The Borden Case

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American Law Review

November-December 1893

Transcribed by Harry Widdows for
PearTree Press, 2002

THE BORDEN CASE.

On the 4th of August, 1892, was committed in the city of Fall River, Massachusetts, the double murder for which Lizzie Andrew Borden was tried in the month of June, 1893, at New Bedford. Not since the trial of Professor Webster for the murder of Dr. Parkman has such wide-spread popular interest been aroused; but on this occasion the notoriety far exceeded that of the Webster case, and the report of the proceedings was daily telegraphed to all parts of the country. If we look for the circumstances which made the case such a special theme of discussion, they seem to be three: first, the particularly brutal mode in which the killing was done; next, the sex of the accused person and her standing in the community; but principally the fact that the evidence was purely circumstantial and was such as to afford opportunity for singularly different conclusions.

The purpose of this sketch is to outline the admitted facts of the case, and then to rehearse briefly the leading arguments of the prosecution and the defense, finally noticing the chief rulings upon evidence and the general conduct of the trial. Much that should be told must be sacrificed to the requirements of space, and in summarizing the evidence the writer will be obliged in many cases to use his own discretion in interpreting and stating the general effect of testimony.

In August, 1892, Andrew Jackson Borden was a retired merchant of Fall River, and lived in a house on the east side of Second street in that city, an important thoroughfare running north and south and faced partly by dwelling houses, partly by business structures. South of the Borden house and closely adjoining was Dr. Kelly's; north of it Mrs. Churchill's; in the rear, but diagonally, Dr. Chagnon's. Mr. Borden was seventy years of age. He was reputed to be worth $300,000 or more, but his family lived in the thrifty and unpretentious style characteristic of New England. The members of the household were Mr.

Borden and four others: 1. Mrs. Borden, a short but heavy person, sixty-four years of age, formerly Abby Durfee Gray, now for twenty-five years the second wife of Mr. Borden; 2. Emma Borden, forty-one years of age, a daughter of Mr. Borden's first marriage, and unmarried; 3. Lizzie Andrew Borden, thirty-two years of age, the other child of the first marriage, also unmarried; 4. Bridget Sullivan, a servant who had been with the family nearly three years. Mr. Borden's first wife had died some twenty-eight years before; by the second marriage there was no issue living.

In the latter part of July, Emma Borden went to visit friends in Fairhaven, an adjacent town. On Wednesday, August 3, however, the number in the household was restored by a brief visit from John V. Morse, a brother of the first wife. He came just after noon, left for a few hours, returned in the evening, sleeping in the house, and went out the next morning. On Tuesday night, August 2, Mr. and Mrs. Borden were taken suddenly ill with a violent vomiting illness; Lizzie Borden was also slightly affected; Bridget Sullivan

was not. On Wednesday morning Mrs. Borden consulted a physician as to this illness. On Thursday morning, August 4, the only persons known to be in the house were Mr. and Mrs. Borden, Miss Borden, Mr. Morse, and the servant Bridget Sullivan. Before describing the occurrences of the morning it is necessary to explain the arrangement of the house.

The appended plan shows the situation of the rooms on the ground and upper floors. As to the ground floor, it is enough to call attention to the fact that there were three doors only: the front door, the kitchen door, and the cellar door; that access from the back door to the front hall might be obtained through the kitchen only, and thence through the sitting-room, or through the dining-room and one or both other rooms, and that in the front hall were two small closets. On the upper floor a doorless partition divided into two small rooms the space over the dining-room. Mr. and Mrs. Borden occupied the room over the kitchen; Lizzie Borden the room over the sitting-room and the front half of the partitioned rooms and the room over the parlor was used as a guest-room and sewing-room. The door between

the rooms of Lizzie Borden and Mr. and Mrs. Borden was permanently locked on both sides (on one by a hook, on the other by a bolt); so that there was no access from the rear part of the upper floor to the front part. Furthermore, the door between the guest-room and Lizzie Borden's room was permanently locked on both sides, and in the latter room a desk stood against the door. In the upper hall over the front door was a clothes' closet. As to the condition of the doors below, on August 3 and 4, (1) the front door was locked on Wednesday night by Lizzie Borden, the last one to enter it; the fastening being a spring latch, a bolt, and an ordinary lock; (2) the cellar door (opening into the yard) had been closed on Tuesday and was found locked on Thursday at noon; (3) the kitchen door was locked by Bridget Sullivan on Wednesday night, when she came in (and was found locked by her), but on Thursday morning there was passing in and out and its condition was not beyond doubt, as we shall see; (4) the door from the bedroom of the Borden couple leading down-stairs was kept locked in their absence from the room. As to the disposition of the inmates of the house on Wednesday, Mr. Morse slept in the guest-chamber, Mr. and Mrs. Borden and Miss Borden in their respective rooms, Bridget Sullivan in the attic at the rear.

On Thursday morning shortly after 6, Bridget Sullivan came down the back stairs, got fuel from the cellar, built the fire, and took in the milk. The kitchen door was thus unlocked, the wooden door being left open, the wire screen door fastened, as usual. Just before 7, Mrs. Borden came down. Then Mr. Borden came down, went out and emptied his slop-pail, and unlocked the barn door. Mr. Morse then came down, and shortly after 7 the three eat breakfast, Mr. Morse left the house at a quarter before 8, Mr. Borden letting him out and locking the door behind him. Lizzie Borden shortly afterwards came down and began her breakfast in the kitchen. At this point Mr. Borden went upstairs to his room, and Bridget went out in the yard, having an attack of vomiting. After a few minutes' absence she returned and found Lizzie Borden absent, Mrs. Borden dusting the dining-room, and Mr. Borden apparently gone down town. Mrs. Borden then directed

Bridget to wash the windows on both sides, and left the kitchen, remarking that she had made the bed

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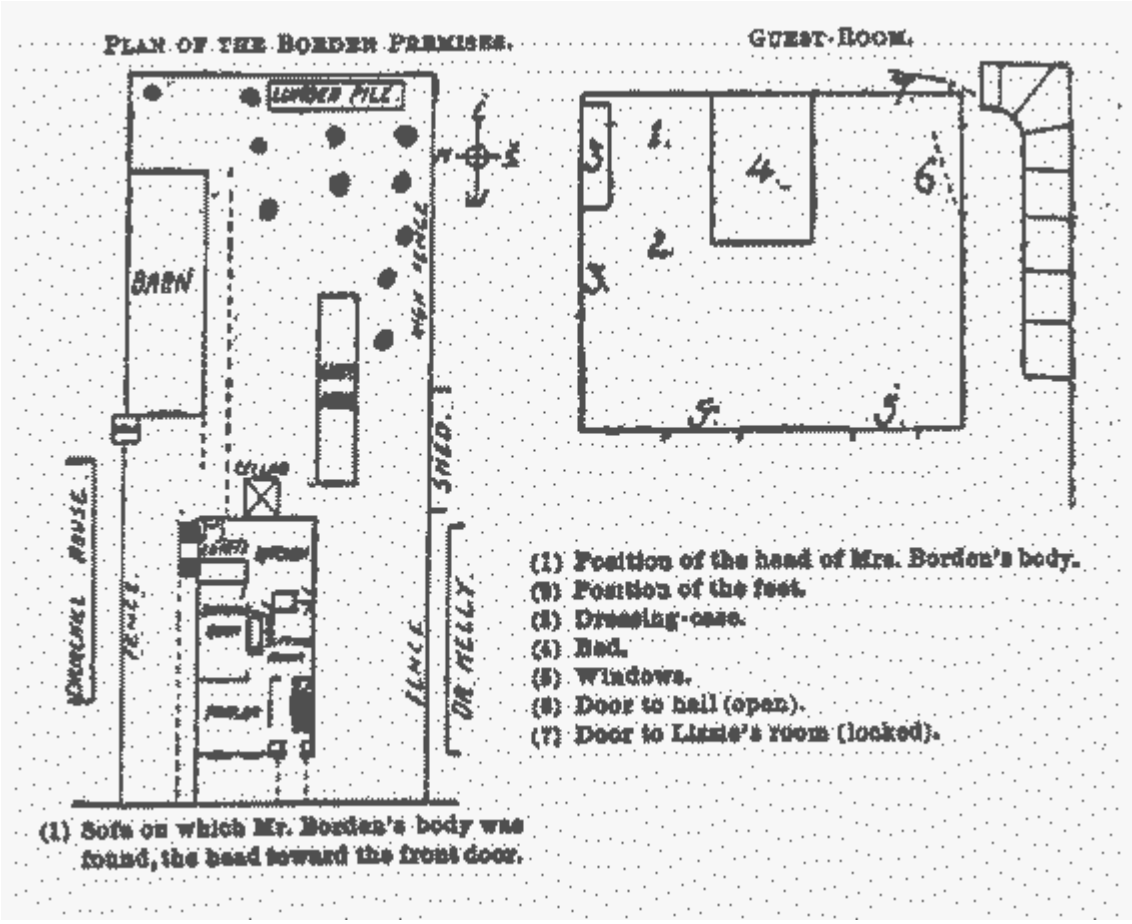
in the guest-room and was going up to put two pillow-cases on the pillows there. This was the last time that she was seen alive by any witness. Mr. Borden had left the house somewhere between 9 and 9:30, and Mrs. Borden's departure for the upper floor must have occurred shortly after or shortly before 9:30.

Bridget then set to work at the windows, after getting her implements from the cellar, and here the kitchen door seems to have been unlocked and left so. In closing the window of the



sitting-room and dining-room Bridget found nobody present, both Lizzie Borden and Mrs. Borden being elsewhere. As Bridget went out, Lizzie came to the back door, apparently to hook it; but Bridget seems to have dissuaded her. The washing began with the outside of the windows; Bridget proceeded from the two sitting-room windows (where the screen door, now unlocked, was out of sight) to the parlor front windows, the parlor side window, and the dining-room windows; and during this time neither Lizzie Borden nor Mrs. Borden appeared on the lower

floor. Then Bridget entered by the screen door, hooking it behind her, and proceeded to the washing of the inside of the windows, following the same order as before. While washing the first, some one was heard at the front door. Mr. Borden had come home, and failing to enter the screen door, had come round to the front and was trying the door with his key, but the triple fastening prevented his entrance, and Bridget came and opened it before he was obliged to ring the bell. At this moment a laugh or other exclamation was heard from the daughter on the floor above. She came down shortly to the dining-room where Mr. Borden was, asked if there was any mail, and then volunteered the information, "Mrs. Borden has gone out; she had a note from somebody," It was now 10:45, though by a bare possibility 7 or 8 minutes earlier, Mr. Borden took his key, went up the back stairs (the only way to his room), and came down again just as Bridget had finished the second sitting-room window and was passing to the dining-room, Mr. Borden then sat down in the sitting-room; Bridget began on the dining-room windows; and Lizzie Borden put an ironing-board on the dining-room table and began to iron handkerchiefs, This conversation ensued:---

"She said, 'Maggie, (1) are you going out this afternoon?' I said, I don't know; I might and I might not; I don't feel very well,' She says, 'If you go out, be sure and lock the door, for Mrs. Borden has gone on a sick call, and I might go out too,' Says I, 'Miss Lizzie, who is sick? 'I don't know, she had a note this morning, it must be in town,' "

Then Bridget, finishing the windows, washed out the cloths in the kitchen; and, while she was there, Lizzie Borden stopped her ironing, came into the kitchen and said:---

"There is a cheap sale of dress goods at Sargent's to-day, at 8 cents a yard,"

And Bridget said, "I am going to have one."

At this point Bridget went upstairs and lay down. In perhaps 3 or 4 minutes the City Hall clock struck, and Bridget's

(1) The Bordens always called her by this name.

watch showed it to be 11 o'clock. Lizzie Borden never finished her ironing. Miss Russell testified (without contradiction) that she afterwards carried the handkerchiefs upstairs, and that there were 4 or 5 finished with 2 or 3 only sprinkled and ready to iron. The next incident was a cry from below, coming 10 or 15 minutes later:---

"Miss Lizzie hollered: 'Maggie, come down.' I said, 'What is the matter?' She says, ' Come down quick, father's dead. Somebody's come in and killed him.' "

Bridget hurried down-stairs and found the daughter standing at the entrance, leaning against the open wooden door, with her back to the screen door. The daughter sent her for Dr. Bowen, and next, on returning, for her friend Miss Russell, Dr. Bowen being absent. While Miss Russell was being sought, Dr. Bowen and the neighbor, Mrs. Churchill, came, the latter first. Mrs. Churchill gave the alarm at a stable near by, and the telephone message reached police headquarters at 11:15. When Bridget came back and mutual suggestion began, as Bridget relates:---

"I says, 'Lizzie, if I knew where Mrs. Whitehead was I would go and see if Mrs. Borden was there and tell her that Mr. Borden was very sick.' She says: 'Maggie, I am almost positive I heard her coming in. Won't you go upstairs to see?' I said: 'I am not going upstairs alone."

Mrs. Churchill offered to go with her. They went upstairs, and as Mrs. Churchill passed up, the door of the guest-room being open, she saw the clothing of a woman on the floor, the line of sight running under the bed. She ran on into the room and, standing at the foot of the bed, saw the dead body of Mrs. Borden stretched on the floor. (1) It may here be mentioned that the medical testimony showed, from the temperature of the body, the color and consistency of the blood, and the condition of the stomach's contents, that Mrs. Borden's death had occurred between one and two hours earlier, probably one and one-half hours earlier, than Mr. Borden's, --- or not much later or earlier than 9:30.

(1) See plan.

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During this time the other neighbors were with Lizzie Borden, who had thrown herself on the lounge in the dining-room, not having been to see her father's or her step-mother's body at any time since the call for Bridget. At a neighbor's suggestion, she went upstairs to her room, and here without suggestion she afterwards (within half an hour of the killing) changed her dress and put on a pink wrapper.

Something must now be said in brief description of the manner in which the two victims had met their death. Mr. Borden's head bore ten wounds from a cutting instrument wielded with a swing; the body bore no other injury. The shortest cut was one-half inch long, the longest was four and one-half inches. Four penetrated the brain, the skull at the points of penetration being about one-sixteenth inch thick. The body was found lying on the right side on the sofa in the sitting room, the head nearest the front door, and the wounds indicated that the assailant stood at or near the head of the couch and struck down vertically from that direction. Spots of blood were upon the wall over the sofa (30 to 100), on a picture on the same wall (40 to 50), on the kitchen door near his feet, and on the parlor door. On the carpet in front of the sofa, and on a small table near by, there was no blood. On Mrs. Borden's head and neck (and not elsewhere) were twenty-two injuries, three ordinary head contusions from falling and nineteen wounds from blows by a cutting instrument, ---of these, one was on the back of the neck and eighteen on the head. The shortest was one-half inch, the longest three and one-half inches in length. Four were on the left half of the head, one being a flap wound made in the flesh by a badly-aimed cut from in front. Some thirteen of these made a hole in the

top of the skull, crushing into the brain, this part of Mrs. Borden's skull being about one-eighth inch in thickness and the thinnest part of her skull. There were blood spots on the north wall, on the dressing-case (over 75), and on the east wall.

The weapon or weapons employed were apparently hatchets or axes. Upon the premises that day were found two hatchets and two axes. Of these only one offered any opportunity for connection with the killings, for the others had handles so marked with ragged portions that they could not have been cleansed

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from the blood which they must have received. Of the fourth some mention will be made later. On Tuesday, Wednesday and Thursday, August 9, 10 and 11, the inquest was held by Judge Blaisdell, and on Thursday evening Lizzie Borden was arrested on charge of committing the murders. The preliminary trial began before Judge Blaisdell, August 25, continuing until September 1, when she was found probably guilty and ordered to be held for the grand jury. The indictment was duly found, and on Monday, June 5, 1893, the trial began in the Superior Court of Bristol County, at the New Bedford Court House. In accord with the law of the State, the Court for such a trial was composed of three judges of the Superior Court of the Commonwealth. Those who officiated on this occasion were Mason, C. J., Blodgett, J., and Dewey, J.

The case for the prosecution was conducted by Hosea M. Knowlton, District Attorney for the County, and Wm. H. Moody, District Attorney of Essex County. Mr. Knowlton is forty-six years of age, educated at Tufts College and the Harvard Law School. He has been a State representative and a State senator, and has held his present office since 1879, He is the senior partner in the firm of Knowlton & Perry of New Bedford. Mr. Moody is forty years of age, educated at Harvard College and Law School. He was for three years city solicitor of Haverhil1 and was made district attorney in 1891. The case for the defense was conducted by George D. Robinson, Melvin O. Adams, and Andrew J. Jennings. Mr. Robinson is fifty-nine years of age, a graduate of Harvard College; and, after serving as State representative and senator, he was sent four times to Congress. He was then governor of Massachusetts three times, from 1884 to 1886. He has an enviable reputation as one of the ablest orators and one of the most upright public men in Massachusetts. Mr. Adams is a graduate of Dartmouth College and the Boston Law School. He settled in Boston and was for several years an assistant district attorney in Suffolk County. He has the reputation of being one of the most experienced and acute criminal lawyers in Boston. Mr. Jennings, the legal adviser of the Borden family, and the youngest of the counsel, is a graduate of Brown University and the Boston Law School.

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He has been a State representative and senator, and his reputation is that of a skillful corporation lawyer and a powerful debater. The firm was formerly that of Morton & Jennings, but in 1891 Mr. Morton, who was reputed the leader of the Bristol County bar, was elevated to the Supreme Bench. Mr. Jennings' present associate is Mr. Phillips, who assisted in the preparation of the case.

We now come to consider the question, what points did the prosecution attempt to make against Lizzie Borden in charging the crime upon her? It endeavored to show, *first*, prior indications, (a) Motive, (b) Design; *second*, concomitant indications, (a) Opportunity, (b) Means and Capacity; *third*,
posterior indications, (a) Consciousness of Guilt. Let us take these in order very briefly.

1. (a) *Motive*. The family history was brought in to show that the accused was not on the best of terms with her step-mother. This was evidenced by the testimony of: (1) A dressmaker, who reported that in a conversation held some time previously, when her "mother" was mentioned, she answered: "Don't say 'mother' to me. She is a mean, good-for-nothing old thing. We do not have much to do with her; I stay in my room most of the time." "Why, you come down to your meals?" "Yes, sometimes; but we don't eat with them if we can help it." (2) The servant, who reported that, though she never saw any quarreling, most of the time they did not eat with the father and mother." (3) The uncle, who did not see Lizzie Borden during his visit from Wednesday noon till Thursday noon; (4) the sister, Emma, who explained the ill-feeling partly on the ground of a small transfer of property by the father to his wife a few years before, and reported that since that time the accused had ceased saying "mother" and addressed her as "Mrs. Borden," and that a gift of other property to the daughters had only partially allayed the ill-feeling; (5) the police officer, who on asking Lizzie Borden on Thursday noon, "When did you last see your mother?" was answered, "She is not my mother. My mother is dead." The general effect of the motive testimony purported to be that the daughters
were afraid of the property going to the second wife, to their

exclusion, and that this fomented an ill-feeling existing on more or less general grounds of incompatibility.

(b) *Design*. No evidence was offered of a specific design to kill with the weapons used. But it was attempted to show a general intention to get rid of the victims: (1) Testimony of a druggist and of by-standers as to an attempted purchase of prussic acid in the forenoon of Wednesday, the day before the killing :---

"This party came in there and inquired if I kept prussic acid. I was standing out there; I walked in ahead. She asked me if we kept prussic acid. I informed her that we did. She asked me if she could buy ten cents' worth of me. I informed her that we did not sell prussic acid unless by a physician's prescription. She then said that she had bought this several times, I think; I think she said several times before. I says: 'Well, my good lady, it is something we don't sell unless by a prescription from the doctor, as it is a very dangerous thing to handle.' I understood her to say she wanted it to put on the edge of a seal-skin cape, if I remember rightly. She did not buy anything, no drug at all, no medicine? No, sir."

This was excluded, for reasons to be mentioned later. (2) Testimony of a conversation on the same Wednesday, during an evening call on Miss Russell, an intimate friend:---

The prisoner said: "I have made up my mind, Alice, to take your advice and go to Marion, and I have written there to them that I shall go, but I cannot help feeling depressed; I cannot help feeling that something is going to happen to me; I cannot shake it off. Last night," she said, "we were all sick; Mr. and Mrs. Borden were quite sick and vomited; I did not vomit, and we are afraid that we have been poisoned; the girl did not eat the baker's bread and we did, and we think it may have been the baker's bread."

"No," said Miss Russell, "if it had been that, some other people would have been sick in the same way."

"Well, it might have been the milk; our milk is left outside upon the steps."

" What time is your milk left?"

"At 4 o'clock in the morning,"

" It is light then, and no one would dare to come in and touch it at that time."

"Well," said the prisoner, probably that is so, But father has

been having so much trouble with those with whom he has dealings that I am afraid some of them will do something to him; I expect nothing but that the building will be burned down over our heads. The barn has been broken into twice."

"That," said Miss Russell, "was merely boys after pigeons."

"Well, the house has been broken into in broad daylight when Maggie and Emma and I were the only ones in the house. I saw a man the other night when I went home lurking about the buildings, and as I came he jumped and ran away. Father had trouble with a man the other day about a store. There were angry words, and he turned him out of the house."

(3) The suggestion to Bridget that she should go to town and purchase the dress-goods mentioned.

2. (a) *Opportunity*. One of the chief efforts of the prosecution was to prove an exclusive opportunity on the part of the accused. The essential result of the testimony bearing on this may be gleaned from what has already been noted. (b) *Means and Capacity*. The medical testimony showed that there was nothing in the assaults which a woman of her strength might not have accomplished. The lengthy testimony in regard to the fourth hatchet was directed to showing that it was not incapable of being the weapon used. The handle was broken off; but the presence of ashes on the handle in all other places but the broken end, as well as the appearance of the break, showed that it was a fresh one, and not impossibly one made after the killing; and if thus made, it was not impossible that the hatchet was used in killing, washed, rubbed in ashes, broken off, and the fragment burnt. A strong effort was made by the defense to discredit these results, which rested chiefly on the reports of police officers, but it had little effect.

3. (a) *Consciousness of Guilt.* This, with exclusive opportunity, were the main objects of the prosecution's attack. Much that was here offered was excluded, and this exclusion possibly affected the result of the case. The points attempted to be

shown were: (1) Falsehoods to prevent detection of the first death; (2) falsehoods as to the doings of the accused; (3) knowledge of the first death; (4) concealment of knowledge of the first death; (5) destruction of suspicious materials.

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(1) To Bridget and to her father the accused said, as already related, that her mother had received a note and gone out. The same statement she made to Mrs. Churchill and to Marshal Fleet. No note, however, was found; no one who brought a note or sent a note came forward or was heard of; no sound or sight of the sort was perceived by Bridget or any others. The only blot upon an almost perfectly conducted trial was the attempt of the counsel for the defense in argument to show that the information as to the note emanated originally from Bridget and that the accused merely repeated it. This was decidedly a breach of propriety, because it was not merely an argument suggesting the fair possibility of that explanation, but a distinct assertion that the testimony was of that purport, and therefore, in effect, a false quotation of the testimony. In truth the accused's statement about the note was her own alone and was one of the facts to be explained.

(2) Here were charged three falsehoods: *(a)* When the accused was asked where she was at the time of the killing of Mr. Borden, she said that she went out to the barn (to Dr. Bowen) "looking for some iron or irons," (to Miss Russell) "for a piece of iron or tin to fix a screen," (to the mayor and an officer and at the coroner's inquest (1)) in the barn loft, eating some pears and "looking over lead or sinkers." The inconsistency of the explanations was offered as very suggestive. The day was shown to be a very hot one, and the loft was argued to be too hot for such a sojourn. Moreover Officer Medley testified to going into the barn, in the loft, and finding the floor covered with dust, easily taking an impression from his hand or foot, but on his arrival quite devoid of any traces of the previous presence of another. The trustworthiness of his statements was attacked by witnesses who said that they and others had been there before the officer. The priority of their visits was not placed beyond doubt; but the effect of the officer's statement of course fell from practical proof to a merely probative circumstance.

(b) When the accused was describing her discovery of the

(1) Her inquest testimony was excluded, for reasons to be considered later.

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father's death, she said (to Officer Mullaly) that she heard "a peculiar noise, something like a scraping noise, and came in and found the door open;" (to the servant) that she heard a groan and rushed in and found her father; (to Mrs. Churchill) that she heard a distress noise, came in, and found her father; (at the inquest) that after eating pears in the loft and looking over lead, she came down, returned to the kitchen, looked in the stove to see if the fire was hot enough for her ironing, found that it was not, put her hat down, started to go upstairs and wait for Bridget's noon-day fire, and thus discovered her father; (to Officer Harrington) that she was up in the loft of the barn and thus did not hear any outcry or noise of any kind; (to Marshal Hilliard) that

after half an hour up in the barn, she came in and found her father. Here, again, a substantial inconsistency was charged,

(c) Mr. Borden had on, when found, a pair of congress boots or gaiters; but at the inquest the accused, before this was pointed out, testified that when he came home about 10:45, she assisted him to lie down on the sofa, took off his boots, and put on his slippers.

(3) Her knowledge of the first death was said to have been indicated: *(a)* By the inevitable discovery of the body in the guest-room through the open door, or of the murderer either in passing about or in going up and down the stairs; *(b)* by the noise of the scuffle, if another had done it, and by the thud of the heavy woman's fall; *(c)* by the readiness with which the accused suggested that Mrs. Borden must have returned; (1) for as her father had been in the room off the hall from 10:45 to, say, 11, and as she had been out in the barn from 11 till the killing was discovered and others came in, there was no time when the mother could have returned since the father's return, and up to that time the accused herself predicated her absence.

(4) If this knowledge existed, then beyond doubt the concealment of it and the pretense of ignorance involved in sending Bridget to get the step-mother was strongly indicative of guilt.

(1) This, however, was not suggested at the trial. Moreover, no attempt was made to show that Mrs. Borden had no latch-key to the knowledge of the accused.

(5) Some attempt was made to show a degree of secrecy and obstruction to official investigation of the rooms; but with little or no result. On Sunday morning, however (the officers having informed her on Saturday that she was suspected of the crime), when Emma Borden and Lizzie Borden were in the kitchen and officers were in the yard, Alice Russell came in : ---

"I saw Miss Lizzie at the other end of the stove; I saw Miss Emma at the sink. Miss Lizzie was at the stove and she had a skirt in her hand, and her sister turned and said: 'What are you going to do?' and Lizzie said, ' I am going to burn this old thing up; it is covered with paint.' I left the room then, and on coming back, Miss Lizzie stood up toward the cupboard door, and she appeared to be either ripping something down or tearing part of this garment. I said to her: 'I wouldn't let anybody see me do that, Lizzie.' She didn't make any answer, but just stepped one step farther back, up toward the cupboard door. * * * Afterwards, I said to them, 'I am afraid, Lizzie, the worst thing you could have done was to burn that dress. I have been asked about your dress.' She said: 'Oh, what made you let me do it? Why didn't you tell me?'"

The prosecution naturally attempted, first, to identify this dress as the one worn on the morning of the killing; in this they failed; second, to show at least that the dress worn on that day was missing, and was not the one handed over by the accused, as the dress of that morning. On this point they made out a very strong case. The dress handed over by the accused to the officers as the one worn on Thursday morning, while ironing, and afterwards, was a silk dress, of a dark blue effect; the testimony, however, pointed

strongly to the wearing of a cotton dress, light blue with a dark figure. Such a dress existed, and had been worn on the day before, but not on Friday or Saturday.

Thus far the prosecution. The defense began with character evidence based on the accused's co-operation in Sunday-school and charitable work and her good standing as a church member. The motive-evidence was not shaken; though the sister of the accused represented the ill-feeling to be of minimum intensity. The design-evidence of prussic acid did not come to the jury. In regard to exclusive opportunity, the defense made no break

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in the chain of the prosecution, except in showing that the screen door was not closed at all moments during the morning. The evidence as to the possibility of an unseen escape from the house was not potent on either side. But no traces of another person were shown within the house; and no suspicious person was located in the vicinity of the house --- if we except some vague reports of a tramp, of a pale, excited young man, and the like being seen on the street, near by, within a day or an hour of the killing. The attempt failed to show the impossibility of the handleless hatchet having been used --- unless we assume (what the defense desired to suggest) that the testimony of all the officers was wilfully false. Coming to the evidence of consciousness of guilt, --- the defense could not shake the story of the note; they merely suggested that it might have been a part of the scheme of the murderer to divert suspicion. They searched for the note and they advertised for the sender or
carrier, but nothing appeared. The inconsistent stories about going to the barn were explained by the excitement of the moment; the inquest-story --- with the most marked divergence --- was excluded. Lead was found in the loft; but no fish-line was shown, (1) and no screen was identified. It was suggested that perhaps both explanations were true, that both purposes coexisted. The inconsistent stories as to her return and discovery of the murder were in part slid over, in part ignored, and in part discredited. (2)

The discrepancy between the statement about the slippers and the actual foot-coverings did not get to the jury. As to the circumstances indicating knowledge, their force was a matter of argument and probability merely; the defense urged the contrary hypotheses which suggest themselves to all. The dress-burning was explained by the sister to have taken place in consequence of a suggestion of hers; but Miss Russell's testimony contradicted this. The defense offered to show a custom in the family of burning all old dresses, but this was rejected, for

(1) The lead-for-sinkers statement had not been admitted, but the counsel for the defense took it up in his argument.
(2) The inquest-story, going into particulars, had never been admitted; but there were still at least two distinct statements.

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reasons to be considered later. Another offer, also rejected, was to show the conduct of a demented-looking man, seen in the woods near the town, a few days after the murder, carrying an axe, and exclaiming "Poor Mrs. Borden!"

The stronghold of the defense was the utter absence of all such traces or marks as would presumably be found upon the murderer. No blood was seen upon her by the five or six people who came in within ten minutes and before she donned the pink wrapper. No garment was found with blood or other traces upon it. (1) No weapon bearing blood or other traces was found within or without the house, One or two of the experts were willing to say that it was practically impossible to deal the twenty-nine blows without receiving more or less blood on the garments and perhaps in the hair (though it does not appear that her head was examined for blood). It is safe to say that this was the decisive fact of the case.

It is, of course, impossible to rehearse here all the minor details of evidence and argument offered on either side. It has been necessary to make a summary estimate of the force of certain evidence mentioned, and it is not impropriety to record here the judgment of the writer and the general trend of opinion on the effect of the whole evidence. It is difficult to see how the assailant could have avoided receiving blood marks during the assaults; it is also difficult to understand what arrangement of implements and clothing, and what combinations of opportunity, sufficed to allow the accused, if she was the assailant, to remove the traces upon weapon and clothes after each assault. But, first, these are difficulties of ignorance; in other words, there is no proved fact which is inconsistent with the thing being so; we merely cannot find traces of the exact *modus operandi*; second, this difficulty is equally as great for any other person than the accused, and we may say greater; it is a difficulty that cannot change the balance of conviction. On the other hand, the conduct of the accused after the killing was such that no conceivable hypothesis except that of guilt, will explain the inconsistencies and improbabilities that were asserted by her.

(1) Except a white skirt having at the back and below a spot of blood as large as a pinhead, the spot being otherwise explainable.

The statements about the purpose of the barn visit, and about the discovery of the father's death, are frightfully inconsistent; while the story of the note requires for its truth a combination of circumstances almost inconceivable. We may add to this the inevitable query, Why did the accused not take the stand to explain these things? Of course, it was her legal right to remain silent; but the rule against self-crimination is not one of logic or of relevancy; it is a rule of policy and fairness, based on broad considerations of average results desirable in the long run. It cannot prevent us, as logical beings, from drawing our inferences; and if we weigh in this case the confounding inconsistencies and improbabilities of those statements and then place with these the opportunity and the refusal to explain them, we can not help feeling that she failed to explain them because she could not; and one side of the balance sinks heavily.

This is not saying that the evidence justified a conviction. If we were to subtract the evidence that never got before the jury, and measure our judgment by the rule which requires proof in such a case to be beyond a reasonable doubt, we might well conclude, as jurymen, not to cast the die for conviction and death. The mind is inclined to hesitate at that point. Such, at any rate, was the temper of the jury; for on Tuesday, June 20, at 4:32

in the afternoon, after less than an hour and a half of deliberation, the jury returned a verdict of "not guilty."(1)

The proceedings, as a whole and in every part, were a model of what trials should be. Court, counsel, and jury, in all that they had to do, combined to exhibit the mode of administering justice in a light of which Massachusetts may well be proud. In all that goes to make judicial proceedings fair and efficacious, the Commonwealth of Massachusetts, if this trial serves as an example (as it certainly does), may claim to stand in the front of the communities of this nation. Nor did dignity and propriety bring with them a loss of zeal or acuteness, as they sometimes do. The cross-examinations of Bridget Sullivan and Emma

(1) It was reported that they were of one mind on the first ballot, and remained an hour in general conversation, at the suggestion of one member, merely to avoid letting the counsel for the commonwealth suppose that his argument did not receive consideration.

Borden were superb pieces of work. Not an objection was made with anything but courtesy; but not a point was yielded that could by possibility be maintained. Not a question passed where any defect was perceivable, and not an item of evidence was offered without carefully laying the necessary foundations.

The opening address of Mr. Jennings for the defense was full of feeling and undoubted conviction. The closing argument of Mr. Robinson was couched in a familiar and persuasive style and discussed with the greatest subtlety and patience and suggestiveness every aspect of the case. Some criticism was heard on the dangerous frankness with which he explained to the jury why they should not allow themselves to consider evidence offered but not admitted and other circumstances pertinent perhaps but inadmissible; yet this was a matter of judgment, and the event seemed to justify his judgment. Here are some fair specimens of the mode and spirit of his address: ---

"In the first place, they say she was in the house in the forenoon. Well, that may look to you like a very wrong place for her to be. But it is her home. I suspect that you have kind of an impression that it would be a little better for her than to be out travelling the streets. I know I would want my daughter to be at home ordinarily. Where would it speak more for her honor and care and reflect somewhat credit upon me and her mother (who is my wife, I want to say) than to say she was at home, attending to the ordinary vocations of life as a dutiful member of the household --- as belonging there. So I do not think there is any criminal look about that.

* * * * * * * * *

"I have said that such things as that are easy in all our houses and that is the danger of a verdict here against this defendant, simply for the reason that you do not see how anybody else could do it. That is very dangerous ground. You go away from your

house in the morning; you go back and find your wife or your daughter dead in the house, the house apparently all locked. You do not know who has been in there.
You return just after the murder has been committed. You, in taking care of the bodies, get blood on your clothing; suspicious circumstances fasten upon you, and somebody tells that you had some little disagreement at the breakfast table that morning, or some neighbor says he heard you say that you hated her, if you please; or, not so much as that, calling her some unpleasant names, and at once they begin to

suspect you, and everything is turned against you, whereas you are entirely innocent."

The opening address of Mr. Moody for the prosecution was a careful, cautious, and unimpassioned presentation, exactly fitted to the situation. The summing up of Mr. Knowlton for the prosecution differed widely in style from Mr. Robinson's argument, and succeeded in being forceful and yet fair, exact yet
sustained and connected. Perhaps its special merit consisted in making the most of the strong points. His description of circumstantial evidence is one of the most effective passages in forensic oratory and must be quoted: ---

"What is called sometimes circumstantial evidence is nothing in the world but a presumption of circumstances. It may be one or fifty. There is no chain about it. The word 'chain' is a misnomer as applied to it. It is the presentation of circumstances from which one is irresistibly driven to the conclusion that crime has been committed. Talk about a chain of circumstances! When that solitary man had lived on this island for twenty years and believed that he was the only human being there, and that the cannibals and savages that lived around him had not found him and had not come to his island, he walked out one day on the beach, and there he saw the fresh print of a naked foot on the sand. He had no lawyer to tell him that was nothing but a circumstance. He had no distinguished counsel to urge upon his fears that there was no chain about that thing which led him to a conclusion. His
heart beat fast, his knees shook beneath him, he fell to the ground in fright, because *Robinson Crusoe knew when he saw that circumstance that a man had been there that was not himself.* It was circumstantial evidence. It was nothing but circumstantial evidence. But it satisfied *him.*

"It is not a question of circumstantial evidence, Mr. Foreman; it is a question of the *sufficiency* of circumstantial evidence.

"Let us anticipate a little. Nobody that has told of it saw Lizzie Andrew Borden burn that Bedford cord dress. There is not a witness to it. And yet my distinguished friend never said to you, 'the evidence of that is circumstantial and you cannot believe it.' Oh, no. We heard what she said before the act was supposed to have been done; we heard what she said after the act was supposed to have been
done; we saw the position she was in; we saw the act she was doing that preceded it, and we put those circumstances together and we say,

as we have a right to say, as it never occurred to one of you not to have said until I suggested the fact, that circumstances have proved that that dress is burned, so that counsel themselves do not dispute the proposition.

" It is like the refuse that floats upon the surface of the stream. You stand upon the bank of the river and you see a chip go by. That is only a circumstance. You see another chip in front of you going the other way. That is only another circumstance. By and by you see a hundred in the great body of the stream, all moving one way, and a dozen or two in this little eddy in front of you going the other
way. "The chain is not complete. Some of the chips go up the stream. But you would not have any doubt, you would not hesitate for a moment, Mr. Foreman, to say that you knew which way the current of that river was, and yet you have not put your hand in the water; you have only seen things from which you inferred it, and even the things themselves did not all go the same way. But you had the wit and the
sense and the human and common experience to observe that those that went the other way could be explained, and that the great body of them went this way."

Some comments now upon the chief rulings of the Court upon evidence. That the three judges represented the best experience and tried ability of one of the ablest Superior Courts in the country is undoubted; and that as a matter of prudence and
judgment the rulings were from their stand-point fairly justifiable is almost equally beyond a doubt. But as a Superior Court is bound to avoid cautiously every chance of a mistrial, its rulings upon exclusion may not represent nor even be intended to represent the Court's positive estimate of the law. It may be suggested, therefore, with all deference, that, from the point of view of Supreme Court principles, most of what was excluded seems admissible.

1. The prussic-acid design-evidence. Here the court decided that the evidence did not come up to the offer, the offer on its terms being apparently proper. The essential terms of the offer, besides the evidence of attempted purchase, were that
prussic acid

"Is not an article of commercial use, that it is not used for the purpose of cleaning capes, sealskin capes, or capes of any other sort, and has no adaptability to such use."

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That the evidence did not prove these preliminary conditions is not strange when we observe that (1) a professional furrier, having always had the care of furs in packing and preserving them from moths, was held unqualified to say whether prussic acid was used in preserving furs, because he had not made a special study of
the application of prussic acid to furs, and that (2) the medical examiner of the county, Dr. Dolan, was not allowed to say whether prussic acid had any capacity or adaptability in the same connection, because he had had no other special experience with it than his training and experience as a medical man. What a wonderful web of obscurity the legal mind can contrive to weave over the simplest matters! A woman of ordinary knowledge is alleged to have bought prussic acid for cleaning furs; but two men of technical

accomplishments are not allowed to say that there is no such use known to their experience! The non-professional woman may by hypothesis presumably have learned of such a use, but not the experienced furrier and the medical man! And, back of it all, why was it necessary to exclude all conceivable hypotheses except that of a criminal use? If, as the medical man testified, that acid-vapor is the most poisonous known, and there is no ordinary commercial use for it, is not this enough? Admissibility does not require the exclusion of all other conceivable hypotheses but one; it lies on the opponent to demonstrate, after admission on grounds of fair and ordinary probability, that certain other reasonable hypotheses exist. The purchase of arsenic, for example, would be suggestive *a priori* of a wicked design; but the accused could show (as at the Madeline Smith trial in Glasgow, 1857) that she used it as a cosmetic, or (as at the trial of Mrs. Wharton in this country)
as a medicine. As for the authorities, which were fully cited on both sides, the clear result is for the admission of the evidence.

2. The statement of the accused at the inquest. This, it will be remembered, contained several damaging contradictions. The offer was based on this stipulation of facts: ---

That the accusation of crime was made against the defendant on Saturday, August 6, 1892, by the mayor and city marshal; that the defendant was kept under police surveillance from August 5 up to and

during the inquest; that her testimony at the inquest began August 9 and continued through August 10 and 11, the subpoena to testify being duly served, that complaint was made and a warrant for her arrest issued August 8, but not served upon or communicated to her; that in due exercise of power given to the Court by the Public Statutes her counsel was not allowed to be present at the inquest on her behalf, and that she was not cautioned by the court as to her right not to criminate herself, but that her counsel was allowed to confer with her and did confer with her before she went upon the stand; and that at the conclusion of her testimony on August 11, she was detained and then arrested on a new warrant, the former one never being used.

On these facts, the Court after a lengthy argument decided as follows: ---

The propriety of examining the prisoner at the inquest, and of all that occurred in connection therewith is entirely distinct from the question of the admissibility of her statements in that examination. It is with the latter question only that this Court has to deal.

The common law regards this species of evidence with distrust. Statements made by one accused of crime are admissible against him only when it is affirmatively established that they were voluntarily made. It has been held that statements of the accused, as a witness under oath at an inquest, before he had been arrested or charged with the crime under investigation, may be voluntary, and admissible against him in his subsequent trial, and the mere fact that at the time of his testimony at the inquest he was

aware that he was suspected of the crime does not make them otherwise. But we are of the 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 so made are not voluntary and are inadmissible at the trial.

The common law regards substance more than fiber. The principle evolved cannot be evaded by avoiding the form of arrest if the witness, at the time of such testimony, is practically in custody. From the agreed facts and the facts otherwise in evidence, it is plain that the prisoner, at the time of her testimony, was, so far as relates to this question, as effectually in custody as if a formal precept had been
served; and, without dwelling on other circumstances which distinguish the facts of this case from those of cases on which the government rely, we are all of opinion that this consideration is decisive, and the evidence is excluded.

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On the authorities, as the Court intimated, the question was here practically an open one. On the one hand the fact that the accused is actually under arrest has been held to invalidate statements made; on the other hand, the mere facts of a
suspicion having arisen and the authorities having became alert and of the accused knowing this do not destroy the voluntary nature of the testimony. Here, then, was an opportunity for the exercise of practical sense and plain reasoning, the precedents (assuming them to be as stated) leaving the subject fairly in the balance. Now what would the ordinary man conclude, not merely by preponderance of evidence, but beyond a reasonable doubt? Mr. Moody has put this conclusion in a nutshell:---

"Now we are looking at the substance of the thing, at the common sense, as Mr. Robinson has said, of the thing --- the common sense, which he thinks is much better than the law ; and the substance and the common sense of the thing is, your Honors, that a caution delivered by her friend and counsel without the surroundings of the court, without her being in the presence of strangers, would be very much more effectual to inform her of her full rights than any caution by the magistrate
or the district attorney possibly could be. And your Honors can have no doubt that the reason why the caution was omitted at the beginning of this testimony was because that subject had been thoroughly talked over between counsel and client, and she knew and understood her rights. And after she had had the opportunity of talking with her counsel, --- I think if we can presume some things of as learned a lawyer as brother Jennings is --- we can presume that he informed her that she would have the right to decline to testify upon a single ground, otherwise she must be obliged to go in there and testify what she knew about the matter; she could only decline to testify upon the ground that it would criminate herself. And can your Honors have any doubt, can your Honors have a particle of doubt, that after she had talked with Mr. Jennings in reference to her rights thereto, in the words of the
stipulation, she went in with a full consciousness that she had a right to decline at the beginning, at the middle or at the end, and that when she went in there she testified as a voluntary witness in every possible sense of the word, legal or otherwise?"

The daily papers of the time corroborate the natural inference from the agreed facts, that Mr. Jennings had ample opportunity

of conference. (1) Is there any lawyer in these United States who has a scintilla of a doubt, not merely that her counsel fully informed the accused of her rights, but that they talked over the expediencies, and that he allowed her to go on the stand because he deliberately concluded that it was the best policy for her, by so doing, to avoid all appearance of concealment or guilt? And yet the ruling of the Court allowed them to blow hot and cold, --- to go on the stand when there was something to gain and to remain silent when the testimony proved dangerous to use. It would seem that, as a matter of law, the fact that an accused person, whether under arrest or not, has had the benefit of counsel's advice ought to make subsequent statements competent as far as regards the free will of the witness.

3. The family custom of burning old dresses,

If a habit is of any value at all to indicate the performance of an act, was not this habit, if proved, of potent influence? Note a curious inconsistency between the prussic-acid ruling and the dress-burning ruling. The purchase of the acid cannot serve (it was ruled) to show a general intention to destroy the victims' lives unless every hypothesis of its adaptability to other purposes is first excluded by evidence; *ergo,* one would think, the dress-burning would not be admissible to indicate a desire to destroy guilt-traces unless every other hypothesis was excluded. But on the contrary, not only is no such requirement laid down for its admissibility, but the defense is not even allowed to show that another such reasonable hypothesis (to wit, the carrying out of a custom with reference to old dresses) exists and equally explains the act. (2) It would seem that the exception to this ruling must certainly have overturned the verdict, had the latter been against the accused.

(1) "Miss Borden could decline to answer the questions put to her if she wished, 'by advice of counsel I decline to answer' being sufficient. Lawyer Jennings is too astute a lawyer to order that, however, although he threatened to yesterday. He knows that it would greatly prejudice his client's case and probably result in an early arrest. --- Boston Herald, August 10, 1892."

(2) To Emma Borden: "What was the custom and habit of your sister in disposing of pieces of clothing or old dresses?" Mr. Knowlton: "I object." Mason, C. J.: "Excluded."

4. The man with the axe seen in the woods. The offer of proof was as follows: ---

"This witness will testify that on the 16th day of August, at his farm, about four miles north of City Hall, while traveling into the woods for the purpose of cutting poles, just before he reached a turn in the road, he heard the words, 'Poor Mrs. Borden' repeated three times, and immediately saw sitting on a rock behind a wall and some brushwood a man. He spoke to the man in French twice, but received no answer. On speaking to him the second time, the man took up from the ground

by his side a hatchet, such as is used in shingling houses, and shook it at him. He stepped back and put his own ax up in an attitude of defense. They remained in that position some few minutes, when the man turned, leaped over a wall, and disappeared in the woods. He said nothing to the witness at any time. The witness noticed upon his shirt spots of blood. He notified the police the same evening of what
he had seen and heard."

The argument of the prosecution was that the evidence was too remote, and the Court excluded it. We are here confronted with another illustration of the attitude taken in the prussic-acid question. The evidence was explainable, to be sure, in more than one way; but a passable explanation, if the witness was believed, was that which the defense offered; and the ruling practically put them in the position of being obliged to show the absence of all other reasonable explanations before the evidence could come in. It was open to the prosecution to show in rebuttal that any number of cranks had exhibited similar indications of possible complicity, all without foundation, --- in other words, to show that this evidence was explainable more naturally in other ways. This would leave it to the jury to decide which explanation was more rational; but as it was, the Court cut off the evidence by restrictions which seem hardly to be justified by any general principles of evidence.

As for the police and their work, there were complaints that they exceeded their duty and exhibited a spirit of persecution utterly unjustifiable. This, one is persuaded, was an unfounded accusation. It was merely the product of the current irresponsible and anarchistic spirit, a spirit which shows uneasiness at

the most ordinary exercise of authority, readily gibing at honest efforts to fulfill disagreeable duties, prone to side with evasions of law, and thoughtlessly hampering the enforcement of the simplest regulations necessary for peace and order. No credence should be given to these statements, flowing as they do from a thoroughly false sentimentality. All along the line we see these indications of the spirit of liberty run riot, --- the opposition to stringent building regulations, the outcry against private execution of the death penalty, the repudiation of the Berthillon system as un-American, the objection to the hiring of armed men merely to protect one's property from destruction, the crippling of the Chicago police by the pardon of their bomb-throwing murderers, and here in the Borden case the feeling against the police for trying to do their duty. These are all expressions of the same unhealthy resentment against necessary restrictions, the same lack of respect for' law as law, the same failure to recognize that the community has rights against the individual.
All are anarchistic in their ultimate tendencies, and it is to be hoped that the American people will be led before long to a sense of the danger of this attitude,

On the contrary, such criticism as the police deserve is that of lack of thoroughness, system, and care in their methods. They did not go far enough. We cannot all expect to equal Sherlock Holmes, but much more may be done than is done. Merely as a few illustrations of the serious failures of evidence from lack of

the above requisites may be noted: (1) The time of Officer Medley's visit to the barn, which would have shown whether it was possible or not for others to have entered the barn before him, was not noted down by him; (2) the list of the dresses in the accused's closet, made by Officer Seaver, which would have shown whether or not the burned dress was among the number, was lost by him; (3) the handleless hatchet, which was at first thrown back in the box by Officers Fleet and Mullaly as of no consequence, proved four days afterwards to be the only discoverable weapon with which the crime could have been committed; (4) the two officers who first found it disagreed as to whether or not the handle was also found, --- a matter which a

memorandum would have settled; (5) the inmates of the house (Dr. and Mrs. Bowen, Miss Russell, Mrs. Churchill, Miss Borden and the servant), were not searched by the officers on their arrival, the house was not thoroughly searched till Saturday (and then not completely), while for some time after the officers' arrival on Thursday sundry third persons were permitted to pass about the outer premises and even the interior without hindrance. Doubtless the irresponsible babblers would have raised an outcry at the enforcement of a strict and business-like restraint and search; but such outcries will have to be ignored if crime is to be traced out. At any rate, lessons have been learned; for when in May last, in a Fall River suburb and under the same police jurisdiction as the Borden affair, Bertha Manchester was murdered, the police, immediately on their arrival, cordoned the premises, photographed every detail, and kept out even the father of the murdered girl. This sort of thing, strict as it may seem, is as it should be, "More care and more method," is the lesson of the Borden case for our police everywhere.

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