THE

CONDUCT OF THE LAW

THE BORDEN CASE

with

SUGGESTIONS OF CHANGES

in

CRIMINAL LAW AND PRACTICE

By

JUDGE CHARLES C. DAVIS
PLYMOUTH, MASS.

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THE BORDEN CASE.

A CLEAR REVIEW OF THE LAW INVOLVED.

(WRITTEN ESPECIALLY FOR THE ADVERTISER.)

I

To the Editor of the Advertiser:--- Sufficient time has elapsed since the trial of Miss Borden to enable lawyers to discuss the principles upon which it seems to have been conducted free from its personal aspects or applications. It is neither my right nor my intention to allege or argue that the prisoner was guilty or not guilty of the terrible and mysterious parricides charged against her. With the profession there is a general dissatisfaction with the law of evidence administered at the trial; and in discussing it the arguments presented are considerations on the side of the government, and may be such as lead the mind to a belief in guilt or innocence, they are necessary incidents to the matter in hand.

The radical mistake of the trial seems to have been a disregard of the rule laid down by Starkie on evidence, Vol. I, p. 505, concerning circumstantial evidence, which I give entire. "But thirdly, it is essential that the circumstances should be of conclusive nature and tendency. Evidence is always indefinite and inconclusive when it raises no more than a definite probability in favor of the fact alleged, as compared with some definite probability against it, whether the precise proportion can or cannot be ascertained. It is on the other hand of a conclusive nature and tendency when the probability in favor of the hypothesis exceeds all limits of an arithmetical or moral nature." In this case two important elements or matters of enquiry were practically eliminated at the outset. These homicides were neither the acts of a robber nor of a raving maniac. They were acts showing plan and intent. There was no evidence of any motive of any stranger to murder the victims, and especially a quiet, inoffensive woman of domestic habits. And they were not acts of homicidal spasm or mania, of a wild man, in as much as the prisoner was

neither harmed nor made cognizant of his presence. The question was not alone "What are the chances that any murder should be committed by a stranger in the middle of the forenoon, with more or less windows open, in a city, in a dwelling-house, on a frequented street, with workmen on adjoining lots and a servant girl outside washing windows." Nor, "What are the chances that such a murder should be committed unknown to a person in possession of the house at the time?" Nor, "What are the chances that *two* homicides shou1d be committed an hour or more apart, on different floors of such a dwelling-house, by a stranger, with another person in possession, without knowledge or alarm?" Nor, "What are the chances in *such* a house, of all others, more guarded by locks and bolts than was the general custom?" Nor, "What are the chances that, with one victim an hour before felled to the floor by a thumping fall, the second homicide shou1d be committed when the only person in possession had gone to the barn on a trivial errand, and returned in time to hear a groan in the yard of a man who must have, been stunned by the first blow upon his head!" Nor, "What are the chances that the person in possession in the middle of a hot forenoon should go to ironing a few pocket handkerchiefs and leave them unfinished at the very moment of the second murder to go to the barn, under a broiling sun, to get a piece of metal for a screen, or lead, for a sinker for a fishing line without hooks, for use upon a contemplated excursion, when she might have bought the sinker for a cent when she purchased the hooks?"

These were not the material questions alone to be considered. The popular mind and the court seems to have considered that if *each one* of these facts were *possibly* consistent with innocence, or possible by another, there could be no conviction. But the material question was whether a jury could find that all the circumstances, with others to be alluded to hereafter, with such others as may suggest themselves, could concur and happen at the same time, and whether the probability of the happening of the coincidences did or did not "exceed all limits of an arithmetical or a moral nature."

A man was tried for robbery of money. One essential fact was the identity of the money as the property of the person robbed. This was an entirely independent issue. The person robbed testified that he had two 1 cent, three 5 cents, eight 10 cents, three 50 cent pieces, and a certain number of bills of a certain denomination, but could identify none of the money. The same number and denominations were found in the possession of the prisoner. The court did not say it is *possible* that another person may be in possession of the same combination; and the prisoner was convicted. A man owned certain samples of cloth of various dimensions, quality and patterns, and the like were found in the possession of the prisoner months after the robbery of his cloths, and in another State. The man robbed could not identify them; but the prisoner was convicted.

It is a rule of law that the possession of property recently stolen and unaccounted for is sufficient for conviction. This was the role when the prisoner could not testify and when certain larcenies and robberies were capital offences; and many a man has thus been convicted and dragged upon the hurdle to his place of execution. This rule was not exceptional. It was in conformity with common sense, and a severe logic, as all rules of evidence are. It was but the expression of the principles of all criminal evidence applied to certain robberies.

But the same law which then and now convicts of robberies, applies to capital crimes. Here was a person who had in possession the bodies of two victims robbed of the precious jewels of their lives. Does anybody think that if this evidence had been applied to a case of robbery or of mere property the law administered, or the verdict would have been the same?

If you find on the floor 10 single cents with the heads all up, do you say that this was possible and that there was no design? If you find them all in one crack in the floor with heads all one way, do you say it was not by design? If you find only one suit in a pack of cards as you deal them in order, one to ten, jack, queen, king, are you not certain that some one arranged them who had opportunity and intent, beyond a reasonable doubt?

In the charge of the learned judge to the jury the justice went beyond his legitimate function in charging the jury "with respect to matters of fact." This of itself I have nothing at this time to comment upon; but in so doing the court suggested with regard to the note alleged to have been received by the murdered woman that it is possible that the perpetrator of the crime wrote it to mislead in some way not made clear to the charge.

It is not easy to see why a man intent on her murder should write a note to get her out of the house. But our point is that this suggestion of a *possibility* that some stranger might have written it for any reasons, it matters not what, furnishes the key to the whole philosophy of evidence upon which the court proceeded in the trial. And if the jury took the law as presented by the court, they would have been false to their oaths if they had failed to acquit; because the charge gave the impression, and was based on the theory, that if each separate independent act or fact were *possible* because it might be done by another or each act by a separate agent, they could not convict.

Whilst the Borden case was on trial a justice of the same court sitting in another county, who had long been a prosecuting officer, and had made a special study of the law of evidence in criminal cases, charged the jury in a criminal trial, not only that they must be satisfied beyond a *reasonable* doubt in order to convict, but must not acquit because of a possible, improbable or unreasonable doubt, but that they should convict on such evidence as they would act upon in

the most important affairs; that it was necessary to government and the preservation of order, of lives and of property, that such a rule should be strictly adhered to; otherwise there could be no convictions for crime, because in all cases there may be a *possibility* of perjury, or mistake of time, place, identity, or even of facts.

And if under a faithfu1 adherence to a rule, there was a case of hardship or mistake, it would be because no law or rule of man could be perfect.

Was any such view of the law of evidence clearly presented to the jury in the Borden case? Are we unwittingly changing the law of evidence in capital trials? Here were judges whom no one distrusts, of recognized learning, independence and ability. Have they unconsciously, by reason of the commendable instincts of humanity, in the trial of a woman for her life, "wrenched once the law to their authority" in case of a murder to whose horrors we have become somewhat accustomed by time, the live memories of which have settled down into the dull grooves of our experience? "Time dissipates to shining ether the solid angularity of facts." True, it is said to be better that ten guilty men should escape than that one innocent person suffer, but this maxim unduly conformed to, would acquit every prisoner.

It does not mean that we should not exercise our faculties of reason, and act from our common knowledge of affairs. Take the familiar case so often described in the books of the conviction of a man caught coming out of a room with drops of blood on the sword he had in his hand, and the gory corpse of a man within the room. The jury were right in convicting him, but some one afterwards confessed the murder, and the government were satisfied that, hearing the cry of the wounded victim, the prisoner had rushed in and snatched the sword from the bleeding body. Such a conviction could not, perhaps, take place to-day, since the prisoner's voice can be heard from the witness stand. But if the jury had hesitated to convict under the circumstances no man could be convicted of any crime; and, indeed, even in this case the confession may have been sensational and false. Even in the case of death in a railway car, stated by the junior counsel for the defence, the conviction was justifiable. There are, then, mistakes under circumstantial evidence of the strongest character, but not so many as under convictions upon direct evidence; and indeed very few cases are tried which do not depend in material points upon inferences from circumstances.

After the illustrations of the money and the cards which I have given it may surprise some readers when I add that Starkie states the like case in English currency, and declares that in such a case the probability of guilt is not beyond an arithmetical proportion. In this country we have convictions daily without regard to so strict a rule. But Starkie also instructs us in other ru1es which modify that which is just presented. First, that "the force and tendency of

circumstantial evidence to produce conviction depend upon a consideration of the *coincidence* of circumstances with the fact inferred, that is, with the hypothesis, and the adequacy of such coincidences to exclude every other hypothesis"; and "where the known and ascertained facts so coincide and agree with the hypothesis that the disputed fact (of guilt) is true, as to render the truth of every other hypothesis, on the principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely impossible the hypothesis is established morally true"; and that "the nature and degree of coincidence between the circumstances and the hypothesis may oftentimes be sufficient to exclude all reasonable doubt,
and thus generate a full moral conviction and belief, although it be not of an absolute and demonstrative nature," Also that " independent circumstance may add weight and moral conviction to the probabilities and coincidences sufficient to convict."

By "independent circumstance" is meant such evidence not of itself essential to conviction in each one of which may be consistent with innocence, and also with guilt, but which all look towards guilt.

For instance, in the case of the stolen money I have cited, while the combination of circumstances does not lead to conviction of guilt beyond "all limits of an arithmetical or moral nature," the conduct of the prisoner, flight, false or improbable stories, prevaracation, (sic) falsely imputing others with the crime, other circumstances too various to mention, and even in some cases an unsustained "alibi," become reasonably conclusive and develop the truth.

But it should be considered that in the case of the supposed robbery of money the arithmetical calculation of chances has as factors, figures or fractions of equal value, made up of the number of the pieces stolen. But in many other criminal trials, and this trial was such a one, the factors are not equal and there is no means of stating their mathemetical value. The learned judge stated a case in which he said the inference was irresistible when the noise of a pistol is heard in an adjoining room and upon opening the door a man is found just dead with a bullet hole in his temple, and near a revolver with one barrel discharged, that the death was caused by the pistol.

But this is, nevertheless a case of circumstantial evidence, and one where the probability of death by the pistol exceeded "all arithmetical proportion." There was. as is it were, but one factor, but that alone overwhelmed all reasonable doubt, although it does not follow that the pistol found did the killing, because it was *possible* that a third party did it, and leaving the pistol to lend the appearance of
suicide, escaped through a window.

Who then can put an arithmetical value to the probabilities of guilt arising from certain facts of more or less violence looking towards guilt? The jury only. Looking at the law of proof philosophically in the last analysis, all evidence is reduced to a consideration of probabilities. There can be no inexorable law of *proof* of human acts;

but there are salutary laws as to the admission of evidence, which may lead to proof to be judged by the jury in the exercise of a practical common sense, logic and knowledge of affairs. For twelve men on a jury have no more right than other men to gorge themselves with doubt, as some men do, upon whose minds nothing can
be proof, just as some philosophers have doubted the existence of matter.

There was a ruling during the trial which was received with almost universal surprise by the bar. I refer to the rejection of evidence that the prisoner, within 24 hours of the homicides, attempted to purchase a deadly poison. It seems sufficient to claim that it is a common practice to trace back before a jury all the life of a prisoner, as a detective would trace it for at least that period before the alleged crime; of course with certain limitations, such as not proving another crime of a different nature as evidence of guilt in the case in issue; leaving it to the jury to decide whether they see any evidence or ground for suspicion of murderous intent or "dreadful preparation" for the crime in question.

The court permitted the government to prove the general facts as to the character and recognized uses of prussic acid, for which it was claimed that the prisoner inquired, and which she said she wanted to treat seal skin furs; and then, because a furrier and a druggist did not know that it was used for such a purpose, rejected the evidence. This was in effect a ruling that a circumstance of independent or helpful evidence, not essential to proof of guilt, but looking in that direction, could not be shown in a case of circumstantial evidence. It was a ruling that such evidence should not be left to a jury, but only admitted or rejected, at the whim of the court.

It was a ruling that if the homicide was committed with a hatchet, evidence that the prisoner sought the purchase of an axe the day before was not admissible because an axe is used to split wood; in other words, if the murder was committed with one deadly instrument or article, the fact that she endeavored to obtain another deadly
agent and could not get it, could not be shown.

It is a matter of common knowledge that seal skins furnish no nidus for moths. The occasion was in August, long after midsummer, and if the evidence had been admitted it would have been open to explanation like any other inculpatory fact. Suppose that the government had offered to show that the prisoner's dress, after the murders, was as white as the newly-driven snow, and the defence had
objected. The prisoner, by his counsel in his opening, declared that "the relations between father and daughter were the relations that ordinarily exist between parent and daughter," "between whom and herself there is shown not the slightest trouble or disagreement whatsoever," and that he was her "loved and loving father."

Suppose the government had claimed, what to many minds is one of the most suspicious facts in the case, that if innocent, and ignorant

of this terrible and unsuspected crime, she would as a loving daughter not have failed to have been in some way marked with blood by that sea of gore from "twenty mortal murders on their crowns."

In such a case would not the court be obliged to exclude the evidence if it believed it had no tendency to show guilt? But in the rejection of the testimony offered of the attempt to purchase prussic acid, the court practically held that if a prisoner tried to purchase a gun the day before a murder and the murder was committed with a pistol, his attempted purchase could not be shown, if the prisoner
stated that he wanted the gun to shoot cats, unless the government could show affirmatively that a gun was never used for shooting cats. This of course is nonsense, but the ruling has never been explained. The fact was a question for the jury to judge, whether it was a suspicious fact or not, and of the weight of that fact.

Another ruling of the learned court, which has caused much comment at the bar, was the ruling that the testimony of the prisoner's evidence at the inquest was not admissible. I am not disposed to dogmatize upon this question, as I feel perfectly free to do upon other points which offend the common sense. I sympathize with
every effort of the court to vindicate the constitutional rights of the citizen, and wish they would make the application to some of their number, who so violate the provision of the bill of rights, article XI, which provides that every subject ought to obtain right and justice "promptly and without delay." The essential question was one which has never been authoritatively decided in this state, and never will be until the prosecuting officers can present it to the law court; namely, whether a person charged with a crime for which he might be arrested without a warrant, or against whom anyone could swear out a warrant, without the knowledge or advice of the official prosecuting officer, nor the justice of the court from which it was issued by the clerk, upon whom the warrant has not been served, who testified
under oath after consulting his counsel, can require the exclusion upon trial after arrest upon a subsequent warrant, of the testimony of his denials before the inquest; and this in a case when he has been under no more survei1lance than other persons in the house he inhabited, and had received no notice of the initiation of any criminal
proceedings against him.

The learned chief justice, delivering the ruling of the court upon the question, admitted that statements of the accused before arrest, on being charged with the crime, may be voluntary and admissible, and that the mere fact that at the time of her testimony at an inquest she was aware that she was suspected, does not make them otherwise: and then rests the ruling, not upon the ground of duress or ignorance, but states that "we are of opinion, upon principle and authority, that if the accused was at the time of such testimony under arrest, charged with the crime in question, the statements are not voluntary and are inadmissible."

It is difficult to see how Miss Borden was under arrest when she was not under arrest. "The common law regards substance more than form," he adds. "The principle involved cannot be evaded by avoiding the form of arrest, if the witness at the time of such testimony is practically in custody." True, the common law regards substance more than form; but the material substance must be whether she had any knowledge of the arrest, and whether there was any arrest, any more than of any other witness who was in the house. But the court avoids the question that, whether, arrest or not, "was her evidence voluntary?" after consulting counsel. It would seem that the material question should be how far the government, the courts or the magistrate should hasten to protect a person in the vindication of his constitutional rights, if he does not assert them; which question, I fear, so far as appears by our reports, seems to have been decided,---namely, that a magistrate at an inquest is not bound to caution any witness brought before him.

If she was a voluntary witness her testimony was admissible. If it was a question preliminary to the admission of testimony like an examination on a "*voire dire*," directed to the discretion of the court, then criticism can only be directed to the wisdom exercised in their judgement (sic) in that discretion. It surely appears that she was a voluntary witness, and the court had the same powers of judgment
which a jury would have on a simple question of fact, to consider whether, unless there was a guilty conscience which believes "each bush an officer," she had any reason to consider herself under arrest any more than the other persons in the house, and whether or not she testified because it would be a moral condemnation to refuse.

Plymouth, Dec. 23.

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A DISCUSSION OF THE JUDGE'S CHARGE.

II.

To the Editor of The Advertiser: I now come to the charge of Justice Dewey in the Borden case. I shall deal with it plainly, perhaps some will think too critically. I do not set myself up as authority in the law, but it seems to me right that one of the elder members of the bar whom the weight of years must fast push from, active practice should speak out. Let it be expressly understood that no charge or thought of imputing or believing in any corruption or anything but the most upright and conscientious intent prevailed with him; but judges are mortal and liable to be unconsciously influenced by bias or prejudice. For it is of their very essence that
bias and prejudice are unknown while they rule us. Our claim is that in the charge as well as certain rulings which have been commented upon, it was not the prisoner, but the Commonwealth which

did not have a fair trial. He commences with a caveat that he must not charge the jury on matters of fact and indicates that he may go to the very verge: and he proceeds essentially and practically, to argue the case upon the evidence to the jury. It does not matter if this is done under the guise of explaining the different qualities of evidence, if the opinion of the justice is left to shine through it all. Even then in discussing the qualities of evidence much is said of which the jury are to be the judges, as well and sometimes better than a single man.

He treats of motive, but does not ask the jury to consider whether any other possible person could have the motive to kill Mrs. Borden, and for "the deep damnation of her taking off."

A recent writer has stated that "whether veiled or open, whether in secret motive or in overt act" the quality of one's feeling, thought, purpose and desire, runs through all his work." For this reason it is perhaps difficult for a judge entirely to withhold his own bias, and there is the more cause for greater caution. His honor,
during the charge, uses this language upon an immaterial and incidental matter.

" Turn over the evidence, recall so far as you can every portion of it, and do you recall any portion --- it will be for you to determine whether you do or not --- do you recall any portion of the evidence where it appears that *at any time, at any place*, under *any circumstances*, she found any fault with the officers for asking her questions, or for making searches?"

Why this vehemence of language not displayed alone in the passage I have quoted? Is this the tone of a judge or of an advocate? Consider that this sentence gives tone, character and tendency to al1 the rest of the charge. Let me examine the framework of this charge as concisely as I may. It was deliberately prepared. It abounds in extracts from the words of eminent jurists and writers on criminal law, first, as to motive; second, as to reasonable doubt; third, as to verbal admission; fourth, as to defendant's not testifying; all of which were of well settled law, which may as well have been concisely stated by the court, but the effect of which seemed to be to add force and dignity to the charge. But the authorities may as we1l have been quoted for each statement of law in the case. The learned judge then proceeds seriatim to "teach the jury to distrust in the concrete almost every important item of evidence upon the part of the people in the case; 1st, the conversation testified to by Mrs. Gifford tending to show personal hostility to Mrs. Borden, concerning which
he intimates that the conversation was the extravagant gush of a young woman --- a maiden of thirty years of age, who, however had evinced none, but the contrary throughout the trial: next, the unreliability of expert testimony.

It so happens that the strongest and most conclusive evidence to the common mind that the crimes were committed an hour or

more apart was the facts that the body of one victim was cold and of the other warm, and the blood flowing light from one and dark and coagulated blood upon the other. Why then cast a shadow on expert testimony generally? Star-eyed science is now king. It is revolutionizing the world, making a new history of the earth, placing its microscope upon the stars, changing religions, lighting, propelling, heating and presenting men with a new and more beneficent God; and why should one of our profession make wholesale slur upon its devotees. We do not tell juries that the testimony of carpenters, engineers, or people of other trades or professions is as matter of law to be distrusted. Testimony of handwriting is matter of judgment, not of science, and is to be distrusted; but why judges should charge juries with regard to the testimony of a class of men, I have never been able to see. Juries can judge of the weight of evidence as well, it is often claimed, better, than a single man. And it has been somewhat a matter of surprise that scientists, especially those of the more exact sciences, have not sometimes protested against the imputations that have been cast upon them as a *class* by the courts. Next we have elaborate possible reasons given why the prisoner might not have chosen to testify. It would seem sufficient to state the law fully as was done in the charge; that she was not obliged to testify, and no influence or consideration of any character by reason of her not testifying could be regarded by the jury. The reasons given are not very clear, or reasonable in themselves, but tend also to what I claim that the whole charge bore, the aspect of a defence.

Again, as to motive. The court stated that it was not necessary for the government to prove motive, but charged "was the defendant under a real and actually operating motive to kill her father and his wife," and added "unless the child be destitute of natural affection, will the desire to come into possession of the inheritance be likely to constitute an active, efficient inducement for the child to take the parent's life?" Now would it not have been proper and fair for the court to have stated that although the government was not obliged to prove a motive, it was proper for the jury to consider whether she might have had a motive, and that if any motive were ever adequate to commit a murder, they might consider who the murdered mother was, whether she was or was not a quiet, inoffensive, domestic woman, or whether she was quarrelsome, quick tempered, engaged in outside affairs; whether the prisoner has any "natural affection" for her stepmother, and whether or not there was any evidence tending to show that any one else could have any enmity or motive to slay her; and in this connection could give such weight as they could reasonably see fit, to the evidence that the mother was first murdered; the evidence tending to show that both were murdered; to the evidence tending to show that both were murdered by the same hand and the same instrument; to the fact that she showed no agony at the discovery of the assassinations; and that amid the

horrors attending its earliest investigation this gushing maiden interrupted the officer to exclaim: "She was not my mother." Natural affection towards the proverbial stepmother this! But the learned judge goes farther and throughout his charge uses the "negative pregnant," or the "affirmative pregnant," depending upon the manner in which the question is put, or else what includes those pregnants, repeatedly throughout his charge. I will illustrate by taking extracts in the order in which they were delivered.

"But take Mrs. Gifford's just as she gave it, and consider whether or not it will *fairly* amount to the significance attached to it. Consider whether or not young women *do not* often use words which, strictly taken, go far 'beyond their real meaning'? Would it be a *just mode of reasoning* to make use of the alleged subsequent murder to put enmity into the words. Judge whether or not there is *clearly* proved such a permanent state of mind on the part of defendant towards her stepmother as to *justify* you in drawing against her on that ground influences unfavorable to her innocence? See whether you would be *warranted* upon the evidence in taking into your minds the conception, and allowing that conception to operate, that at or about the time she had a feeling towards her stepmother that would properly be called hatred? Such a conception if erroneous, may be serious and more liable to affect improperly your conclusion than a mistake on any single portion of the evidence." It should be observed that even the simple "whether or not" in a charge skillfully or carelessly used, often betrays the bias or a opinion of a judge, depending upon the location given to the proposition propounded, its connection with other propositions, or even the tone of voice of the judge. Touchstone, Shakespeare's wise fool, said "there is much virtue in a 'if'. Your 'if' is the only peacemaker." There may also be much virtue in your "whether or not," but it may be used to make trouble and do great harm.

Next with regard to the note, all that is said in the charge is an argument too plain to discuss or dispute. It was an argument against a motive to tell a false story about the note to Mrs. Borden, and I have not the heart nor the space to repeat it, but only to state that I have added in the appendix the charge officially repeated and now for the first time actually presented to the public gaze. Again the charge asks "is it *reasonable* and *credible* that she should have killed Mrs. Borden at or about the time claimed by the government." With regard to admissions, after quoting the statement "of a thoughtful writer on the law" upon the subject, he says "will be for you to say whether there is not *more* danger of some misunderstanding, some inaccuracy, some error creeping into evidence when it relates to statements, than there is when it relates to acts. Would you *not* hold that it was a just and *reasonable* view to take, that if a party is to be held responsible in a case like this largely upon statements, that these statements should be *carefully* and *fully* proved?"

Carrying an intimation that they were not so proved. Next, with regard to evidence of defendant's statement, "the day before this calamity fell upon the household," of a presentiment of some disaster upon the household, the learned judge says: " See whether it seems to you *reasonable* and *probable* that a person meditating the perpetration of a great crime could the day before predict to a friend either in form or substance, the happening of that disaster? It so happens that the very last capital case in our printed reports, Commonwealth vs. Holmes, 158 Mass. 253, was one in which Justice Dewey was one of the trial bench, and there was evidence of open threats of the prisoner to commit the crime. The learned judge argues to the jury here and says: "Would one naturally, probably, predict a day or two before hand, that any thought of the motive of that crime would occur?" Perhaps not; but that is for the jury to consider, not for the court to charge or argue. This statement of the prisoner was made on the same day that the government offered to prove the attempted purchase of prussic acid. But last of all, in the appendix to his charge the learned judge approached the testimony of Mrs. Reagan as to the prisoner's charging Emma that Emma "had given her away," and the alleged denial of the truth or that statement, and charged, "But I say it is suggested that the parties who represented the defendant and who were seeking to get a certificate from Mrs. Reagan were proceeding without having received any assurance from anybody that the statement was false and one that ought to be denied. It would be for you to judge as reasonable men whether such men as Mr. Holmes and the clergyman and other" parties who interested themselves in that matter of the denial of said statement, started off attempting to get a certificate from Mrs. Reagan contradicting that report, without having first taken any steps to satisfy themselves that it was a report that ought to be contradicted.

Here is an indorsement (sic) by the court without evidence of the character of men, some and, I think, all of whom, were not witnesses, a statement made by the judge who has so severely instructed the jury to strict proof, and an instruction without any evidence to show that certain persons had not done a certain act without authority, when in fact the whole transaction was the result of social or sectarian sympathy with the prisoner.

This charge was calculated to lead the jury to reject or distrust the authority of all human testimony, and even to doubt the evidence of their own "*ego*." But more than all, the judge undertook to give an essay upon the philosophy of testimony so far as it might be applicable to the case in hand. In so doing he stated only partially essential considerations, some of which I have cited in previous pages, and then he drew many of his illustrations from the case before him in such a manner that the jury might readily consider matters of fact just as the charge stated or alluded to them. Let us suppose that

the learned judge had charged the jury in the following fashion: "You are to consider whether or not it is reasonable to suppose that upon the evidence the prisoner had some hostile feeling towards the stepmother, towards whom there was of course no natural affection, It is for you to find, but you know I am giving you no opinion upon the matter, whether or not you can reasonably or fairly find that the
prisoner had knowledge that if her stepmother died first, she and her sister Emma would be the certain heirs of her father's estate; it is for you to judge whether or not she might not have been actuated by that motive; it is for you to inquire honestly and diligently whether the mother in law, considering the manner in which she lived and al1 the circumstances, could or would not have had an enemy, actuated by passion, cupidity, or revenge, who could under all the circumstances have done this deed, and who was impel1ed by wicked or foolish motive to kil1 the mother before the father; and in considering this question you have the right to consider whether the blows
were those of a man or a woman and also independent facts, not each in itself necessarily implying guilt, nor inconsistent with innocence, but all suspicious or helpful, as you shall find them or not supporting one another, and agreeing with or not agreeing with the numerous probabilities of guilt, if you shall so find them"

"If, for instance, stolen property recently taken is found to be in the possession of a prisoner, and he undertakes to explain or account for their possession, he has a right so to do, but it is your right and duty to hold him to an explanation as far as is in his power. This in this case, if the prisoner at one time said that she went to the barn at the time of the second homicide to get a sinker for a fishing line, and made no attempt at the trial to prove she had a fishing line, or one without a sinker, or stated at another time that she went to get metal for a window screen, and made no attempt to prove that there was a window or a screen that needed such repair; if you think it reasonable, or unreasonable, or even probable that she would go to ironing in the middle of a hot forenoon and leave the ironing
unfinished just after her father entered the house to go upon this trivial errand; if you think it probable or improbable, natural or unnatural that she, with the habits of economy which she evinced, would have burned in August the entire skirt of a dress made in the spring, and only prove that she might have got paint on it in the spring, with no evidence, as I understand, that she did disfigure it by paint, you have the right, and it is your duty to consider these matters in the light of your knowledge of human affairs, for you are not jurymen shut out from the use of common reason.

As you shall judge of these facts, as far as you find them facts, you have a right to apply them to strengthen or weaken all the other probabilities or improbabilities, if they are numerous and concur. It is also my duty to state to you that if a prisoner sets up an alibi, namely, that he was not present at the time the crime was committed, the burden of proof is

upon him to establish the fact beyond all reasonable doubt that such was the case. In this case it seems clear and is not disputed that the prisoner was in the house when her stepmother was murdered. You are to judge whether or not it is reasonable to suppose that just at the moment the second murder took place she had left the house, and that she heard a groan outside as she was returning. You have heard the evidence of the nature of the blows upon the head of her father and you are to judge whether it is reasonable to suppose that her statement in this regard was true. It is also to be considered that all evidence as to time even from the most honest witnesses is very untrustworthy, and I will read you a passage from an eminent jurist upon this point, etc.; and suppose he had closed by saying: "It is now for you to find whether or not the prisoner is beyond a reasonable doubt, and in all human probability a probability against which you as practical reasonable men cannot estimate the doubt, the key which opens the door of this mystery, and its lock of many wards!"

Let me more distinctly present the most notable defects, both affirmative and negative, of this remarkable charge. It is the manifest duty of a judge to charge the jury upon the laws applicable to all the facts as the jury may find them: and as it is not his province to declare all the facts proven, so it is not the province of the judge to charge as if certain facts open to judgment of the jury were not in evidence. This charge does not cover the whole case. It no where gave any intimation that it was any part of the duty of the jury to test the prisoner's statements of truth or falsehood as having any bearing upon the question of guilt, as declared by Starkie in the extracts I have quoted and elsewhere. On the one hand they were told that as they should decide the question of a settled hostility to her stepmother, with an intimation that there was no reliable proof of the same, it might affect their verdict more than any question in the case, on the other hand they were not told that all her statements were to be tested, which in a case of circumstantial evidence might be decisive. For example: The prisoner herself stated that she last saw her father alive and was the first to find him in death; that she was absent about one-half hour at the barn, and as she approached the house heard a groan; that she left her father on the couch, and found his body in exactly the same position. She heard no fall nor groan when her mother fell; that the door from the room into the entry was open; that she heard her father fumbling at the front door when he was making entrance to his home which he would never leave alive. It thus appeared from her that he had never power to resist the first assault and never rose from the couch, on which it was her lot to "make up all his bed" in death. Her loving father never knew who assaulted him nor whether his life was wrenched by a lineal or an "unlineal hand." Fifteen or more mortal blows were showered upon his head. The government's claim was that this statement was false as well as the statement that a note came from a friend who was ill. If either of those statements were

fa1se, improbable, or beyond conception, no intimation was given to the jury whether it was material to the verdict, they might pronounce. The suggestion is made that the murderer watching in a closet for an hour or more after the first murder, waited a half hour after Miss Borden left the house before he attempted his bloody deed, and had not accomplished the act when she entered the house; that he departed unknown and unseen without noise and without a trail. The questions, then, on this part of the case, were, did the father have power to groan after the first blow? Could she have heard such a groan? Why did not the groan arouse her to immediate investigation? Why did she not then or ever afterwards make a public outcry? Why did not that murderer of her mother complete his second crime at the first opportunity after the prisoner left the house?

And now what did the learned judge charge upon this matter? Can it be possible our eyes deceive us? We give the exact words of the charge. "Is it *reasonable* or *credible* that she could have killed Mrs. Borden at or about the time alleged by the government?" "Credible" is a strong word. Can such things be and overcome us like a summer's cloud, without the wonder of all judicial minds?

Consider that this phrase "*credible*" was practically telling the jury not only to acquit, but that she was not guilty. If this paragraph represents truly the judicial opinions of the court upon the evidence, as must be presumed, the court may as well have ordered a verdict for the prisoner. The remark that her guilt cannot be *conceived* of, for that is what it means, was practically stating that "if you give a verdict, gentlemen, against the prisoner we shall grant a new trial," because in a

trial for a capital offense, an average jury, having never been trained to follow their reason, do not, trust the results of reason. They feel the need of some one to lean upon, and will take any excuse which the court may suggest. What are juries for, and what are they good for with such a statement as I have quoted? This statement abolished the jury, and revolutionized the laws applicable to criminal tria1s; for juries are impanelled to stand not only for the prisoner against the government, but for the people against the prisoner, and in certain sense sometimes for both people and prisoner, against the court. Did anyone ever hear of a criminal case, contested and to be submitted to a jury, where the court even intimated that the prisoner's guilt could not be *conceived* of? The same statement necessarily was app1icable to the murder of the father, because nobody doubts that the same hand and instrument committed both crimes. In view of this and other facts too numerous to detail, the learned judge first brings forth the statement made the day before the homicide of a presentment of some calamity, and practically argues it as a matter of defense. It should be noted that what she said had reference not to accident or any convulsion of nature but it had reference to some human agency, as she spoke of a man whom she had seen prowling around. Would it not have been fair to the government

to suggest that though this statement was not by itself inconsistent with innocence, it was not necessarily inconsistent with guilt, if she desired to impress her friend with the idea that something overwhelming might occur caused by human hands, which might thus divert suspicion from herself. Let me suppose further that the learned judge had not charged as he did without reservation, that "defendant cannot be required to clear up mystery. There is no way in which the burden of proof in any essential matter can be transferred to her." While this is of course true in a general sense, there is nothing here or elsewhere that she is under any obligations in a case of circumstantial evidence to make good and true, the truth of any of her statements even if proved to have been false. Suppose the court had said "Do you think it reasonable or credible that if a young woman of her age was told by her stepmother of very domestic habits that she was called out by a note in the middle of a hot forenoon to see a sick "friend," that she would not have inquired who the sick friend was, that she would have evinced no concern for her long absence, that after all that tragedy in Fall River, the note and the sick "friend" would never turn up"? And is it reasonable and credible to suppose the prisoner told the truth, and the murderer waited in the entry half an hour before he attempted to accomplish his deadly purpose." Such supposed charges as I have indicated would be as fair and as little argument for the government as that which was administered for the defense. But they would have been equally beyond the law. If the charge given was not upon "matters of fact," in part in what was not in truth the fact, and beyond that an argument for the defence more authoritative and more effective than the argument of the able counsel for the defence, I should be puzzled to know what is argument upon facts. "Would some power the gift would give us," to see it otherwise. If the dead could speak, this defunct statute against charging upon matters of fact might well exclaim like the curious infant from its stony grave :---

" If thus I'm done for,
What was I begun for ?"

Plymouth, Dec. 23.

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THE LESSON FOR JUDGES AND PEOPLE.

III.

To the Editor of the Advertiser: And now what, if any, are the lessons to be drawn from this case?

The people of this commonwealth are tired of this emollient justice, and at the same time there is natural and uncontrolled repulsion

against the barbarism or coldly putting to death a fellow human being, even with many who justify capital punishment. This repulsion and an extensive popular feeling act upon the courts, and its judges would not be human beings if they were not more or less unconsicously (sic) affected by it. This repulsion is warping the law of criminal evidence in capital cases. For, say what we may, argue as you please, the same law is not practically administered in a capital case as in a case of larcency or a prosecution under the liquor-license laws.

Formerly a majority of the bench of the supreme court ruled the law in capital cases; and now a small minority, two out of a bench of 16 justices of the superior court dispose of the rights of people when lives and property are at stake. The attorney general, in his report made last January, after that most wonderful argument in the Trefethen case, which for closeness of reasoning has never been excelled in this country, expressed his approval, so far as tried, of the experiment of capital trials in the superior court. I doubt whether he would make that statement now. I agree that there is little reason for a separate panel of jurors, or a special term for these trials, or for requiring the atty. general, but if they remain in the superior court the government and the people should have the right to carry exceptions to the highest state tribunal of law.

The Boston Daily Advertiser stated truly in its issue of July 15 in an article upon the safety of assassination :---

"Is this sort of thing to last forever? Is murder really the safest of all crimes? Is society powerless to help itself? Is the law necessarily a terror to evil-doers only when their evil doings are comparatively trivial? Is it not time to inquire whether the safeguards that have been so ingeniously woven around murderers by our present rules of evidence and methods of procedure in capital trials do not carry solicitude for the "rights" of the accused to a point where the rights of citizens to the protection of their lives are sacrificed?"

To this repulsion and to popular demands may be attributed the scanty use of the power of committal for contempt for the public discussion of cases before and during a trial. The chief justice of England summoned the editors of the Times before him during the trial of the Tichborne case, and imposed a fine for discussing its merits. In the Borden case some papers in Boston declared from the first, and persisted in the declaration until after the trial, that there was not a particle of evidence against her; and the text of daily report of the evidence in the least sensational paper in Boston was ornamented by the reporter's valuable comments on the drift of the evidence from day to day throughout the trial.

To this repulsion is in part to be attributed the artificial and unjust outcry against Judge Blaisdell, who did just what every justice in the Commonwealth, sitting as a coroner, so far as I can learn, has always done. He takes the place of a coroner, with a jury of six men,

whose minds are not known until they have expressed them after the hearing. They are on a voyage of discovery, and bound by no legal rules of evidence. If we interpret the ruling of the court correctly it follows that every witness in a criminal case should be cautioned that he is not obliged to criminate himself, otherwise no court can afterward admit his testimony.

This feeling also accounts for the newspaper attacks upon the police officers, who were doing their duty, perhaps not as it would be exercised in another case, but who were blamed for trying to "catch" a prisoner in his acts and statements. One would suppose that it was wrong in detectives to dissimulate, and the moral law forbid them from setting a trap or making a private mark to detect crime. This feeling exalts a prisoner charged with crime into a hero, and sends flowers to him. It induces philanthropic women, whose life is spent in going about doing good, to volunteer, during a trial their unsworn testimony to the character of the prisoner, even to deposing without cross-examination, that women burn their clothes three
months old in stoves; but there is no such volunteer testimony during a trial for robbery.

But above all other considerations a ruling of the superior court under the present system "will be recorded for a precedent, and many an error, by the same example, will rush into the State." All the rights of the government and of the people, so far as the law claimed by the government is concerned, are left without a remedy; and the law administered in one case in that court would be
followed in the next, and never be authoratively reversed.

Tell me, nymphs, what power divine
Shall, henceforth, wash the River Rhine?

We are unwittingly erecting an "imperium in imperio," which is oppressive under any government, an imperium which is to decide the most important rights of all others. Whilst the meanest immigrant who is washed --- or unwashed --- upon our shores, may carry his dollar claims to the supreme court of the Commonwealth the people cannot for the protection of their lives, property, or good order. I invoke the Great and General Court to review this subject; for it must be it does not "lack gall to make oppression bitter."

Do the legislators mean that without enactment, and without declaration of the law by the supreme law authority, under a democratic system, two men shall practically build up a system of the law of criminal evidence contrary to the spirit of our constitution, upon matters of importance so supreme! Why not give the Commonwealth the right to present a bill of exceptions as permitted to the State by Connecticut Law.

One man suggests that it would be putting a prisoner a second time "in peril of life or limb." But there is no provision against it in our state constitution, and the United States S. court has four times adjudged that the first 10 articles of ammendment (sic) of the federal

constitution, of which that against peril of life and limb is one, were prohibitions intended not to limit the authority of the states, but to restrict the federal power. 4th and 5th Howard's Reports, and 5th and 7th of Wallace. But even under that provision new trials before a final judgment are had.

Another suggests that it would work hardship on the prisoner, but in case of a frivolous exception, there is no law to prevent his giving bail, for treason is the only crime not bailable.

Prosecuting officers have never a desire to prolong a case, or increase the number of their duties: and, if it should be guarded against, let all exceptions be endorsed by the attorney general.

If, then, trials are to be had in the superior court, let not the laws be decided at a jury trial amid the various prejudices, the possible fears of a bench which is looking into the face of fellow-creature, and before the mute eloquence of a woman's pleading face; but let the government, in vindication of the people's rights and safety, remove the question where it may be considered as an abstract question into the pure atmosphere of the upper air, above the clouds and fogs, the passions and prejudices of the world beneath. Then will the people feel assured indeed that there has been no mistake of justice.

They surmise that, contrary to the spirit of the constitution the charge was not made by one, who, in their opinion, could have been as "free, impartial and independent as the lot of humanity will permit."

Plymouth, Dec. 23.

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THE LESSON FOR JUDGE AND PEOPLE.

IV

To the Editor of the Advertiser:--- Permit me to acknowledge the receipt of many letters from strangers as well as friends, too numerous for separate reply, expressing their approval of the comments which you recently did me the honor to publish, upon the legal conduct of the Borden trial. I am also indebted to daily papers in Massachusetts and in other States for copies of their issue republishing the letters in full, as well as many commendatory notices of the press in this and other States.

One of these papers, the Troy Daily Press, inquires why I did not follow up the "Lessons of the Borden Trial" by expressly opposing all capital punishment for crime. My answer is twofold: (1) That the principal object of the letters was, under the limitations of a newspaper, to confine myself to the administration of trials and to suggestions of change in modes of procedure, and not to the

suggestion of new laws for the punishment of crime: and (2), because I believe that this trial itself furnished to the community most potent leaven for final condemnation of capital punishment.

As I would not have it inferred that I was not in favor of a radical change of the law of punishment for murder, I will detain your readers with a few words upon that subject.

Statesmanship enacts laws with reference to the facts of human nature and not with reference to theories, either of sound minds or of one-sided reformers, now popularly called "cranks." Indeed, we have many laws which, a century hence, will be deemed as brutal, ineffective or misplaced as the trials for witchcraft or the persecutions of the Quakers. We shall also learn to restrain small offenders and new criminals with a lighter curb and to condemn with more severity than is often done those who have become professional criminals. The abolition of the death penalty has become a necessity even with the legislator who, is not opposed to it from principle. When the average mind of the community has come to the conclusion that a punishment is too severe or barbarous, or even to doubt upon the question, the experience of a century has shown that neither pure judges nor honest juries will execute it, but avoid and dodge it if they can. Gibbon wrote more than one hundred years ago, that "whenever the offence impresses less horror than the punishment,
the rigor of penal law is obliged to give way to the common feelings of mankind." Think of a great government of men stringing up before high heaven a human being, whom it can control. English law hanged men for stealing over 20 shillings, juries finally convicted for "under 20 shillings," when forty pounds were stolen. The law was repealed. We had until long after the Revised Statutes of 1836 a law in this Commonwealth making it a capital offense to break and enter feloniously in the night time, if the prisoner were armed, or put anyone in fear. Within my remembrance here in the same Old Colony in which Miss Borden was tried, a jury pronounced a verdict of breaking in the daytime, when it was clearly proved that
the robbery took place before daylight; and the punishment was first modified to imprisonment for life, and in 1871 to confinement for any term of years.

So also until 1858 the law knew no degrees of murder. In 1857 a woman was tried for the murder of her husband in this County of Plymouth, and I was senior counsel for the defence. It was clear1y proved that a few days before her husband's death she purchased arsenic of an apothecary in the neighborhood: that one evening he was taken somewhat ill, and the physician called prescribed castor oil and left the house, in which she, with two young children besides the husband, were the only inmates; that, a few hours after, the husband was taken ill and died of arsenical poison.

It was a case of deliberate murder, or of entire innocence. The jury were equal1y divided, and a new trial was had in 1858.

Meanwhile the legislature changed the law by defining two degrees of murder, the second degree punishable by imprisonment for life. That law was changed partly because the legislators realized that no woman could be executed in this Commonwealth.

At the second trial the court charged that if the prisoner purchased the arsenic with a well considered intention to poison her husband, and if she abandoned that intention, and placed the paper of arsenic in her cupboard with her dishes; and if after the physician left whilst mixing the oil at the clipboard, it occurred to her that, "now it would be a good time to poison my husband;" and if without further thought she did the horrid deed, that would be murder in the second degree. The jury caught the bait as a trout jumps at a fly, and the court landed a human life.

Here was a case in which the prisoner's counsel had not the assurance to suggest such a defence, which was supported by no sufficient facts to prove it. Since that time two women only under plain circumstances of peculiar atrocity have been convicted of murder of the first degree, but neither has suffered the extreme penalty of the law; and no woman will be convicted, sentenced and executed in Massachusetts.

It is hardly possible to conceive of an intentional homicide, by poison which would not be deliberate murder in the first degree. Ever since that trial the practical issue with courts and with jurors has not been "guilty or not guilty," but what possible excuse can be found for not convicting of the real crime which has been committed; and when from circumstances of homicide it must have been the deliberate act of the perpetrator, as in many recent cases, juries and courts have found the way to let the accused "go and sin no more." If in the course of God's providence these judges and these jurors shall open the eyes of legislators to enact practical laws, I shall say "God bless you for these verdicts."

"In one view it is creditable to human nature that your hearts are better than your statutes, and that your verdicts condemn your laws." One gentleman writes me, "The 'poor criminal' when brought to trial has the sympathies of the public. When the crime is first committed a cry of horror goes up from pulpit, press and people, and strong desire is expressed that the scoundrel perpetrator be brought to speedy justice. No sooner, however, is he or she put on trial than all is changed. *Any one else* might have done it but the accused never." This is an expression of a prevalent opinion. "All that is human must retrograde if it do not advance."

A statute that cannot be enforced is not law, and brings all law into contempt. Another gentleman informs me that in a capital trial, upon a question as to the admissibility of evidence, in which the Commonwealth had no power of exception, a learned judge remarked that "this is a capita1 case, and we must be careful to make no ruling which may be against the rights of the prisoner," but finally left

it to the district attorney to put in the evidence if he saw fit. It was, therefore, a question not clearly objectionable, in the mind of the court, but the court hesitates to give the government what was a small matter, and in some respects laudable, the benefit of the doubt.

It shows that the justice was a man before he was a judge, but does it not show a tendency even in judges not to rule the law as absolutely and independently in a capital case as in one which involves a milder punishment? In other words, did not the punishment warp the court in matter of law, when in his charge to a jury he would be obliged to instruct them that their finding of fact should not be affected by the possible punishment?

But I have no squeamishness against capital punishment on any moral grounds. Government rests on force, and cannot abandon the *right* to punish capitally. We claim the right to kill in self defence, and in defence of our country in open warfare; and until we abandon these rights how much more must we assert them against those who seek to destroy all government by secret organization,
who recognize no laws of civilized warfare, whose religion is assassination, whose processes are wholesale and indiscriminate murder, and who are sworn to accomplish their objects even at the sacrifice of some of their number; whose cannon is the bomb and whose fortress is the market place, the theatre, the people's legislative hall and a man's private castle, his fireside and sacred altar.

No law of civilization or humanity demands mercy to them. They are worse than pirates and manstealers, and should be treated as the enemies of mankind. We should no more hesitate to check their devastating course than to exterminate the pests of army worms, even before they have consummated their crimes. How this may be done consistently with the abolition of the death penalty for ordinary
murders, and with what limitations it would perhaps be useless at present to suggest. Whether the jury may declare the penalty when the crime is the result of conspiracy or organization with others; whether the crime shall be capital when the jury find that it was the outcome of any such organization, or in whatever form the exception may be stated, are questions which must be left to the considerate judgment of legislators.

Meanwhile I look for some statement from one or more opposed to capital punishment for murder to answer to a hesitating world, "What shall we do with anarchists ?" and call the attention of such as favor capital punishment on Biblical authority, to the fact that the Lord God is not represented as pronouncing a sentence of death on the first murderer, but declared "whosoever slayeth Cain vengeance shall be taken on him seven fold."

Plymouth, Feb. 5.

THE LESSON FOR JUDGES AND PEOPLE.

V

To the Editor of the Advertiser:--- It may be deemed presumptuous to declare that the rule that no person shall be compelled to furnish evidence against himself should be abolished. It is imbedded in our state and national constitutions, and apparently in the Anglo-Saxon mind. I do not look for its immediate abolition, but the time will come when we shall "reform it altogether." I do not propose to enlarge upon the origin of this rule, nor upon the motives for its creation. Blackstone does not mention it among the acquired rights of men, and not, of course, among natural rights. It is a common law rule of evidence, but not the earlier law of England.

It was not the "Magna Charta," nor the English "Bill of Rights," nor any early law supplementary to them which gave it birth. Indeed, the rule is not mentioned by Blackstone. It is sufficient to state that, however useful or necessary it may once have been, under our paternal and more civilized government it is a temptation to crime and an obstruction to justice. Indeed, so far as capital trials are to be considered, the tendency of judges is towards leniency to the prisoner. There can be no Jeffries now on any bench.

Like a faded flower this rule has become useless and offensive. It is a fetish of English conservatism, worshiped as one of the "idols of preconceived opinion," as Coleridge phrased it. It makes glad not "mad the guilty, and apppals the free." It is the tombstone of the past on which are inscribed the names of victims of the criminals who have gone "unwhipped of justice."

Surely there can be no sacred right of protection from inquiry of a person suspected of a crime. In the Genesis the Lord God is represented as asking Adam: "Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?" And the Lord said, also, to Cain: "Where is Abel, thy brother ?" This was the first death as well as the first murder, of which Lord Byron, in his "Eve," took occasion to present that most dramatic cry ever made, from Zillah,.

"Father! "
"Eve! Ada! Come hither! Death is in the world."

If, as publicists assert, government, especially a democratic government, is a compact, express or implied, between all who live under it and the ruling power, in which each agrees to conform to its laws and to suffer their penalties if he offends, there can surely be no natural or sacred right of exemption from the question, "Where is thy brother Abel ?"

But whether publicists are right or not in this regard there can be no question of the fact that a man is born into allegiance and obedience to his native land, and must conform to the laws of a

country into which he moves.

"Protecti trahit subjectionem, et subjectio protectionem," "Protection implies allegiance, and allegiance protection,"

An earthly parent questions his child: "My son, did you eat of the green forbidden fruit ?" "Young man, did some serpent devil prompt you to mislead that young woman ?" and often the answer is "Yes," and sometimes the primeval one: "The woman tempted me." Our law reverses the law of nature, and declares that a great nation, the parent and protector of all within its borders, shall ask no
such questions of its children.

If the courts could look into the hearts of men like the Great Searcher of hearts we would not decline the exercise of such a power. If a prisoner is entirely innocent why should he object to being questioned? Nature prompts him to reply. His honor and all that he holds dear would urge him to protest and explain; and if he knows that another is criminal, as a good citizen he would disclose his knowledge. The innocent citizen of unsophisticated mind and habit is prompted to state the truth, and no advice of lawyers would restrain him. But we reverse the order of nature here, and set up an artificial barrier to the truth, and then ask a jury to find the truth.

The astronomer may search the planets millions of miles away, and from the perturbations of Jupiter point with unerring certainty to the guilty orb as yet unseen. We may search all man's effects with an official warrant for evidence of crime: but the judge by the official warrant of his office can not search the man before him for that which is in the prisoner's heart, by his statements, his explanations, his consistencies or inconsistencies, his concealments and subterfuges, his bearing, his eyes, his frankness or prevacations, to find that angel of innocence which beams from his face, and satisfies a man familiar with human nature, or discover the dark devil of guilt which to his mind cannot he concealed.

"For murder, though it have no tongue, will speak
With most miraculous organ."

The French mode of trial is a success. There are few failures of justice, although with a more excitable and impulsive people than the Anglo-Saxon; and trials by the French are conducted with a dispatch which we cannot boast of. Indeed the certainty of conviction of the guilty seems to lead to more confessions after arrest than in this country.

Today Vaillant was executed, though he effected the death of no man. In two months "nay, not so much, not two," from the hour of his infernal act, Vaillant has met his deserts, notwithstanding some delay caused by awaiting the decision of President Carno. Nothing can touch him further, and he can no more affright civilization with the enormity of his hellish designs. Who can see that the consummation, most devoutly to be wished would have been effected
in Massachusetts or Illinois in two years?

Our rule that a prisoner may not testify, and cannot be required to testify, and that he shall not be prejudiced by not testifying presents to a jury a mental and psychological absurdity.

The first thing the juror entering upon a trial is taught is that we do not want a delivery of the truth, a *verdict*, but only what truth we can get at in a certain way. He finds at the outset an artificial barrier set up against his reason. There is a story of a simple honest man who was asked some question about a prisoner's guilt, who said "Ask the prisoner; he knows." This was the simple expression of honest nature, and simple honesty was right. How can a very conscientious man free himself from doubt whether the fact that the prisoner has not testified may not have so biased or colored his conclusion of guilt from the other evidence, that he cannot find a verdict against the prisoner? He will be "so desirous of standing straight that he will lean backwards." .

Let it be noted that this may be in the trial of a cause in which a human life is at stake and in which judge and juror are not loth (sic) to find any excuse which may satisfy their consciences for not convicting?

To this, add the law, if it be a law, and if it is the law it is a bad one, that a judge as well as counsel for defence may present reasons to the jury why the prisoner may not testify. Besides the fact that by the elaborate suggestion of these reasons it places the court before the jury somewhat in the attitude of defending the prisoner, see how absurd it is practically to state them to the jury and then tell
them that they cannot weigh the fact that the prisoner has not chosen to testify.

"Ah !" says the juror, "I think the true reason must be that he is guilty. If I were on trial, and perfectly innocent, charged with the death of a dear father murdered, no lawyer could prevent me from testifying, My innocence would speak out."

"Beware," says the law by the mouth of the judge, "that would be looking for the truth. You must consider the prisoner just the same as if he were dead and could not testify."

"How can I," says the juror, "when I know he is alive? But why do you puzzle me by incubating reasons? Why do you not say of the rule that is absolute and admits no argument: that the law allows it, and the court must award it, and state nothing more? My right to an opinion whether this rule is reasonable, or one I can logically conform to, is I suppose, reserved to me. I will take it as a naked rule of law, but it puzzles my mind why you should give me possible reasons which I cannot believe, and cannot discuss or act upon. I am sure I do not know what my verdict may be." Such may be the meditations of a keen and conscientious juror.

The only objection to the French practice of questioning the prisoner is one which no longer exists. If we look at a work on evidence published in England a hundred years ago, it will be seen

that the only objection to the French practice was that prisoners were brow beaten by judges and counsel in France. But this was when trials in neither country were conducted with the dignity which now; exists, and when it was "English you know" to differ from the French. But our practice has shown the fal1acy of this objection, when a prisoner testified at his own request. Who has ever known a prosecuting officer to overstep the mark except to his own discomfiture? Times have changed and we all change with them.

All hail to the day when we shal1 *compel* the prisoner to be questioned under oath, when those absurdities may be swept away, and the juror, unhampered by artificial rules, may look for the truth! And then, far more than now, through the fogs and mirages of all the facts,

Fou1 deeds will rise,
Though all the earth o'erwhelm them, to
men's eyes,

Plymouth, Feb. 5.

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CHARGE TO THE JURY.
[Official Report.]

Mr. Foreman and Gentlemen of the Jury:--- You have listened with attention to the evidence in this case, and to the arguments of the defendant's counsel and of the district attorney. It now remains for me, acting in behalf of the court, to give you such aid towards a proper performance of your duty as I may be able to give within the limits for judicial action prescribed by law: and to prevent any erroneous impression, it may be well for me to bring to your attention, at the outset, that it is provided by a statute of this State that the Court shal1 not charge juries with respect to matters of fact, but may state the testimony and the law.

Without attempting to define the exact scope of this statute, it is not to be doubted, in view of expositions made of it by our court of last resort, that it was intended to prevent the judges presiding at the trial from expressing any opinion as to the credibility of witnesses or the strength of evidence, while it does not preclude them from defining the degree of weight which the law attaches to a whole class of testimony, leaving it to the jury to apply the general rule to the circumstances of the case.

I may perhaps illustrate this distinction in the course of my remarks; but, speaking comprehensively, I may now say to you that it will be your duty, in considering and deciding the matters of fact necessary to rendering your verdict, not to allow your judgment to be affected by what you may suppose or believe to be the opinion of the Court upon such matters of fact.

The law places upon the Court the duty and responsibility of

furnishing you with a correct statement of such rules and principles of law, applicable to the case, as you need to know; and places upon you, and you only, the distinct duty and responsibility of deciding all questions of fact involved in the issue between the Commonwealth and the defendant; and your decision can properly rest
only on the law and the evidence given you, together with those matters of common knowledge and experience relating to the ordinary affairs of life, and the common qualities of human nature and motives of action, which are never proved in court, but which, as jurors, you are expected to bring with you to this investigation.

I will here add that nothing in the prior official proceedings in this case, neither the inquest nor the hearing or trial in the District Court at Fall River, nor the action of the Grand Jury in finding the indictment can properly influence your judgment in this case. In connection with those proceedings, by the usual legal formalities, the case is brought before you for inquiry, and it is independently of
any official action that has gone before. It is still more plain that neither the defendant's confinement in prison nor her coming here in the custody of an officer, nor the legal, restraint under which she manifestly is, raise against her any presumption of guilt. They are a part of that necessary discomfort which under our laws, as they now are, one is called to experience who is regularly charged with a
capital crime. The defendant is being tried before you on a written accusation, termed an indictment, which contains two charges or counts; one count by the use of the usual legal language in substance charges her with the murder of Andrew J. Borden, and the other count charges her with the murder of Abby D. Borden in Fall
River in this county on August 4th, 1892. Chapter 202 of the Public Statutes contains these sections: "Murder committed with deliberately premeditated malice aforethought, or in the commission of or attempt to commit a crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty is murder in the first degree. Murder not appearing to be in the first degree, is murder in the second degree.

The degree of murder shall be found by the jury" --- in connection with rendering their verdict, if they find against the defendant. The government claims that the killing of Mr. and Mrs. Borden, by whomsoever done, was done with premeditated, deliberate malice aforethought within the meaning of the statute and it was murder in the first degree. The statute nowhere defines murder itself, and for
such definition we must resort to the common law, and according to that law "murder is the unlawful killing of a human being with malice aforethought." A short explanation may be needed of these elements of murder in the first degree. The term malice as here used means more than personal hatred or ill-will. It means any unlawful motive, or it is sometimes said to denote a state of mind manifested by the wrongful act done intentionally without just cause or

excuse. The words malice aforethought by themselves alone have been settled by our Supreme Court to imply purpose and design in contradistinction to accident or mischance. The words "deliberately premeditated" mean that the wrongful intention to kill must have been formed before the act of killing. The killing must be the result of a plan or purpose to kill unlawfully, formed without reflection and deliberation by the guilty party. The law does not require that this intention, plan or purpose to kill shall have existed for any considerable time before it is carried out. The time may be very short. It is enough if there was a clear intent to kill formed before the act of killing; and so the Government claims that you ought to be satisfied that the killing of Mr. and Mrs. Borden was wrongful and malicious, that is, without just cause or excuse, and that it was deliberately premeditated,---that is, the design to do it was first formed and after that was carried out.

Although most of the evidence may relate to both counts in the indictment, the counts are distinct and will require a separate finding by you.

The second main proposition in the case is that the killing of Mr. and Mrs. Borden was done by the defendant. In considering the evidence with regard to this issue, you will need to have certain legal principles in mind and to use them as guides. One such principle is the presumption of law that the defendant is innocent. This presumption begins with her at the outset of the trial, and continues with her through all its stages until you are compelled by the evidence to divest her of it. As one learned writer has expressed it, "This legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party is entitled." This presumption of innocence operating in behalf of the defendant also operates in behalf of all of us, and as was declared in an important capital trial, it is a presumption founded on that universal beneficence of the law which says that every man does right till the contrary appear.

The law does not undertake to fix or measure the force of this presumption in this case by any formal or arbitrary rule, but leaves it to your just and intelligent judgment. It may vary in different cases, its force being strengthened amongst other things by the character and previous way of life of the defendant. I understand the government to concede that defendant's character has been good; that it has not been merely a negative and neutral one that nobody had heard anything against, but one of positive, of active benevolence in religious and charitable work. The question is whether the defendant, being such as she was, did the acts charged upon her. You are not inquiring into the action of some imaginary being, but into the action of a real person, the defendant, with her character, with her habits, with her education, with her ways of life, as they have been disclosed in the case. Judging of this subject as reasonable

men you have the right to take into consideration her character such as is admitted or apparent. In some cases it may not be esteemed of much importance. In other cases it may raise a reasonable doubt of a defendant's guilt even in the face of strongly criminating circumstances. What shall be its effect here rests in your reasonable discretion.

It is competent for the government to show that the defendant had motives to commit the crime with which she is charged, and evidence has been introduced from which you are asked to find that she had unpleasant relations with her stepmother, the deceased, and also that her father, Andrew Jackson Borden, left an estate of the value of from $250,000 to $300,000, and that so far as is known to the defendant, he died without having made a will. If his wife died before him, it is not disputed that he left the defendant and her sister as his only heirs. It appears that Mr. Borden was 69 years old, and Mrs. Borden more than 60 years of age at the time of their deaths. Taking the facts now as you find them to be established by the evidence, and taking the defendant as you find her to be, and judging according to general experience and observation, was the defendant under a real and actually operating motive to kill her father and his wife? An able writer on the criminal law says:

"In the affairs of life it is seldom a man does anything prompted by one motive alone to accomplish one end." Unless the child be destitute of natural affection, will the desire to come into possession of the inheritance be likely to constitute an active, efficient inducement for the child to take the parent's life?"

If you find as a fact that the defendant was under an actually operating motive, pecuniary or any other, to destroy the life of her father and stepmother, then it becomes a matter proper to be considered. For, as one has said: "It may tend to repel the presumption which exists, in addition to the general presumption of innocence, that a person will not commit a crime without reason, inducement or temptation."

It is not necessary for the government to prove motive. It has been said that there can be no adequate motive for murder, but it is a part of the folly and sin of man that he will sometimes act contrary to the highest and strongest motive; by his perversity he will make a weak motive strong and then act upon it.

Imputing a motive to the defendant does not prove that she had it. I understand the counsel for the government to claim that defendant had towards her stepmother a strong feeling of ill will, nearly, if not quite, amounting to hatred. And Mrs. Gifford's testimony as to a conversation with the defendant in the early spring of 1892 is relied upon largely as a basis for that claim, supplemented by whatever evidence there is as to defendant's conduct towards her stepmother.

Now, gentlemen, in judging wisely of a case you need to keep all parts of it in their natural and proper proportion, and not to put

on any particular piece of evidence a greater weight than it will reasonably bear, and not to magnify or intensify or depreciate and belittle any piece of evidence to meet an emergency. I shall say something before I have done on the caution to be used in considering testimony as to conversations. But take Mrs. Gifford's just as she gave it, and consider whether or not it will *fairly* amount to the significance attached to it, remembering that it is the language of a young woman and not of a philosopher or a jurist. What, according to common observation, is the habit of young women in the use of language? Is it not rather that of intense expression, whether or not they *do not* often use words which, strictly taken, would go far beyond their real meaning. Would it be a just mode of reasoning to make use of the alleged subsequent murder to put enmity into the words and then use the words, thus charged with hostile meaning, as evidence that defendant committed the murder?

Again, every portion of the testimony should be estimated in the light of the rest. What you wish, of course, is a true conception,---a true conception of the state of the mind of the defendant towards her stepmother, not years ago, but later and nearer the time of the homicide: and to get such a true conception you must not separate Mrs. Gifford's testimony from all the rest, but consider also the evidence as to how they lived in the family; whether, as Mrs. Raymond, I believe, said, they sewed together on each other's dresses; whether they went to church together, sat together, returned together; in a word, the general tenor of their life. You will particularly recall the testimony of Bridget Sullivan and of defendant's sister, Emma, bearing on the same subject. Weigh carefully all the testimony on the subject in connection with the suggestions of counsel, and then judge whether or not there is *clearly* proved such a permanent state of mind on the part of defendant towards her stepmother as to justify you in drawing against her upon that ground inferences unfavorable to her innocence.

Recall the evidence; reflect upon it; compare one part of it with another, and see whether you, as intelligent and reasonable men, desiring to approach the consideration of this case from a just and true standpoint, would be *warranted upon* the evidence in taking into your minds the conception and allowing that conception to operate upon all your construction and estimation of the other evidence, ---the conception that at and about the time of these murders this defendant had towards her stepmother a feeling that could be properly called hatred. If that is not a just conception warranted by the evidence, then it should not enter and find lodgment in your minds as a controlling idea under the operation of which the evidence in this case is to be judged. Such a conception, if erroneous, may be more serious upon the operations of your mind and more liable to affect improperly your final conclusion than a mistake on any single portion of the evidence.

Because, if it is a wrong conception, unwarranted by the evidence, unjust to the defendant, and you start out in the case with that, it colors and affects all the action of your minds till your verdict is rendered.

Now, gentlemen, the material charge in the first count of the indictment is that, at Fall River, in this County, the defendant killed Mrs. Borden, by striking, cutting, beating, and bruising her on the head with some sharp cutting instrument. In the second count the same charges are made in regard to Mr. Borden. And the Government claims that these acts were done with deliberately premeditated
malice aforethought, and so were acts of murder in the first degree.

The law requires that before the defendant can be found guilty upon either count in the indictment every material allegation in it shall be proved beyond a reasonable doubt. Now what do the words "beyond reasonable doubt" mean? Some
courts do not favor an attempt to define them, thinking that the jury can judge as well without any suggestions. But I am unwilling to omit any further explanation, and I can in no way give you so accurate a description of their meaning, as by reading to you an extract from an opinion of the Court by whose views it is our duty to be governed. The Court says:

"Proof beyond reasonable doubt, is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis or theory except that which it tends to support. It is proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases, beyond reasonable doubt, and, to a moral certainty, are synonymous and equivalent.
They mean the same thing. Each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and conscience of the jury as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. In other words, they must have as clear and strong a conviction in their own minds of the truth of that conclusion to be acted on by them as in matters of the highest importance to themselves."

Now you observe, gentlemen, that the Government submits this case to you upon circumstantial evidence. No witness testifies to seeing the defendant in the act of doing the crime charged, but the Government seeks to establish by proof a body of facts and circumstances from which you are asked to infer or conclude that the
defendant killed Mr. and Mrs. Borden.

This is a legal and not unusual way of proving a criminal case, and it is clearly competent for a jury to find a person guilty of murder upon circumstantial evidence alone. Indeed, judges and juries have been somewhat divided in their views as to the comparative strength and value of circumstantial and direct evidence. In direct evidence

witnesses testify that they have actual and immediate knowledge of the matter to be proved, so that the main thing to be determined is whether the witnesses are worthy of belief. The chief difficulty with this kind of evidence is that the witnesses may be false or mistaken, while the nature of the case may be such that there are no means of discovering the falsehood or mistake.

In circumstantial evidence the facts relied upon are usually various and testified to by a large number of witnesses, as you have seen in this case. When the evidence comes from several witnesses and different sources, it is thought that there is more difficulty in arranging it so as to escape detection if it is false or founded on mistake. The principle that underlies circumstantial evidence we are constantly
acting on in our business, namely, the inferring of one fact from other facts proved.

Sometimes the inference is direct, and almost certain. For instance, the noise of a pistol is heard from a certain room in a hotel. The door is unlocked or otherwise opened. A man is found, just dead, with a bullet hole in his temple. Near him is a revolver with one barrel discharged. In such a case, if no contradictory or controlling facts appeared, we should infer, with a very strong assurance, that the death was caused by the pistol. In other cases the facts from which the conclusion is sought to be drawn are numerous and complicated, and the conclusion not so closely connected with the facts or so easy to draw.

This is illustrated by the case on trial here. You have got to go through a long and careful investigation to ascertain what facts are proved. This is the same process essentially that you go through in dealing with direct evidence. Then after you have determined what specific facts are proved, you have remaining the important duty of deciding whether or not you are justified in drawing and will draw from these facts the conclusion of guilt, Here therefore is a two-fold liability to error, first in deciding upon the evidence what facts are proved, and second in deciding what inference or conclusion shall be drawn from the facts. This is often the critical or turning point in a case resting on circumstantial evidence. The law warrants you in acting firmly and with confidence on such evidence, but does require you to exercise a deliberate and sober judgment, and use great caution not to form a hasty or erroneous conclusion. You are allowed to deal with this matter with your minds *untramelled* by any *artificial or arbitrary rule or law*. As a great judge has said, "The common law appeals to the plain dictates of common experience and sound judgment." The inference to be drawn from all the facts must be a reasonable and natural one, and to a moral certainty a certain one. It is not sufficient that it is probable only. It must be reasonably and morally certain.

In dealing with circumstantial evidence in such a case as this some special considerations need to be borne in mind. One of them

is this. Inasmuch as the conclusion of guilt, if reached at all, must be inferred or reached from other facts that are proved, every fact which in your judgment is so important and essential that without it the conclusion of guilt could not be reached must itself be proved beyond reasonable doubt, must be proved by the same weight and force of evidence as if it were the main fact in issue. But in seeking to establish a case by circumstantial evidence it may often happen that many facts are given in evidence, not because they are thought to be necessary to the conclusion sought to be proved, but to show that they are not inconsistent with that conclusion, but favorable to it and have some tendency to rebut a contrary presumption.

If any facts of this second class should fail to be proved to your satisfaction, that would not prevent you from drawing the conclusion of guilt from other facts, if they were sufficient to warrant it. In other words, failure to prove a fact essential to the conclusion of guilt, and without which that conclusion would not be reached, is fatal to the government's case, but failure to prove a helpful but not an essential fact may not be fatal.

Now let me illustrate. Take an essential fact. All would admit that the necessity of establishing the presence of the defendant in the house, when, for instance, her father was killed, is a necessary fact. The government could not expect that you would find her guilty of the murder of her father by her own hand unless you are satisfied that she was where he was when he was murdered. And if the evidence left you in reasonable doubt as to that fact, so vital, so absolutely essential, the Government must fail of its case, whatever may be the force and significance of other facts, that is, so far as it is claimed that she did the murder with her own hands.

Now, take the instance of a helpful fact. The question of the relation of this handleless hatchet to the murder. It may have an important bearing upon the case, upon your judgment of the relations of the defendant to these crimes, whether the crime was done by that particular hatchet or not, but it cannot be said, and is not claimed by the government that it bears the same essential and necessary relation to the case that the matter of her presence in the house does. It is not claimed by the government but what that killing might have been done with some other instrument. Take another illustration. I understand the government to claim substantially that the alleged fact that the defendant made a false statement in regard to her step-mother's having received a note or letter that morning bears an essential relation to the case, bears to it the relation of an essential fact, not merely the relation of a useful fact.

And so the counsel in his opening referring to that matter, charged deliberately upon the defendant that she had told a falsehood in regard to that note. In other words, that she had made statements about it which she knew at the time of making them were untrue, and the learned District Attorney, in his closing argument, adopts and

reaffirms that charge against the defendant.

Now what are the grounds on which the Government claims that that charge is false, knowingly false? There are three, as I understand them, --- one that the man who wrote it has not been found, second that the party who brought it has not been found and third that no letter has been found, and substantially, if I understand the position correctly, upon those three grounds you are asked to find that an essential fact --- a deliberate falsehood on the part of the defendant has been established.

Now what answer or reply is made to this charge? First, that the defendant had time to think of it; she was not put in a position upon the evidence where she was compelled to make that statement without any opportunity for reflection. If, as the Government claims, she had killed her step-mother some little time before, she had a period in which she could turn over the matter in her mind. She must naturally anticipate, if she knew the facts, that the question at no remote period would be asked where Mrs. Borden was, or if she knew where she was. She might reasonably and naturally expect that that question would arise. Again, it will be urged in her behalf, what motive had she to invent a story like this? what motive?
Would it *not have answered* every purpose to have her say, and would it *not have been more natural* for her to say simply, that her step-mother had gone out on an errand or to make a call? What motive had she to take upon herself the responsibility of giving utterance to this distinct and independent fact of a letter or note received with which she might be confronted and which she might afterwards find it difficult to explain, if she knew that no such thing was true? Was it *a natural thing* to say, situated as they were, living as they did, taking the general tenor of their ordinary life, was it a natural thing *for her to invent*? But it is said no letter was found. Suppose you took at the case for a moment from her stand-point, contemplate the possibility of there being another assassin than herself, might it not
be a part of the plan or scheme of such a person by such a document or paper to withdraw Mrs. Borden from the house? If he afterwards came in there, came upon her, killed her, might he not have found the letter or note with her, if there was one already in the room? Might he not have a reasonable and natural wish to remove that as one possible link in tracing himself? Taking the suggestions on the one side and the other, judging the matter fairly, not assuming beforehand that the defendant is guilty, does the evidence satisfy you as reasonable men beyond reasonable doubt that these statements of the defendant in regard to that note must necessarily be false? Sometimes able judges and writers in dealing with circumstantial evidence have made use of illustrations. They have compared the indispensable facts to the several links in a chain. If one link of the chain breaks, the chain ceases to serve its purpose as a chain, no matter how strong the remaining links may be. So in the chain

of circumstantial evidence, if one essential fact fails to be proved, the connection is broken, a gap arises in the process of proof and it cannot be legally affirmed that the conclusion aimed at is established beyond reasonable doubt.

Sometimes the process of proof by circumstances is compared to a rope cable, and the several facts that may be material but not absolutely essential to the conclusion, are likened to the strands or cords in that cable. Some of the strands or cords may give way and yet the cable may not be broken, but may bear the strain put upon it. So in the process of proof by circumstantial evidence. Important but not absolutely essential facts may fail to be established, and the loss of them, while it may weaken, may not destroy the force of the remaining evidence. But I much doubt whether in ordinary life in reaching a solution and determination of problems that arise, the elements on which our decision depends assume either in the visible
outward world or in our minds the relation to each other of links in a chain or strands in a cable. Some of the facts may have a real connection with each other so that one may involve or imply the other; and they may thereby have additional weight and importance to us. Another fact may be independent of the rest, may have no connection with them in the real and outward world, the only connection being in our minds, and yet this separate fact may be decisive upon our conclusion. Let me illustrate: Suppose a gentleman already engaged in business is proposing to himself to start some kind of manufacturing business in this city. He inquires into the matter, the cost of his plant, the facilities for transportation, the cost of making the article intended, the probable demand for and the price of the goods in the market, and all such other things as a prudent man would consider, and reaches the conclusion with a clear and strong assurance on which he is ready to act, that he will go forward with the enterprise. He then mentions his plan to his family physician.
The physician at once says to him: This new enterprise may promise all that you think of it, but you must not undertake it. You are already carrying all the burden that your strength of body or mind will endure. If you take on another burden there is great danger that it will be disastrous to you. Having confidence in the skill and
fidelity of his physician and believing the opinion given to be correct, he at once decides to relinquish the enterprise. Now we see a large body of facts leading to a certain conclusion are controlled by one separate fact opposed to that conclusion. Yet the body of facts and the separate fact have no connection with each other, save in the person's mind. This body of facts had nothing to do with causing his state of health, and his state of health had nothing to do with the body of facts.

Hence it is a rule in the use of circumstantial evidence that as every real fact is connected with every other real fact, so every fact proved must be reasonably consistent with the main fact sought to be

proved --- namely in this case, the fact of the defendant's guilt. However numerous may be the facts in the Government's process of proof tending to show defendant's guilt, yet if there is a fact established---whether in that line of proof or outside of it---which cannot be reasonably reconciled with her guilt, then guilt cannot he said to
be established. Now gentlemen, you know that I am expressing no opinion as to what is proved. I am only trying to illustrate principles and rules of law and evidence. Referring to the present case let me use this illustration: Suppose you were clearly satisfied upon the testimony that if defendant committed the homicides she could
by no reasonable possibility have done so without receiving upon her person and clothing a considerable amount of blood stain; that when Bridget Sullivan came to her upon call and, not long after some of the other women, she had no blood stains upon her person or clothing; that she had had no sufficient opportunity either to remove the stain from her person or clothing, or to change her clothing. If these supposed facts should be found by you to be real facts, you could not say upon the evidence that the defendant's guilt was to a moral certainty proved. So you see that in estimating the force of different facts, or portions of the evidence, it is not enough to consider them as standing apart, for the force which they appear to have when looked at by themselves, may be controlled by some other single fact. In order to warrant a conviction on circumstantial evidence it is not necessary for the Government to show that by no possibility was it in the power of any other person than the defendant to commit the crimes; but the evidence must be such as to produce a conviction amounting to a reasonable and moral certainty that the defendant and no one else did commit them. The Government claims that you should be satisfied upon the evidence that defendant was so situated that she had an opportunity to perpetrate both the crimes charged upon her. Whether this claim is sustained is for your judgment. By itself alone the fact, if shown, that the defendant had the opportunity to commit the crimes would not justify a conviction; but this
fact, if established, becomes a matter for your consideration in connection with the other evidence. When was Mrs. Borden killed? At what time was Mr. Borden killed? Did the same person kill both of them? Was defendant in the house when Mrs. Borden was killed? Was she in the house when Mr. Borden was killed? In this connection you will carefully consider any statements and explanations of
defendant put in evidence by the Government and shown to have been made by defendant at the time or afterwards, as to where she was when either of them was killed, and all other evidence tending to sustain or disprove the truth and accuracy of these statements. Did other persons, known or unknown, have an equal or a practical and available opportunity to commit these crimes? Is there reason to believe that any such person had any motive to commit them? Is there anything in the way and manner of doing the acts of killing,

the weapon used, whatever it was, or the force applied, which is significant as to the sex and strength of the doer of the acts? For instance, the medical experts have testified as to the way in which they think the blows were inflicted on Mrs. Borden, and as to what they think was the position of the assailant. Are these views correct?
If so, are they favorable to the contention that a person of the defendant's sex and size was the assailant? Is it reasonable and *credible* that she could have killed Mrs. Borden at or about the time claimed by the Government, and then with the purpose in her mind to kill her father at a later hour, have gone about her household affairs with no change of manner to excite attention? As you have the right to reason from what you know of the laws and properties of matter, so you have a right to reason and judge from what you know of the laws and property of human nature and action; and if it is suggested that the killing of Mr. Borden was not a part of the original plan, that it was an incident arising afterwards, it will be for you to consider under all circumstances, and upon all the evidence whether that suggestion seems to you to be reasonable and well founded.

Several witnesses called by the Government have testified to statements said to have been made by defendant in reply to questions asked, I believe in each instance, as to where she was when her father was killed, and considerable importance is attached by the Government to the language which it is claimed was used by her as showing that she professed not only to have been in the barn, but up
stairs in the barn. And the Government further claims it is not worthy of belief that she was in the upper part of the barn, as she says, because of the extreme heat there and because one of the officers testifies that on examination they found no tracks in the dust on the stairs and flooring. Now what statements on the subject the
defendant did make and their significance and effect is wholly for you upon the evidence, and there is no rule of law to control your judgment in weighing that evidence. But here, gentlemen, I may repeat to you the language of a thoughtful writer on the law, not as binding upon you, but as containing suggestions useful to be borne in mind in dealing with this class of evidence. He says, "With respect to all verbal admissions it may be observed that they ought to be received with great caution. The evidence, consisting as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake, and the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having
misunderstood him. It frequently happens also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature."

Gentlemen, it will be for you to judge whether that extract which I read, which I say I give to you in the way of suggestion and not as a binding authority, expresses a reasonable principle, a principle that is wise and safe and prudent to be acted upon in such a case as this--whether there is not more danger of some misunderstanding, some inaccuracy, some error creeping into evidence when it relates to statements than there is when it relates to acts. Would you not hold
that it was a just and reasonable view to take that if a party is to be held responsible in a case like this largely upon statements, that those statements should be most carefully and thoroughly proved?

Now the Government has called as witnesses some gentlemen of scientific and medical knowledge and experience, who are termed experts, and there has been put into the case considerable testimony from them. Now, following a distinction which I have before pointed out, I think I may say to you that expert testimony constitutes a
class of evidence which the law requires you to subject to careful scrutiny. It is a matter of frequent observation to see experts of good standing expressing conflicting and irreconcilable views upon questions arising at a trial. They sometimes manifest a strong bias or partisan spirit in favor of the party employing them. They often
exhibit a disposition to put forward theories rather than to verify or establish or illustrate the facts. While they are supposed to testify on matters not the subject of common knowledge and experience, and in distinction from ordinary witnesses, are allowed to express their opinions where the ordinary witness could not, yet when the
jury pass judgment upon them and their testimony they have no peculiar privileges. The jury have the full right to consider them, their appearance, their candor or want of it, their apparent skill, the reasons they give in support of their view, the nature of any experiments which they have made, the consistency or otherwise of what they say with other proved facts or with the common knowledge and experience of the jury, and finally, acting under a due sense of their responsibilities, to give to the testimony of the experts such value and weight as it seems to deserve. It often happens that experts testify to what is in substance a matter of fact rather than of opinion. A surveyor called to prove the distance between two points may express
his opinions founded on his observation, or he may say, "I have actually applied my measuring chain and found the distance." So, for instance, Professor Wood may say, "There are in science tests of the presence of blood as fixed and certain as the surveyor's chain is of distance. I have applied those tests to supposed blood stains on
a hatchet, and I find no blood;" or "I have applied them to stains on a piece of board furnished, and I find it to be a blood stain." This testimony may be regarded as little a matter of opinion as the testimony of a surveyor. On the other hand, if Professor Wood shall be asked to testify as to the length of time between the deaths of Mr. and Mrs. Borden, from his examination of the contents of the

stomachs, his testimony must perhaps be to some extent a matter of opinion, depending possibly on the health and vigor of the two persons and constitutional differences; upon whether they were physically active after eating, or at rest; upon whether one or the other was mentally worried and anxious, or otherwise. Now his knowledge and skill may enable him to form an opinion upon the subject with
greater or less correctness; but the question to be dealt with is by its essential nature different from the other. If you should accept his testimony as correct and satisfactory on the first subject, it would not necessarily follow that you should on the second. So as to whether certain wounds in the skull were caused by a particular hatchet head or could have been caused by that hatchet head only, if you have the hatchet head and the skull, you may think you can apply them to each other and judge as well as the expert. I call your attention to the subject in this way to make clear to you, first, that you are not concluded on any subject by the testimony of the experts, and, second, that it is important to apply to their testimony an intelligent and discriminating judgment. So doing, you may find that each person who has appeared as an expert has so testified as to warrant your confidence in his skill and knowledge, in his fairness, and in the correctness of his opinions.

Now, gentlemen, I have been asked by the counsel for the Commonwealth to give you instructions upon another view of this case, a view, so far as I remember, not suggested in the opening, or in the evidence, or hardly in the closing argument for the Commonwealth. And yet the evidence is of such a nature that it seems to us
that, as a matter of law, the Government is entitled to have some instruction given you on this point; as a matter of fact, it would be entirely for you to consider whether the claim of the Government upon the matter to which I am going to refer is consistent with the claim which it has argued to you; whether the Government has not put this case to you, practically, upon the idea that the defendant did these acts with her own hands.

But it is a principle of law that a person may be indicted in just the form in which this defendant is indicted, that is, indicted as if she were charged with doing the act herself, and yet she may be convicted upon evidence which satisfies a jury beyond reasonable doubt that the act was done personally by another party, and that her relation to it was that of being present, aiding, abetting, sustaining, encouraging. If she stood in such a relation as that to the act, the act was done by some other person and she aided him, encouraged him, abetted him, was present somewhere, by virtue of an understanding with him, where she could render him assistance, and for the purpose of rendering assistance, then she would be a principal in the act just as much as the other party who might be acting.

But you notice the essential element. There must have been an understanding between her and her third party, if there was one,

an agreement together for the commission of these crimes. She must have given her assent to it. She must have encouraged it. She must have been in a position where she could render assistance to the perpetrator, with his knowledge, by virtue of an understanding with him, and for the purpose of giving assistance either in the way of watching against some person's coining or furnishing him facilities for escape or in some other manner. The central idea of this proposition is that she must have been present by virtue of an agreement with the actor where she could render assistance of some kind, and for the purpose of rendering assistance. And if there was another party in this crime, and if she is proved beyond reasonable doubt to have sustained the relation to him in committing that crime which I have expressed to you, then she might be held under this indictment, because under such circumstances in the eye of the law, they both being in the sense of the law present, the act of one is the act of both.

Gentlemen, something has been said to you by counsel as to defendant's not testifying. I must speak to you on this subject. The constitution of our State in its Bill of Rights provides that "No subject shall be compelled to accuse or furnish evidence against himself." By the common law persons on trial for crime have no right to testify in their own defense. We have now a statute in these words, "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him." You will notice that guarded language of the statute. It recognizes and affirms the common law rule that the defendant in a criminal prosecution is an incompetent witness for himself, but it provides that on one condition only, namely, his own request, he shall be deemed competent. Till that request is made he remains incompetent. In this case the defendant has made no such request, and she stands before you, therefore, as a witness incompetent, and it is clearly your duty to consider this case and form your judgment upon it as if the defendant had no right whatever to testify.

The Supreme Court, speaking of a defendant's rights and protection under the constitution and statutes, uses these words, "Nor can any inference be drawn against him from his failure to testify." Therefore I say to you, and I mean all that my words express, any argument, any implication, any suggestion, any consideration in your minds, unfavorable to defendant based on her failure to testify is unwarranted in law.

Nor is defendant called upon to offer any explanation of her neglect to testify. If she were required to explain, others might think the explanation insufficient. Then she would lose the protection of the statute. It is a matter which the law submits to her own

discretion, and to that alone. You can see, gentlemen, that there may be cases where this right to testify would be valuable to a defendant. It may be able to afford the jury some further information or give some explanation that would help the defense. In another case where there was no doubt that an offence had been committed by
some one, he might have no knowledge as to how or by whom it was done, and could only affirm under oath his innocence, which is already presumed. The defendant may say, "I have already told to the officers all that I know about this case, and my statements have been put in evidence; whatever is mysterious to others is also a mystery to me. I have no knowledge more than others have. I have never professed to be able to explain how or by whom these homicides were committed."

There is another reason why defendant might not wish to testify. Now she is sacredly guarded by the law from all unfavorable inferences drawn from her silence. If she testifies, she becomes a witness with less than the privileges of an ordinary witness. She is subject to cross-examination. She may be asked questions that are legally competent which she is not able to answer, or she may answer questions truly and yet it may be argued against her that her answers were untrue, and her neglect to answer perverse. Being a party, she is exposed to peculiar danger of having her conduct on the stand and her testimony severely scrutinized and perhaps misjudged, of having her evidence claimed to be of little weight, if favorable to herself, and of great weight so far as any part of it shall admit of an adverse construction. She is left free, therefore, to avoid such risks.

Gentlemen, we have given our attention to particular aspects of this case and of the evidence. Let us look at it broadly.

The government charges the defendant with the murder of Mr. and Mrs. Borden. The defendant denies the charges. The law puts on the government the burden of proving beyond reasonable doubt every fact necessary to establish guilt. The defendant is bound to prove nothing. The law presumes she is innocent. The case is said to be mysterious. If so, the defendant cannot be required to clear up the mystery. There is no way, under the law, by which the burden of proof as to any essential matter can be transferred to her. The government offers evidence. She may rest on the insufficiency of that evidence to prove her guilt, or she may also offer evidence partially to meet or rebut it, or raise a reasonable doubt as to any
part of the government's case.

You are not to deal with the evidence in a captious spirit, but to allow it to produce on your minds its natural and proper effect. You are to think of it and reason upon it in the same way you think and reason on other matters, only remembering the strict proof to which the government is held by the law.

In such a case as this, or in any case, you cannot be absolutely certain of the correctness of your conclusions. The law does not

require you to be so. If, proceeding with due caution and observant of the principles which have been stated, you are convinced beyond reasonable doubt of the defendant's guilt, it will be your plain duty to declare that conviction by your verdict. If the evidence falls short of producing such conviction in your mind, although it may raise a suspicion of guilt, or even a strong probability of guilt,
it would be your plain duty to return a verdict of not guilty. If not legally proved to be guilty, the defendant is entitled to a verdict of not guilty. The law contemplates no middle course.

You will be inquired of by the clerk as to each count of the indictment separately and in the same manner. If you find the defendant guilty of murder in the first degree, the Foreman, in reply to the inquiry of the clerk, will say, "Guilty of murder in the first degree," and so as to murder in the second degree, if you find that to be the degree of murder. As to the second count, if the finding is the same, the answer should be the same. If, on the other hand, your finding is "Not guilty," the Foreman should so reply to each inquiry.

Gentlemen, I want to refer at this point briefly to one or two matters, not in a connected way, where it seems proper to me that a brief suggestion should be made. Something was said in the arguments in regard to defendant's attitude towards the officers, and criticism made of the officers by defendant's counsel, not by her. Of course there are certain senses in which a party is represented in Court by his counsel or her counsel and bound by their action. But in a matter relating to the personal guilt of the defendant, where evidence is sought to establish that guilt, I do not understand that the law turns the attention of the Jury to any action of the Counsel. The action of the Counsel may affect her in some ways, may affect her legal rights, but the question is: Is she guilty? Has she done anything which, as a matter of evidence, should be reckoned against her?

Now take this question of her relations to the officers. Turn over the evidence, recall so far as you can, every portion of it, and do you recall any portion
--- it will be for you to determine whether you do or not---do you recall any portion of the evidence where it appears that at any time, any place, under any circumstances she found any fault with the officers for asking her questions or for making searches? Something was said in the argument---properly said because the
Counsel charged with the duty of presenting the evidence to the Jury in such a light as they honestly think the evidence ought to be considered and weighed,---in regard to statements alleged to have been made by the defendant. The duty of Counsel for the Government is different from that of the Jury and different from that of the
Court. Primarily it is,---while they do not seek to do anything wrong or to mislead the Jury or to introduce any untrue evidence --- to present to the attention of the Jury those things that make for

the side which they are sustaining or seeking to sustain. I said something was said in regard to the statements which there was evidence tending to show the defendant had made in regard to presentiments of some disaster to come upon the household; and as I understand the argument, you were asked to look upon those statements, which were testified to by one of the witnesses, as evidence tending to show that the defendant might have been harboring in her mind purposes of evil with reference to the household,--- statements made only, I believe, the day before this calamity fell on the household, only the day before the deed was done by the defendant, if she did it.

Now, in considering that evidence, you should not necessarily go off in your view of it upon the suggestion of counsel, but, so far as you deem it important, hold it before your minds, look at it in all its lights and bearings, and see whether it seems to you reasonable and probable that a person meditating the perpetration of a great crime, would, the day before, predict to a friend, either in form or in substance, the happening of that disaster. Should any different principle be applied to such a statement made by the defendant with reference to her own family than should be applied to the statement which one man might make to another man and his family?

Suppose some person in New Bedford contemplated the perpetration of a great crime upon the person or family of another citizen in New Bedford, contemplated doing it soon. Would he naturally, probably, predict, a day or two beforehand, that anything of the nature of that crime would occur? Is the reasonable construction to be put upon that conversation that of evil premeditation, dwelt upon,
intended, or only of evil fears and apprehensions?

Take this matter of the dress, of which so much has been said, that she had on that morning. Take all the evidence in this case, Bridget Sullivan's, the testimony of these ladies, Dr. Bowen's. Lay aside for the moment the question of the identification of this dress that is presented. Taking the evidence of these several witnesses, considering that evidence carefully, comparing part with part, *can you*, gentlemen, *extract from that testimony* such a description of a dress as would *enable you from the testimony to identify the dress*? Is there such an agreement among these witnesses, to whom no wrong intention is imputed by anybody---is there such an agreement in their accounts and in their memory and recollection, and in the description which they are able to give from the observation that they had in that time of confusion and excitement, that you could put their statements together, and from those statements say that any given dress was accurately described?

Then take, again, the matter of Mrs. Reagan's testimony. It is suggested that there has been no denial of that testimony, or, rather, that the persons who busied themselves about getting the certificate from Mrs. Reagan had no denial of it.

Mr. Knowlton --- Not by me, sir. I admit it.

Dewey, J. --- Admit what?
Mr. Knowlton --- That she did deny it.
Dewey, J. --- Mr. Reagan?
Mr. Knowlton --- Yes, sir.
Dewey, J. --- Oh, no doubt about that. It is not claimed that

Mrs. Reagan does not deny it. But I say it is suggested that the parties who represented the defendant in the matter, and who were seeking to get a certificate from Mrs. Reagan, were proceeding without having received any authority to get the certificate, and without having had any assurance from anybody that the statement was false and one that ought to be denied.

You have heard the statement of Miss Emma about it here; and it would be for you to judge, as reasonable men, *whether such men as Mr. Holmes and the clergymen and the other parties* who were interesting themselves in that matter, started off attempting to get a certificate from Mrs. Reagan contradicting that report, without first having taken any steps to satisfy themselves that it was a report that ought to be contradicted.

Gentlemen, I know not what views you may take of the case, but it is of the gravest importance that it should be decided. If decided at all it must be decided by a jury. I know of no reason to expect that any other jury could be supplied with more evidence or be better assisted by the efforts of counsel. The case on both sides has been conducted by counsel with great fairness, industry, and ability. You are to confer together; and this implies that each of you, in recollecting and weighing the evidence, may be aided by the memory and judgment of his associates. The law requires that the jury shall be unanimous in their verdict, and it is their duty to agree if they can conscientiously do so. And now, gentlemen, the case is committed into your hands. The tragedy which has given rise to this investigation deeply excited public attention and feeling. The press has administered to this excitement by publishing without moderation rumors and reports of all kinds. This makes it difficult to secure a trial free from prejudice. You have doubtless read, previous to the trial, more or less of the accounts and discussions in the newspapers. Some of you, when you were selected as jurors, said that you had formed impressions about the case, but thought that they would not prevent you from giving a candid judgment upon a full hearing of the testimony. Doubtless you were sincere in that declaration; but in this matter you will need great care and watchfulness, for we are often influenced in forming our judgments by what we have heard or read at some previous time, more than we are conscious of. You must guard so far as possible against all impressions derived from having read in the newspapers accounts relating to the question you have to decide. You cannot consistently with your duty go into any discussion of those accounts or in any way use or refer to them. Your attention should be given to the

evidence only, for the discovery of the facts, and any other course would be contrary to your duty.

And, entering on your deliberations with no pride of opinion, with impartial and thoughtful minds, seeking only for the truth, you will lift the case above the range of passion and prejudice and excited feeling, into the clear atmosphere of reason and law. If you shall be able to do this, we can hope that, in some high sense, this trial may be adopted into the order of Providence, and may express in its results somewhat of that justice with which God governs the world.

MEMORANDUM

The trial of Elizabeth A. Borden charged with the murder of her father and stepmother in their dwelling house in Fall River in the month of August, A.D., 1892, was held at New Bedford, June fifth to June twentieth, 1893, and resulted in verdict of acquittal.

The Judges of the Superior Court who sat at the trial were, ----
Hon. Albert Mason, Chief Justice, appointed judge by Gov. John D. Long in 1882.
Hon. Caleb Blodgett, appointed in 1882 by Gov. Long.
Hon. Justin Dewey, appointed in 1886 by Gov. George D. Robinson.

The Attorneys for the Commonwealth were Hosea M. Knowlton, District Attorney of the Southern District, as senior in the absence of Hon. Albert E. Pillsbury, Attorney General, (in consequence of his illness) and William H. Moody, District Attorney of the Eastern District, as junior counsel. For the prisoner Ex-Gov. Geo. D. Robinson, and Andrew J. Jennings, Esq., of Fall River.