many counts as are deemed necessary to meet the evidence; and the district attorney will not be required to elect on which count he will proceed to trial. *Dill* v. *State*, 1 Texas. App. 278.

7. BURDEN OF PROOF—*Malice.*—An instruction in a capital case that "the law implies malice in case of unlawful killing by means calculated to produce death, and in such a case the burden of proof is on the defendant, if he would reduce the offense to a lower degree than murder in the second degree," is erroneous. The law never casts the burden of proof on the accused in such a sense as to relieve the State from proving the facts constituting any degree of crime. *Perry* v. *The State*, 44 Texas, 473; *Murray* v. *The State*, 1 Texas App. 417.

§ 661. 8. EVIDENCE—*Preparation for Combat.*—On a trial for murder, the State having introduced testimony tending to show antecedent malice and previous preparation for the combat, the accused has a right to introduce testimony tending to show that such preparation was

made in anticipation of an expected attack on himself; and the exclusion of such testimony is error. *Long* v. *The State*, 52 Miss. 23.

9. VARIANCE.—Where an indictment for murder charges the wound to have been inflicted on the *right* side of deceased's body, and it is proved to have been on the *left* side, the variance is not fatal. *Nelson* v. *State*, 1 Texas App. 41.

10. DECLARATIONS OF DECEASED.—In a trial for homicide, where the question whether the prisoner or the deceased commenced the encounter which resulted in death, is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner. *Wiggins* v. *People*, 93 U. S. (Otto), 465.

11. CHARACTER OF DECEASED.—Evidence that the general character of the deceased was that of a turbulent, violent man, is competent, on a trial for homicide, as bearing on the question whether the killing may have been committed from a well-grounded apprehension of danger. But this rule does not warrant taking the opinions of witnesses as to what particular acts the deceased would have been likely to commit. *State* v. *Elkins*, 63 Mo. 159. To nearly same effect, *State* v. *Brown*, *Id.* 439; *Marts* v. *State*, 26 Ohio St. 162.

12. OF CHARACTER OF ACCUSED.—Upon a trial for murder, charged to have been perpetrated in the attempt to commit a rape the prosecution offered evidence that several years previous to the offense charged, the prisoner had committed a rape. The judge received it, and instructed the jury that they must not consider it, in determining whether the prisoner had committed the murder charged; but if they were satisfied, by other evidence, of his guilt of murder, they might consider the testimony to a former rape as having some bearing on the question whether the murder was committed in attempting to commit a rape. *Held*, error. The fact of the accused committing a rape on another person, years previously, could have no tendency to show the intent of the homicide charged in the indictment, unless by showing that he was of a character and disposition leading to the commission of rape, which is not a legitimate mode of proving the commission of crime. *State* v. *Lapage*, 57 N. H. 245.

§ 662. 13. KILLING OF OFFICER.—If a public officer be resisted and killed by a person he is attempting to illegally arrest without color of authority of law, the killing will be manslaughter only, unless the evidence shows previous or express malice. If such malice is shown, the killing is murder, notwithstanding any illegality in the arrest. *Rafferty* v. *People*, 72 Ill. 73.

14. MANSLAUGHTER.—To reduce killing to manslaughter, there must have been in the circumstances reasonable cause to fear that the

deceased was about to kill the defendant, or do him great bodily harm; that he did actually fear this without proof of reasonable cause, is not enough. *State* v. *Brown*, 64 Mo. 367.

15. INTENTION TO KILL IN MANSLAUGHTER.—Intention or purpose to kill may be present in the crime of manslaughter, where the killing is without malice, upon a sudden quarrel. *Erwin* v. *State*, 29 Ohio, 186.

16. *Same*—Manslaughter may sometimes be intentional. It is not justifiable to take life under provocation; and yet a provocation may be serious enough to deprive intentional killing of its malicious character, so that it is neither murder on the one hand, nor justifiable or excusable on the other. *Ibid.*

17. JUSTIFIABLE HOMICIDE.—The right given an officer having the custody of a prisoner convicted of a felony, to take life to prevent the escape of the prisoner, does not extend to an officer attempting to *re-arrest* an escaped penitentiary convict. He has only such authority as belongs to an ordinary peace officer in making an arrest. *Wright* v. *State*, 44 Tex. 645.

18. SELF-DEFENSE.—To sustain a plea of self-defense it must not only appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the slayer really acted under the influence of those fears, and not in a spirit of revenge, but it must also appear that he thought and believed, and that he had good reason to think and believe that the danger was so urgent and pressing *at the time of the killing*, that, in order to save his own life or prevent a felony on his person, the killing of the other was absolutely necessary; and it must appear, also, either that the person killed was the assailant, or that the slayer had really, in good faith, endeavored to decline any further struggle before the mortal blow was given. *Stiles* v. *State*, 57 Ga. 183.

§ 663. 19. SELF-DEFENSE—*Retreat.*—One attacked with felonious intent may resist to the extent of taking the assailant's life. He is not under obligation to retreat. But one attacked without felonious intent must retreat, if he can, before he can justify the killing of his adversary. *State* v. *Dixon*, 75 N. C. 275. Compare *Erwin* v. *State*, 29 Ohio, 186.

20. RESISTING OFFICER.—A person guilty of a misdemeanor and fired on by a policeman, while avoiding arrest, may repel such attack in self-defense by returning the fire; and if, in so doing, he kills the officer, such killing is not necessarily unlawful. *Tiner* v. *State*, 44 Tex. 128. Compare *James* v. *State*, *Id.* 314.

21. WHAT CONSTITUTES MURDER.—If, in a mutual combat, arising upon a sudden quarrel, the slayer, under color of fighting upon equal terms, uses a deadly weapon without the knowledge of the other combatant and kills; or when, at the beginning, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and does

use it, and kills the other with it, the killing will amount to murder. *State* v. *Christian*, 66 Mo. 138.

22. IMPROPER TREATMENT OF WOUND.—If one person intentionally inflicts upon another a wound calculated to destroy life, and death ensues therefrom within a year and a day, the offense is murder, or manslaughter, as the case may be; and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death. *State* v. *Bantley*, 44 Conn. 537.

23. CERTAINTY IN INDICTMENT.—An indictment for murder in the first degree, which describes the assault, and then charges that of the mortal wound inflicted by defendant the deceased "did instantly die," does not state with sufficient certainty the time and place of the death. *State* v. *Lakey*, 65 Mo. 217. Otherwise, had the averment been that the deceased "did then and there instantly die." *State* v. *Steeley*, 65 Mo. 218.

§ 664. 24. TECHNICAL AVERMENTS.—The words of a statute, "willful," "deliberate," "malicious," and "premeditated," are essential in an indictment for murder, but the common law form is sufficient. *Poole* v. *The State*, 58 Tenn. 288.

25. INSTRUCTION.—It is the duty of the court trying such indictment to give the jury the technical meaning of such words, and not merely use them. An instruction that "the testimony must be sufficient to exclude every other reasonable hypothesis but that of the guilt of the defendant," is defective, although not abstractly erroneous. The court should add that the proof must exclude the idea that the deceased might have come to his death in a manner inconsistent with the guilt of the accused; that the jury must acquit if the evidence left a reasonable doubt of guilt, although not showing that another was the guilty agent. *Ibid.*

26. LOCATION OF WOUND.—In Texas the penal code and code of criminal procedure have abrogated the common law requirement, that an indictment for murder should aver the part of the body on which the mortal wound was inflicted. *Wilkerson* v. *State*, 2 Tex. App. 255.

27. WHEN MALICE MAY BE PRESUMED.—If one intentionally kills another with a dangerous weapon, the law presumes that the killing was malicious, and it devolves upon the slayer to adduce evidence to meet or repel that presumption. If he succeeds in adducing sufficient evidence in the minds of the jury of a reasonable doubt of his guilt, he is entitled to an acquittal. *The State* v. *Alexander*, 66 Mo. 148.

28. PRESUMPTION FROM USE OF DEADLY WEAPON.—If one kills another by shooting him with a pistol, the law presumes it is murder, in the absence of proof to the contrary. *The State* v. *Evans*, 65 Mo. 574.

29. PRESUMPTION.—The fact of willful killing being established, the offense is presumed to be murder. If the accused relies on circumstances such as provocation to reduce the grade to manslaughter, he must prove them by satisfactory evidence; raising a reasonable doubt is not enough. *State* v. *Smith*, 77 N. C. 488.

30. DECLARATIONS OR THREATS OF THE DECEASED.—Threats of the deceased against the accused, are not admissible in evidence, until it has been proved that the accused had been advised of them. *State* v. *McCoy*, 29 La. Ann. 593.

31. THREATS BY DECEASED.—Upon a trial for homicide, recent threats made by the deceased against the accused may be competent, without accompanying proof that they were communicated to the accused, if the case was one of doubt which was the aggressor, for the threats tend to resolve this question; but they are not admissible when the evidence indicates a willful homicidal attack by the accused. *Johnson* v. *The State*, 54 Miss. 430; *S. P. State* v. *Elliott*, 44 Iowa, 486. Compare *State* v. *Alexander*, 66 Mo. 148; *State* v. *Lee*, *Id.* 165.

32. DYING DECLARATIONS.—Statements made by the deceased are admissible in evidence as dying declarations only so far as they relate to the killing and the facts and circumstances attending it, and constituting a part of the *res gestæ*. So far as they relate to anterior occurrences tending to prove malice, they are inadmissible. *State* v. *Draper*, 65 Mo. 335.

33. THREATS MADE BY THE DECEASED, just before the homicide, that he was going in search of and would kill the accused, *held* admissible, though not made in the presence of the accused, as tending to show the purposes of the deceased in assailing the accused in the affray in which he was killed. *West* v. *State*, 2 Tex. App. 460.

34. BAD GRAMMAR AND SPELLING.—"We, the *juror*, find the defendant guilty, and *sess* his punishment at *deth*," however obnoxious in spelling and style, is an intelligible verdict in a murder case; but it will not support a judgment, inasmuch as it fails to show of what degree of murder the defendant is found guilty. *Krebs* v. *The State*, 3 Texas App. 348.

35. EXCUSABLE HOMICIDE.—The mere attempt to commit a larceny is not a felony under the Tennessee code, and the owner is not excused in killing the trespasser in the act. *Marks* v. *Borum*, 57 Tenn. 87.

36. *Same.*—A party assailed and endangered in life or limb, is not bound to retreat, but may pursue his adversary till the danger is past; and if in so doing a conflict ensues, and he kills his adversary, the killing is justifiable. *West* v. *State*, 2 Texas App. 460.

37. SELF-DEFENSE.—In order to justify homicide on the ground of self-defense, the party must have employed all means within his power, and consistent with his safety, to avoid the danger, and avert the necessity of the killing. *Levells* v. *The State*, 32 Ark. 585.

§ 665. THE LAW OF SELF-DEFENSE.—If one without fault believes, and has reasonable cause to believe, that another is about to take his life, or do him great bodily harm, and he has no other apparently safe means of securing himself from the impending danger, he may take the life of the other, and is excusable upon the ground of self-defense and apparent necessity, although it may turn out that the appearances were false, and that there was, in fact, neither design to do him serious injury, nor danger that it would be done. *Holloway* v. *Commonwealth*, 11 Bush (Ky.) Reps. 344. *If one believes, and has reasonable grounds to believe*, that another has sought him out for the purpose of killing him, or doing him great bodily harm, and that he is prepared therefor with deadly weapons, and makes demonstrations manifesting an intention to commence an attack, he is not required to retreat, but has the right to stand and defend himself, and even pursue his adversary until he has secured himself from danger, and if in doing so it is necessary to kill his antagonist, the killing is excusable upon the ground of self-defense. *Ibid.*

§ 666. 1. ASSAULT WITH DANGEROUS WEAPON—*Killing Assailant Justifiable—Manslaughter—Old Grudge.*—In criminal cases, the court will weigh the testimony, and if it preponderates against the verdict, they will grant a new trial. And a conviction of murder in the first degree in this case, is reversed on an examination of the proof adduced. *Copeland* v. *The State*, 7 Hump. (Tenn). 429.

2. If the prisoner was going her own road, in a laudable pursuit, and was assailed in that road with a hickory stick of dangerous character, and thereupon slew her adversary with a knife, this was homicide in self-defense. *Ibid.*

3. If the prisoner, upon meeting her adversary unexpectedly, who had intercepted her upon her lawful road, and in her lawful pursuit, accepted the fight, when she might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping her on the way; and it would be manslaughter. *Ibid.*

4. If the deceased was approaching the prisoner's path with the intention to assail the prisoner, and became irresolute and stopped, or abandoned her intention, leaving the prisoner full and unobstructed right and liberty to pass, and the prisoner brought on the attack, with the design to slay the deceased, the killing would be murder in the first or second degree according to circumstances. That is, if the killing was the result of an old grudge, and a previously premeditated intention, it would be murder in the first degree; but, if it were the result of malice, suddenly produced by the sight of her enemy, without premeditation, it would be murder in the second degree. *Ibid.*

5. Where the deceased went upon the path of the prisoner, armed with a dangerous club, intending to inflict some dangerous punishment on her, and stopped upon her path and awaited her coming, and the prisoner kept on her way, determined to resist and protect herself, be the consequences what they might, and the deceased commenced the combat, and the prisoner killed her, this was not murder in the first or second degree, but was homicide in self-defense, or at most, manslaughter. *Ibid.*

§ 667. 1. KILLING THROUGH FEAR, ALARM OR COWARDICE, WHERE THE DANGER IS UNREAL.—If a man, though in no great danger of serious bodily harm, through fear, alarm or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defense. *Grainger* v. *The State*, 5 Yerger (Tenn.) 459.

2. If a man is in great danger of bodily harm, or thinks himself so, and kill another, it will be a killing in self-defense. *Ibid.*

3. But if, from the facts, it appears he only believed that a violent assault and battery, without endangering his life, or, inflicting great bodily harm, was intended, it is manslaughter. *Ibid.*

[*Sed quære?* This case of *Grainger* v. *The State* has been much criticised by subsequent cases in Tennessee and other States.]

§ 668. 1. SHOOTING WITH INTENT TO KILL—*Acting upon Appearances—Contingent Threat Communicated—Definition of Assault.*—To constitute the offense of maliciously shooting with intent to kill, under the second section of article 6, of the Revised Statutes of Kentucky, edition 1852, page 251, the offense must be such that it would have been murder had death ensued. If the offense had been under such circumstances as to constitute *manslaughter*, had death ensued, then, death not ensuing, the offense becomes the misdemeanor defined by article 17, chapter 28, page 262. The offenses designated by these two different statutory provisions are grounded on the distinction between murder and manslaughter. *Rapp* v. *Commonwealth*, 14 B. Monroe (Ky.) 615.

2. The sudden heat and passion referred to in the statute last named must be a passion caused by such provocation as, had death ensued, would have reduced the offense from murder to manslaughter. Mere words or gestures do not constitute such a provocation. *Ibid.*

3. If, from all the circumstances attending the infliction of a wound, the party wounding had reasonable grounds to believe, and did believe, that the party wounded intended to proceed immediately to the infliction of bodily harm upon him, with a knife in his hand, and that he would do so unless prevented by such act of defense as was then in his power, the act is excusable on the ground of self-defense. *Ibid.*

4. It was competent for the defendant indicted for shooting maliciously with intent to kill to prove that a son of the person wounded,

who was in the store when the defendant and his father entered it (his father having invited the defendant into the store), immediately ran up the stairs and returned about the time the defendant shot at his father, with a pistol, which he snapped at the defendant, and that he had had such pistol loaded some time before, and had then made a contingent threat to shoot the defendant, of which the defendant had been notified. This evidence would tend to elucidate the motives and acts of the parties. *Ibid.*

5. An assault, in law, is an effort to cut, strike or shoot, within striking, cutting, or shooting distance. If a party start to strike or cut, and before he gets in striking or cutting distance, stops and abandons his purpose, it is not an assault, in law. *Ibid.*

§ 669. 1. MUTUAL COMBAT WITH DEADLY WEAPONS.—*Duty of Retreating —Acting upon Appearances.*—The law allows an individual, in defense of his person or property, to use such means as are necessary. In the selection and use of these means, he must of necessity, exercise his own judgment. He acts at his peril, and if he goes beyond what is necessary to accomplish the object and violates the law, he must abide the consequences; and in the exercise of this judgment, he must act rationally. *Meredith* v. *The Commonwealth*, 18 B. Monroe, (Ky), 49.

2. If one is threatened with death, or some great bodily injury, and has reasonable ground to believe, that it will be immediately inflicted unless prevented by an act of self-defense, which is in the power of the person assailed, he has the right to use such defense, for his own safety, although it might afterward appear that there was no real design to inflict the apprehended injury. *Ibid.*

3. Therefore an instruction that the defendant might lawfully kill his assailant, "if he had no safe means of escaping;" and that he is not excusable "if he could have safely retreated from the danger, and by that means have saved his life and person," is erroneous, because it leaves out of view, or negatives the principle above stated. *Ibid.*

4. Whether reasonable grounds for the belief existed on the part of the defendant, that he was in imminent danger of death, or great bodily harm, is a question of fact for the jury. *Ibid.*

§ 670. 1. KILLING IN SELF-DEFENSE—*Bare Fear—Overt Act—Reasonable Fear.*—At common law, a bare fear of danger of death or great bodily harm, unaccompanied by any overt act indicating a present intention to kill or injure, would not warrant a party in killing another; but there must have been some actual danger at the time. *Dyson* v. *The State*, 26 Miss. 362.

2. The Mississippi statute renders homicide justifiable "when committed by any person, in the lawful defense of such person, or of his, or her husband, wife, parent, child, master, mistress or servant, when

there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished." *Ibid.*

3. The only modification of the common law, made by this statute, consists in the justification extended to the accused "when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury," instead of the old rule, "actual danger at the time." *Held*, that it was not the intention of the Legislature to dispense with the necessity of showing *some overt act* indicating a present intention to kill, or to do some great personal injury, and that the danger was imminent at the time of the killing. It was intended to alter the rule of the common law so far as to justify a party acting conscientiously, upon reasonable fears, founded upon present overt acts to all appearances hostile, although there was really no danger at the time. [That an overt act is not necessary under certain circumstances, see *Phillips* v. *The Commonwealth*, 2 Duvall (Ky.) 328, and *Carico* v. *The Commonwealth*, 7 Bush (Ky.) 124.] *Ibid*

4. The following principles, declared by the circuit judge in charging the jury, are approved, and declared to be sound and salutary rules for the protection of society:

(*a*) In order to justify killing, there must be some overt act indicating a present intention to kill the party, or to do him some great bodily injury.

(*b*) The danger of such design being accomplished must be imminent; that is to say, immediate, pressing, and unavoidable at the time of the killing

(*c*.) Mere fears of a design to commit a felony, or to do some great personal injury to the party, though honestly entertained, unaccompanied by any overt act indicating a design immediately to commit the felony, or do the injury, will not justify the killing. *Ibid.*

§ 671. 1. HOMICIDE UPON APPEARANCES OF DANGER—*Imminence of the Danger—Arming with Deadly Weapon and Seeking Affray—Necessity of Killing a Question for the Jury.*—Under the Mississippi statute (Hutch. Code, 957), reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished, must both co-exist at the same time, to make a killing justifiable self-defense. *Cotton* v. *The State*, 31 Miss. 504.

2. What is reasonable ground to apprehend such design must always be as much, or indeed more, a question of fact for the jury, than a question of law for the court. *Ibid.*

3. As part of the means of arriving at the truth of this fact, the peculiar character of the hostile party is as much a fact for the consideration of the jury as any other fact in issue; and the jury must

determine from the hostile demonstrations whether there was such danger *of this party* executing his felonious designs as to justify the party in killing. *Ibid.*

4. Although there may have been no actual danger at that very moment of time, the question in such a case is, whether by delay the danger is not increased. *Ibid.*

5. The only general rule which a court can, with any safety, lay down on this subject is, that whether the danger must be imminent and unavoidable, at the time of the killing, to make the killing justifiable self-defense, must depend on the facts and circumstances of each particular case; and of these, the jury must be the judges. *Ibid.*

6. It was erroneous to instruct the jury that if the accused was armed with a deadly weapon, and sought and brought about the difficulty with the deceased, and killed the deceased in the difficulty with such weapon, he is guilty of murder; because the fact of a man's being armed with a deadly weapon, though he may be the aggressor in a difficulty, amounts to nothing, unless he provided himself with it with a view of using it if necessary in overcoming his adversary. *Ibid.*

7. In such case, the party having commenced the difficulty, he can only use his weapon in self-defense, or take the life of the opposite party, where the danger is immediate and impending, or unavoidable. *Ibid.*

§ 672. 1. HOMICIDE IN SELF-DEFENSE—*Threats—Apparent Danger—Imminent Danger—Voluntarily Engaging in Mortal Combat.*—Threats, however deliberately made, do not justify an assault and battery, much less the taking the life of the party making them. *Evans* v. *The State*, 44 Miss. 762.

2. Evidence of threats previously made by the deceased, and communicated to the defendant, is not admissible in trials for homicide, unless the testimony show, that at the time of the killing the deceased had sought a conflict with the accused, or was making some demonstration toward the accomplishment of such threats. *Ibid.*

3. Where the defendant, being armed with a gun loaded with buckshot, invited the deceased to come out of the field where he was at work, and while the deceased was approaching his cabin in his shirt sleeves, the defendant deliberately shot and killed him, it was held not error to exclude evidence of a threat made some time previously by the deceased, that if the prisoner fooled with him he would kill him. *Ibid.*

4. If a man invites another to mortal combat, he who gives the invitation, being already armed, can not lawfully shoot the other before he has armed himself, and whilst going to a place for his weapon, although the deceased had formed the purpose to use the weapon on his return. *Ibid.*

5. In every case where homicide is attempted to be justified on the

ground of reasonable apprehension, it must appear that the danger was *urgent*, *present* and *imminent*, and that no reasonable mode of warding it off, or escaping from it existed, except to take life. *Ibid.*

For further illustrations of the doctrine of self-defense, and reasonable apprehension of danger of death or of great bodily harm, see the following cases:

Barfield's case, 8 Iredell (N.C.) 344
Benham's case, 23 Iowa.....154
Biggs' case, 29 Georgia.....723
Bohannon's case, 8 Bush (Ky.)..481
Burke's case, 3 Iowa.....331
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Carico's case, 7 Bush. (Ky).....124
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Gray *v.* Combs, 7 J. J. Marshall..478
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Head's case, 44 Miss.....731
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Hinton's case, 24 Texas.....454
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Pritchett's case, 22 Ala..... 39
Rapp's case, 14 B. Monroe (Ky.) 615
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Sloan's case, 47 Mo..... 664
Wesley's case, 37 Miss.....327
Webster's case, 5 Cush. (Mass.) 305

APPENDIX I.

Since this work was chiefly prepared and electrotyped, the Legislature of Indiana (1881), has enacted a Revised Code of criminal procedure. In the main the former statutes are unchanged, but some new sections have been enacted, and some changes have been made as to former statutes, not materially affecting, however, the law as discussed in this volume. On the subject of prosecutions by affidavit and information, section 106 provides,

That all public offenses, except treason and murder, may be prosecuted upon information based upon affidavit:

1. Whenever any person is in custody or on bail, on a charge of felony or misdemeanor, and the court is in session, and the grand jury is not in session or has been discharged.

2. When an indictment has been quashed, and the grand jury for the term when such indictment is quashed is not in session or has been discharged.

3. When a cause has been appealed to the Supreme Court and reversed on account of any defect in the indictment.

4. Whenever a public offense has been committed, and the party charged with the offense is not already under indictment therefor, and the court is in session and the grand jury has been discharged for the term.

5. (This clause relates only to misdemeanors.)

N. B. There being no emergency clause in this act, it will be in force only from the publication and circulation of the acts in the several counties of the State.

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☞ The references are to the pages.