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THE

TRIALS

OF

JOHN DUNCAN WHITE *alias* CHARLES MARCHANT,

AND

WINSLOW CURTIS *alias* SYLVESTER COLSON,

FOR THE

MURDER ON THE HIGH SEAS

OF

EDWARD SELFRIDGE AND THOMAS P. JENKINS,

CAPTAIN AND MATE OF THE SCHOONER FAIRY, OF BOSTON.

BEFORE THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE FIRST CIRCUIT, HOLDEN AT BOSTON.....OCTOBER TERM, 1826.

Boston:

DUTTON AND WENTWORTH——EXCHANGE STREET.

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1827.

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Trials

ADVERTISEMENT.

CONSIDERABLE pains have been taken to make the ensuing Report ample in its parts, and correct, if not complete in its whole; and the Publishers doubt not, but that the learned and important Opinion of the Court, and the eloquent and elaborate Arguments of the Counsel on each side, will, together with the testimony of the witnesses, render the "Trials of MARCHANT and CURTIS," not only interesting but useful, alike to the practitioner and the general reader.

☞A separate Examination or Review of each Trial was prepared for the press; but we have foreborn to insert them, inasmuch as the Report has already swelled to a size much beyond what was originally contemplated.

DISTRICT OF MASSACHUSETTS, TO WIT:

District Clerk's Office.

BE it remembered that on the fifteenth day of January, A.D. 1827, and in the fifty-first year of the Independence of the United States of America, Dutton & Wentworth, of the said District, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, to wit:

"The Trials of John Duncan White, alias Charles Marchant, and Winslow Curtis alias Sylvester Colson, for the murder on the high seas of Edward Selfridge and Thomas P. Jenkins, Captain and Mate of the Schooner Fairy, of Boston. Before the Circuit Court of the United States, for the first Circuit, holden at Boston, October Term, 1826."

In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned:" and also to an act entitled "An act supplementary to an act, entitled An act for the encouragement of learning, by securing the copies of maps, charts and books to the authors and proprietors of such copies during the times therein mentioned; and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

JNO. W. DAVIS,

Clerk of the District of Massachusetts.

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Circuit Court of the United States.

FIRST CIRCUIT.

DISTRICT OF MASSACHUSETTS, OCTOBER TERM, 1826, HOLDEN AT BOSTON

BEFORE

HON. JOSEPH STORY, *Associate Justice of the Supreme Court.*

HON. JOHN DAVIS, *District Judge.*

THE UNITED STATES *versus* JOHN DUNCAN WHITE, *alias* CHARLES MARCHANT, and WINSLOW CURTIS, *alias* SYLVESTER COLSON, indicted for murder on the high seas.

ARRAIGNMENT.

On the 31st of August 1826, JOHN DUNCAN WHITE, otherwise called CHARLES MARCHANT of Dover, England, and WINSLOW CURTIS, otherwise called SYLVESTER COLSON of Buxport, Maine, Mariners, were apprehended, at Louisburg, Cape Breton Island, by the authority of the government there, on suspicion of having committed murder and piracy on board of a vessel belonging to the United States. Being sent to the United States for trial, they were brought first into the port of Boston, within the District of Massachusetts; and on the 29th of November, the Grand Inquest for the District, consisting of the following gentlemen, viz:

DAVID FRANCIS, FOREMAN.

Thomas Tirrell,	Mark Wood,
Nathaniel Hills,	Nathaniel Ford,
Ebenezer Carleton,	William W. Mann,
James Stevens,	John Farwell,
Joseph Cummens,	Samuel Eldrige,
Daniel Atkins,	Isaac Whipple,
Daniel Williams,	Dan Hastings,
Martin Cowles,	Samuel Perry,
Samuel Higgins,	Zachariah Lovell,

Came in and returned to the Court four Bills of Indictment against the prisoners aforesaid, to wit:—A first for the felonious homicide of

EDWARD SELFRIDGE, master of the schooner Fairy, an American vessel, belonging to Boston; a second for the murder of THOMAS PAINE JENKINS, mate of the said schooner; a third for a revolt, and piratically running away with the said vessel and cargo; and a fourth for murder and piracy on board of the same.

Upon motion of GEORGE BLAKE, Esq. United States Attorney for the District, the prisoners were brought in and placed at the bar; and upon another motion of the District Attorney, that the Prisoners should be called upon to plead to the charges, contained in the Indictments aforesaid, the clerk read two of the indictments, in each of which both of the prisoners were charged with the felonious homicide and murder aforesaid.

The prisoners severally pleaded *not guilty* to the charges contained in the indictments, and desired the assistance of counsel for their defence; whereupon the Court assigned ANDREW DUNLAP and RUSSELL JARVIS, Esquires, as counsel for *Curtis*, and WILLIAM A. WARNER and SIDNEY BARTLETT, Esquires, as counsel for *Marchant;* and appointed Wednesday the 13th of December, for their trial.

TRIAL

OF

JOHN DUNCAN WHITE, *alias* CHARLES MARCHANT,

FOR THE MURDER OF

THOMAS PAINE JENKINS,

BEFORE THE

CIRCUIT COURT OF THE UNITED STATES,

HOLDEN AT BOSTON, IN THE DISTRICT OF MASSACHUSETTS, ON

WEDNESDAY, 13th DAY OF DECEMBER, 1826.

PRESENT,

Hon. JOSEPH STORY, *Associate Justice of the Supreme Court.*

" JOHN DAVIS, *District Judge.*

GEORGE BLAKE, Esq. *U. S. Attorney, for Mass. District.*

William A. Warner and Sidney Bartlett, Esq'rs. } *Counsel for the Prisoner.*

It being previously ordered upon motion of counsel, filed under the direction of the Court, that the trial of White should be separate and apart from that of Curtis, the prisoner was accordingly brought up at the appointed time and placed at the bar. Seventy-three Jurors were then called upon their summons, all but two of them answered to their names, and the Clerk proceeded to fill the pannel. As the Jurors were called the prisoner exercised by his counsel the right of challenging peremptorily, six or seven times; and the following gentlemen being selected, were sworn to try the issue, viz.—

Moses Prichard, Foreman,	Benjamin Reed,
Franklin Weld,	Asa Biglow,
John Webber,	John Brown,
Benjamin D. Lyon,	Andrew Hildreth,
Antephas Newton,	Boardman Williams,
Jesse Tucker,	Dexter Bowman.

The Indictment contained four counts, and after it had been read by the Clerk, the District Attorney opened the case for the government in effect, as follows.

May it please your Honors, and you Gentlemen of the Jury.

It has become my duty to lay before you the evidence, and to explain to you under the direction of this Honourable Court, the principles of law which are applicable to the present interesting prosecution.---In the fulfilment of this duty, I shall have occasion to unfold to you the circumstances of a transaction, which, as far as I know, (and my experience in the prosecution of crimes, has not been very limited) is in point of atrocity, and cold, deliberate wickedness, without its parallel, in the judicial history of this, or any other country.

It is a case of murder: murder, "*Most foul as, at best, it is,*" "*but in this, most foul, strange, and unnatural.*" For if I am rightly informed as to the nature of the evidence which will speedily be laid before you, it will be found to be a case, in which crimes of the deepest malignity, and atrocity have been committed, as it were, for the very love of their perpetration; and without any of the ordinary motives or incentives, by which wicked men are sometimes impelled to deeds of such a character. It is, moreover, a case, not of one murder only, but of two, at the same time and place, and both under similar circumstances; not of two murders only, for it will be impossible for me to explain before you, the circumstances attendant upon the perpetration of the specific crime which is charged in this indictment, without disclosing at the same time a retinue of other crimes with which it was immediately associated; so indeed as to make it apparent, that not less than five horrible offences, for each and every of which, the prisoner now at that bar has incurred the forfeiture of his life to the violated laws of his country, were on the occasion alluded to, all compressed within the compass of four and twenty hours!

[Here the District Attorney presented to the Jury at considerable length, a very minute and elaborate statement of all the principal facts and circumstances which he expected, would be developed in the course of his examination, of a number of highly respectable witnesses whom he should have occasion presently to call before them; and by whose testimony he had no doubt that his statement would be supported in every essential particular.]

From this history of the transaction which is referred to in this indictment, it will have been perceived said he, that as to one point, and one only, the evidence which will be brought before you must still leave something to supposition and conjecture.---That the prisoner at the bar was an agent probably the principal one, in the murder of Thomas P. Jenkins, will be established by indisputable

proof; but in what precise manner the murderer may have proceeded to the accomplishment of his fell purpose will not and cannot be fully explained.

The deed as I have stated to you was perpetrated in the darkness and solitude of night, when none but the eye of the murderers themselves, and that of the omniscient and omnipresent God could have witnessed the exact manner of its perpetration.

This point, therefore, and I may venture to state to you that it is the only one thus circumstanced in this case, must be left to mere inference, to such conclusions as you may reasonably deduce from all the other facts and circumstances in the cause.

I beg leave here to remark that it was in reference to this point merely, that several distinct counts, or different modes of setting out the offence, were deemed to be expedient, if not, indispensably requisite, in the frame of this indictment.

It is well known to every lawyer conversant in any degree with the forms of prosecution in criminal cases, especially in cases affecting the life of a human being, that the utmost precision and nicety are required by the laws of the land in which we live, not only as to the substance of the accusation, but as to the manner also in which the offence shall be described and alleged; it is this consideration which has given to the present indictment the appearance of tedious, unnecessary prolixity. As it was cursorily read to you by the clerk, it must I am aware have seemed to you as being clogged with much of redundancy and repetition, as a narration of a twice and thrice told story, without any essential variance or modification.

I beg to assure you, gentleman, that the true state of the case is far otherwise; and that there is not, as I humbly believe in this indictment, tedious and prosing as it may have seemed to you to have been, not a line or a letter, which, according to the technical rules of law, and in reference to what I knew, must be the state of the proof before you, could have been safely omitted.

Although, as was before stated to you, the precise manner of the killing could not be made certain by the evidence I had to offer, it was, nevertheless indispensable that some manner, and that too positively, and without qualification or alternative, should be set forth in this indictment.

In framing this bill, it was therefore the intention to set forth the manner of the homicide in various ways; meaning to conform the description contained in some one of

the Counts, as nearly as possible to what was supposed would be the evidence, and, at any rate, that all the Counts taken together should be sufficiently comprehensive to embrace all the modes in which, under the circumstances of the case, the murder could by possibility be supposed to have been perpetrated.

Accordingly, four distinct Counts or different modes of describing the act of murder alleged, are set forth in this indictment.

I. The first count proceeds on the supposition that the murder was complete, consummate ; that THOMAS P. JENKINS was dead on board the vessel, before his lifeless body was thrown into the sea ; that the killing was accomplished by the instrumentality of a hatchet ; and that MARCHANT was the principal actor in the scene, and CURTIS was present as an aider and abettor.

II. The second count differs, in nothing from the first, except that it simply reverses the posture of the parties, placing CURTIS before as the principal agent, and MARCHANT as the aider and abettor.

III. The third Count supposes that the homicide may have been effected in a different mode from that which is stated in the precedent allegations ; that it may have been occasioned by the act of casting into the sea, and the consequent suffocation and drowning ; and it charges MARCHANT and CURTIS as being jointly concerned in this act of casting the living body into the sea.

IV. The fourth and last Count proceeds on the ground that divers grievous wounds and bruises were inflicted by the joint agency of the two persons, charged upon the body of the deceased ; that these wounds, &c. were not, instantaneously mortal ; that while a spark of life was yet remaining, the body by the joint agency of the murderers, was cast into the sea ; and then alleges the death as the consequence of all these several acts, in combination.

The District Attorney then referred to the general definition of murder as laid down in the fourth volume of Blackstone's Commentaries ; observing that he should abstain from any further reference to the principles of the law relative to the subject of *Homicide* generally, and its different degrees of aggravation or extenuation, upon which there was much abstruse learning, inasmuch as it would appear from the evidence to be adduced in the case at bar, that either the witnesses are grossly perjured, and their testimony throughout, a mere phantasy, an illusion, or that the case was no other than a case of the most cool, deliberate, foul, and diabolical murder.

He referred also, to Chitty's Criminal Law, and cited a few passages therefrom, upon the subject of principals and accessaries, for the purpose of shewing that all who are present aiding and abetting in the commission of a felony are in equal guilt with the immediate agent and may be charged as principals in the indictment, also to shew the meaning of "being present," in a legal point of view.

Also, that the manner of the killing and the weapon employed as the implement of death are no otherwise material than that the manner set forth in the indictment must not be entirely at variance with that exhibited by the proofs; such as killing by sword or pistol in the one, and by poison or drowning in the other, &c. &c. &c.

[Here the District Attorney proceeded to call the witnesses for the prosecution.]

Andrew Cunningham, Jr. *sworn.* I belong to Boston, and was one of the owners of the Schooner Fairy—part was owned by me, and part by my brother, Charles Cunningham. He also belongs to Boston.—The burthen of the Fairy was eighty-two tons and some odd feet. She was registered in Boston, and carried her register with her. She had only one boat. It was a pretty long narrow boat—perhaps sixteen feet in length.—The schooner sailed on the 20th of August last, bound to Gottenburg. She was laden with coffee, fustic, rice, sugar, and tobacco, but carried no specie—none at all—not enough to pay for her port charges at Gottenburg. Edward Selfridge was the Master of the schooner. He is an American, as appears by the roll, of twenty three years of age; and I always understood him to be a good captain, and a skilful navigator, but he never sailed in our employ before. The mate was Joseph Paine Jenkins, and belonged, as he said, to Barnstable. The crew were Winslow Curtis, Charles Marchant, John Hughes, and John Murray. I shipped them all, and remember the prisoner at the bar. He went by the name of Charles Marchant. I also recognize Hughes and Murray. The weather was warm and pleasant, as it usually is in August, when the Fairy sailed. She was one year old, a very tight and staunch vessel, and every way fitted for the voyage. I never heard any thing from her until I saw an account of the piracy, in the Newburyport paper, nor have I ever seen or heard from either the captain or the mate. The schooner was well found in every respect. I do not recollect in particular that she had a hatchet on hoard, but I never sent a vessel to sea without one. I cannot swear that it was a hatchet or an

axe—it is common to have both. They are used to cut wood and sometimes to cut away the masts.—My brother and myself were the exclusive owners of the Fairy.

Caleb Loring, *sworn*. I am acquainted with the family of the late Thomas O. Selfridge, and knew his son Edward Selfridge. I always concluded that he was born in Boston, but do not recollect particularly. I lived in the neighbourhood of Mr. T. O. Selfridge—was well acquainted with him, and was present at his death. He has been dead fourteen or fifteen years, but his widow, Mrs. Selfridge, is now living.

Stephen Hook, *sworn*. I live in Kensington, in New-Hampshire, and am master of a vessel—the schooner Sally, of Newburyport. I was in that vessel on a voyage to Nova Scotia during the last summer. Francis Pike was my mate; and we sailed on the 6th of June. While there I saw the prisoner. He was on shore at Louisburg, Cape Breton Island. I believe it was on the 25th or 26th day of August—no, I am mistaken—it was on the 30th or 31st day of August, early in the morning. We put in for water. I went up to the Old City and when I returned, Mr. Pike told me that a strange boat had arrived there, that he had been on board, and saw four men in her, and that they said they were from Philadelphia, in the Brig Fame, and had been shipwrecked. The next morning I went ashore, and saw all four of them. They had just landed, and I had some conversation with them on the edge of the bank. They were all together, but Curtis first addressed me. He asked me if I would give him a passage home to Danvers, where he lived. I told him yes. Murray also wanted a passage home. This was in the morning not far from sun-rise.—I agreed that Murray should have a passage, and he immediately took the boat and went on board. Either Curtis or Marchant, and I am not sure but both, said they were from Philadelphia, in the brig Fame, bound to Labrador for a cargo of fish, but neither Hughes nor Murray said any thing of the kind. Marchant and Curtis did not tell who the owner was, nor mention, at any time, the name of Franklin Avery. They said that the vessel sprang a-leak, and they left her at sea; and that the master, mate, and the rest of the crew went in another boat, but they did not say who the master was, or how many the crew consisted of. No farther conversation occurred at this time. Murray and Curtis wanted to return home, and Marchant had got a passage for Halifax. He was to give the boat to the captain for

taking him there. Marchant and Hughes remained on shore while Curtis took his chest and with Murray went on board of my vessel, and in about an hour afterwards I went on board myself, and found Curtis had unlocked his chest. He took out a bag and filled it with some very good clothes, and carried it on shore. I then thought there was something wrong and guilty about them, and determined to go on shore and pursue them. Accordingly I took three of my men and went on shore, about half a mile from where Curtis was. Murray then came up to me upon the run. He could hardly speak for some time. He has an impediment in his speech; and he seemed very much agitated. At length he said, "you must go right away and take those two fellows, meaning Marchant and Curtis, for they are murderers, and have killed the captain and mate." I told him to step into a house near by, for if they saw him with me they would abscond. He then stated that he thought Marchant was the worst of the two, and wanted me to take him first, for he had gone up to the Old City, which was about three miles off. I immediately took three men into my boat and started for the Old City. When I got up against Mr. Slatery's, where Curtis was, I saw him come out of the front door and go round the house. I told my people to pull ashore as quick as possible, for Curtis was going to make off. The moment I jumped ashore, I made for the house. Curtis pulled for the forest behind, I followed him but finding I could not overtake him, I halloed to my people to go up to Old City in the boat and I would go up by land. I went up by land and found three men by the way and took them with me, we arrived at a field and found Marchant lying across a bunch or stock of hay, I laid my hands upon him and told him he was a murderer. He told me he was guilty. He said he was not guilty of killing them, but was guilty because he helped throw them overboard. He said nothing more of any consequence and I tied his hands and took him into a store. As I had no authority there, I requested Mr. Dod who owned the store to get a horse and go to Sidney for a Magistrate, and then I took the same boat which my crew had come in and with them and Hughes returned on board of my vessel.

I do not know that Curtis was armed when he went off from the house upon the run. Neither did Marchant use any abusive expressions at the time I laid my hands on him, or when he said he was guilty. Murray remained in the vessel all the while, and when I had got the rest on board

I went ashore after Curtis. I had no subsequent conversation with Marchant. He was agitated when I took him and confessed that Curtis killed both the captain and the mate; Curtis killed the mate with an axe on the hen coop while he, Marchant, was standing at the helm, that for three days after they were at sea, Curtis had haunted him, Marchant, to kill them both, but he would not consent to it; that after Curtis had killed the mate, he, Curtis, went down into the cabin and killed the captain; that he, Marchant, heard the captain scream murder several times, that he, Marchant, helped Curtis drag the body up the cabin steps; and that after they had got the captain on deck, Curtis jabbed him overboard through the port hole; I do not recollect that Marchant said any thing else at this time.

As soon as I had got Marchant, Murray and Hughes on board, I went on shore for Curtis. I hunted round till dark but finding nothing of him I got a company of soldiers to guard the shore that night, for I feared he might come down, get the boat and go off. It took about thirty men to guard the shore and the prisoners. The next morning the Judge got out from Sidney. While we were talking together, a lady came in and told us that on the preceding afternoon she saw a man pass her house with a bag on his back; and that he was going towards Gabberrouse. A guard of soldiers was immediately sent forward and they found Curtis and returned with him about eight o'clock in the evening. By this time Marchant had been examined. His hands were untied during the examination, and he told the same story before the Magistrate that he told me when I took him, and which I have related. I was present when Curtis' examination began. Marchant was also in the room. When Curtis first came in, he exclaimed "Charles if you had only heard to my advice, we should not have come to this."* The Judge asked Marchant how it was, he, Marchant, made no reply, but must have heard what Curtis said. Curtis added, "he knew that he had got to die and would tell the truth," and then went on, and confessed that Marchant killed the mate, and he, Curtis, killed the captain: that he, Curtis, was forward at the time and heard Marchant strike the blow, and also heard the mate fall from the hencoop on the deck; that when he, Curtis, got aft, Marchant was throwing the mate overboard; that, after Marchant had thrown the mate overboard, he picked

*The prisoners Counsel here objected to the admission of Curtis' confession, and cited 2d Starkie 54, in support of their objection, which, however was overruled by the Court.

up a bolt, and told him, Curtis, to go down into the cabin and kill the captain, or he, Curtis, should share the same fate, that he, Curtis, then took an axe, went down below and approached towards the birth of the captain who was asleep; that his heart then began to fail him, and he ran back to the steps, that Marchant came to the cabin and told him, if he did not kill the captain, he, Marchant, would kill him, Curtis, that he, Curtis, then went towards the captain's birth again and struck him with the axe; that the captain screamed and cried out murder, that Marchant instantly jumped down the cabin, seized the captain, and hauled him out of his birth, that he, Curtis, then killed him on the cabin floor; and that afterwards they both together dragged him up stairs across the deck to the port hole, and threw him overboard.---I do not recollect that Curtis said any more on this occasion, nor did he say with what weapon Marchant struck the mate; Marchant was present while Curtis made this confession, but offered no reply. I soon went away to my supper, and after the examination the prisoners had their hands tied and were marched off by the guard to Sidney.---Neither stated when the murder was committed, but Marchant said the vessel was about two degrees west of the Grand Bank. I did not examine the bundle of clothes, it was examined by the Justice; the clothes of the captain and mate were taken out and put into separate chests.

Francis Pike, *sworn*. I live in Newburyport. I follow the seas for a living and am mate of the schooner Sally. I was at Louisburg with captain Hook on the 30th of August last, and we remained there several days. I saw the prisoner on the 30th of August as I was going ashore. He was in a boat with Curtis, Murray, and Hughes. I went to Mr. Slatery's house and in about half an hour Marchant and Hughes came there, but Curtis and Murray remained in the boat. Marchant asked me how far it was to Sidney, I told him I did not know, for I was a stranger in the place. He then asked me how far it was to Halifax, and what course. I answered "West by South." I asked him where he was from. He replied that he had been cast away in the brig Fame, Francis Avery, owner, from Philadelphia, bound to Labrador for fish. I asked him how large a crew he had. He said that there were eight men, that the captain, mate and two of the crew took the other boat, and were lost sight of in a fog, and that he feared they were lost. This is all he said; he soon after went away. I stopped at the house about 15 minutes and Curtis came

up. He said the brig sprung aleak and was left in a sinking condition. I afterwards heard Curtis say in the presence of Marchant, that he, the prisoner at the bar, killed the mate, and he, Curtis, killed the captain with an axe. I did not hear Marchant make any answer to this at the time.---The circumstances of the examination, &c. at Louisburg are true, and took place as related by captain Hook.

JOHN MURRAY, *sworn.** I was born in Boston. I am nineteen years of age; and have a mother living in Boston. I belonged to the Fairy, and was shipped on board that vessel by the owners, as Steward and Cook. She left Boston on the 15th or 18th of August last, bound to Gottenburg—Edward Selfridge was master, and Thomas Paine Jenkins, mate. On the day the vessel sailed, Marchant and the mate had a dispute at the wharf—I took no particular notice of it. I was busy at work; some hard words and abusive language passed between them, but there was no fighting. Curtis came on board on the same day. He was unwilling to go in the vessel—and he and his landlord had a quarrel together. Finally, however, Curtis made up his mind to go. We got under way and went down as far as Nantasket roads, where we came to an anchor for the night, and on the next morning we got under way again, and went to sea. The last land we saw was the high lands of Cape Cod. Charles Marchant was in the mate's watch, and John Hughes and Winslow Curtis, were in the captain's or first watch. Charles used to find fault because he had to stand four hours, and do two men's duty at the helm, and said he would not put up with it. Curtis once said the captain was a damned rascal for having thrown water on him when he was asleep, during his watch on deck.—Three days before the murder a small axe was missing.—We had two axes and a hatchet on board. It was always curious what had become of the hatchet. It was small, and it used to hang in the cabin by the bulk head. The mate asked me about it. I enquired of the men where it was, but they did not know. I never saw it afterwards. On Sunday night, 27th of August, I went below at half past 9 o'clock in the evening. It was the captain's watch on deck, and I heard no

* Murray was one of the crew of the Fairy; and when he took the stand the Court upon motion of the prisoner's Counsel, directed Hughes, also one of the crew of the Fairy, to retire under the custody of the Marshal, in order that each might undergo a separate examination.

more until about four o'clock the next morning, when I got up and found the scuttle shut. I slept in the forecastle and left the scuttle open when I turned in—it was always left open in the night. When I found the scuttle fast I went below again. John Hughes was with me, but neither Marchant nor Curtis was down in the forecastle at this time. Their births were empty, but Curtis's hat was on his chest. I waited some time, and at length I heard the watch called by Marchant or Curtis, I do not know which. John Hughes now turned out and went up the scuttle and I followed him. As we were going aft, Hughes asked Marchant where the mate was. He answered, "We have killed the damned rascals and thrown them overboard." Curtis was then within hearing and replied "The devil has got them by this time, and is tormenting them in hell." They afterwards said they had murdered the captain and mate, and were willing to answer for it. They now began to destroy the things on deck, and to stave in the water casks, and throw over the anchors, cables, &c. and ordered me to get breakfast.—After they had finished their breakfast, they began to overhaul the letter bag and papers in the cabin. They brought up the captain's writing-desk. Marchant opened it, and took out the letters and papers, some he tore up, and some he put back again. The letter bag was left on board the vessel when she was scuttled. Marchant and Curtis took the captain's sextant and quadrant, and all his fine cloths, such as shirts, flannels, handkerchiefs, coats, trowsers, &c. Marchant took the command, and said the schooner should go as he ordered her. Curtis said he would hail as captain, but Marchant made no reply to him. Marchant had most of the ordering to do. At this time the vessel was sailing west. Marchant said first he meant to run her for Newfoundland, and then he said he would run her for Nova Scotia. They threw over spars, ropes, sails, &c. and steered various courses. Marchant did not seem to know where to go, but kept the vessel up before the wind, and said if he could not find Nova Scotia he would make for the Spanish Main.—Marchant and Curtis found four pistols in the cabin, belonging to the captain. Each took a pair and put them in a chest on deck. They would take them out at times and fire them off. Curtis took me unto his watch and Marchant took Hughes unto his. Three days after this we made land, and Marchant said we will now heave the schooner about and get ready to scuttle her. So she was hove about and stood out for

sea. Curtis and Marchant then began to bore holes in her. After they had bored the holes, they stopped them up with plugs, hove the vessel about again, and stood in for the shore. They had but one auger, and with it they bored holes in the forecastle and in the cabin. When Marchant thought the schooner was in shore far enough, he pulled the plugs out, ordered the boat to be hoisted out of the main hatch and three chests to be put in her. Marchant filled the captains chest with clothes, Curtis took the other, and the third belonged to Hughes. The mate's was left on board of the schooner; all the mate's clothes were taken out, and such as they did not want they threw about the cabin. After they had got all things into the boat, the compass, provisions, liquors, &c. Curtis took the axe and cut holes in the side of the schooner down to the water's edge. I was then ordered by Marchant to get into the boat. She was provided with a sail and mast. The schooner was between five and eight miles from the land when we left her, and as we went along, Curtis and Marchant were making up a story to tell the people on shore. After they had thought of a number of stories, they agreed to say that they belonged to the brig Fame, of Philadelphia; that she sprung a-leak at sea; that the crew took to the boats—four in one and four in the other; and that the small boat being separated from the long one in a fog, they expected she was lost with the captain and mate and other men in her.—They agreed to call the captain's name "Adams," but did not say what they would call the mate.—They wanted me to tell the same story, and to hold as a secret what they had done. About four hours after we left the vessel we reached the shore.---I have never seen the schooner since. The last time I saw her she was most hull down. When we made land, Marchant and Hughes went up to a house and left me and Curtis in the boat. They were gone about twenty minutes and when they returned, Marchant said we must go off and remain in the harbour for the night; and in the morning get a passage for Halifax or England. We went off about a stone's throw from the land and staid there all night. The next morning we pulled ashore again and all hands went round to see what we could find. I wanted to escape, but Curtis took me with him into a house; and Marchant took Hughes into another. They would not suffer Hughes and myself to be alone together. After breakfast Curtis wanted me to go with him and say nothing about what had happened. He took the boat and went

on board of the American schooner Sally. Curtis asked me to help him take his chest on board and I did. I enquired if the captain was on board, and one of the crew answered that he was gone on shore. There were three men in the Sally.---Curtis wished me to return to the shore, I told him I wanted to wait till the captain came off. Curtis then unlocked his chest, took out some fine clothes, and put them into a bag; and wanted me to go ashore with him. I told him I would go, if he would come back again; and he said he would.---As we went on shore, Curtis said he was afraid I would tell of him, I answered I did not know as I should.* When we landed, Curtis went up to a house with the bag of clothes, and I took a small boat, went a cross the river, and saw a parcel of men standing together on shore about half a mile off. I made my way toward them as fast as I could. The first man I spoke to was captain Hook. I told him my story that a boat had come ashore and that Marchant and Curtis were murderers, and scutlers of the vessel. He immediately set out for them, and I went on board the Sally.---Captain Hook told me I had better do so.---Marchant and Hughes were soon after taken and brought on board the schooner. Curtis had made off with himself, but was taken on the next night and brought to Slatery's house for examination. Marchant was present when he came in, and the first words of Curtis' were---"Charles, you have brought me to this;" and then Curtis said that Marchant killed the mate in the first place, and told him, Curtis, that if he did not kill the captain, he, Marchant, would kill him, Curtis; so he, Curtis, went down the cabin and killed the captain.---He did not tell how it was done.--Marchant laid all the blame onto Curtis until Curtis was brought into the house, when he made no reply to what Curtis said, but hung down his head and began to cry. The next morning they were taken to gaol at Sidney where they endeavoured to escape. I did not know, nor had I any suspicion what was to happen on the 27th of August.---The officers and men always agreed very well, there was no fault found, and I saw no difficulty among

*The witness had gone on thus far with his evidence, when it being 2 o'clock in the afternoon, the court adjourned, having first directed the Jury to keep together, and not to speak to any person or converse with each other, in relation to the issue before them, while taking refreshments, which were allowed them upon consent of the prisoner's counsel.---At 3 o'clock in the afternoon, the court met according to adjournment; and the jury and prisoner having answered to their names, the witness proceeded with his testimony as above reported.

them.---I believe there were two or three dollars in the captain's desk, and once, about four days after we were out, Marchant asked me if there was any money on board, I told him I did not know. He said he thought there must be some or else the captain could not pay the port charges at Gottenburg. Marchant did not say that any body told him that there was money on board, nor did he ever ask me but once about money. After the murder I examined the cabin and looked into the captain's birth, the mattress was there but no bed clothes. I saw some blood on the pillow, on the barrels in the gang way, and on the steps. I also saw some on the quarter deck, near the hen coop and on the port hole. I likewise saw several spots of blood on Marchant's trowsers, which he wore for three days afterwards. They both said when I came on deck in the morning, that the captain and mate had gone to the devil ; that there was no harm in killing such men, and that if they had been two good men the murder would be something to think of. They threatened my life if I told of them.—They said they might have taken my life as easy as they had taken the lives of the captain and mate ; and they always kept their pistols loaded with musket balls in a chest on deck. Curtis was afraid I should tell, and always used to be talking to me about the murder ; but Marchant did not seem to wish to say any thing about it. (*Cross examined.*) The mate was a man of good size, stout and active. He always treated Marchant kindly, and used to call him "*Charly.*" Marchant remained on the watch four hours, and the rest only two each night. Marchant said he meant to tell the mate he could not stand it all the way to Gottenburg. Marchant once told me, that on the night of the murder, the mate came up to him while he was sitting at the sky light to steer, and asked him what he was doing ; that he answered "sitting on my back side," and that the mate then ordered him to stand up and steer. The quarter deck was three or four yards wide, and there used to be a cable coiled about midships, between the companion way and the rudder. I never heard Marchant say that the mate was killed before Curtis came on deck. I don't know which was killed first, but Curtis said the mate was killed first. The mate's watch was at twelve o'clock in the night, and after twelve o'clock on the night of the 27th of August, Marchant would be at the helm. I never was present at any dispute between the mate and Marchant, nor did I at

any time see Curtis shift the heaver* or put it away in the boat. I have sailed with the mate before. He was quick tempered, when in a hurry, but good natured. On the way from Sidney to Louisburg, Marchant said that Curtis wanted to kill me and Hughes, and that I might thank him, Marchant, for saving my life ; for if he had followed Curtis' advice, I should not have been here now. Marchant is not an American ; and this is the first port of the United States, into which we were brought after the murder of the captain and mate.

Abigail Jenkins, *sworn.* I am the mother of Thomas Paine Jenkins. I have lived in Boston for twelve or thirteen years, and my husband has been dead for sixteen years. Thomas was born in Barnstable. He resided with me whenever his business would permit, and contributed to my support. Whatever I asked for he would get me, and he always used to give me his money, and say, "Here Mother, take it, and buy just what you want with it." He was a good child—a very dutiful son—smart and active, quick-tempered, but pleasant and good natured. He was mate of the Fairy, and twenty-five years of age. I have never seen or heard from him since he went away in August last. The first house that the prisoners came to at Sidney, belonged to my daughter. She wrote me a letter and said she saw them; and little thought it was her poor brother whom they had murdered.

John Hughes, *sworn.* I was born in Milford, in Wales. I have been two years in America, and am twenty four years old. Some time in August last, I cannot recollect the precise day, I shipped on board the schooner Fairy, of Boston, as a seaman. Edward Selfridge was captain and Thomas Paine Jenkins mate. Marchant, Curtis and Murray, were the rest of the crew. She was a good vessel, but had only one boat attached to her. The mate and Marchant had a few words at the wharf on the day we sailed. The mate told Marchant "Come, bear a hand, and get the wood in." Marchant said with an oath, "Who are you ordering, do you think you have negroes under you?" The mate answered him in a cross way, but I cannot recollect what he said, nor did I ever hear any more about it. Every thing went well on board the schooner, until Sunday night, the 27th of August. At half past nine o'clock in the evening, the captain went

* A heaver is a piece of hard wood two or three feet in length, and as many inches in circumference; and it is used to set up halliards, &c.

below, and turned in. Curtis and myself were in the captain's watch, and Marchant was in the mate's watch. The captain's watch began at eight o'clock, and lasted till twelve. Just before the captain went down, he told me to keep a good look-out and call him at twelve. At twelve I called the watch forward, and then went down to call the captain. He was asleep in his birth. I awoke him, and told him, "it is twelve o'clock, sir." He asked me how the vessel held. I answered, "north west," and he then asked me how the weather was. I told him, "clear, with a light wind." I then returned on deck, and staid there about ten minutes. The captain did not come up, so I went down and called the mate and Marchant. They came up. Marchant took the helm, and the mate asked me how the vessel headed for the last four hours. I said, "east north east," and he then told me I might go below. I turned in and soon fell asleep. Curtis had turned in before I went down, and was in his birth at a quarter past twelve.

I heard the watch called in the morning, but cannot tell who called it. It was sunrise and I had just awaked. I went to Curtis' birth to call him, he was not there, but his hat lay on his chest, I run upon deck and Murray came after me. From the cable I went aft. Marchant was sitting on the weather rail, and Curtis at the helm. I asked them where the mate was. Marchant replied "we have killed the captain and mate, and thrown them overboard. "Yes," said Curtis, "we have killed the damned rascals and hove them overboard." "The devil has got them in hell by this time." Marchant added "you may thank God that we did not kill you as we did them." "I may thank God" said I, "but do not know but that you will kill me as you did them." They said, "we will not kill you, if you behave yourselves." I could talk no more. I began to cry. I afterwards asked Marchant who killed them. He answered, "I killed one, and he the other," pointing to Curtis at the helm. I asked him "what caused you to kill those two men?" He replied "no cause at all," and said he was sorry he had done it. Curtis spoke up and said, "sorry!" "what for killing them two fellows? If they were good men it would be worth a while to be sorry. I had as lief kill the two damned rascals as to kill a dog." I asked them what they would do with the schooner. Marchant said, "run for Newfoundland, scuttle her and go ashore in the boat." I told him, "it will be a terrible thing for the owners to lose the schooner and cargo. He said, "damn the owners, the insurers will

have to pay for all." Marchant then said, " what are you crying about all this time." I said, " it is enough to make any man cry." Marchant answered " you think a great deal of killing a man," " cry ! Look at the old countries, Italians, Portuguese and Spaniards, they make nothing of killing a man." I said, " If they do it will you do the same ? Only look upon it and see what a shocking thing it is to kill those poor men ; I dare say the captain was asleep when you killed him." Marchant did not make much answer to this but turned away with a " ham." They now hove the cable and hawser overboard. I asked them what are you doing that for, they said, " to make the vessel sail faster." Then they cut away the best bow anchor, stove in the water casks, hove over wood and lumber, and said they would not go to Newfoundland but to Nova Scotia. Curtis said he would be captain, and Marchant answered that one was no more captain than the other. They ordered one, about as much as the other. They steered different courses, towards Nova Scotia and made land on Wednesday morning. We were near the Grand Bank when the murder took place, the weather was fine, and I saw a sail the next morning. There were two axes and one hatchet on board the vessel. The small one hung near the bulk head in the cabin. It might weigh four or five pounds and had a short handle. It was missed two or three days before the murder took place ; and I have never seen it since. Marchant ordered breakfast on the 28th, before he and Curtis began to strip the vessel. Afterwards they overhauled the cabin, captain's writing desk, letter bag, &c. tore up some of the papers and letters, and threw and knocked others about. There was about a dollar and fifty cents in the captain's desk. I never heard any enquiries on board about money. I went down to see the captain's birth after the affair, and saw some blood on the pillow and ceiling, on the barrels, deck and starboard rail, and on the port hole. The mattress was in the birth, but no bed clothes. I did not look on the stairs ; nor was there any blood on the hen coop, but I saw some specks on the forepart of Marchant's trowsers. We made land before light on Wednesday morning ; we did not do much after we had made land, but stood off and on. Marchant and Curtis then bored holes, two in the cabin on the larboard side, and two in the forecastle, and plugged them up. No one helped them—they had but one auger and took a turn about with it. At length they made land again, lowered the sails and took down the yards, and got out the boat.—

Curtis having first cut away the main top mast; put three chests into the boat with a bag of bread and cheese, some butter, a compass, quadrant and sextant; the chests belonged to the captain, Curtis, and myself. They took the mates clothes also—some of one thing and some of another, but a few were left. Marchant first got into the boat, and then he ordered us in; while Curtis seized the cook's axe and cut holes in the deck and side of the schooner. We were four or five miles from the shore at this time. Curtis and Marchant had four pistols with them—they used to keep them in a chest on deck, taking them out occasionally and firing them off. They made up a story while going ashore, and agreed to tell that they belonged to the brig Fame, captain Adams, of Philadelphia; that she sprung a-leak, and that the captain, mate, and two seamen took the other boat. They said we must not tell what had happened. They were afraid to leave us alone; Curtis was with one of us and Marchant with the other at all times. It was sun-set when we arrived on shore. Marchant and myself went to Mr. Slatery's house, to enquire what place we were in. We got some milk, and eat it in the boat, and we lay in the boat all that night in a creek. In the morning we went on shore. Captain Hook then came up and asked us where we came from. Curtis and Marchant said that the vessel sprang a leak, and they left her at sea; that it was not quite as bad as a shipwreck, and that they were from Philadelphia in the brig Fame, bound to Labrador. Curtis asked for a passage to America. Captain Hook said he would give him one; and Curtis and Murray then went on board captain Hook's schooner. Marchant got a passage for Halifax in a shallop that was there, and asked me if I wanted to go with him. I said I wanted to go some where, but God knew where; I did not know what to do; I feared they would kill me; for there were only two or three persons there, and I was a stranger among them. I saw captain Hook in a boat, and I beckoned to him to come on shore. He came and took me. I told him I was innocent and was glad I was taken. He said he would have the two rascals, if it cost him his life. Curtis by that time had run into the woods. He came out of a house first. I then went in the boat up to the Old City with captain Hook's crew. He went up by land and found Marchant, took him to a store and tied his hands, and carried him to the schooner. After we had been there about an hour, we were all taken ashore, and kept in a kind of store all night, under guard.

I heard Marchant examined. He said that he was innocent of killing the two men, but helped throw them overboard; that on the morning of the 28th of August, he, Marchant, told Curtis it was only two o'clock; that Curtis came up and said "the mate is asleep on the hen-coop —now is our chance to kill him:" and he, Curtis, struck him with an axe; that the mate then fell off the hen-coop and Curtis gave him another blow; that Curtis could not throw the mate overboard, and he called him, Marchant, to help him; and as soon as they threw the mate overboard, Curtis took the axe and went down to kill the captain, while he, Marchant, returned to the helm. There he heard the captain cry out, murder, and scream two or three times. Then he went to the companion way, and helped Curtis drag him up; that they took him by the shoulders, hauled him up and pushed him out of the port-hole; that Curtis had been asking him to do it for three days before; that the mate never did him any harm; that he, Marchant, did agree to help throw them overboard, if Curtis would kill them; that Curtis wanted to kill me and Murray, but that he, Marchant, said, "no, we have done enough now, without killing any more." I was also present when Curtis was taken, and when he was brought into the house and examined. He said, "O, Charles, if you took my advice we should not have been here," &c. (*Cross examined.*) I saw Curtis shift the heaver and stow it in the long boat, one or two nights before the murder. It struck me rather odd, but I did not think much of it. Marchant said that the captain and mate had never done him any harm, that Curtis, for three days wanted him to kill them, and that he afterwards consented to help throw them overboard; that Curtis wanted to go down and kill us two, forward, and said, if we were killed, they would never be found out; and that he, Marchant, said, "no, we have done enough that is wrong already." Curtis used to boast and exult about the murder, but Marchant talked but little of it, and seemed to be sorry; and always sought to avoid the subject.

Thomas B. Curtis, *sworn*. I have known Edward Selfridge for several years. He was a very mild, peaceable, and intelligent young man; correct in his habits, and enterprising in his business. He made several voyages with me to the East Indies, and to Europe, and devoted his earnings to the support of his mother. She is a widow, and has two other sons.

The examination of the witnesses for the government being finished, Mr. Bartlett opened on the part of the prisoner.

May it please the Court—Gentlemen of the Jury.

THIS cause, so far as relates to the introduction of testimony, is now finished. The prisoner has no witness to produce to you. He stands there in this fearful struggle for his life, a friendless foreigner, committed to his counsel, yourselves and the court. Nor is this circumstance, gentlemen, one of light and trifling importance to him. It shuts him out from the usual sympathies that citizens of a common country extend to each other. It does more, gentlemen, it precludes him from the possibility of placing before you the legal proofs of a previously pure and well spent life—a benefit which in cases of doubt and uncertainty, is of incalculable importance. The rule of law, gentlemen, which in all cases presumes a man innocent until he is proved to be guilty, is under such circumstances extended, and allows you to infer that a man of known probity and humanity would not commit a crime evincive of a base, wicked and malignant spirit. To the prisoner at the bar, gentlemen, these humane provisions are of no avail. He feels that he is not to be tried by jurors drawn *de vicineto*, from his neighbours and his peers ; to the solemn appeal of the clerk, how he will be tried, he cannot answer by God and my country—and he is thus left subject to the influence of the too common prejudice against citizens of the older and more corrupt communities of Europe.

I know, gentlemen, that these considerations do not alter the strict principles of law. I know that they do not furnish you any peculiar rule for the trial of this case ; but I know also, that to a humane and intelligent jury, they do afford additional inducements, if any were necessary, to give to this defendant the full benefit of any doubt that may arise in the course of the trial. There is still another influence, gentlemen of the jury, against which it is my duty to caution you. It is hardly possible that you have not through the medium of the public journals, or from some other source, obtained a narrative of the occurrences on board the schooner Fairy. It may be, that in your minds the prisoner is associated with other and numerous offences—if it be so, gentlemen, let me beseech you to dismiss them from your memory. They can have no lawful influence here, they can but serve to mislead you. If the prisoner has been guilty of other crimes, you ought not to doubt that upon trial for those crimes the strong arm of justice, will reach him. Upon this trial, as you would be true to yourselves, as you would be true to your oaths ; you will keep clearly in view the single offence charged in the indictment.

In this case, gentlemen of the jury, I have a brief duty to discharge. The narrow ground upon which the defence rests, does not require, nor do the rules of the court permit me to comment upon the testimony. I have only to state to you the principles of law, and evidence which I deem applicable to it, and read to you a few authorities, in support of those principles; and I shall then leave the case to the counsel associated with me.

The offence charged in the indictment, is the murder of Thomas Paine Jenkins, a citizen of the United States, on the high seas, on board the schooner Fairy, owned in whole or in part, by citizens of the United States; and to give jurisdiction to this court, the government must prove to you these allegations beyond a reasonable doubt. The crime of murder consists in the killing another in the peace, with malice either express or implied; and this definition subdivides itself into three parts; *the death—by the prisoner or his accomplice—with malice.* Upon the first point, gentlemen, I will not weary you with any observations as to the doubts and possibilities that may arise in this case. I will merely read to you the opinion of a most eminent judge and lawyer, in relation to the clearness of proof which the law seemed to him to require, and leave you to apply it to the evidence given you. I read the opinion of lord Hale. "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead. For the sake of two cases, one mentioned in my lord Coke, P. C. 104, p. 232, a Warwickshire case; another which happened within my own remembrance in Staffordshire, where A was long missing, and upon strong presumptions, B was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon B was indicted of murder, and convicted and executed; and within one year after, A returned, being indeed sent beyond sea by B against his will; and so, though B justly deserved death, he was really not guilty of that offence for which he suffered." It is added in a note to Starkie on Evidence, from which I read. "I recollect to have read a very remarkable account of the case of Ambrose Gwynnett, who after being convicted of murder, was suspended for a considerable time in the usual course of execution, and afterwards gibbeted, and yet, in consequence of a series of singular circumstances, he survived his supposed execution, and having escaped to a foreign country, actually met and conversed with the per-

son for the supposed murder of whom he had been condemned to die."*

But it is my purpose, gentlemen, to call your attention to the third point in the subdivision, the "malice express or implied." This is in all cases a most important question, and in this case, gentlemen, the defence will rest upon it. Express malice then is cool, deliberate, predetermined state of mind, usually evidenced by antecedent menaces, lying in wait, conspiracy, and other like facts, and with this division of malice, if I am not mistaken in the testimony, you will have little to do. It is implied malice, malice as an inferenee of law, which in this case calls for your serious attention. Whenever the facts shew "a heart regardless of social duties and fatally bent upon mischief, there" says sir Michael Foster, "the law implies malice." Gentlemen, upon this definition, you cannot but see that the whole question turns upon the intention of the prisoner, and that intention is to be gathered mainly from the antecedent conduct and relation of the parties, and from the existence, or want of an adequate motive for the commission of so deep a crime.

Upon this point, gentlemen, I cannot aid you better, than by reading to you the principles as I find them laid down in the books. I read to you from 2d Starkie on Evidence, pp. 949, 950. 960.

"Where malice is an inference of law from the facts, that is, as it seems in all cases where the act does not result from actual and preconceived malice, the question still frequently depends upon the actual *intention* of the prisoner, which is to be found as a fact by the jury. They are to find the nature, extent, and origin of the intention, as, whether the prisoner really intended not to destroy the deceased, but to do him some bodily injury, and to what extent, and whether this intention was preconceived, or arose upon the occasion of some sudden provocation given."

"By *constructive* malice, or malice in law, it is meant that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart regardless of social duty, and fatally bent upon mischief. Here the law itself infers malice from the circumstances found by the jury, without their special finding of an actual intention to destroy the deceased."

"Where the defence is, that the death was occasioned by *accident*, the nature of the act itself which occasioned the death, and the real motive and intention of the prisoner, are the proper subjects of evidence; but the conclusion as to the quality of the offence, as founded upon such facts, is usually a question of law. If the act was done in the prosecution of felonious intention, it will amount to murder. But it is not murder, but manslaughter, if the prisoner intended to commit a mere trespass when he accidentally killed the deceased."

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* 2 Starkie on Evidence, p. 944.

"Circumstantial evidence in this, as in other criminal cases, relates principally to the probable *motive* which might have urged the prisoner to commit so heinous a crime; for however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to expect that some motive, and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, and the consequences of which is usually so fatal to the criminal."

Gentlemen, if upon a careful consideration of these principles of the evidence—if upon looking at the previous kindness and good will between the defendant and the mate—and the want of all possible motive for the commission of so bloody a deed, you should be led to doubt whether the fatal result was not the consequence of some unexplained affray or assault, in the fervour of which, the deplorable event has happened, it is your right, gentlemen, and it will be your duty, to reduce the offence charged, to the crime of manslaughter. The definition of this offence, gentlemen, is too simple and familiar to you, to need the production of authorities. I will merely note it to be the killing another in the heat of blood, without malice and upon reasonable provocation. Permit me to add a few considerations, gentlemen, of the nature and principles of the testimony upon which this consists, and I will leave it to abler hands.

The crime alleged to have been committed, was without witness, in the presence only, of one or both the defendant's joined in this indictment. Upon the evidence it is for you to determine, whether both or one only is guilty; and that evidence, gentlemen, is derived entirely and wholly from their several confessions. I call upon you, gentlemen, to pause for a moment, and examine the nature and principles of that species of proof. I call upon you to reject the too common belief that such evidence is of the highest nature. I know, gentlemen, the rule "out of thine own mouth will I judge thee," is of almost universal acceptation. It is said to afford relief to the mind, when the accused becomes his own accuser, and leaves little for a court and jury, but to measure out to him the punishment of his offence; and yet, gentlemen, upon examination of its principles and of the principles of law in regard to it, I strongly believe that it will be found to be the weakest of all human proof. In the first place the law, gentlemen, has shown its deep distrust of it, by rejecting all admissions made under the slightest influences, it will not stop to consider, nor will it suffer juries to consider, how great or small that influence

is. It has provided too, that the whole confessions, as well those that exculpate as criminate, shall be taken together; thus allowing a violation of the common rule, that a party shall not create evidence for himself; and when under these severe and guarded restrictions, it is allowed to be placed before you—under what deep and painful uncertainty does it rest. You have in ordinary cases, gentlemen, the doubt, as to recollection of witnesses and their fairness;—the recollection, too, of facts that address themselves to all the senses; that remain under the observation long enough to induce a certainty of the existence—but confessions, gentlemen, are the things of a moment—they rest upon the accuracy of one solitary faculty —the mistake of a word, the transposition of a letter or sentence, may cost a man his life. And yet, gentlemen, who of us does not recollect the thousand instances of his own imperfect apprehensions. Add to this, gentlemen, the consideration that every thing depends upon the state of mind and intention of the witness—that least of all is correctness to be expected from persons filled with surprise and horror. Recollect, too, that innocence placed under circumstances of strong suspicion, will often weakly and foolishly resort to artifice and falsehood. And then say, gentlemen, whether evidence of this nature shall be suffered to have a deep influence in a case, involving infamy and the life of a fellow being.

Suffer me, gentlemen, to place these considerations before you, in language drawn from eminent authorities, and I have done.

"The case cited by Ld. Coke and Ld. Hale, and which has already been adverted to, is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances, that a murder has been committed; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced, and injudicious person, ignorant of the nature of evidence, and unconscious that truth and sincerity of innocence will be his best and surest protection, and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to artifice and misrepresentation." 2 *Starkie on Evidence*, p. 960.

"It may be proper also to remark in this place, that some of those presumptions which have lately been touched upon are to be regarded with great caution; since it sometimes happens that an innocent, but weak and injudicious person, will take very undue means for his security, when suspected of a crime. A strong illustration of this is afforded by the case of the uncle, mentioned by Lord Hale. His niece had been heard to cry out, 'Good uncle, do not kill me!' and soon afterwards disappeared; and he being suspected of having de-

stroyed her for the sake of her property, was required to produce her before the justices of assize ; he being unable to do this, (for she had absconded,) but hoping to avert suspicion, procured another girl resembling his niece, and attempted to pass her off as such. The fraud was however detected ; and, together with other circumstances, appeared so strongly to indicate the guilt of the uncle, that he was convicted and executed for the supposed murder of the niece, who, as it afterwards turned out, was still living. *Ibid.* v. 1, p. 32.

" A confession must never be received in evidence, where the defendant has been influenced by *any* threat or promise.* To say that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the consequent declaration by the prisoner, for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, if *any* degree of influence has been exerted. And where a confession has once been induced by such means, all subsequent admissions of the same, or of the like facts, must be rejected, for they may have resulted from the same influence. *Ib.* ii. 48.

" For hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured. Words are often misreported, whether through ignorance, inattention or malice, it mattereth not to the defendant, he is equally affected in either case, and they are extremely liable to misconstruction ; and withal this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted." *Foster*, 243.

These, gentlemen, are the principles which I have thought important in the case ;—the application of them will be made by my associate, who is to follow me, and I have only to ask you to carry in your mind the precept drawn from the highest of all authority, " In righteousness," let me add, in mercy, " shalt thou judge thy neighbour."

Mr. Bartlett was immediately succeeded by Mr. Warner, who closed in behalf of the prisoner, as follows :—

May it please your Honors, and you Gentlemen of the Jury.

The Court has appointed me to the charge of presenting to you the prisoner, White's,† defence, under the case shewn in evidence by the government. I shall seek to discharge this duty, thus contracted, as far as any thing has

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* Warrickshall's case, Leach's C. C. L. 3d edit. 298 ; Cowp. 334 ; 2 Haw. c. 46, s. 36. Two men were charged with the murder of one who (as it afterwards appeared) was still living, and yet one of them, upon a promise of pardon, confessed himself to be guilty of the crime. Note to Warrickshall's case, Leach's C. C. L. 301, 3d edit. And an instance is mentioned in the State Trials, where not only the party himself, but his brother, were executed on a supposed confession, although all the parties were innocent.

† " John Duncan White," is the real name of the prisoner. In the testimony of the witnesses, he is called " Charles Marchant," the name by which he shipped on board of the Fairy.

been left for me to do by my associate, with much plainness, and with fidelity to the prisoner, the law, and myself. I am unaccustomed to have any thing I may say, have a direct and immediate bearing on an issue, involving human life, and most if not all of you, are doubtless as unaccustomed to pass on such an issue. I have, however, no appeal to make to your sympathies, no address to urge to your feelings as men, apart from those which you ought to bear and exercise as faithful representatives of the country. If the prisoner may not, upon a fair application of the rules of law to the evidence, be acquitted of the charge here brought against him, I have no wish, because I ought not to have a wish, that your compassion alone should rescue him from the laws' just judgment. I should deem an effort to accomplish this, unfaithfulness to the law, which I feel myself entrusted to advocate, and not to relax. Still, the magnitude of the subject of your enquiry deepens very greatly my accustomed sense of professional responsibility. And I therefore, approach the case as it lies in evidence before you, with no common concern from that cause. I feel also very sensibly the want of an exact preparation of the defence as far as regards the arrangement and disposition of all the particulars of evidence in its support. And this because we had but a very imperfect and inexact knowledge of the testimony to be adduced, till we heard it with yourselves from the stand. Under these circumstances I cannot but express my satisfaction that both you and myself are called to discharge our several duties in a court whose peculiar wisdom, watchfulness, and clemency, render it certain that the laws of the country on the one hand will not go uninforced, nor, on the other, the rights of the unfortunate or the criminal be in danger of being compromitted or left unprotected by any inadequacy or deficiency of counsel. I am happy for the same reasons also, that the point of the prisoner's defence is plain and single, easily intelligible, not easily misrepresented by men or misunderstood by you. But it is one, which under the evidence, claims your very serious and attentive consideration.

I shall now briefly and simply state to you the defence, and shall afterwards ask you to consider with me, how far that defence is probable or otherwise, having a general view to the situation, circumstances, and probable motives of action of the party. How far it is inconsistent with, or disproved by the facts and confessions shewn by the government, and the considerations and facts of a positive char-

acter, shewn also by the government which go fairly and reasonably by a just application to establish it.

The prisoner, White, says, and has so solemnly instructed us as the truth of the case, that on the night of the 28th of August, he did cause the death of the mate Jenkins on board the Fairy—that he did it however in a quarrel which arose between him and the mate when together by themselves on their night watch; that the quarrel arose out of the fact, that the prisoner fell asleep at the tiller, and got the vessel off her course—that the mate was very angry at this, and that words arising from it, the mate struck the prisoner twice, the second time standing on the cable coil, which raised him a little from the deck—that White returned the blow, and with force, and staggered the mate with great violence, against the low railing of the schooner—that the mate fell over it into the sea, and sunk and drowned; that he immediately informed Colson of this unhappy and unintended deed; that on receiving this information, Colson at once fired with the project, which he instantly proposed, of putting an end to the captain, against whom he had for some days been wishing and devising some plan of revenge for his having thrown water on him, and that Colson, immediately flew with the axe into the cabin to execute his horrid purpose; that Colson executed that purpose on the captain; whether with or without any, or with what degree of criminal cooperation by the prisoner in that death, is not now the subject of enquiry; it may be on the indictment now pending against them for the murder of the captain. If this statement be substantially true, and you shall find it on the whole probable, that in this manner, and by this act, began the scene of horror unfolded, then however liable the prisoner may be for any supposed toleration of, or cooperation in the death of the captain, he is not guilty of the murder of the mate. Because so to have caused his death would not be murder. The law has fixed gradations to the crime of *Homicide*, and has in benevolent regard to human frailty marked them with a reference to the degree of malignity and deepseatedness of the passion which actuates the offender. It is one thing to kill, with a mind previously bent and determined to slaughter, and that is murder; and another, to cause death by the instant impulse of excited passion, and that is manslaughter. In which of these two modes the prisoner, White, caused the death of Jenkins the mate, is the exact and sole subject of our enquiry. And here I state a principle, that if the case made out by the government, shall be found when you ex-

amine it, not be irreconcileable and inconsistent with the supposition that the mate was killed in a sudden quarrel; but if all the facts and admissions proved may be made consistent with the supposition, then you are bound to find that the mate was killed rather than that he was murdered. Because in that case the proof of murder will not have been made conclusive to your minds, and the government is bound to make it conclusive. In other words, if on the whole survey, you shall doubt in which of the two ways the mate came to his death; you will be bound to find it in the least criminal. Because no degree of crime beyond what is conclusively proved is to be presumed.

Let us now consider together for a moment, whether the case made out by the government does not leave it something more than doubtful in our minds, whether the prisoner with malice aforethought murdered the mate, or killed him in a sudden quarrel. Let us consider, under the application of fair considerations and principles to the precise evidence before us, which of the two is the best sustained position, that the prisoner, and Colson, settled and arranged a murderous conspiracy to slaughter the two officers on board that vessel, and deliberately did it together, which is the case the government will contend for; or that the prisoner caused the death of the mate in a sudden quarrel, and that that unhappy act, not only furnished the occasion, but the immediate excitement to the destruction of the captain; and was the first, though not the deadliest on the catalogue of crimes committed either by Colson or White, or both, on board that ill-starred vessel; which last is what we maintain to be the true and legal interpretation of the evidence.

To determine this upon legal principles applied to the testimony, I must ask for your careful discrimination. Consider that the sole and single charge made in this indictment is for the murder of the mate, for the *murder* rather than the manslaughter of the mate---that is the naked question submitted to you. The other crimes, viz. the murder of the captain, the revolt, the piracy, the scuttling, are none of them now before you. Consider this, and let me ask you most carefully to distinguish and separate, that small portion of the evidence which goes to shew in which of the two ways I have mentioned, the mate came to his death, from the large and dark mass of testimony which goes to establish the perpetration of the series of crimes to whomsoever imputable, which ensued upon that death. All this latter testimony you must lay out of the case, as bring-

ing no aid to the single enquiry I submit to you. Because, admit if you please for this view, a co-operation of the prisoner in the destruction of the captain, the piracy and scuttling ; admit the apparent union of White and Colson, after the scene of bloodshed ; the facts if proved are altogether insufficient and inconclusive to shew whether the mate came to his death in the quarrel or by murder, which is our enquiry ; inasmuch as all these criminal acts may, and as we shall submit, might as naturally have had their beginning in an act of manslaughter as of murder, and therefore do not prove one to the exclusion of the other.

In now coming to the inquiry by which of the modes suggested the mate came to his death, let me ask for a moment to turn your attention to the relative or comparative probability of the mode contended for by the government, and that relied on as the true one by the prisoner, having in our view the situation and circumstances and probable motives of action of the accused.

What is the exterior view of the case ?

Here were six men on board a small trading schooner laden with tobacco and sugars, &c.

The first natural enquiry we make is, what motive has been shewn by the government as adequate ground for the reasonable supposition of a settled plan and conspiracy of two out of six, two against four, to murder the officers and take the vessel ?

The plan was most attrocious and most perilous, and some decisive motive must be shewn to exist---if we suppose a plan preconcerted ; the prisoners statement frees us from the necessity of finding such a motive.

Is it supposed to have been a hope of money ? The dollars of an Indiaman, known to be on board, would hardly furnish, of themselves, without other cause, reasonable ground to infer a settled plan of such double and hazardous murder.

The project of two against four, must under any circumstances, have been attended with great hazard. It is in evidence the officers were both armed. The plan would therefore not only be one of the most unexampled atrocity, but one of very great danger. Could the expectation of the money that this little vessel could furnish, have possibly been the cause and motive of such a deep and deadly plan. Was there the least ground to expect money ? Could the paltry change which the captain must carry in his purse, to pay his vessels expenses, have furnished inducement to such deliberate and repeated murder ?

But do not the facts show there was no such inducement—that money was not the object? Was any found? —Was it sought for? Was any disappointment shown at not finding it? None whatever! What would have been the conduct of men, whose sole object had been money, and who had waded through blood for it, and found none? Would you not have heard execration upon execration? Do you find in the evidence a murmur? Was a previous and common hatred and malice the motive? I see none brought home to the two—to unite them in such a plan. Colson had doubtless received an insult from the captain, as he deemed, in his having thrown water on him—and entertained a latent purpose of hostility and vengeance, liable to be called into action by any favourable opportunity. And the circumstance may naturally have excited a low and vindictive mind to a purpose of revenge. An insult works deeper into the human heart than an injury, and moves more of passion, and impels more naturally to violence than the hope of gain. But not the most distant cause of hatred of the captain, is brought home to the prisoner nor, if the witnesses state truly, of the mate—for the mate had ever treated him kindly in the main. No common cause of hatred then is brought into view to furnish reasonable ground for a united plan for the murder of both captain and mate. But does not the evidence from White contradict effectually the supposition that either of these was probably his actuating motive. When Hughes enquired the motive, did he not say, "there was none"—and "that he was sorry for it?" Apply these words of sorrow as consistently with our supposition they do apply to his sorrow for his unhappy destruction of the mate, and for his subsequent criminality in relation to the captain, and do not the residue appear as if "there was no cause," negative, the presumption that he was acting under a thirst either of plunder or revenge? If either of these motives had governed him, would he not in that relenting moment have admitted or stated it? There is no act of previous conspiracy between them proved; it is left to be presumed from what occurred afterwards. If there had been a plan, would nothing have been seen to show their confederacy by talking together and apart? Would nothing have been noticed to show co-operation?

There is then no inherent probability in the position taken by the government. In a general view of the circumstances, probability would be against it. It must therefore be matter of strict proof, and that proof must be the stricter in propor-

tion to the greater comparative probability of the contrary supposition.

On the other hand, is there any impossibility—is there any improbability—is there any unreasonableness in the supposition, that the several crimes of murder, revolt, piracy, and the sinking of the vessel, should or might naturally follow the commission of the crime of manslaughter on board a vessel. Is it strikingly improbable that these crimes, particularly in a case where there were circumstances tending to produce them in the mind of one daring and revengeful spirit on board, as there were here, should or might be naturally traced up to an act of manslaughter—to a death caused in a quarrel, as standing at their head, and as furnishing the occasion when they burst into execution. There would clearly be no general improbability in this, when we consider the progressive character of violence and crime. Has there been any thing proved by the government, then, to show, at all conclusively, that such was not the truth in the present case?

This brings us to examine the bearing and efficacy of the proof derived from the prisoner's confession on this particular question. And first of the statement made by White to Hughes and Murray on the morning of the 29th. For you will be careful to distinguish between the statements, or admissions, or language of Curtis and those of the prisoner. You will remember that this statement was made after the death of the captain. It admits that they had killed the captain and mate, and no more. The term murder never was used, and the same is admitted here and now. But the question, "How was the mate killed?" remains still;—whether the killing of the mate by one, were not the occasion for the killing of the captain by one or the two, is still left open. If he had killed the mate as he said he did, and had then been hurried into a criminal co-operation in that of the captain, his language would have been such as is proved.—Here let me exhibit, that not only this confession, but all the other confessions and acts proved, would have followed as well from what we say was their beginning, as from the supposition of the government. To test this with regard to the acts done, let us look for a minute, at what would appear to us to be the natural consequences of an act of manslaughter on board this vessel, in the existing state of things, and see if they might not have been precisely what they are proved to have been.

Take it to be proved as it is, that Colson had a determined hatred of the captain, for the insult received, and

was anxiously seeking and devising, if not planing, an opportunity of revenge. That he had some purpose of mischief, is proved by his shifting the heaver, &c. so as to secure an instrument of revenge if occasion should offer. That Curtis had received that insult of the water thrown on his head. I ask you, then what would have been more likely to excite and impel the low, exasperated, and vindicative mind of Colson, to the immediate destruction of the captain, the object of his hate, than the sudden removal of the mate by an act of violence.

Is it not the natural and common operation of an act of violence to give an impulse to the minds of those within its reach and influence ; and to a violent mind, a violent impulse, to excite a mind already bent and strained to a deadly purpose, to an immediate spring upon its object, with a deadly act? It is the progressive operation too of one violent act to impel those violently inclined to still more violent deeds ; history does not record a revolution that does not exhibit this law of violence and crime. Where then would you find a situation in which such an act as the destruction of the mate by violence, would be likely to operate with more fatal force, than that act on the mind of Colson, an exasperated sailor, in awakening a purpose of immediate vengeance on the captain. Take it that such was the case, and that Colson seized on the occasion presented by the mate's sudden death to put an end to the captain. Take it that the prisoner also in the unsettled, agitated and excited state of mind naturally consequent on his own act of violence, was drawn by the impelling force of his own, and the attracting force of Colson's excited passion into a criminal toleration of or co-operation in the captain's death, and then let me ask you, what would have been his conduct and language, and what would have been Colson's, when they next met their fellow seamen. Would not the conduct and language of each, after precisely such a transaction, have corresponded with that proved against each? Would not the language of White have been likely to be an admission of his guilt ; an undiscriminating one under the circumstances, but under a consciousness in such case, that one violent and unhappy act, had hurried him into a more violent and more criminal one ; would not his admission be marked by a regretful and lamenting spirit? And is not his admission so qualified and accompanied? Does he not say there was no sufficient motive, and that he was sorry for what was done? How would the probable language and conduct of

Colson have resembled or differed from that proved.—Would it not have been what it is shewn to have been? The exulting language of gratified and glutted vengeance—the conduct of daring and desperate criminality. I submit that their respective conduct would have been substantially what it is proved to have been, under the different degrees of their criminality, or, at least, under this different introduction to crime.

Colson, desperate and reckless, careless of human life, and seeking to sacrifice and murder the remainder of the crew.—Boasting of, and describing his atrocious deed—as he did, turning often to it—and gratifying the vengeance of his soul by retrospection.—White, conscious of guilt contracted, but of no criminal intent at the outset, seeking to interpose, and to prevent the further shedding of blood as he did, and mainly expressing an anxiety to part from the desperate murderer. Viewing the admissions of White to Hughes in this light, are they inconsistent with such a qualified participation on his part, in the guilt of Colson, as is stated. If not—is there any other fact, or confession, which conclusively negatives the defence.—It is altogether plain that the taking possession of the vessel, and all their subsequent acts, are entirely without bearing, to show in which of the two modes suggested, the mate fell. Because, these would all have happened precisely as they did, as well on the one supposition as the other. Are the confessions of White to Capt. Hook, and at Louisburg, at variance with the defence. Confessions, recollect, are of all proofs of facts, the least to be rested on when made under circumstances likely to induce the party to misrepresent or prevaricate. To make them evidence of facts, we must be satisfied of their entire and exact truth; that his confession there contains such an account, you will not believe. It is at variance with that made to Hughes, and is destroyed by its entire contrariety to that of Colson: both cannot be true, for they are utterly inconsistent; and yet both are entitled to the same credit, made under the same circumstances and inducements. It is impossible, however, that both should be true; which then is to be your guide to the facts—neither can be a safe one. But in fact White's statement is easily explained. Look at it on our statement. Keep in view that this man had caused the mate's death in a quarrel; that Colson had murdered the captain; that they had afterwards jointly scuttled the vessel, and had landed with two men, who knew all that had been done, though not how it had been done—who knew

that the captain and mate were dead, but knew not the manner in which they fell.

The prisoner under these circumstances, is called on for an explanation of the whole matter, to strangers. What account should we reasonably expect would be given by him? Would it be that he should, with open directness, tell the plain true story of his own violence on the mate, follow it by an account of Colson's murder of the captain; of his own submission to, and toleration of, the act; thus shewing himself to have been the original aggressor, the first in the commission of a crime?

Thus to have placed himself in the narration, though it would only have placed him truly and criminally, would to his apprehension have placed him hopelessly. There would be so many circumstances of common guilt acknowledged, that though his own feelings would have told him he was less guilty than Colson, his own mind would not be adequate to mark the distinction in such a statement, by a line broad enough, to be wholly satisfactory to himself, and still less so, as he would deem, to others. Such a course as that suggested, might have been expected from a mind trained by experience or reflection, to a sense of the truth, that indirectness, and prevarication are impolicy under almost all circumstances, alike of the criminal and the innocent. But what would be the course which an untutored and to a degree a criminal mind like his, would be likely to take in his circumstances? He would feel that his guilt in fact was far inferior to that of Colson.--- would he not then be most likely to make this feeling the keel on which to frame his representation? Would he not be likely to tell his story so that while it should admit the main facts known to the witnesses and not to be denied, should be sure to put Colson into the foremost place of guilt, and leave himself far, sensibly far behind him. I think an account which should seek so to distinguish their relative guilt might naturally be expected. And such an one is the account he gave to captain Hook, and on his examination at Louisburg. I take its collected effect to be an admission on the part of the prisoner, that he was not without a participation of the guilt that marked at least a part of the transaction on board, but that the murderer's place was Colson's, and not his, and that is what with more directness he now says before you. Nor is it an answer to say the account he gave, made him more culpable in law, than the one he might have given. He neither knew, nor thought how the law would view or

judge the account, but which would likeliest carry to his hearers the justest apprehension of the degree of his own agency and guilt. Thus would these confessions import nothing effectually to negative the foundation of his defence. Nothing to shew that the first act of the prisoner was the murder, rather than the manslaughter of the mate. And as to the effect of his admissions as to the death of the captain we are not now to enquire.

We have thus considered the insufficiency of the evidence of the government, to prove that the mate was killed by an act of murder, and the greater probability on the evidence that he was killed as we say, however satisfactorily it may have been proved, that murder and other crimes followed that death. We have seen that this evidence thus viewed, would leave it doubtful.—But gentlemen, are there not circumstances of a positive character, more than sufficient to turn the scale, and give to the prisoner's statements the greater weight? The prisoner is unable to prove the quarrel by positive evidence, because no witness was present. But the very circumstance of his inability so to do, is a point of positive evidence in his favour. For it is shown to you, that their watch was together and alone on that night. Thus is the place and the opportunity for the affray proved by positive evidence, and further, that none of the crew was in a situation to hear it. No circumstance of previous arrangement is proved against White, as there is against Colson. It is shown that White stood at the helm on this night, a hot one;—that he made his over-duty there, a subject of complaint to the mate, but was not relieved.—Here is the subject matter which was at the bottom of the difference and quarrel. In his statement to Murray, White represented the conversation which occurred between them, as to his sitting at the helm on the sky-light. This was insulting to the mate, and might naturally lead to blows. The mate is shown to have been a stout and active man, able to chastise him;—quick tempered, and therefore likely to have done it—and to have had some words with White in Boston, enough to show his mind to have been in a state easily excited to strike him. It is also positively proved, that Colson said White killed the mate before he came up; thus admitting the material fact, for the prisoner, though connecting it with confessions of his own guilt. If it were a joint plan, would one have done this act alone? Would one have begun the execution of this plan of death, without the presence and aid of the other? White had

no hatred of the captain, and had been treated with great kindness by the mate.

Gentlemen, the government has itself admitted its own uncertainty as to the manner in which the mate died. With a full knowledge of all the evidence, the government could not say in which of three ways that evidence would prove the death. They have declared it to have been done in so many different ways.—With an axe—with a billet of wood—with the hands pushing overboard, and so drowning;—thus admitting that drowning may have been the mode of death under the evidence. Why did not the government suppose, under all the evidence another mode—the killing in a quarrel by a blow which struck him overboard and so drowned him. If it were uncertain to the government, whether it were in one of three ways, may it not be at least uncertain, if it were not in still a fourth—or rather in one of the three ways supposed by the government, but without the malice charged. But is it uncertain, under the positive facts proved? Connect all these facts with the want of motive to murder.—Connect them with the consideration of the frequency of a brawl between sailors and a mate. Connect them with the consideration, that in this, as in a thousand other instances, they may have led to an affray, and that affray have proved a mortal one, and proving mortal, might, under the circumstances of the case, have been followed by the disastrous deeds disclosed; that this all might have been consistently with the case made by the government, and that the government has failed to prove that it was not, and could not be. And then, gentlemen, before you say upon your oaths, that there were no words between them, that there was no affray, and that there is no room to doubt, but that the prisoner with malice aforethought murdered the mate, let me ask you as men and as jurors, to pause and ponder;—and, gentlemen, if you pause you will doubt, and if you doubt, you must acquit—of murder.

Mr. Warner having thus closed the defence of the prisoner, Mr. Blake addressed the Jury in behalf of the government. He spoke without referring at all to his minutes; and we regret to add, that the numerous public duties of that gentlemen, have prevented him from furnishing us with his very faithful and eloquent argument on the occasion.

After Mr. Blake had concluded his remarks, his Honor Mr. Justice Story charged the Jury. He went in a very minute, lucid and elaborate manner into all the facts and circumstances of the case, and stated the law to the following effect:

Upon the subject of what constitutes murder, there is no difficulty on the present occasion. Murder is the killing of another in the peace of the government, with malice aforethought; and whenever the killing is shewn to be done without justifiable cause or legal excuse, and without any mitigating circumstances from the sudden transport of passion, the law implies malice. Malice, indeed, may be inferred, not merely from known personal hatred and animosity, or threats of revenge, but from the homicide being accompanied by circumstances of brutal malignity and cruelty, such as usually belong to a depraved heart and diabolical temper; such as indicate (as has been said) a heart regardless of social duty and fatally bent on mischief.

The indictment contains various counts upon which it is necessary merely to observe, that one charges the death to be by drowning, another by means of a hatchet, a third by means of a hatchet and drowning jointly; one charges the party as principal in the murder, and another as present aiding and abetting the murder. The law is perfectly clear, that a party who is present, aiding and abetting a murder, may be charged as principal, and is equally guilty with him, who inflicts the mortal blow or wound. It matters not, who holds the fatal instrument; the blow or wound is deemed to be given by all, who are present and aiding and abetting the murder. There is no dispute between the counsel, as to these principles. It was necessary to allege the death in various ways, because it might turn out upon the evidence, that the party was not dead, when thrown overboard, and as the manner of the death must be stated in the indictment, and as a death by drowning is substantially different from a death by means of a hatchet, the indictment might fail, even if a prisoner's guilt were ever so manifest, unless the death were truly laid, and proved, as laid in the indictment. It may be added, that whether the death was inflicted by a hatchet or an axe would not be a material variance.

At half past 10 o'clock in the evening, the jury retired with the case; and the Court adjourned until 9 o'clock the next morning.

THURSDAY, DECEMBER 14, 1826. The Court met this morning according to adjournment. The prisoner was placed at the bar ; and the jury having answered to their names, returned a verdict of GUILTY.

The prisoner who appeared to be considerably agitated, while the clerk was calling over the pannel, enquired as soon as the verdict of GUILTY was pronounced against him, if he might be allowed to speak a few words to the jury. The Court informed him that it would be improper for him to address the jury at that time, inasmuch as he had been fairly tried and legally convicted of the crime charged against him ; but if he had any remarks to offer when brought up to receive his sentence, he would be cheerfully listened to. He then burst into tears and declared himself guiltless of the murder.—Said he was a foreigner, away from his family and connections, in a country different from his own, and destitute both of money and of friends ; that the trial had been conducted unfairly towards him, and that the verdict of the jury was cruel and unjust ; and thus continued to assert his innocence until he was remanded to prison.

TRIAL

OF

WINSLOW CURTIS, *alias* SYLVESTER COLSON,

FOR THE MURDER OF

EDWARD SELFRIDGE,

BEFORE THE

CIRCUIT COURT OF THE UNITED STATES,

HOLDEN AT BOSTON, IN THE DISTRICT OF MASSACHUSETTS, ON

WEDNESDAY, 20th DAY OF DECEMBER, 1826.

PRESENT,

HON. JOSEPH STORY, *Associate Justice of the Supreme Court.*

" JOHN DAVIS, *District Judge.*

GEORGE BLAKE, ESQ. *U. S. Attorney for Mass. District.*

ANDREW DUNLAP, AND
RUSSELL JARVIS, ESQ'RS. } *Counsel for the Prisoner.*

SOON after the opening of the Court, CURTIS the prisoner was placed at the bar. Seventy one Jurors were then called upon their summons. The prisoner's counsel moved, as each juror was called, that he should be sworn to make true answers, and to each was proposed the following question: Have you formed an opinion in this case? Six jurors only having been obtained, the trial could not proceed. His Honor, Judge STORY, observed, that this had produced a serious difficulty. New venires must now issue, new lists be furnished to the prisoner, two days before the trial, and the necessary delay would prevent his attendance to his other duties at Washington. The prisoner's counsel proposed a continuance of the cause, but this was refused. They then asked if it was the determination of the court, that the prisoner should be tried at the present term; and being informed that it was, they said, if an impartial jury could be made up among the by-standers, the prisoner would wave the two days notice of the list of the jury to which he was entitled. *Tales de circum-*

stantibus being accordingly returned by the Marshall, a pannel, consisting of the following gentlemen were sworn to try the issue :

Elisha Penniman, Foreman,	Samuel Hosea,
Ebenezer Davis,	Richard Holmes,
Daniel Pierce,	Moses Carleton,
John Whitney,	Bela Beal,
Charles J. Adams,	John Kendall,
Isaac Riddle,	Gamaliel Merritt.

The indictment contained four counts, in each of which, the commission of the offence was set forth in a different mode.

I. The first count proceeds on the supposition that the murder was complete, consummate ; that Edward Selfridge was dead on board the vessel, before his lifeless body was thrown into the sea ; that the killing was accomplished by the instrumentality of a hatchet ; and that Curtis was the principal actor in the scene, and Marchant was present as an aider and abettor.

II. The second count differs in nothing from the first, except that it simply reverses the posture of the parties, placing Marchant before as the principal agent, and Curtis as the aider and abettor.

III. The third count supposes that the homicide may have been effected in a different mode from that which is stated in the precedent allegations ; that it may have been occasioned by the act of casting into the sea, and the consequent suffocation and drowning ; and it charges Curtis and Marchant as being jointly concerned in this act of casting the living body into the sea.

IV. The fourth and last count proceeds on the ground that divers grievous wounds and bruises were inflicted by the joint agency of the two persons, charged upon the body of the deceased ; that these wounds, &c. were not instantaneously mortal ; that while a spark of life was yet remaining, the body by the joint agency of the murderers, was cast into the sea ; and then alleges the death as the consequence of all these several acts, in combination.

After the indictment had been read by the Clerk, the District Attorney opened the case for the government. He briefly stated the facts, as he expected they would appear in evidence, and the principles of law applicable to them ; And then proceeded to call the witnesses.*

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* The facts in the case of Curtis were proved by the same witnesses, who testified in that of Marchant; and for the principles of law to be applied to those facts, as laid down by the District Attorney in his opening ; *vide* Marchant's Trial.

ANDREW CUNNINGHAM, *sworn*. I, with my brother, owned the schooner Fairy. We are both citizens of Boston. The Fairy belonged to this port, and was registered here. She was a strong substantial vessel, about a year old, and of 82 tons burden. Her cargo consisted of coffee, fustic, rice, and tobacco; and was valued at $7000. She sailed on the 19th of August last, bound to Gottenburg, and carried a long boat with her. Edward Selfridge was master. I had known him but a short time previous; he was recommended to me by Mr. Thomas B. Curtis. Thomas Paine Jenkins was mate; and I understood that he belonged to Barnstable. The crew consisted of Charles Marchant, John Murray, John Hughes, and Winslow Curtis, the prisoner at the bar. I shipped them all. I cannot swear that there was an axe or hatchet on board, but I never sent a vessel to sea without one. The schooner was insured at a fair premium, 1 1-2 per cent; and carried her register with her. It was pleasant weather when she sailed, and she was well furnished for the voyage; but I have never had any letters from the captain since he went away, or heard of the vessel except by the account of her destruction in the Newburyport newspaper.

THOMAS B. CURTIS, *sworn*. I was acquainted with Edward Selfridge. He lived in my vicinity, and I knew him intimately from his youth. He was born in Boston, and sailed a number of voyages under my care and patronage in a vessel which I commanded. He was mild and amiable in his disposition, and always bore an excellent character. I have never heard from him since he sailed in the Fairy, in August last.

FRANCIS PIKE, *sworn*.* I was born in Newburyport, and now live there. I follow the seas for my living, and recently sailed with captain Hook, as mate of the schooner Sally. We were at Louisburg together last summer, about the 30th of August. I saw a boat come into the harbour about four or five o'clock in the afternoon, with a schooner's top-gallant sail in her. Going on shore in my boat, at the time, I went up to Mr. Slatery's, where I was little acquainted. While there, two men, Marchant and Murray, came up to the house door, and enquired of me how far it was to Sidney, by land. I told them I could not

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* Here Murray and Hughes were directed by the court, upon motion of the prisoner's counsel, to retire under the custody of the Marshall, that the witness might be examined apart from them.

tell, for I was a stranger in the place. They then enquired how far it was to Halifax, by water, and what the course was. I told them, west by south. I asked them where they came from, and they said they were from Philadelphia, in the brig Fame, Francis Avery, owner, but did not tell the captain's name ;—that the crew consisted of eight men ; that the captain, mate, and the other two men, took the small boat ; that they separated the day after leaving the vessel, in a fog ; that the captain told them to steer north-west-by-north, if they missed each other ; and that they expected he, and all hands with him, were lost. They then wanted to know if there was any vessel in the harbour bound to Halifax, and went away. In about twenty minutes afterwards, Curtis, the prisoner at the bar, came up with a bucket in his hand, for some milk. I asked him if he belonged to the boat that had just come in. He said that he did, and that he came from Danvers ; that he had been cast away ; that the captain belonged to Marblehead, and was a damned rascal, and as green as a cabbage leaf ; and that he, Curtis, had been in the boat three days and a half, and felt most beat out. I told him I was mate of the Sally, lying in the harbour, and that he might have a chance with her. He repeated the story of Marchant, paid the woman for his milk, and went away. I returned immediately to the Sally, and when the captain came on board, I told him of the strange boat in the harbour. The boat lay on the beach the next morning, but I do not know what became of her during the night. Captain Hook went on shore the next day, and I remained in the vessel. In about half an hour Curtis and Murray came to the vessel in their own boat with a chest, a bag, and two hats ; and Curtis said the captain had given him leave to come and put his things on board. When they got on deck, I asked Curtis where he would have his chest stowed, " aft or forward." He answered, that it might stand where it was ; that he was going on shore, and would soon return and take care of it. He then unlocked the chest, took out some clothes, put them into a bag, and went on shore with Murray, taking the bag with him. Captain Hook soon came off, and we got some breakfast. Then we both went ashore together. We saw Murray about a quarter of a mile off, coming down a hill. He was running as fast as he could, and came up to us out of breath. He stutters ; and it was a considerable time before he could speak. He said that he belonged to the boat which came into the harbour the

day before; that Curtis and Marchant had murdered the captain and mate, and that he wanted to find some place were he could be safe; for he was afraid they would kill him. I borrowed a boat and carried him to our schooner; and captain Hook pursued after Curtis and Marchant. I returned to the shore soon after, stopped about ten minutes, and then went on board the Sally again. Between eleven and twelve o'clock, Marchant and Hughes were brought on board. They were hungry, and I got them some dinner. Two or three hours after this, I took them ashore again. The next morning I went as a witness to a house about a gun-shot from the shore. Marchant, Murray, and Hughes, were there, but not Curtis; nor was I present when Curtis was first brought in, having returned to the Sally.

(*Cross examined.*) I was at the house of Mr. Slatery on the afternoon the boat came in. He was absent, but his wife was at home. Marchant and Hughes came there first. They came to the door. I was inside. After staying a few moments, they went off and Curtis came for some milk. He was alone, and when he went away, took the same direction that Marchant and Hughes had taken. The houses are about a gun-shot apart, along the shore, at Louisburg. I saw no one pursuing Murray, when he came running towards me and captain Hook. I was not present when Curtis was examined. Marchant was in the room. I heard Curtis say he killed the captain and Marchant the mate.

Caleb Loring, *sworn.* I was formerly acquainted with the family of Thomas O. Selfridge, and knew his son Edward. He was born, I believe, in Boston, and used to live in my neighbourhood.

Stephen Hook, *sworn.* I belong to Kensington. I was at Louisburg last summer in the schooner Sally. Mr. Pike was my mate. We there saw the prisoner at the bar. He is an American citizen. About the 15th of August we sailed for Labrador, and put into Louisburg on a Saturday night for water, and continued there until the next Wednesday. Just at night, I understood from my mate, that a boat had come into the harbour with four men in her, who had been cast away. I told him I would go in the morning and see them, and if they were Americans give them a passage home. Accordingly, in the morning I went on shore and saw them on the edge of the bank. They were all together, or within hearing of each other; and I asked them some questions—where they were from, &c. I wont

be sure who answered, but I believe Curtis did, for my conversation was pretty much with him. He said that they were from Philadelphia, in the brig Fame—she sprung a-leak, and after pumping some time, they abandoned her —that the crew consisted of eight men, and four took the other boat and had been lost in a thick fog. Curtis then said he belonged to Danvers, and asked me if I would give him a passage home; I replied yes, by all means, and told him to carry his things right a-board the Sally, for I should sail the first fair wind. He and Murray immediately took the boat and went to my vessel. I did not go with them myself, because I wished to attend to some of my men who were getting water at the brook. At this time Marchant was bargaining with an English captain to go to Halifax. They finally agreed as to the passage and both got into the boat to go to Sidney, where the vessel lay, which was to take them. After my boat had carried water enough to the Sally, she came after me and I returned on board. Mr. Pike immediately told me that Curtis and Murray had been there, and that Curtis had unlocked his chest, taken out some clothes, and with Murray gone on shore again. I then thought there must have been some difficulty in their vessel, and determined to pursue after them, and if I found them guilty, take them, if not, why let them go. Accordingly, with my mate and three men, I put ashore about half a mile from Slatery's house, where they were. We had not however been ashore but a few moments before Murray came running towards us. When he first got up to us he could not speak, for he was out of breath, and has an impediment in his speech—he was fifty rods off when we first saw him. At length he said we must go right away and take those two fellows, Curtis and Marchant—for they were murderers, and had killed the captain and mate. I told him to step into a house, for if they saw him near us they would abscond. He replied, that he wished Marchant taken first, as he thought he was the worst. I then went with my people in the boat in order to take Marchant. When I got opposite to Mr. Slatery's, I saw Curtis go round the house with a bag. I directly told my men to pull ashore, for Curtis was going to make off. Soon after I jumped on shore, I meet Hughes. He said he was clear. I told him I heard so, but he must go into my boat. I then run as fast as I could after Curtis. He did not run at first, but walked. He however soon disappeared behind the bushes and shrub-trees. I cannot say whether Curtis saw me or not. I was forty or fifty rods from him, yet he

might have seen me as he entered the edge of the wood. I now began to think they had agreed to meet each other on the other side of the forest, and after hunting round for a half an hour, I told my men to go up to the Old City in the boat, and I would go up by land. Taking two or three of the inhabitants with me, I started to go up. On approaching a field, we discovered Marchant lying on a stack of hay.* I now bound the hands of Marchant and also of Hughes, who had come up with my men in the boat, and took them to a store. Being destitute of authority, I requested Mr. Dod to get a horse and go to Sidney for a magistrate ; and taking my boat in tow, carried the prisoners in their long-boat to my vessel. I then returned on shore, and with the assistance of eight or ten men armed with muskets, searched for Curtis. We hunted round until dark, when I got a company of soldiers to guard the shore all night—fearing that Curtis might come down, find a boat and go off in the night. Before this, however, I had brought Marchant and the rest of them on shore and put them in a sort of barrack to be guarded by the inhabitants, who turned out unanimously.

On the next morning the Judge came out from Sidney ; and while we were at Slatery's conversing together, a woman came in and told us that she saw a stranger go by her house the afternoon before with a bag on his back ; and that he took the road to Gabberrouse. Six or seven armed men immediately started for Gabberrouse, and found him, and brought him in, between eight and nine in the evening. I was present during Marchant's examination, and also when Curtis was brought in. He took his seat very near me, looked at Marchant and said, " O Charly if you had heard to me, we should not have come to this." And afterwards said, " I know I have got to die, and I will tell the truth." " You killed the mate, and I killed the captain." " Otherwise, I was forward and heard you strike the mate, and I also heard him fall on deck ; and when I came aft, you was throwing him overboard ; you then picked up a bolt, and told me, if I did not go down and kill the captain, I should share the same fate."—Then Curtis stated that he went below with an axe, approached the captain's birth, and his heart failed him—that he came back to the steps and Marchant told him if he did not kill the captain, he, Marchant, would kill him, Curtis ;

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* Here the witness was cautioned by the court, not to say any thing which Marchant might have confessed to him.

that he, Curtis, then returned to the birth of the captain, and struck him with an axe, and the captain screamed murder; that Marchant immediately sprung into the cabin and hauled the captain out of his birth—and he, Curtis, killed him on the cabin floor; and that then they both dragged him up the steps and pushed him overboard through the port hole. Marchant never opened his mouth while Curtis was making this confession. Curtis said they both hauled the captain up the steps; but he did not say any thing about any agreement between them, or where the vessel was, when the murder was committed.

(*Cross examined.*) Curtis and Marchant had no conversation together before the magistrate; nor did Marchant open his lips to what Curtis said. I saw them all together on the shore the morning after my mate informed me of their arrival. Slatery and one or two other persons were also present. I did not hear the bargain between the English captain and Marchant; nor was I at Slatery's house when Marchant and Hughes first came there.

John Murray, *sworn.* I was born in Boston. I am 19 years old, and have a mother, brothers, and sisters living in Boston. I have followed the seas for about four years, and was on board the schooner Fairy last summer. I shipped as steward and cook in the month of August, several days before the vessel sailed. Edward Selfridge was master and Thomas Paine Jenkins mate. Charles Marchant, John Hughes, and the prisoner at the bar, composed the rest of the crew. We were all brought here in the British brig Chebucto; and Boston is the first port in which Curtis and the rest of us landed since we left Halifax.—When she sailed, the Fairy had a boat—a very large one. I never knew of any quarrel between the captain and Curtis before we left the port—but Marchant, being unwilling to work, had some hard words with the mate on the wharf—no blows, however, were struck. The watches on board the schooner were divided into two. The captain, Curtis and Hughes composed one, and Marchant and the mate the other. She left Boston on the 18th of August, the weather was fine; and we went down to Nantasket roads for the night. About 2 o'clock in the morning, we went to sea, and in three days we were out of sight of land. About three days afterwards Marchant asked me if there was any money on board. I told him I did not know, and he answered, that he thought there must be some, or the captain could not pay his port charges at Gottenburg. About the same time an axe which used to

hang near the bulk head in the cabin, was missing. The mate remarked it and was angry about it, and told me to look for it. I did, but could not find it, nor did I ever see it afterwards. Marchant used to take it hard that he was obliged to stand four hours at the helm, and do two men's duty every night; and Curtis once told me that the captain was a damned rascal for throwing water in his face when on his watch on deck. On Sunday night, the 22nd of August, it was the captain's watch until 12 o'clock; and at half past nine he went below and turned in. I went to bed as usual. The crew all slept in the forecastle together and Curtis's birth was opposite to mine, but I cannot say whether he came down that night or not. Curtis and Hughes both had a right to go below after 12 o'clock.—I awoke about 4 o'clock the next morning and found the hatchway closed—it is generally kept open, the air in the forecastle being close and hot. I then felt round and found no one but Hughes in his birth. Presently I heard the watch called. I cannot tell who called it, nor do I recollect the voice. Hughes immediately turned out and went on deck, and I followed. Curtis was at the helm, and Marchant sitting on the weather rail. Hughes asked Marchant where the captain and mate were; he made answer, "we have killed the captain and mate, and throwed them overboard." "Yes," continued Curtis, "we have killed the damned rascals and thrown them overboard;—the devil has got them by this time, and is tormenting them in hell." Marchant said the mate had not treated him well, and Curtis called the captain a damned rascal, for having thrown water on him. They told us not to be scared at what they had done; that we were innocent of the murder; and they were willing to suffer for it, if they were taken. Curtis said he would hail as captain, if they spoke any vessel, because he was an American; and Marchant ordered me to get some breakfast—said he would have the best the schooner afforded, and wanted it on the quarter deck. The day before this we were near Newfoundland; and the last land we had seen was the high lands of Cape Cod. The next day we saw a sail, but a good ways off. While I was cooking the breakfast, they both began to clear the deck, by throwing over cables, spars, sails, staving in water casks, &c. in order, as Curtis said, to make her sail the faster—keeping at the same time up before the wind, and steering towards Newfoundland. They both assisted in lightening the schooner, but Curtis was busier, if any thing, than Marchant. After

breakfast they overhauled the cabin, brought up the captain's desk, took out the papers and letters, tore up some, and put others back, and divided the captain's fine and course clothes, between them. Soon after I went down into the cabin. There were no bed-clothes in the captain's birth, but I saw some blood on the pillow, on the barrels near by—on the quarter deck—on the side rail, and one spot on the hen-coop; and some also on Marchant's trowsers. There were two or three dollars in the captain's desk, and Marchant put them in his pocket. They both took what other things they wanted, Curtis putting his share into his chest, and Marchant his portion into the captain's chest, which was brought on deck. Afterwards they brought two pair of pistols from the cabin, two large, and two small ones. Each took a pair and loaded and fired them off occasionally, on deck. In the mean time, they steered various courses, but finally made up their minds to go to Nova Scotia. Curtis took me in-to his watch, and Hughes was taken into Marchant's. They asked me if I was scared much, and told me never to tell what they had done, but to keep dark and say nothing about it.

Three days after the murder, we made land early in the morning. Marchant and Curtis now prepared to scuttle the vessel. They first hove her about, and each taking the auger by turns, bored two holes in the cabin, and two in the forecastle, and plugged them up again. Then hove about and stood for the shore. When they thought her far enough in, they ordered the boat to be hoisted out; and put in her a top-gallant sail, the three chests which belonged to Curtis, Hughes and the captain; and a spy-glass, sextant and compass; also some provisions, liquors, &c. All things being ready, they told me to go on board the boat, and pulled the plugs out of the schooner. Curtis now said she would not sink fast enough, and he took the axe and cut a number of holes in her side. Then she began to fill fast, and we left her. The last time I saw her, she was nearly hull down. I could not say exactly how many miles off it was; perhaps three or four. As we steered towards the shore Marchant asked me what I should do. I answered, that I should say nothing about what had happened if they would spare my life. They then made up several stories to tell the folks on shore; and at length agreed if any one questioned them, to say that they belonged to the brig Fame, captain Adams, bound to Labrador, for a cargo of fish; that the vessel foundered at

sea—that there were eight men on board in the whole; and that the captain, mate, and two hands, took the small boat and had been lost in a fog. As soon as we landed Marchant went up to a house to enquire what the place was. In about twenty minutes he came back and said it was Louisburg, and that we must go off into the harbour and stay till morning. So we did, and remained all night about a stone's throw from the shore. In the morning we all returned to the land; Curtis kept with me the whole time, telling me for God's sake not to say any thing. Afterwards I went with him to the schooner Sally. There were three men on board, all strangers to me. I did not tell them any thing, because I feared Curtis might have pistols about him and would shoot me. Curtis soon unlocked his chest, took some good clothes out and put them into a bag. He then wanted me to go on shore with him. I consented; and as we were going, he said he was afraid I would tell of him. I told him I did not know what I should do. When we landed, Curtis went up to a house; and I, seeing a small boat, took it and sculled to the other side of the river. There I saw a parcel of men standing together on the beach. I ran up to the first one, who was captain Hook, as fast as I could, and told him to take those two men, for they were murderers, and had killed the captain and mate; and were making off with themselves. He told me to go to his vessel; and he would pursue after them. Towards night I was carried on shore again, and the next morning Marchant was examined. Curtis was brought in towards evening, and I heard him say, that Marchant had brought him there, and that he knew he was to die, and would tell the truth. He also stated that he killed the captain, and Marchant the mate; that Marchant had been persuading him for three days to do it; and told him, if he, Curtis, did not kill the captain, he, Curtis, would be murdered himself; for the captain once shot a man at the yard arm, at the north-west coast.

(*Cross examined.*) Curtis said he was forward when the mate was killed and thrown overboard. I did not say I was glad when they first told of the murder. Curtis asked me if I was not glad. I told him I did not know as I was. I feared he would take my life. I always meant to inform of them. When Curtis was going on shore from the Sally, and asked me not to tell, I replied, that I did not know what I should do. I said nothing about the affair when captain Hook first came to us, after we entered

the harbour. There were two or three other persons with him at this time, &c.*

ABIGAIL JENKINS, *sworn.* I am the mother of Thomas Paine Jenkins, and reside in Boston. My son was born in Barnstable. He went out mate of the Fairy last summer, and had always been in her from the time she was built. I have never heard from him since August last. Thomas was always very kind towards me and contributed greatly to my support. He has left four sisters and two brothers.

JOHN HUGHES, *sworn.* I was born in Milford, Wales, and have been in this country about two years. I shipped on board the Fairy in August last. Edward Selfridge was captain and Thomas Paine Jenkins mate. Curtis, the prisoner, Marchant and Murray also belonged on board. The schooner was tight, strong, and well found. She had a long-boat, but no other. I recollect that there were two hatchets and one axe on board. The hatchets hung in the cabin, near the bulk head; but the axe always stood in the companion way, by the gunnel, where the cook used to split his wood. Marchant and the mate had a few words together on the wharf, just before we sailed. The mate wanted him to bear a hand, and stow in the wood, as they wished to start away the first wind. Marchant answered, "do you think you have a parcel of negroes under you?" The mate made some reply to this;—I believe, however, he damned Marchant, who said nothing afterwards, but grumbled to himself. We sailed on the 19th of August, and went down to Nantasket roads, and anchored for the night. At two or three o'clock the next morning, we got under way and went to sea, the weather being very fine. Marchant and the mate were in one watch, and the captain, Curtis, and myself, in the other. I heard of no enquiries about money, but one of the hatchets was missing, after we had been out two or three days. The mate asked for it and looked all about the deck for it. He did not find it, nor did I ever see it afterwards. I saw Curtis shift the heaver. He took it from the stem of the boat and put it at the bow. A heaver is a piece of wood two or three feet long, and as big round as a man's wrist; and is used to set up halliards, &c. I do not recollect what night it was, that Curtis shifted the heaver, nor

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*Here the court adjourned. At half past three in the afternoon, the court came in; and the prisoner and jurors having answered to their names, the witnesses proceeded with their testimony as above.

did any thing occur out of the way on the evening of the 27th of August. At half past twelve, the captain gave me orders to call him, and then went below. At ten, Curtis came and relieved me, and I remained on deck till twelve, when I called the watch forward. Marchant came up, and I went down for the captain. He was asleep. I awoke him, and said, "It is twelve o'clock, sir." He enquired how the vessel headed. I told him "East, north-east," and that there was no more wind than when he turned in. I then returned upon deck, and found Marchant had relieved Curtis at the helm. I continued on deck nine or ten minutes, but finding the captain did not come up, I called the mate. He came up and asked how we had been going, for the last four hours. I answered him, and he said I might go below. It was now nearly half past twelve; and I turned in. Curtis lay in his birth when I went down. I soon fell asleep, and heard nothing more until four or five o'clock the next morning, when I heard the watch called. Curtis was not in his birth at this time, nor do I know when he left it. His hat lay on the chest. I turned out as I heard the watch called, and went on deck. Murray followed me. Marchant was sitting on the weather-rail, and Curtis at the helm. I asked, "where is the mate?" Marchant said, "we have killed the captain and mate, and thrown them overboard. "Yes," said Curtis, "we have killed the damned rascals, and the devil has got them in hell by this time." I now began to cry, for I was alarmed for my safety. They then both spoke up, "You damned fool, what are you crying about?" "It is enough to make any man cry," I answered. "You have nothing to fear," said they—"you are innocent." "God knows I am innocent, but what have you killed them for?" Marchant then said he was sorry. "Sorry!" cried Curtis, "what are you sorry for? I had as lief kill those two damned rascals, as to kill a dog.—If they were good men, it would be something to be sorry for." Marchant afterwards said, "I killed one, and he killed the other," pointing to Curtis at the helm. They now began to clear the deck, and for this purpose, threw over the cable and hawser, cut away the best anchor, stove in the water casks, tore down the square sail, and threw it overboard with the ster-sail, &c. Afterwards they got breakfast. As soon as they had finished their breakfast, Marchant brought the captain's writing desk from the cabin, opened it, and with Curtis hauled the letters and papers over, tearing up some and throwing others about. Curtis said he would be

counted captain; and Marchant answered, that one was captain as much as the other. Curtis also said he would hail, if they were spoken by any vessels. There were about $1 50 in the captain's desk, which they took out. They also took the captain's pistols. Marchant had three of them, and Curtis one. They loaded and fired them with balls once or twice during the day, and kept them in their chests on deck. I went into the cabin after the murder. First I looked into the captain's birth. There were no bed-clothes in it. I then saw some blood on the mattress, on the pillow, and on the ceiling over head; but I noticed none on the floor or the steps. There were, however, some spots on the quarter deck, on the rail, and on the port-hole, on the starboard side.

When I cried, Marchant said, "what do you cry for? You think a great deal of killing a man. Look at the Portuguese, Spaniards and Italians, they think nothing of it." I asked him what he was going to do with the schooner. He answered that he meant to run for Newfoundland and scuttle her. I told him it would be a shocking thing for the owners to lose the vessel and cargo. "Damn the owners," said he, "she's well insured" and cried Curtis, "if she is not insured let the owners answer it." They told me not to inform of what they had done, but never promised me my life on condition that I would not reveal; and I never expected to get on shore again. We were two or three hundred miles from the shore when the murder was committed. After steering different courses before the wind for three days, we made land before light in the morning. We stood off till noon, when we tacked and stood in again. Marchant and Curtis, now took the auger and bored holes—two in the cabin and two in forecastle, and plugged them up—furled the fore-top-sail, trailed up the fore-sail, and took down the main-sail; and kept the vessel four or five miles from the shore. Then they put some bread and liquor, a spy-glass, sextant and compass into the boat, together with three chests, belonging to the captain, Curtis and myself. The plugs being pulled out, the water began to run into the vessel; and after Curtis had cut some holes in her side and deck, we all jumped into the boat and left her. The fog was pretty thick, and I could not see at a great distance, but when I last saw the Fairy she was in a sinking condition. As we went on shore, both Marchant and Curtis said we must tell the people that we belonged to the brig Fame of Philadelphia, Francis Avery owner, that she sprung a-leak, and that the

captain and mate with two hands, took the other boat and were lost in a fog. When we landed, it was towards evening, and Marchant and myself went up to a house. We saw Mr. Pike there, and Marchant asked what was the name of the place, he replied Louisburg, Cape Breton Island; and enquired of us where we were from. Marchant told him we belonged to the brig Fame from Philadelphia, and the vessel foundered at sea, and that it was most as bad as being cast away. Marchant then enquired how far it was to Halifax by water, he said "West by South;" and bidding him good night, we returned to the boat. Curtis then went on shore after some milk; and as soon as he came back, we hauled off near some fishing boats, and spent the night. In the morning we went on shore again. Captain Hook came up, and Curtis and Marchant told the story of the vessel's foundering at sea, &c. Captain Hook agreed to take Curtis home to America, and Marchant bargained with an English Captain for a passage to Halifax. Marchant soon went away, and Curtis, Murray and myself stopped on the beach. Curtis was afraid we should tell what had happened, and said, "For God's sake don't tell, for we shall all be hung if you do." I asked him which was killed first, he said Marchant killed the mate first, and he killed the captain. I asked him why he did not tell the captain when he went down the cabin—He answered, "The devil got into me, and I could'nt."—Curtis cried then, and I cried too. During this, Marchant had gone across the stream—he landed on the other side. When I saw captain Hook coming on shore, I ran towards him and told him I was innocent. He said he knew it, and ordered me to go with his crew in the boat, while he pursued after Curtis and Marchant, whom he would have if it cost him his life. At this time Curtis came out of Slatery's house, and went towards the forest. Captain Hook then pursued after Curtis, but losing him at the edge of the wood, he went up to the old city by land after Marchant, while we went up by water. Marchant was soon taken; and we were kept together under guard all night in a kind of stable. Marchant was examined the next day; I was present when Curtis came in, and said—"O Charly if you had taken my advice we should not be here." The Marshall then told the guard to put him in another room.—Last Thursday I heard Curtis say to Marchant, "If you had taken my advice and killed them two damned rascals, we should not have been here.*"

* Here the Court checked the witness, and cautioned him against testifying to any confessions made in prison.

(*Cross examined.*) I don't know that I shall be in trouble if the prisoner is not convicted, nor have I any fears of being tried for the murder. I have been kept in the prison ever since we were landed here. My cell is the third on the left hand as you enter the arch; and Curtis' is opposite to mine. Marchant's is next to Curtis'; and I can hear them when they are talking together. I know Curtis' voice and saw him looking through the upper hole in the door when he said to Marchant "if you had taken my advice we should not be here." When we first arrived at Louisburg, Marchant and not Curtis, went with me to Slatery's house, &c.

JOHN MURRAY, again called. The scuttle has sometimes been knocked down by the flapping of the sails, but I never knew it to be fastened in that way. It is fastened out side by means of a padlock, &c. We went directly to the Sally after Curtis had spoken to the captain for a passage. I do not recollect of any conversation between Curtis and Hughes, when Marchant went away with the captain of the English shallop. There was not a great deal of blood about the vessel after the murder, &c.

JOHN HUGHES, again called. When Curtis told me on the shore not to inform of him, Murray was standing two or three yards off. The mate's watch, and captain's spy glass were found in my chest, Curtis and Marchant made me take them, and I feared they would kill me if I did not take them. I never knew the hatch to be fastened down by the sails blowing against it; I walked about the shore when Curtis and Murray went to the Sally. I did not inform of the murder when captain Hook first came down to the boat, because I did not know but Curtis and Marchant had the pistols about them and would shoot me. Besides there were only two or three houses on shore, which were inhabited by some women and an old man.

STEPHEN HOOK, again called. I should think there might be eight or ten fishing huts where the prisoners landed; they were occupied at the time chiefly by women—the men were most of them making hay at the old city or out catching fish, which their wives cure when taken.

MATTHEW NEWPORT,* *sworn.* I have been acquainted with Curtis, for two or three years; and always thought

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* This was the only witness offered by the prisoner's Counsel. He was admitted to testify, immediately after the evidence for the government had closed.

him to be a quiet, inoffensive man. I keep a small store in Salem, for sea fareing men, and Curtis has bought goods of me at times, and always paid me well for them. I do not know his family; I once heard Curtis say his father followed him up pretty close for his wages, &c.

The examination of the witnesses having been concluded, Mr. JARVIS opened in behalf of the prisoner, as follows:

May it please the Court, and you, Gentlemen of the Jury.

CALLED by this honorable Court, to aid in defence of the prisoner at the bar, it is with no little embarrassment that I rise to an undertaking so difficult and responsible. I feel the magnitude of the duty imposed on me, and I also feel my utter incompetency to discharge it with fidelity and effect. I stand here, gentlemen, in defence of human life! I stand here to aid a fellow creature in repelling a charge of most infamous and atrocious character; and for which, if it be proved against him, his body must be consigned to an untimely grave, his name branded with the foulest of epithets, and his immortal soul sent, prematurely and unprepared, before *the great and last tribunal!* These, gentlemen, are solemn considerations. They are well fitted to produce deep and serious impressions; and I need not assure you that the impressions they have produced on myself are of greatly embarrassing character.

Nor, gentlemen, is your situation one of less solemnity; of less responsibility. You hold the balance of justice. You are required to decide between the United States of America and the prisoner at the bar, a question involving his life! You are required to say whether he is innocent of the charge preferred against him; whether he shall be liberated from his present durance, and sent again into society, entitled to equal rights and privileges with any of its members; or whether he shall be cut down in the prime of his days, and delivered over to an ignominious death, a warning and an example to evil doers! Need I inform you, gentlemen, that in approaching a subject involving such awful consequences, you must discard all prejudices and prepossessions? I have too much respect for your understandings, and for your disposition to do strict and impartial justice, to believe for a moment that you need any such caution. Still, gentlemen, it becomes my duty to give it. I therefore say, with perfect respect, that in deciding between the government and the prisoner at the bar, you must shut your hearts against every feeling; that you must listen to nought but the evidence; that you must require strict and satisfactory proof.

It becomes my duty, gentlemen, to state several maxims by which you must be governed, in deciding the case before you. First : You must not consider the prisoner *guilty*, because he is *indicted*. I know that when an individual has been brought to the bar of his country, charged with a crime of atrocious character, the public are too much disposed to pass judgment on the case, before they have become acquainted with its merits. I know that against an individual so situated, prejudices are easily excited, and often widely circulated. I know also, gentlemen, that your situation as judges of this case, peculiarly exposes you to such prejudices. The crime charged is one of great enormity ; a crime from which human nature revolts ; and which, in all civilized countries, is punished with exemplary severity. The case has produced great public excitement ; and scarce an individual can be found in this community, who has not formed an opinion of its merits. One prisoner, Marchant, who was closely connected with the prisoner at the bar, as being on board the same ship with him, when this dreadful deed was purpetrated, has already been convicted of murdering Jenkins, the mate. Reports of the evidence in that trial, and not the most accurate, have gone abroad, and been made a subject of newspaper discussion. Therefore the case before you, so far as it is connected with the case of Marchant, has been prejudged. But, gentlemen, because another man has been convicted of murdering Jenkins, the mate, you are not thence to infer that the prisoner at the bar has murdered captain Selfridge. You must have no part in this prejudication. The verdict against Marchant, righteous as it is, must not be received as evidence against the prisoner at the bar, and must not, for a moment, be made a subject of your consideration. I know, gentlemen, that when we see a man arraigned, especially for a crime of great enormity, we are apt to consider that there must be some foundation for the charge But, gentlemen, you will recollect that the innocent may be accused as well as the guilty ; and that, according to the wise and benevolent maxim of our law, you are bound to presume the prisoner's innocence, until his guilt be established.

Another maxim by which you must be governed in deciding this case, is, that the *atrocity* of the crime charged affords no proof of its *perpetration*. Men do not become suddenly and desperately wicked, and imbrue their hands in blood from slight incentives. There is in the bosoms of most men, brought up beneath a mild and equal system

of laws, a natural reluctance to shedding blood and perpetrating deeds of horror. Therefore, gentlemen, the very atrocity of the crimes charged in this indictment, instead of operating on your minds against the prisoner, should operate in his favor, as it so far shows the improbability of his guilt.

The counsel for the government has described a case of highly atrocious character; a most foul and horrible murder, committed under circumstances of peculiar aggravation. It has described the murder of a son, who was the staff and support of a widowed mother. But, gentlemen, the statement of the District Attorney is not evidence, and you must not believe it any farther than it is proved.

What, gentlemen, is the charge in this indictment? A charge of wilful and deliberate murder. To support this charge, what is necessary for the government? It must prove

1st—A Killing—

2d—A Killing by the prisoner—

3d—A Killing by the prisoner with malice, or under circumstances affording neither justification nor excuse. If the government fails to establish any one of these points, and by the most clear and satisfactory evidence, the whole process has failed; the prisoner is entitled to your verdict, and you are bound to acquit him.

Are these points supported by the evidence now offered? Are you satisfied, beyond all reasonable doubt, that captain Selfridge has been killed; and by the prisoner; and with malice, or in other words, under circumstances affording neither justification nor excuse? This evidence is of two kinds; first, the confessions of the prisoner at the bar; and secondly, a variety of circumstances which constitute *presumptive evidence*, or evidence from which you are to *presume* the prisoner's guilt.

I will not consume your time, gentlemen, in commenting upon the confessions offered in the case before you, I shall leave such comments to my highly talented associate, on whom they will more properly devolve, and who is abler than I am to do justice to this part of the case. I will therefore confine myself to a few remarks upon this species of testimony. You will probably be told, gentlemen, by the counsel for the government, that the confessions of the party accused are the best and highest evidence that can be offered; since no man in possession of his understanding, would voluntarily confess himself guilty of a crime which he never perpetrated; especially of one so enormous as that charged in this indictment. But,

gentlemen, it becomes my duty to state that this species of evidence is liable to many objections. Confessions are nothing more than the recollections of witnesses, and as such, are always liable to a double doubt. First, the witnesses may not have distinctly heard or correctly understood the confession; and secondly, they may not report correctly what they correctly understood. They may not recollect, or they may misrepresent. Cases have occurred when parties have confessed themselves guilty of crimes they never committed. I will refer you, gentlemen, to a remarkable case of this kind, which occurred not long since in the state of Vermont. Two men named Bourne were indicted for the murder of one Russell Colvin. They were convicted; and if I recollect correctly, were convicted, mainly on their own confession. Before the sentence of the law could he executed, lo! the identical Russell Colvin appeared alive!! This case, gentlemen, is worth your consideration; for it is better than a volume of argument, to shew the danger of freely or hastily admitting this species of evidence. The law, gentlemen, receives such evidence with great caution; for it totally rejects it, unless it be perfectly voluntary. If it can be shown that the party confessing entertained any apprehensions of injury, any hope of reward, any expectation of advantage, the evidence is utterly inadmissible.

The other kind of evidence here offered, is a variety of facts and circumstances which may tend to raise a presumption of the prisoner's guilt. This evidence also is liable to objections. I know, gentlemen, that many consider it better than direct and positive testimony. I know it is often said that *circumstances cannot lie, though witnesses may;* that a number of *circumstances*, so connected as to form what is called *a chain*, is better than the declaration of a witness who swears directly and positively that he saw the crime committed. But, gentlemen, you will recollect that *circumstances* can be learned only from the declarations of witnesses; and witnesses are as likely to falsify when relating circumstances, as when swearing directly and positively to the perpetration of a crime under their own observation.

As most of the evidence here offered is *circumstantial* or presumptive evidence, I will state to you, gentlemen, a few of the rules by which you must be guided in estimating it. The first rule is that, in all cases, the *corpus delicti*, or that which is the ground work of the offence charged, and without which, no such offence can be committed, must be clearly and satisfactorily proved. Thus, when a party is

indicted for murder, it is necessary to prove that the person alleged to have been murdered—*is dead*. On this point, gentlemen, I will read to you a few authorities; and will preface by saying that, in trials for crimes, you are judges of both the law and the fact. As judges of the fact, you are to decide whether captain Selfridge has been killed by the prisoner; and as judges of the law, you are to decide whether that killing, under the circumstances proved, amounts to the crime of murder. I will read a passage from Sir MATTHEW HALE, one of the best, the wisest, the most humane judges that ever adorned the bench of England, that country whence we derive our excellent system of laws. "*I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead.*" 2 H. P. C. p. 290.—I will also read a case from Sir EDWARD COKE, another justly celebrated English judge. 3 Co. p. 232.

Likewise the civil law, or law of the ancient Romans, which now prevails in most parts of continental Europe, and which has always been considered, by English and American lawyers, far less favorable to the liberty of the citizen or subject than the English or common law, under which we have the happiness of living, recognizes the same principle. From this law, gentleman, I have taken an extract, the substance of which I will give you in a translation. "Unless the killing be proved, no process, no examination can be instituted against any one as the supposed murderer."* Such gentleman, is the fundamental rule in estimating presumptive evidence. Now, gentleman, apply this rule. You must be satisfied that captain Selfridge is dead, before you can convict the prisoner of murdering him. If you entertain on this point the slighest doubt, you can proceed no farther; the prisoner is entitled to your verdict, and you cannot convict him.

Another rule in estimating circumstantial or presumptive evidence, is that, each circumstance in the chain must be clearly and distinctly proved. No one is to be admited as true, because it is deducible by argument from those already proved. Thus, if a man were found dead and bleeding from severe wounds, and another man were seen near the body with a bloody axe in his hand, you are not authorized to say that he, and he only, gave the fatal blow.

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* Item illud sciendum est, nisi constet aliquem esse occisum, non haberi de familia quaestionem: Liquere igitur debet, scelere interemtum, ut senatusconsulto locus sit.

Quaestionem autem sic accepimus, non tormenta tantum, sed omnem inquisitionem et defensionem mortis.—*Dig. Lib.* 29. *s.* 24–25.

The death, the wounds, the standing near with the axe, are *circumstances proved*. That the wounds were inflicted with the axe, and by the man found with it near the body, are merely matters of inference. In such case, you would not be authorized to say that he gave the stroke, and with the bloody weapon ; for the circumstances of his standing near, with the weapon in his hand, are perfectly consistent with his innocence. The blows may have been given with some other weapon, and the blood may have flowed on the axe. It may have been given by another person, and the one standing near may have been the first to discover the fatal deed.

A third rule is that, where the circumstances are related by the same witnesses, the number related does not increase the proof. These witnesses, in fabricating a tale, may relate many circumstances as easily as *one*. If any one of these circumstances be disproved, the chain is broken, and the whole falls as mere invention. The number of the *witnesses* will make no difference, if they have opportunities of conferring together ; for a large number of witnesses may as readily concur in a fabrication as a few.

A fourth rule is that, the difficulty of proving the negative must always be allowed for the prisoner. The negative is in many cases difficult, and in most, impossible to be shewn. The prisoner may not be able to shew a *chain of circumstances* tending to prove his *innocence*. He is not therefore *guilty*. The burden of proof is on the government ; and they must shew *a chain of circumstances* clearly proving his *guilt*.

A fifth rule by which you are to be guided, in estimating circumstantial evidence, is that, a jury must be as strongly convinced of the prisoner's guilt, from the combination of circumstances proved, as if they had direct and positive testimony of his having perpetrated the crime. You must not, gentlemen, be able merely to say that, the prisoner is *probably guilty*. You must not say that the evidence offered is the best you can obtain, or that the nature of the case affords. "The nature of the case" is known only from the evidence ; and to authorise you to convict the prisoner, it must be such a case as shall enable you to say that, the prisoner is *necessarily* guilty ; that you have no reasonable doubt ; that the supposition of his innocence involves an absurdity or a gross improbability. If you cannot say this ; if you have a reasonable doubt ; if the circumstances proved, however strong against the prisoner, are still consistent with his innocence, or leave a probability of it ; you are bound to acquit him.

A sixth rule is that, some *act* must be shewn to have been done by the prisoner, which had a necessary connection with the crime, or which he would not probably have done, unless he had the commission of the crime in view. Thus if one be indicted for murder by poison, and nought but circumstantial evidence be offered, it must appear at least, that he had poison in his possession. So if one be indicted for murder by shooting, he must be shown to have had pistols or powder and ball.

Another rule is that, where the commission of the crime is to be collected from the circumstances proved, a variation between any two or more of these circumstances will defeat the whole proof. Facts are never contradictory. A fact and the opposite of that fact cannot exist together. If a witness states one circumstance, and the same or another witness states another circumstance inconsistent with the first, the whole should be rejected ; for as a whole, the statement is impossible, and must be untrue.

An eighth rule is that, the *agreement* in a *chain of circumstances* does not prove that the prisoner *is*, but only that he *may be* guilty. Direct and positive testimony, if the witness be believed, is the only testimony that can prove guilt beyond the probability of innocence. Every case of circumstances, however strong, still leaves a doubt ; and of this doubt, the accused should always have the benefit. If in the present case, such doubt exists ; if you can say that, notwithstanding the probability against the prisoner, there is still a probability of his innocence, however slight, his guilt is not clearly proved, and you are bound to acquit him.

A ninth rule by which you will be governed in estimating circumstantial evidence, is that, the absence of proof to be expected, or the want of any circumstance naturally or necessarily arising from the circumstances proved, is a strong argument against the truth of the story told. Thus, if two men be indicted for murder, by cutting the throat of the party murdered ; and it be proved that blood flowed abundantly from the wound, stained almost every adjacent object, and particularly the clothes of one of the accused, and yet, that no spot or particle of it appeared on the clothes of the other ; there would here be wanting a circumstance that must almost have necessarily happened from the circumstances related. The omission would be unaccountable, and would afford a strong argument against the guilt of that party whose clothes were thus free from stain.

Now, gentlemen, let us apply these rules to the case

under consideration. Is the *corpus delicti* proved? Is captain Selfridge dead? Are you satisfied of this point beyond all reasonable doubt? If you have such doubt; if you perceive a probability, however slight, of his being still alive, the prisoner is entitled to the benefit of that doubt, and you cannot convict him. The counsel for the prisoner maintain that such probability exists. What is the story told? That captain Selfridge was thrown overboard. You have no evidence, clear, precise, definite and satisfactory, that he was dead before being thrown into the waves. You have then a right to presume that he was thrown overboard alive. This is a presumption in favour of the prisoner; in favor of human life; and you are bound to presume every thing in his favor which is not clearly proved against him. We admit, gentlemen, that murder was committed; that Jenkins the mate was killed by Marchant. We admit that since that fatal night when this deed of horror was done, captain Selfridge has not appeared among us, and that no tidings of him have since been received by any member of this community. What then? Captain Selfridge may still be alive, for his being still alive is perfectly consistent with all the facts proved. Apply here, gentlemen, the second rule I stated as your guide in estimating circumstantial evidence; and do not *infer one* circumstance from *others* that are *proved*, unless it *necessarily* follows from those proved. If captain Selfridge was thrown overboard, it does not *thence follow* that he was first killed; and if thrown overboard alive, it does not *thence follow* that he is now dead. The death must not be *inferred*. It must be *proved*, and beyond all reasonable doubt. The government must *prove*, either that he was dead before the casting into the waves; or if alive then, that he was subsequently killed.

Admitting then that, he was thrown into the water alive, there is at least a slight probability of his having been taken up by some passing vessel. You will notice particularly, gentlemen, the place where this crime is alleged to have been committed. The vessel, according to the testimony, was then near the Grand Bank of Newfoundland. This is the very track of nearly all the trade between Great Britain and her American Colonies, and indeed, of nearly all the trade between the two shores of the Atlantic. We have not, gentlemen, provided ourselves with charts, or produced nautical men to testify to this position. But if such men should be consulted, I believe they would state that this vessel, at the time when these horrible tragedies were acted, was in that part of

the ocean over which passes nearly all the trade between the United States and the British Colonies on one side, and England and the North of Europe on the other. I believe they would tell you, gentlemen, that scarce an hour passes, without bearing some vessel near the place where this murder is said to have been committed. You will also bear in mind, gentlemen, that men may sustain themselves during several hours in the water, especially if expert swimmers. I will not state precisely how long a man may remain in the water without drowning; but I believe that many cases could be shewn, where men had thus sustained themselves six, eight or even twelve hours. An ox was lately taken up in Long Island Sound, which, if I recollect rightly, was proved to have been in the water during forty-eight hours. I would not, gentlemen, on an occasion so solemn as the present, where a fellow being is on trial for his life, introduce any thing of a ludicrous character, or susceptible of a ludicrous interpretation. I therefore say with the utmost seriousness, if an ox, which is an animal much less adapted to sustaining himself in the water than man, could keep afloat in deep water for forty-eight hours, we are authorized to believe that a man, especially an expert swimmer, could sustain himself in the same situation during ten or twelve hours at least. You will likewise remember, gentlemen, that a vessel was in sight on the very morning after this fatal deed was perpetrated. There is then a probability that captain Selfridge, if thrown into the water alive, was taken up by some passing vessel, and is alive at this moment. This supposition is not repelled by the fact, that no intelligence of him has been received in the United States since this melancholy event. He may have been carried to some distant country, where no information could arrive among us, in the short period that has intervened since this fatal catastrophe is said to have happened. The circumstances offered in evidence are sufficient to leave a doubt of his death; and if you entertain that doubt, you can proceed no farther and the prisoner is entitled to your verdict.

But admitting poor Selfridge to be dead, is there any clear and conclusive evidence that the prisoner at the bar was his murderer? The first evidence you have of this, is the evidence of the prisoner's confessions. Having already commented upon the objections to which such evidence is liable, I will endeavour to pass briefly over this part of the case. How are these confessions proved? The first witness you have is captain Hook, a highly respecta-

ble individual, and who deserves the thanks of the whole community for his zeal, activity, and public spirit, in endeavouring to bring two supposed murderers to justice. But, gentlemen, the testimony of Captain Hook, though delivered with the most honest intentions, must be received with very liberal allowances. He was told a tale of most foul and horrible murder, committed by Marchant and the prisoner at the bar. He made immediate pursuit of them under a belief of their guilt; and would therefore consider all their movements and declarations, every thing they did and every syllable which fell from their lips, as indications of criminality. Such would naturally be the effect of the story he had heard; for it was fitted to rouse every feeling of indignation against the accused and of compassion for the victims. How then can he be strictly impartial? He did as most men would have done in his situation; he prejudged the prisoner's case; and therefore, in spite of himself, with every disposition to act uprightly, he testifies under strong bias and prepossession. Besides, gentlemen, when you consider all the circumstances, you will say that his recollections may not, probably be the most accurate. He was told that both Curtis and Marchant were murderers; he pursued them both as such; he apprehended Marchant; he heard them both examined; he conveyed them both on board of his vessel. He also tells you that he was so much agitated during the whole transaction at Louisburg, that he does not recollect all that transpired or was said. Put all these circumstances together, gentlemen, and then ask yourselves whether he would not be liable to confound the confessions of Curtis and Marchant, and whether there be not a strong probability of his having done so?

But, gentlemen, let us examine these confessions, and thence determine whether they contain sufficient to convict the prisoner, or whether they can be explained consistently with his innocence. The first is as follows. When brought for examination into the room where Marchant was, whose examination had just then terminated, he exclaimed, "Oh, Charly! if you had heard to me. we should not have come to this." Is this a confession of having murdered captain Selfridge? The utmost ingenuity cannot torture it into such construction. If, gentlemen, you can explain it consistently with the prisoner's innocence; or if any explanation can be given, which may raise a doubt of his guilt, you are bound to give it such explanation; for he is entitled to the most favorable con-

struction. How then shall we explain it? The murder of the captain and mate were both perpetrated by Marchant. He had expressed such intention to Curtis, several days before the fatal deed was done, and advised him to participate in it. Curtis declined, and advised him to forbear. But, rejecting this counsel, he perpetrated the deed, without the knowledge of Curtis, or without even his expectation that Marchant would persevere in his bloody resolution. To the advice thus given to Marchant, may we suppose the prisoner referred, when he said, "*Ah, Charly! if you had listened to me, we should not have come to this!*" According to captain Hook, he also said at the same time that, "*he knew he had got to die, and would tell the truth.*" Gentlemen, you will recollect that, according to the testimony of Hughes and Murray, Curtis not only participated in the plunder of the captain's clothes, but assisted in running away with the vessel, and finally scuttled her. You also know, gentlemen, and every seaman in the country knows that, running away with and suttling a vessel, are crimes punishable with death. I admit for a moment, that these crimes were committed by the prisoner, and that they are crimes of great enormity. But they are not charged in this indictment, and he is not on trial for them. Supposing then, that he had committed these crimes, and was conscious of having incurred the penalty of death for so doing; how easy is the explanation of the confession that "*he had got to die!*" It referred to the commission of these crimes, and not to the murder of captain Selfridge. The words are susceptible of this explanation; it does not violate probability, and you are bound to give the prisoner the benefit of it.

I will now call your attention, gentlemen, to the circumstantial evidence; and I contend that it does not so clearly prove the prisoner's guilt, as to leave no probability of his innocence. The first in the *chain* is that, for some days previous to the fatal event, *an axe was missing*. What then? Is a man to be convicted of a horrible crime and consigned to an untimely grave, because an axe is lost? Apply the rule I just now stated, which forbids you to infer one circumstance from another, and requires you to prove both. Could not this axe be lost without the aid of Curtis?—Could not its disappearance be accidental; or could not another on board this ship have concealed it, without the aid or knowledge of the prisoner? It is idle, gentlemen, to argue on this point; but as it has been mentioned by the counsel for the government in opening, as *a link in*

the chain of circumstances against the prisoner, and as it will probably be insisted on in closing, I will offer what seems a satisfactory explanation. This axe fell overboard by accident! Such things have happened at sea, and may happen again; and there is no absurdity in supposing that it happened on this occasion! But if, gentlemen, the axe be insisted on, as having been used in these tragedies, I will offer another explanation. This murder was committed by Marchant, and the axe was previously concealed by him for the purpose. It was stained with the blood of the slaughtered victim, and Marchant fearing it would be a witness against him, threw it into the sea. Perhaps it will be said that this is not consistent with his subsequent conduct in confessing the murder. But I answer, that it was the thought of the moment, excited by the sight of the bloody weapon, and acted upon before he had time to reflect. Another circumstance against him is that, a short time previous to this night of blood, the prisoner *shifted the heaver*, or carried a wooden instrument from one part of the vessel to another! But, gentlemen, is a man to be convicted of murder, because he moves a stick of wood? Is the act of moving a stick of wood from one part of this vessel, where it lay in sight, to another part of the same vessel, where it was also laid in sight, an indication of the prisoner's guilt? If so, gentlemen, none of you now sitting in that box, can be sure of your lives for one half hour. I trust that juries will require stronger evidence than this, to convict men of capital crimes! Besides, gentlemen, if the prisoner were bent on committing a murder, and had armed himself with an axe, a weapon sufficient for the purpose, there seems no necessity for pressing another into service. It seems, gentlemen, a waste of words to comment on these trifling circumstances. But, since they are mentioned by the counsel for the government, as *links in the chain of circumstances* against the prisoner, my duty requires me to give you an explanation of them.

Another circumstance urged against the prisoner is that, he was found on deck with Marchant, on the morning immediately after the perpetration of the bloody deed. But gentlemen, apply here a rule I have stated, against inferring a circumstance from a circumstance proved. We admit the circumstance of his being found on deck. Must you infer from thence, that he was there for the purpose of murdering captain Selfridge? Apply also the rule which requires you, in convicting a prisoner on presumptive or circumstantial evidence, to prove some act of the prisoner

which is necessarily connected with the crime, and which he would not have done, had he not intended to commit the crime. Has the fact of his being on deck at this time, a necessary connection with the crime, and one which would not have happened without the intention to commit it? Could no lawful purpose have carried him there at such time, and is the fact of his being there totally inconsistent with his innocence? How shall this be explained? I will tell you, gentlemen. You will recollect that the time when this tragedy was acted, was in the month of August; and you will also recollect that, according to one of the witnesses, the births below were very warm and uncomfortable. The prisoner went above in search of fresh air and cool lodging; and on arriving there, he found these murders already perpetrated by Marchant. He was then told by Marchant, that unless he consented to take a share of the blame, confess that he had participated, and assist in running away with the vessel, his own throat should be cut. He was awed by these threats, and prevented from returning to his birth. He was compelled to remain on deck through the night, and in the morning to confess that he had shared with, and assisted Marchant in whatever mischief had been done. You will be told, gentlemen, by the District Attorney, that this statement is utterly improbable; that if Curtis were innocent, he would have informed Murray and Hughes, and that all three would have risen upon Marchant, confined him, and brought him to the punishment due to such enormities. But, gentlemen, recollect that Marchant has proved himself to be a bold, daring, and desperate man, and you need not be told what influence such men can acquire over spirits more timid and humble. There is no improbability in supposing Marchant to have thus overawed every man on board this vessel. You have all heard of Black Beard, and Kid, and Lafitte and other piratical leaders, who, by means of bold and desperate resolution, have been able to exercise such entire controul over large bodies of men, as to drive them into the daily perpetration of the most horrible enormities. If, then, one bold and resolute man has been able to controul five hundred, and urge them to the most desperate deeds, what absurdity is there in supposing that' another bold and desperate man should exercise the same controul over three men, two of whom at least, appear to be timid and submissive individuals? Recollect also the terror which the witnesses themselves acknowledged. They tell you they

were apprehensive of losing their own lives; and if you believe them, so great was this fear, that when at Louisburg, though in the midst of a civilized country, and surrounded by a population who could and would have protected them, and who certainly discovered great zeal in the cause of justice, they dared not give information of the crime, while in company with the criminal. They waited till he was out of sight; they took the opportunity when his presence no longer terrified them, to tell the tale of his enormities. Recollect also, gentlemen, that a portion of the very property plundered from the unfortunate victims, the mate's watch, and the captain's spy-glass, were found in the possession of Hughes. Recollect also, gentlemen, that the reason assigned by him for receiving them from Marchant, was his fear of death if he refused them. Where then is the improbability in supposing the prisoner to have been driven by the threats of Marchant, into a confession of having participated in these dreadful proceedings? Where is the improbability in supposing, that the man who had dyed his hands in blood, and had driven one man into receiving a portion of his victims' property, should drive another into confessing a participation in his guilt?

Another circumstance against the prisoner is that, he shared in the plunder of the captain's clothes, and assisted to run away with and scuttle the vessel. But, gentlemen, though these are crimes, and of great enormity, the prisoner is not on trial for them, and they afford no proof of his having committed the crime charged in this indictment. How then shall we explain this part of the prisoner's conduct? He too, in common with the witnesses Murray and Hughes, was apprehensive of being murdered by Marchant. He had already been compelled by Marchant's threats, to confess that he had borne a part in the murders; and to lull Marchant's suspicions and preserve his own life, he consented to participate in the subsequent transactions. Or, gentlemen, he took the captain's clothes for the sake of plunder. It was an after thought. He saw two foul murders had been committed, and that he had been driven by his fears, to confess himself a participator. He therefore said to himself, "since these deeds are done and cannot be undone, I may as well share in the harvest, as leave the whole to Marchant." I admit them, gentlemen, to be crimes; but they are not crimes for which the prisoner is on trial. They have no connection with the murder of Selfridge, and afford no presumption against the prisoner of having perpetrated that enormity.

Another circumstance that will be urged against him is that, he never conversed with the witnesses Murray and Hughes, on the subject of these murders, or devised with them any measures for securing and bringing Marchant to justice; and this, you will be told, is the course which an innocent man would have adopted. But, gentlemen, recollect the silence that was kept on this subject, among all the men on board. Even Murray and Hughes exchanged not a syllable concerning it. There was a mutual distrust among them, and no one dared to address another on the subject, and concert any measures for securing the perpetrators, from apprehension that his own life would be in jeopardy.

Another circumstance is his flight, when at Louisburg. This, gentlemen, will probably be strongly insisted on. You will be told that the wicked flee, even when no man pursueth, and that Curtis fled on the approach of captain Hook. But, gentlemen, he may have fled, though innocent of this murder. This circumstance is not clearly and distinctly proved; for captain Hook merely tells you that he saw the prisoner *walk away*, and thought he ran, but is not certain of it. But admitting it to be true, it is no evidence of the prisoner's having murdered captain Selfridge, or that he fled from fear of apprehension for that murder. According to the rule which requires every circumstance in the *chain* to be *proved*, and forbids one to be inferred from another, you are not authorised to infer that his flight arose from such fear. It does not appear that when he fled, he had received any knowledge or intimation that Murray had informed against him. He had no reason to suppose that such information had been given; for in the last conversation that was held on the subject between him and Murray, he was led to believe that Murray would not inform. Why then should he flee? He had stolen the captain's clothes, and fled from fear of apprehension for that. He had also scuttled the vessel, and therefore knew what every sailor in the country knows, that for this crime, he had incurred the penalty of death. If these explanations of his flight be consistent with probability, you are bound to adopt them, for he has a right to the most favourable construction of his conduct.

I will now, gentlemen, call your attention to several circumstances that afford a strong presumption of the prisoner's innocence. First, no adequate motive can be assigned for the perpetration of this horrible crime. It was not avarice. Had the vessel been loaded with specie, this motive might be urged. But no money was found on

board; nor does the testimony shew that the prisoner had any reason to suppose the vessel contained any. Can you believe, gentlemen, that the inconsiderable booty of the captain's clothes afforded him a sufficient incentive for imbruing his hands in the blood of a fellow being? The thought is too horrible to be tolerated! Was the motive revenge? The testimony does not disclose any adequate provocation. There had been no quarrel between the prisoner and the deceased. The prisoner indeed complained of the captain for throwing water upon him while sleeping on his watch; but, according to the testimony, he spoke of it with apparent mildness, and not as an act fitted to excite any deadly hostility. Besides, gentlemen, every seaman will tell you that it is an usual punishment for the offence of sleeping on watch. We are not then to believe, gentlemen, that a slight and usual punishment would inspire the prisoner with a degree of rancor against his commander, that could be appeased only by his destruction. Men do not usually commit such horrors from such slight incentives.

Another and very strong circumstance is that, he did not kill the witnesses. Supposing him to be guilty, Hughes and Murray knew it; and the moment they set foot on shore, they had the power of telling the bloody tale, and causing the criminals to be secured. If guilty, Curtis was aware of this. He knew that he was in their power, and that a single word uttered by either of them to the first individual they should meet on shore, would put his existence in jeopardy. To remove these witnesses, to place them beyond the power of telling tales, is a course that regard to self-preservation would have dictated. Would he, if guilty, have been restrained from so doing by any principle, or any reluctance to shedding blood? The man who could raise a murderous hand against one victim, would not be restrained from slaughtering others, if the safety of his own life required it. I maintain, gentlemen, that Curtis, if guilty of murdering the captain, would have improved the first opportunity for putting the witnesses beyond the power of putting his own life in danger.

I will now call your attention to a circumstance that affords a strong argument in the prisoner's favor, and I request you to give it particular notice, as it is a very important part of his defence. You are told, gentlemen, that much blood flowed in this horrible tragedy. You are told there was blood on the captain's pillow, blood on the ceiling of his birth, blood on the cabin floor, blood on some barrels adjacent, blood on the stairs, blood on the deck, blood on

the hencoop, blood on the rail, blood on the port hole, and above all—blood on Marchant's clothes! But you are also told that there was no sign, no spot, no particle of this "filthy witness" on the clothes of the prisoner!! Here, gentlemen, apply a most important rule I stated, as your guide in estimating circumstantial evidence. Here is the absence of proof to be expected from the circumstances proved. Here is the want of a circumstance that would naturally and almost necessarily follow from the rest. What is the story related to you? That Curtis went into the cabin and struck the captain with an axe; that Marchant went down and assisted Curtis to drag him from his birth; that both killed him on the cabin floor; that both dragged him up the stairs and along the deck, and threw him overboard; that blood flowed freely on every object around, and along the path from the birth to the port hole; and that some of this blood found its way to the clothes of one of the perpetrators. What would you expect, gentleman, under circumstances like these? What would be natural? What would be almost necessary? That blood should find its way to the clothes of the other!! Can you for a moment believe, gentlemen, that two men could strike another in his bed with an axe; inflict a wound from which blood would fly with violence on many surrounding objects; then drag him from his bed and dispatch him on the floor; then carry the mangled and bleeding body up a staircase and throw it over a vessel's side, marking their way in blood as they proceeded, and yet escape without spot or stain upon their own garments? Consider also the manner in which the body is said to have been carried up the stairs. Marchant is said to have dragged him up by the shoulders. Curtis must then have been beneath, and the blood would have flowed downward, and upon him. The omission, gentlemen, is unaccountable, if Curtis be guilty He could not thus have gone through this bloody business without spot or stain. His garments must have exhibited this crimson proof! But he was free from blood. Both the witnesses say that no spot appeared on him; and the circumstance is clear, strong and conclusive, to show that he could have had no share in this foul murder. I say, gentlemen, that in a *chain* of circumstantial evidence, the want of the proof to be expected, or the omission of a circumstance naturally or necessarily following from the rest, is sufficient to invalidate the whole statement. In applying this rule to the present case, I do not mean that the whole story of the murder is untrue. I admit that Selfridge was most foully murdered, and admit the vessel ex-

hibited all these signs of the bloody deed. I contend only that the story is invalidated with regard to Curtis; that he could have had no share in the transaction, and that Marchant alone was guilty of all this slaughter.

Another circumstance which ought to weigh in the prisoner's favor, is a discrepancy between the witnesses, and in a very obvious particular. Murray relates very particularly the story of the blood, and says there was blood on the cabin floor. Hughes gives precisely the same account, except that he saw *no blood* on the cabin floor. Murray, when examined a second time on the same point, says there was not much blood on the floor, but *so much* that it could not escape the observation of any one who should enter the cabin. Here, gentlemen, apply one of the rules I stated; that when the guilt of the accused is to be collected from the *circumstances shewn*, a variation between the witnesses in any obvious or important point, is sufficient to invalidate the whole statement. In circumstancial evidence, all parts of the story must agree. They must fit like tenon and mortice. Or in other words, the *chain* must be complete. The want of a *link* destroys the connection, and the whole must fall to the ground. You find here, gentlemen, a disagreement on a point in which you would expect concurrence, if the story were true. Both witnesses say they went into the cabin together, discovered the blood in several places there, and traced it up the stairs, along the deck and over the vessel's side. All circumstances connected with a murder so horrible would have been matters of interest, and been eagerly sought by the witnesses.—Curiosity alone would have prompted it, and their curiosity, under such appalling circumstances, must have been very strong. As they were together in the cabin, they must have pointed out to each other every circumstance relating to the bloody deed, which fell under each other's observation. They traced the blood up the stairs to the port hole in company, and whatever one saw, must have been pointed out to the other. Yet Hughes did not see the blood on the floor, though it was very visible to his companion, who says that no one could have entered the cabin without seeing it. What reliance then, can we place on the testimony of Hughes in this part of the case? How shall we account for his not seeing what every man present must have seen, whose eyes were open and who could distinguish red from white. The disagreement is remarkable; it is sufficient to raise a doubt in the prisoner's favor, and of that doubt, you are bound to give him the benefit.

Another circumstance that should operate strongly in the prisoner's favor, is his wish to return to his native country. His very first step, after landing at Louisburg, was to seek an American vessel, go on board of her with one of the witnesses, and bargain for his passage homeward. Does this look like guilt? If he had committed these crimes, his first thought, his first movement, would have been to fly from his native land, to regions where her justice could not reach him. Supposing him guilty, he was, when at Louisburg, in the power of the witnesses. He knew that he was in a civilized country, the neighbor of his own; that a single word from Murray or Hughes could in a moment bring down all that country's legal power upon his head; that they had given no promise of secrecy, and that he had no reason to suppose they would spare him. He was in a foreign port, where he knew that he could find a foreign vessel that could instantly bear him from his native shore, to a country where his crime could never be known, or if known, could never be the subject of legal investigation. What, under such circumstances, would have been the course of any man of common sense, who had perpetrated such a deed as that charged against the prisoner? He would have lost not a moment in finding the means of escape. He would have gone on board some English or other foreign vessel, and thereby have fled beyond the jurisdiction of the laws he had violated. Marchant found a foreign vessel, and engaged a passage to Halifax. Why did not the prisoner accompany him? If guilty, he would have consulted his own safety, and adopted the means of flight so abundantly within his reach. But no! gentlemen, such was not his course. He immediately sought the means of returning to his native land. He went on board an American vessel, in company with one of the witnesses, and bargained with captain Hook for his passage homeward. He avoids the course which the guilty would have adopted; he neglects the means of safety within his power, and runs directly into the jaws of justice. He avoids the course which the guilty would have chosen, and chooses the course which the guilty would have avoided. Such conduct, gentlemen, is totally inconsistent with the supposition of his guilt, and affords the strongest presumption of his innocence.

There is nothing then, gentlemen, in this whole chain of circumstances, which affords conclusive evidence of the prisoner's guilt; for all the circumstances proved may exist consistently with the supposition of his innocence.

The axe may have been lost, and he may have moved the stick of wood; he may have been found on deck in the morning after the murder; he may have assisted to run away with and scuttle the vessel; he may have stolen the captain's clothes, and may have run away from Louisburg. What then? All these may have occurred, and still he may have had no share in these horrible murders. You must be satisfied of his guilt beyond all reasonable doubt. You must not be able to say merely, that the probabilities are against him. You must be able to say that he is clearly, certainly guilty; that there is no probability of his innocence; that you have no doubt; that the supposition of his innocence involves an absurdity or a gross improbability. If you cannot say this; if you have a doubt, his guilt is not *proved*, and you are bound to acquit him.

I will now, gentlemen, offer a supposition which requires your serious attention. The whole evidence against the prisoner depends on the testimony of Murray and Hughes. Take away that, and the whole case falls, devoid of foundation. What absurdity is there in supposing that these witnesses, and not the prisoner, have done this deed? Many innocent men have been convicted, and by the testimony of the very persons who perpetrated the crime. I do not, gentlemen, assert this of these witnesses. If they be innocent, God forbid that I should whisper ought against them! If they be innocent, they deserve the thanks of the whole community, for their endeavors to bring justice upon the perpetrators of these crimes. You will recollect, gentlemen, that all on board this vessel were placed in circumstances exposing all to the same suspicion. They were all on board together; all had motives equally strong; for no motive adequate to the commission of such deeds is proved against any. All assisted in turning the vessel from her course, after the disappearance of the officers; and all, with the exception of Murray, shared in the plunder. What then turns the balance of probability in favor of the witnesses and against the prisoner? Their own declarations! simply their own declarations! And who can say, gentlemen, that if the situations of the witnesses and the prisoner were reversed, the testimony would not be reversed also? I do not accuse these witnesses. But witnesses have falsified; witnesses may falsify; and there is no absurdity in supposing Murray and Hughes, two frail and fallible men, capable of what other witnesses have done. Gentlemen,

think seriously of this; for if it be sufficient to raise a doubt, you must give the benefit of that doubt to the prisoner.

I have said, gentlemen, that innocent men have been convicted of crimes, by the testimony of the very persons who had perpetrated them. I do not say, gentlemen, that Murray and Hughes stand in that relation to the prisoner. I merely give it as a hypothesis fitted to raise a doubt in the prisoner's favor. To show that such convictions have occurred, I will read a few cases selected from a very valuable treatise on presumptive evidence.

[Mr. JARVIS here read Jennings' case, Phillips' Evidence, Appendix, p. 65.]

This case, gentlemen, is followed by several others of similar character, and tending to establish the same point, the danger to which juries are exposed, of convicting the innocent upon the testimony of the guilty.* Take these cases into serious consideration; and before you pronounce the prisoner guilty, enquire fully and cautiously whether the hands of Murray and Hughes may not have been in this thing, and whether, if they and the prisoner should change places, a different tale would not be told, and be equally consistent with probability.

Gentlemen, I have done. Though I may have levied a severe tax on your patience, I am conscious of having omitted many things important in the prisoner's defence. But I have the consolation of knowing that I am not the prisoner's only counsel; that I shall leave the remainder of his defence to abler hands. My associate who will follow me, will urge on your consideration all the important particulars that I have omitted, and to him do I leave the completion of our duty. It remains for me, gentlemen, to thank you for the patience and attention with which you have honored me.

Mr. JARVIS finished his remarks about 9 o'clock, when the Court (after receiving the testimony of JESSE FERRIN, who stated that the prisoner once boarded with him, and was like other sailors, rash and insolent when in liquor, &c.) adjourned to the next day.

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* Harris' case, Phillips' Evidence. Appendix, p. 72.
Do. do. p. 101.

THURSDAY, Dec. 21, 1826, at 9 o'clock the Court assembled, and Mr. DUNLAP closed on the part of the prisoner as follows:—

May it please your Honors, and you Gentlemen of the Jury.

IT has fallen to my lot to close this interesting and important prosecution, on the part of the prisoner at the bar, who stands before you, for life or for death. Great are the responsibilities which have devolved upon us all. My labours and my responsibilities, have been much lightened, by the faithful and able manner in which my friend and associate, who opened the defence, disclosed to you the grounds upon which the prisoner founds his hopes of an acquittal. But a duty remains to be performed on my part, and I shall endeavour to discharge it, by presenting to you my views of the evidence, and the law applicable to this cause. The free constitution of government under which we live, secures to the prisoner the benefit of counsel. The provisions of our mild and merciful system of laws, require of the court to assign him counsel, who are bound by the obligations of the law, by their oaths, by the dictates of humanity, and by the respect which is due from them to the court, faithfully to exert their utmost ability, in the defence of the life of a fellow being, who is committed to their care. No matter what prejudices may have existed against the accused; no matter how heavy may be the charge brought against him, he is not to be overwhelmed; for when he is set to the bar of this court for his trial, the law sustains him by the presumption of his innocence, and gives him the assurance of a fair trial.

Gentlemen, notwithstanding the humane provisions of the law, in his behalf, the prisoner meets his trial surrounded by difficulties and hardships. It is true he cannot say with the other party to this indictment, who was a few days since convicted of a similar offence, "I am a friendless foreigner," for he was born on our own soil, and is our own countryman. But he is as unfortunate, and as friendless as any foreigner. His family, his kinsmen, and his friends reside at a great distance. They are poor, and unable to come and sustain him, in this hour of his peril. His only protection is the counsel assigned him, and his only reliance is the impartiality of the court, and the jury, who hold, in this solemn issue, between the United States and the prisoner, involving his life, the scales of justice. He labours under another disadvantage. He has not had the time, nor has he the means, of bringing the fishermen of Sidney and Louisburg, to contradict or explain the

statements of the witnesses against him. It might, perhaps, be in his power, if he could avail himself of the evidence of the inhabitants of these places, to prove that previous inducements or threats, compelled the confessions said to have been made by him, when he was arrested; that he was under a guard of soldiers; and that the circumstances attending those confessions, in law invalidate them, and destroy their influence in this cause. He might perhaps be able to satisfy the court and the jury, that these confessions have been misunderstood, misrecollected, or mistated. Of all these means of manifesting his innocence, he is, by his unfortunate situation, deprived, and he must now stand or fall, by the evidence adduced by the government against him. There are other difficulties with which he has to contend. The testimony in the trial of Marchant has been heard, has been the subject of much conversation, and has been spread by the newspapers, before the world. All this is not intended, but is calculated to excite a prejudice, and to direct the force of public opinion against the accused. He was not a party to that trial, had no opportunity of cross examining the witnesses, of drawing forth facts and circumstances in his favour, of keeping back improper testimony, and of offering his proofs, and his explanations, so that the evidence in Marchant's trial, which ought not, in the slightest degree, to have affected Curtis, has done him a great injury. This is manifest from the fact, that from the large panel returned, an impartial jury could not be made up for his trial. It is another great hardship, and it furnishes a strong reason, why the jury should proceed with the greatest caution, deliberation, and even a distrust of their own judgments in this case, for you cannot be entirely certain, that your own minds may not have been insensibly affected with some portion of the prejudices excited against the prisoner.—This is not all. We have been told that the deceased, for whose murder the prisoner is indicted, was an amiable and honourable young man, that he was cut off in the hour of promise and hope, that he was the son of a widow, the object of her dearest affections, the comfort of her age, and her chief dependence for a support. The District Attorney, who has told you this, has not done so, for the purpose of inflaming your indignation against the unfortunate man at the bar. He is too generous and high minded, to resort to such a measure. He merely intends to be enabled to defeat any suggestion on our part, that captain Selfridge may yet be alive, by arguing, that from his cha-

racter, his regard for his relatives, the dependence of his only parent upon him, it must be inferred, that if he had survived and escaped the dangers which threatened him, he would have transmitted the earliest intelligence of his fate; which, were he alive, ere this would have been received. But the effect is as injurious to the prisoner, as though the object were to influence your minds, and turn the current of your good feelings against him, who needs, and has a right to the best feelings of your hearts, until the presumption of his innocence is destroyed by the proof of his guilt. Besides, he takes his trial in emphatically a commercial district, where the interests of us all are intimately connected, even entwined with the interests and the safety of commerce. I will not believe that a single man in our district, could be drawn as a juror, who would not make an effort to divest himself of any feeling or prepossession, which might interfere with an impartial judgment. But the mere suspicion of an offence like that charged in this indictment, is in a commercial district calculated to awaken a strong impression against the accused. These are some of the hardships, which are the lot of the prisoner. Yet I do not despair, I do not yield up the hope, which it is my duty to feel for my client, that the lips of your foreman may pronounce his acquittal; for I am sure that before this court, and this jury, his fate is in the hands of upright men, conscious of the important duty, which they have this day to discharge, and who will never deprive a human being of the blessing of life, and condemn him to an ignominious death, and his family to ignominious lives, unless upon the most clear, strong, manifest, and satisfactory proof.

Gentlemen of the Jury, it is naturally one of the first enquiries, what dire motive could have operated in the heart, and prompted the commission of an act like this. Such a deed could not have sprung from a slight cause. No motive can be supposed an adequate one. But if the prisoner be the author of this horrible crime, there must have been some powerful incentive, and an investigation of the facts of the case, must enable us to find it. Against this act the common feelings of human nature must have risen. The deceased was murdered, it is said, in the dead of the night, when he was defenceless, and in his sleep. He was one to whom the prisoner owed respect and obeisance, and whose life he should have protected, not raised his hand to destroy. The crime by the English law was Petit Treason, for it was the murder of one, to whom he

owed a sort of allegiance. Let the horrors of the deed be described in any terms, they will not exceed the truth; and if the defendant is guilty, by the laws of God and man, "whoso sheds man's blood, by man shall his blood be shed," he deserves to die, and that all he can ask, from his fellow men, is their prayers, that he may repent of his sins, and that God would have mercy upon his soul. You will not, cannot believe that this wickedness could have been perpetrated, without a motive, and if you can find none for the commission by Curtis, is it not more reasonable to conclude, that there being no positive proof against him, the case being wholly one of circumstantial testimony, that the circumstances have deceived, and that Curtis is innocent? Now, seek through the whole cause, and there is not one of you, who can find it, or put his finger upon a particle of evidence, which furnishes a shadow of a motive for this act on the part of Curtis. The only thing suggested is, that the captain had, as Curtis said, thrown a little water upon him, when he was asleep. You cannot find the motive here. No being in the shape of a man, could have been urged on by such a trifling affront, to seek such a bloody revenge. Even if he were a monster covered with crime, steeped in guilt, yet he could not have shed blood upon such an insufficient provocation. Do not, gentlemen, for the honor of human nature believe it. The witness, Murray, who testifies respecting this throwing the water, says, that Curtis did not speak of this, as though he thought any thing of it. The punishment, is a common mode on board a ship, of awakening a sleeping sailor upon the watch. It does no injury, gives no offence; leaves no sting, and it could not have kindled such a deadly spirit, a thirst for revenge, which could be quenched only in human blood. If it were not vengeance was it avarice, the hope of plunder, which led to the commission of this enormous wickedness? Marchant had made enquiries, and endeavoured to discover whether there was money on board; but it will be recollected, that Curtis was not privy to those enquiries, and that he never made any of the sort. The prospect of plunder must have been too small, the chances of detection too numerous, and the punishment so awful, the consequences so tremendous, that it cannot be believed that he could have been induced by this motive to hazard every thing dear to him—his life, and his hopes. Neither is there any evidence to found even a suspicion upon, that plunder was the object. If then, neither the desire of revenge for injuries, nor avarice could have been the motive,

I leave it to the jury to say, whether it is not more reasonable to believe, that Curtis could not have committed this foul crime, that it must have been done, or compelled by Marchant, who had a powerful motive for it, than that Curtis has, without an earthly inducement, brought the sin of blood upon his head.

Gentlemen, by exploring the motive, you may find the clue to the whole transaction. If Curtis had no motive for it, you will not charge it upon him, for you will not suppose that he killed the captain without any. If Marchant had a motive for the act, then is the act accounted for. Now Marchant had a motive to kill the captain—the strongest motive of human action, the desire of self-preservation. In Marchant's bosom, not Curtis' is the motive for this death of the captain, the clue to the whole transaction to be found. Marchant killed the mate, either in consequence of a premeditated design, or from a sudden impulse or sudden quarrel. This was the first step in this iniquity, and the cause of all the crimes which succeeded. Marchant killed the mate, the murder of the captain was a necessary consequence for his own security. He had stept in so far in blood, that he could not return. Another murder was necessary to screen the author of the first, from detection and punishment. But Curtis did not kill the mate, and he had, therefore, no motive to murder the captain, in order to cover up one sin, by the commission of another. It was not revenge, it was not the hope of plunder which occasioned captain Selfridge's death. It was, as has been observed, the natural necessary consequence of the death of the mate. Here, here only in Marchant's heart, can the motive be found. Who killed the mate? Clearly not Curtis, he had had no quarrel of the least importance with the captain—none at all with the mate, Mr. Jenkins; he was not in the mate's watch, he was not upon deck at the time; he went below and retired to his birth, when his watch was out, leaving Hughes, who soon followed him, and Marchant and Mr. Jenkins above. The government know, that Curtis had nothing to do with the murder of the mate. He was indicted jointly, with Marchant, for that offence; he was arraigned with him; pleaded with him; and preparations were made to try him with Marchant. His counsel moved for a separate trial. The trial of Marchant has been concluded, the evidence has come out, and so far from implicating Curtis, it manifests his innocence. The District Attorney, with his knowledge and experience, does not adventure to try Curtis for the murder of the mate. The

court is delayed, and new proceedings are had, to put Curtis upon trial for another offence, on another indictment; the one now submitted to you. The prosecution of the murder of the mate is abandoned, I contend to you. Why? Because Curtis cannot be convicted; because he is innocent of the murder of the mate. The conduct of the government acquits him, Marchant acquits him, the evidence acquits him, of that crime. It is said that Curtis acknowledged that Marchant had been teasing him some days to join in the outrage. Couple that acknowledgment with the first remark, said to have been uttered by Curtis when arrested, and brought back for his examination—"O Charly had you heard to me, we should not have come to this." Does not this prove conclusively, that Curtis had not given his consent, and had not joined in a league with Marchant? Perhaps too, he thought that Marchant had renounced his wicked intentions, and this may be the reason why he did not make any disclosures to the master of the vessel. If, therefore, Curtis was not the author of the mate's death, and the murder of the captain was its immediate and inevitable consequence, you will rather trace all these crimes to their source, the first, and charge upon Marchant, this offence, than upon Curtis.—By setting down captain Selfridge's murder to Marchant's account, the motive is found, and the transaction accounted for. By charging it to Curtis, there is no motive apparent, and the transaction is utterly unaccountable.

Gentlemen of the jury. What are the proofs against the defendant? They are confessions and certain circumstances. First, as to the confessions; and here I must ask your attention to the nature of this kind of evidence, its great uncertainties, and the danger of an implicit reliance upon it. It is often said, that confessions freely and voluntarily made, are the highest species of evidence, that they supercede the necessity of any other; for a man will not testify against himself, unless his testimony be true. But the difficulty is, that they seldom are freely and voluntarily made. What induces a guilty man to confess a crime? Not conscience, but interest; a hope of some favour, and an expectation of some advantage. An innocent person, surrounded by suspicious circumstances, encompassed with dangers, seeing no means of escape, may also, from the same motive, a false hope of favor, an illusive expectation of gaining some advantage, make confessions and declarations against himself. Curtis may never have had any hand in either of these murders. The

extent of his guilt, may have been a subsequent connection with Marchant, when the mischief was done, and could not be repaired. Yet he may have confessed what captain Hook has stated, thinking that a partial admission would do him some good, give him a claim to credit, and that with the extenuation which he alleged, of the necessity under which he acted, he would be believed, and stand excused. The witnesses to the confession may not state truly the prisoner's declarations, they may not recollect accurately, they may not have understood correctly, and a word added or lost, may change the whole character of the confession. The confession may not have been freely and voluntarily made, in which case it is not evidence. It is not to be supposed, that a man would freely and voluntarily confess away his own life. How is it with the unfortunate man at the bar? He makes no confessions; he pleads not guilty. He contends earnestly before you for his life, and the love of life glows in his bosom. Can you believe, that he would freely and voluntarily cut off his defence, and furnish out of his own mouth, the means of his condemnation?

Let us look to the law upon the subject of confessions; in a note to Phillips on Evidence, vol. 1, p. 81.

"A confession from the nature of the thing, is a very doubtful species of evidence and to be received with great caution. It is hardly to be supposed that a man perfectly possessed of himself, would make a confession to take away his own life. It must generally proceed from a promise or hope of favour, or from a dread of punishment, and in such situations the mind is agitated; the man may be easily tempted to go farther than the truth. Besides, the witness respecting the confession may have mistaken his meaning. How easy it is to understand the speaker different from what he meant. The smallest mistake in this particular might prove fatal."

This is the true doctrine, and a remarkable case in illustration, is the case referred to by the opening counsel, the case of the Bournes of Vermont, who were convicted upon evidence of their confessions of the murder of a person, who was then alive, and was found just in time to save the innocent from perishing upon a scaffold. What made the Bournes confess a crime of which they were not guilty? Not conscience surely, for they were innocent. They were hemmed in with suspicious circumstances, and dangers were all about them. They were weak and frail men, and their motive for confessing, must have been the hope of gaining some advantage or favour. What would have been the reflections of the jury who convicted the Bournes, had they perished before the discovery of their innocence? Could a man of that jury ever have laid his head upon his pillow

in peace afterwards ? Gentlemen what will be your reflections, in case a verdict shall pass against the defendant, and at some future time, you shall learn from Nova Scotia, that these confessions have been untruly stated, misunderstood, misrecollected, or that they have been obtained by promises or threats, by the deceptive allurements of hope or by intimidation, operating upon a mind borne down by terror and distress ? In the first volume of Pickering's Reports, page 202, the learned Judges of the Supreme Judicial Court of Massachusetts, in giving judgment in the case of Ford *vs.* Philips, pronounce an opinion on the subject of an admission, on "acknowledgment" or ratification by an adult, of a promise made during minority, and say the "acknowledgment" must be "voluntary not under the terror of an arrest," and they cite with approbation the authority of Ld. Alvanley in the case of Harmer *vs.* Killing, 5 Esp. 103, to the same effect. Now if the prisoner at the bar, under arrest in a civil suit, in the hands merely of a constable, could not be bound by an acknowledgment of a contract made when he was a minor, to the extent of fifty dollars or even a sixpence, ought he to be bound by acknowledgments, said to have been made in a foreign land, under a criminal accusation of the most solemn character, subject to a process of examination unknown to our system of government or laws, when brought in after pursuit late in the evening, by a file of soldiers ; to the extent of his life ? It is for you to answer by your verdict, this question, and to your intelligence and humanity I cheerfully submit the decision. In this matter of confessions, juries are in the greatest danger of being misled, and there has been more mischief done, more perjury, more money fraudulently sworn from one man's pocket into another's by false evidence to confessions, than in any other mode. If a man falsely swears that he saw me do an act in State-street, for example, I may be able to disprove his assertion, but if he says that I made to him a confession, or acknowledgment, I cannot be a witness, and cannot disprove the words sworn to as mine. The very reason assigned why a confession is said to be the strongest evidence against a party, that a regard for his own interest will prevent him from admitting more than is true, is the very reason why he will make no confession at all, and why testimony as to confessions is always suspicious, and instead of being always believed, should be always distrusted. Have none of you, gentlemen, never had law suits, and have you never been surprised and defrauded by testimony as to your confessions, either made out of the

whole cloth or greatly misunderstood and mistated? If any of you have suffered, you will know what weight to give to testimony of this character.

Besides the danger of falsehood and mistake, on the part of the witnesses, and the fact that hopes or fears may have destroyed the judgment, or produced an improper influence upon the mind of the party, there is another danger in these cases of confessions. Wrong inferences may be drawn, wrong constructions may be made, and a wrong judgment founded upon a prisoner's declarations, by the tribunal, before which he is tried. A strong case in point is to be found in the works of the celebrated philosopher, Voltaire, a man as much distinguished for his knowledge of human nature, natural force, and clear strong common sense, as he was renowned among the scholars of Europe, for his learning. In his "Essai sur les probabilites en fait de justice," Voltaire 30th vol. page 421, we find the following case related, which I will endeavour to translate to you. "The judges of the bailliage de Bar, who, in 1768, caused to perish, a father of a family, an old man named Martin, upon the wheel, condemned him upon the most false conjectures. A murder and robbery were committed, upon the high way, some paces from the house of the accused. There were found on the sand, the tracks of two shoes, supposed to be his. A witness of the murder was brought into the presence of the accused, who being confronted with him said, 'he is not the assassin.' 'God be praised,' exclaimed the innocent old man, 'you see he has not recognized me.' The Judge interpreted these words as an avowal of the crime. He thought that they signified 'I am guilty, and he has not recognized me.' They in fact signified directly the reverse. The sentence was appealed from, but it was confirmed by the court at Paris. The innocent old man was brought back, he was executed, his property confiscated, and his numerous family dispersed. Some time afterwards a wretch was condemned and executed in the same place, and he confessed that he was the person who had committed the murder, for which the virtuous father of a family had lost his life. It is evident that this dreadful judgment was pronounced merely in consequence of the judge having been a bad reasoner." This, gentlemen, is a powerful case in aid of my suggestion, that all other dangers being removed, there is a danger that an erroneous judgment may be formed of the confession itself. In this case the court where the cause was tried, and the high tribunal, to which it was appealed, considered the exclamation, "God be

praised, you see he has not recognized me," as the hasty exultation of guilt, at unexpected escape, whereas it was the natural transport of innocence bursting from the heart. While this book is before me, permit me to read to you another passage from this treatise, marking with the utmost clearness and precision, the different degrees of proof which should be required in civil and criminal causes, and having a strong general bearing upon the cause. Voltaire says, in relation to the difference between these causes, "What is the difference? That of life and death, the honor and the shame of a whole family. If we are to give a construction to a doubtful testament, an intricate marriage settlement, to interpret an obscure law of inheritance, to decide a question of commercial law, there is an absolute necessity that a decision should be made, and we should be led by the greatest probabilities. There is nothing but money at stake. But it is not the same thing when the life and character of a citizen are to be taken away. Then the greatest probability will not be sufficient proof. Why? When a field is in controversy between two parties, it is evidently necessary for public tranquillity and private right, that the party to whom the field belongs, should possess it. But when a man is accused of a crime, it is not evidently necessary that he should be delivered over to the executioner, even upon the greatest probability. It is quite possible that he may live, without disturbing the quiet of the state. This is the true doctrine of probabilities!"

Gentlemen of the jury, having said thus much upon the subject of confessions generally, let me next turn to the particular confessions in this case, as they came from the witnesses, and see what they amount to. The testimony comes from Mr. Pike, captain Hook, and John Hughes. Mr. Pike swears that he heard Curtis say that Marchant killed the mate, and he killed the captain. This was when Curtis was arrested, after he had attempted to escape, and was brought back. Upon cross examination, being asked to state the first words which Curtis used, he gave these as the words: He knew nothing either said by Curtis before or after. These words were all that he swore to, and they were all which could be got out of him. This differs very materially from captain Hook's statement; for he says that Curtis' first words were, "O, Charly, had you heard to me, we should not have come to this!" and he adds a great deal more which was said by Curtis, in which he by no means admitted, that he killed the cap-

tain, but on the contrary said, that Marchant rushed in and killed the captain on the cabin floor. It is very evident that Mr. Pike is giving us his conclusions in the place of facts, and his ideas and opinions what Curtis' declarations amounted to, instead of the declarations themselves. This way of lumping things, in a matter so doubtful as confessions, is too unsatisfactory to render the evidence of this witness a safe foundation for a verdict of guilty in a capital case. I impute no desire to deceive to this witness, nothing more than gross inaccuracy, and a want of intelligence.

Next in order is the testimony of captain Hook, whose conduct is deserving all praise, and whose testimony has the weight of gold in this cause. It is a clear, candid account of what Curtis said upon his examination, according to the best of his recollection, subject like that of every other man, to mistakes. The first remark which I have to make upon captain Hook's testimony is, that it is as different from Pike's, as light from darkness; and in relation to the confessions of Curtis, it utterly destroys the effect of that witnesses evidence. He does not say that the first words which Curtis uttered were, that Marchant killed the mate, and that he killed the captain. He does not sum up the whole that was said in a single sentence; neither does he say that Curtis said what Pike has put in his mouth. This intelligent witness informs us, that Curtis' first words were, "O, Charly, had you heard to me, we should not have come to this!" that then Curtis gave the following account: That he was forward and heard the blow, and the fall of the mate; that he immediately went aft, and found Marchant throwing the body of the mate overboard; that Marchant then picked up an iron bolt, and threatened him, that if he did not go down into the cabin and kill the captain, he should share the same fate; that he went down; that his heart failed him; that he returned to the stairs to Marchant, who drove him back; that then he struck the captain, who screamed and jumped from his birth, and that Marchant rushed in and killed him on the cabin floor; that then they hauled him up the stairs, and threw him overboard out of the port hole. This is captain Hook's account of what was said by Curtis; and you will observe, that Curtis does not admit that he killed the captain. He says that Marchant rushed in and killed the captain on the floor. Curtis does not say that he killed the captain alone, as you would infer from Pike's evidence. He does not even say,

they killed the captain; but he says Marchant rushed in and *he* killed the captain on the floor. In whose scale does this evidence, the most important in the cause, weigh—the prisoner's or the government's? All the other testimony as to the confessions, all the facts proved in the case, clear Curtis of the murder of the mate. If a doubt remained, the testimony of captain Hook removes it, and completely establishes Curtis' innocence of that crime. When the declarations of the prisoner are put into the case, what in them is in his favour, is as much evidence, as what makes against him. The whole is to be considered, and weighed by the jury. This is the dictate of humanity and common sense, and it is the rule of the law. Does not this confession shew, that in the murder of the mate, which was the first crime, that which led to all the rest, Curtis had no participation? He was awakened at the dead of the night, by the noise on deck, perhaps by the dying shriek of the unfortunate Jenkins. In alarm and confusion so great, that he leaves his hat behind him, on the chest, he hastens to the scene. Perhaps the threats and teasing of Marchant came to his mind. May it not be that he hastened to prevent murder, not to join in it? This inference is as fairly to be drawn from his confession as any other. When he arrives at the quarter deck, the deed is done, it is finished, it can neither be prevented or recalled. Marchant was then plunging his victim in the ocean, and hot from murder, reeking with blood, stands before Curtis hardly awakened, and his mind full of horror at what he saw. With an uplifted bolt over his naked head, he threatens him with instant death unless he becomes a partner of his guilt, an associate with him, and unites his fate with his, by ties and bonds which could never be broken, those of a common crime, and a common danger. He menaces him with death unless he goes down into the cabin, and kills the captain, an event now necessary to Marchant's security. There was no time for Curtis to reason, and deliberate. We in this court house can talk and reason, and deliberate about the manner in which Curtis should have acted. But Curtis could do none of these things, and in his distracted state of mind he must follow the first blind impulse, even if it led him to destruction. No man can tell, whatever may be his calm reflections when in security, what in such a moment of danger might be his own conduct. Curtis was like a bird caught and fluttering in a snare. A powerful and daring man, who had just committed one murder, and who would not hesitate to commit another, armed, menaced him

with death, in the dead of the night, in the broad Atlantic ocean, on the deck of a small vessel, where there was none to aid him. Thus was he driven into that cabin. A single moment's pause gave an opportunity for a single reflection. His heart failed him. He returned and sought to escape from this bloody business. He was driven instantly back. His next rapid, hasty thought, was to strike the captain, not to murder, but to rouse him to a sense of the dangers which were about him. It must have been so ! Had he struck him with an axe to murder him, captain Selfridge would never had time to send up a shriek, or a prayer to heaven. He would never have sprung from his birth, but one groan would have issued from his lips, and he would have been a corpse.— At that instant Marchant rushes in, and kills him immediately upon the floor. Gentlemen, the whole of this work of butchery, could have occupied but a few moments, during which those two young men were killed, and this unhappy young man, with no chance for escape or deliberation, involved so deeply in this horrible transaction. Gentlemen, will you make no allowance for Curtis under all these circumstances, and will you reject the suggestion, which is offered to you, that if he struck the captain, as would appear from captain Hook's testimony respecting his confessions, he did it to save, not to destroy his life ?

But if it were otherwise, and Curtis killed him, or assisted in the act, not from malice, a necessary ingredient in the crime of murder, but from terror of Marchant to save his own life, the case presents one of the most solemn and profound questions of morality and law. I know that the opinion of lord Hale may be cited against the defendant, but he gives no authority, no adjudged case in which that opinion has been ruled. The opinions of the greatest men are not law under our system until they are recognized in courts of justice. Against his opinion is that of another eminent man. I speak from a hasty recollection, but I think it is sir Francis Bacon, an eminent philosopher as well as lawyer, who says, if two men are upon a plank in the ocean, which is sufficient to sustain but one of them, either may innocently push the other off. Here a man is justified in taking the life of an innocent person, in order to preserve his own, in conformity to that law of nature above all laws of men, written in the hearts of us all, the law of self-preservation. Every man prefers to pass the bitter cup of death to another rather than drain it himself. The reason also which lord Hale

assigns for his opinion, shows that the doctrine has no application to the case under consideration. He says in his Pleas of the Crown, vol I. p. 31,

"If a man be menaced with death, unless he will commit an act of Treason, Murder, or Robbery, the fear of death doth not excuse him, if he commit the fact, for the law hath provided a sufficient remedy against such fears, by applying himself to the Court and Officers of Justice for a writ, (*de securitate pacis.*")

Could Curtis, in the Atlantic ocean, on that fatal night, with that bolt over his naked head, raised by a murderer's arm, have applied to a magistrate for protection? No, gentlemen, the only protection upon the deep, is the power of Heaven, and the moral influence of the law. Blackstone in the fourth volume of his Commentaries, chapter 2d, says, "an unwarrantable act, without a vicious will, is no crime at all." Again, "there are cases where the will does not join with the act," as "where the action is constrained by some outward force and violence. Here the will counteracts the deed, and is so far from concurring with, that it loathes and disagrees to what the man is obliged to perform." These are my views of the law, and the fact, growing out of captain Hook's evidence. I contend that is in favour of the defendant, more than against him; and that my inferences from it are confirmed by the circumstance of the hat on the chest, showing that he quitted his birth suddenly, and the strong bright fact, that while there was blood upon Marchant, the stain of crime, there was none upon Curtis; clearly proving that his hands were not employed in this work of murder.

Gentlemen, the only remaining source of testimony to confessions at Nova Scotia, is the evidence of John Hughes. I shall have occasion hereafter in a subsequent stage of the argument, to comment upon his claims to credit, in his peculiar situation. At present my remarks will be confined to that part of his evidence respecting Curtis' declarations to him on the shore, the morning after their arrival at Louisburg, when Curtis and Murray returned from captain Hook's vessel. He swears that Curtis then told him that he killed the captain, and when asked by Hughes how he came to do it, said "the devil must have been in him." When Hughes was asked who was present at this time, he named Murray. Murray did not hear this testimony. He had been at our request sent into another room, but I called him in and asked him about the matter and he knew nothing about it. Hughes named Murray as present, but Murray does not support

and confirm him. Had it been said, Murray must have heard it, and he would have recollected it; for he has ten times the intelligence and mind of Hughes. Can he be believed, thus unsupported and substantially contradicted by Murray? The story is moreover utterly improbable. Curtis was at this time with the bag of clothes under his arm, preparing to flee into the woods. Strong fear was upon him. He had in coming on shore in the boat, expressed his apprehensions to Murray, that he was about complaining of him. He was taking measures for his own safety. At that time, would he have made these confessions, to be brought up against him, and take away his life? Is it probable; is it possible? This witness is evidently exasperated against the defendant on account of passionate expressions respecting him. He was about entertaining you with the slang of the jail, passing from one cell to another, to prejudice you against the prisoner, till he was checked by the remark of the court—"No prison confessions." If, therefore, Hughes' story is unsupported, if it is improbable and too strongly tinctured with a hostile feeling, and Pike's testimony, too uncertain and incorrect, there is no testimony as to the Nova Scotia confessions, which can be relied upon, except that of captain Hook. I leave it to the jury to say on which side of the cause that evidence weighs. There is another class of confessions in the case, those said to have been made on board the vessel. They come wholly from Murray and Hughes, and depend entirely upon the credit due to these witnesses. From men in that situation, however innocent they may be, any testimony should be received with great caution. Look to the evidence to these declarations. Murray says that he went upon deck in the morning with or immediately after Hughes. Marchant was sitting upon the rail, and Curtis was at the helm. Hughes asked where the mate was. Marchant replied, *we* have killed *them*; to which Curtis responded, yes, *we* have killed *them*; and added other expressions too shocking to be repeated. Hughes swears to the same things, but he also states many other remarks, such as the conversation respecting the Spaniards and Portuguese, of which Murray with all his shrewdness and intelligence, gives us no information. A discrepancy and material variance between the stories of these witnesses, in important particulars which the jury cannot have failed to observe. Gentlemen, please to remark that Marchant was the chief speaker. Curtis was merely assenting to what Marchant said. Mar-

chant said, *we* have killed the captain and mate. That was not true. Marchant killed the mate alone ; yet Curtis, according to these witnesses, assented as much to the remark, which implicated him in the murder of the mate, as that of the captain. Either Curtis never made the declarations attributed to him, or else he was so completely in the power, and under the fatal influence of Marchant, that he was in a state of mind to assent to any thing which he should say. Marchant must have had a hold upon him, which Curtis knew not how to break. The language said to have been used by Curtis, shows the troubled state of his mind. It was the mirth of a demon, the language of distraction. Curtis did not kill the mate ; but he admitted that he had done so. It was untrue with respect to the mate. May it not have been equally untrue and forced with respect to the captain ?

Gentlemen, I now come to the facts and circumstances proved, independently of any confessions or declarations, of either Marchant or Curtis. There are some facts which I rely upon, as raising strong presumptions in favour of the prisoner, and there are others which it is contended, furnish evidence of his guilt. Those for him as well as those against him are few. They lie in a narrow compass. Some of them have already been commented upon, and a brief notice of them will be amply sufficient. It will not fail to strike your minds in a favourable point of view, for the defendant, that he was not in the mate's watch. Neither did he linger upon the deck, as he might easily have done, in case he had formed any plan with Marchant to destroy the mate. The moment his watch was out at twelve o'olock, he went below, even before Hughes quitted the deck. He retired to his birth calmly, like a man who meditated no harm. Had he been concerned in a plot of murder, could he have gone down thus, and quietly laid his head upon his pillow ? He would have been restless and disturbed, and could not have retired to his bed, but would have found some excuse for remaining about the decks. The manner, the deliberate manner in which he retired, is in his favour. The sudden manner in which he rose, is also in his favour. He would neither have gone to bed in the manner he did, nor could he have risen as he did, had he been in league with Marchant. When he rose in the night, his hat was left by him on the chest. That little circumstance speaks loudly for him. It proves that he did not steal forth, silently and cautiously like a murderer, but rose suddenly, in confusion, in alarm. There was no blood

upon Curtis, while blood is found upon Marchant. These are circumstances in favour of the prisoner, they are given to you almost in a word, and though they are few, yet they are weighty, and deserving great consideration. Those against him, are, his declarations, which have been commented upon, his confederacy with Marchant in the direction and destruction of the vessel, and his attempt to escape at Nova Scotia. They are all reconcileable with his innocence, not of high and aggravated offences, but of the precise crime described in the indictment, the murder of the captain, the only charge submitted to you to try. If he has scuttled the vessel, or half the vessels which may have sailed on the Atlantic, he is not upon trial for any such offence, and you will cheerfully leave to some other jury, the responsibility of convicting him. Your business is solely with this indictment. If you turn to captain Hook's evidence, it appears that Curtis, by the force of the most dreadful circumstances, was thrown, body and mind, into Marchant's power. In this way, are his remarks, and his subsequent conduct on board the vessel, and his part in her destruction, accounted for. He had been drawn in so far in this business, that there was no retreat. He must go on wherever his fate might drive him. Thus plunged into difficulties, covered with suspicions, and his life actually forfeited by the scuttling of the vessel, the rest, the escape, is easily accounted for, without charging him with the death of the captain. He had enough to flee for, even if he had not to answer for that sin. The other circumstances, the removing the heaver from one end of the boat to the other, and the loss of the hatchet, are of too unimportant a character to require a comment. It is enough to say, that the heaver was accidentally removed, not put out of sight, and the hatchet must really have been lost. If murder were to have been committed with it, it would not have been put aside, but left in its usual place, where it might most readily be found for that purpose, as well as any other. Before leaving this part of the case, I must ask your attention to two other circumstances favourable to Curtis; Murray's remark to captain Hook, that Curtis was not the worst, and Curtis' preparation to return, with this same Murray, to Newburyport. If Marchant and Curtis killed the mate and captain, the import of the declarations testified to, as made in the morning, or if Marchant killed the mate, a man awake, and Curtis killed the captain in his birth, asleep, how could Murray say that Curtis was not the worst? He must have been the worst if there could

have been any difference between them. Murray could never have said this to captain Hook, and Curtis would not have taken passage in company with Murray, unless the one had felt confident, and the other conscious, that Curtis was a man more sinned against than sinning; and that whatever other offences he might have committed, the sin of shedding innocent blood, did not lay at his door.

Gentlemen of the jury. What is the situation of Murray and Hughes, these important witnesses in this prosecution, and what are their claims to credit? How stand they in this business? Suppose Marchant and Curtis had accused them, by making the first movement. The places of these four persons would have been changed. The witnesses would have been in the bar, and the prisoners upon the stand. They might have testified falsely, but it would have been difficult, if not impossible to detect them. Curtis and Marchant would then have been kept together, as these witnesses have been, and they might have concerted any stories to screen themselves, by sacrificing the others. Every thing which they might have said, would have been listened to, while the story of the accused would have been disregarded. Gentlemen, these things should make you exceedingly cautious, how you give credence to the testimony of men in the situation of these witnesses. Murray, on cross examination admits, what he did not think it worth his while to communicate, till it was forced out of him, that he was asked, whether he was not glad of what had happened, and that he replied, that he did not know whether he was or not. He says he was alarmed, and both he and Hughes make the same excuse for their subsequent submission and acquiescence to Marchant and Curtis; their fear. Is not that as good an excuse in the mouth of Curtis, for his acts, when Marchant stood over him with the uplifted bolt, as for Murray and Hughes? As to Murray, it is evident that he did embrace the earliest opportunity of informing. On the first night of their arrival, the boat was upon the shore, Curtis was gone up to the house after some milk. Murray and Hughes are left with Marchant, two to one, yet no attempt to seize him, or go to the houses in the vicinity and give the alarm; so far from that, they draw off from the shore, and remained with them in the boat all night. The next morning, Marchant and Hughes breakfast in one house, Curtis and Murray in another. Yet we hear of no attempt to inform. Captain Hook and others soon meet them, and the false account is given by Marchant or Cur-

tis, of the fate of their vessel, but they are all four present, all hear these falsehoods, and by their silence give their consent and sanction to them. No disclosure at this time, when such an excellent opportunity was presented. A passage is engaged for Curtis and Murray, on board captain Hook's schooner. While on board this vessel Curtis had no one to aid him. The mate was there with two others. Murray made the fourth man. It was exactly the time and place to give the information, and to have Curtis secured. But not a lisp against him came from the lips of Murray. They returned on shore, and met Hughes. Marchant was gone up to the city with the English captain, to whom he had sold the boat, and Hughes was left behind, who never went to the neighbouring houses to inform. He says there were but two there. Captain Hook instantly contradicts him, and swears there were eight or ten. When Murray, Hughes and Curtis were together on the shore, they were two to one again; as the night before, near the same place, yet they make no attempt to secure him, or give the alarm. Hughes did not go to the houses near, when Marchant was gone to the city. He says there were only women there, doubtless there were men there also. He did not follow up to the city, to give information. In short, Hughes never opened his mouth, to tell what he knew, till captain Hook seized him, and tied him, as he tied Marchant. Nor did Murray, till after great delay, and till Curtis had expressed, in coming from captain Hook's vessel, his distrust of him. The fact of Murray's running towards captain Hook, in the manner stated by that witness, at that late hour, looks much like a man in haste, to anticipate the movements of others, and to be the first to accuse, in order to cast the suspicion from himself, upon others. In Hughes chest, moreover, was found a part of the plunder, the mate's watch and the captain's spy-glass. He had been so honest, that notwithstanding all his fears, he refused to take any part of the clothing. Yet the mate's watch and the captain's spy-glass are found upon him; circumstances which he never mentioned in the other trial, and which were forced out by cross examination in this. However innocent these witnesses may be, yet they are under such a cloud of suspicions, that it would be exceedingly dangerous to take away a man's life upon their testimony.

Gentlemen of the jury, I have given you generally my views of the evidence. There are some legal considerations which must be submitted to you, who in all criminal

causes, are judges as well of the law, as the fact. The *corpus delicti*, the existence of the offence, in this case *the death*, must be clearly proved. In ordinary cases, there is no doubt, the offence has been committed by some one, and the only question usually is, Is or is not the prisoner at the bar the man? There is, therefore, great danger of mistake in this matter, and that the jury may take for granted, what should not be presumed, but should be proved, as the foundation of the cause, the *corpus delicti*. Ld. Hale says, vol. II. H. P. C. p. 290,

"I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, for the sake of two cases, one mentioned in my Lord Coke's P. C. cap. 104, P. 232, a Warwickshire case."

The opening counsel read to you some celebrated cases to this point—one of the most remarkable of which, was the Vermont case, shedding so much light upon that part of this case, relating to the confessions. There the *corpus delicti* could not have been proved; for the man, whom the Bournes confessed that they murdered, was alive. Captain Selfridge may yet be living. It is not known that he was killed on board the vessel. There was but a little blood there. If alive when thrown over, by some fortunate event, his life may have been preserved. The vessel was in the great path of the commerce of the Atlantic. The fishermen of France, of England, of the British northern provinces, of the United States, and the navigation of the West India fleets, and the trade between North America and Europe is there continually passing, and re-passing. Men have been sustained a long time in the water. He may yet be alive. It is the duty of the government to prove his death, and it is my duty to suggest, to be weighed by you, the doubt upon this subject.

Gentlemen, I now come to the most important point of law in this case. Not only in the consequences to the prisoner, but in respect to the precedent, which may be established. The law of the United States regulating the proceedings in trials for treason and other capital offences, copied from the English statutes relative to treason trials, provides, that a copy of the indictment shall be "delivered" unto the prisoner two days "before his trial." Similar language in the English statutes made for the protection of the subject against oppression in political prosecutions has been construed to mean, before the arraignment. I refer to lord George Gordon's case, in Douglas's Reports, and Foster, 230.

In this case the prisoner at the bar was arraigned on the twenty-ninth day of November, and it also appears by the records of the court, that his copy was not delivered to him, till some days after his arraignment, and after he had pleaded. He needs his copy before he pleads, in order that he may be enabled to plead correctly. Whether in this case it would have made any difference, it is not of importance to consider. You are bound to guard his rights; to see that all his privileges are maintained for the sake of the law, and to prevent the establishment of a precedent, whereby hereafter, under a different government and different judges, the innocent may be oppressed and destroyed. You will guard the rights of the prisoner with the same zeal and independence, as you would protect a man like Algernon Sidney, who should stand at the bar, the object of oppression, by a corrupt government. We live now in calm times, have a mild administration of government, and wise, humane, and upright judges. But the time may come, when our government may be corrupt and tyrannical, and another Jeffries may sit upon the bench, shedding torrents of human blood, under the forms of law. In such times, the only safeguard of innocence must be, not the court, but the law and the jury. This cause is committed to you, from which you can be discharged only by a verdict. The prisoner has waived nothing; he can waive nothing, unless by an express relinquishment of his rights upon the record, and if he has been put upon his trial before you, without the prerequisites of the law having been complied with, I contend that a verdict can never be rightfully rendered against him. In these positions I am supported by the case of Andrews, 3d Mass. Rep. p. 133, where it is holden, that a party, having been put upon his trial as an accessary, the principal not having been convicted, or tried, without his express assent, waives nothing; for the court say "In criminal cases an express relinquishment of a right should appear, before the party can be deprived of it." And in the case of Phillips, who was put upon his trial as an accessary before the fact to the Stoneham murder, a few years since, where the principal was dead, having committed suicide, the court say in the 16th vol. Mass. Rep. p. 425, "as the prisoner has been put upon his trial, he has a right to a verdict."

Gentlemen of the jury, I must now leave with you the defendant. The question is not, whether he may be strongly suspected, but, whether he is proved to be guilty.

If you doubt, you must acquit; for the law, as has been often said, declares, that it is better that many guilty should escape, than one innocent person suffer. Gentlemen, we must now part, and I solemnly adjure you, as you wish to be judged in candour and in charity, in this life and in mercy in the life to come; judge ye in candour, in charity, and in mercy, the cause of the prisoner at the bar, who is committed to your charge.

Mr. Dunlap closed the defence of the prisoner about half-past eleven o'clock, A. M. Mr. Justice Story then remarked, that as to the objection, raised by the prisoner's counsel, upon matter of law, I now say, without meaning to intimate what my opinion of it may be; that if the prisoner wishes to retrace his steps, he may do so, and commence anew.

Counsel for the Prisoner. The prisoner is on trial for his life. In conducting his defence, it is our duty not to waive any point in his favor; but the prisoner can do as he pleases.

Mr. Justice Story. Prisoner, you have heard the remarks of your Counsel. What say you? Do you wish for a new trial?

Prisoner. I have nothing to say, Sir. My Counsel must speak for me.

Counsel for the Prisoner. We have nothing to say, one way or the other. We would not be understood, as either acceding to, or rejecting the proposition of the Court. The cause of the Prisoner is in their hands.

Mr. Justice Story. The proposition for a new trial was made to the Prisoner, not as a matter of right, but of indulgence—that it may never be said, that he had not every advantage on his trial, which the law could possibly allow him. But neither he, nor his Counsel, incline to accept of that proposition; the District Attorney, will, therefore, please to proceed on the part of the Government.

Whereupon, Mr. Blake arose and addressed the Jury nearly as follows:—

He commenced by remarking to the Jury, that were it not for the heavy responsibility that was resting upon him, the peculiar, unparalleled atrocity of the case, its notoriety, and the very natural feelings of indignation it had excited in the mind of this community; were it not, more especially, for the very reasonable expectation which, he knew, was, generally, entertained, that every public func-

tionary, in any way connected with the administration of justice, would fulfil to the very utmost of his duty, on such an occasion, he had no hesitation in saying he should not have esteemed it as any dereliction of that duty, were he to leave the case as it was, and waive his privilege of closing upon the arguments of the learned counsel for the prisoner now on trial.

For, said he, if, in the judicial history of this, or any other country, there ever *was* a case, criminal or civil, which seemed to bid defiance to all argument or illustration, this had appeared to him, from the very commencement, being a case, precisely of that description. The very presentment of it, upon the evidence, that has been adduced, exhibited, as he said, an aspect which he was sure that no reasoning of *his* could make *stronger*, and no ingenuity or eloquence on the other side, could have had any tendency to obscure or alleviate.

In the discussion of such a case, he could not condescend to follow the learned and ingenious gentlemen who were of counsel for the prisoner, through all their labyrinths of reasoning and refined, and fanciful speculations upon the technical rules of evidence; much less, to treat, with seriousness, the multitude of anecdotes and cases which had been cited in illustration of those rules; and to show under what circumstances, certain innocent men, of other times, may have *suffered*, or *guilty* men have *escaped*.

It was sufficient for him, on the present occasion, to say, that in the administration of justice by any human tribunal, human testimony must be received, and relied upon. Angels do not, in these latter days, descend from their celestial abodes to mingle in the concerns of man here below, or to attest to the character of his deeds or his motives.

It is enough, said Mr. B. for his purpose, that in the affairs of men, and before any earthly tribunal, if a man be *credible*, he must be believed; if, upon the sanctity of an oath, he declare to the truth of a fact, and his statement be consistent, and his veracity unimpeached, the testimony, although its effect reach to the very life of a fellow being, could not properly be refused.

As to the *cases* which have been adduced by the learned counsel, on the other side, in illustration of the principles of evidence they have contended for, as well might the fables of Æsop, or any of the extravagant narrations of the *Arabian Nights*' entertainments, have been cited as authorities on an occasion like the present.

In a case of equivocal complexion; one in which the evidence is complex and doubtful, and where a mere atom

would be sufficient to incline the balance, references of the kind here alluded to, might indeed serve to eke out an argument or an illustration; but they must surely be useless, and worse than useless, in their application to a case like the one then under consideration; a case, in which the evidence brought to its support, is so *doubled* and *twisted*, and *twilled* together, as to form a web from which no human power or subtlety or sophistry, could make an escape.

That he did not speak too confidently, or strongly on this head, would, said Mr. B., be made apparent by the mere presentment of the several views in which the evidence for the prosecution would speedily be arranged.

He observed, however, that before proceeding to the consideration of the particular proofs in the cause, it might be useful for him, in reference to the grounds which had been assumed by the learned counsel in the defence, to submit a few remarks respecting the general character and aspect of the case; and the first observation he would make, was, that the cause now on trial, was a cause most remarkably exempt, both as to the law and the fact, from all the common difficulties and perplexities which are ordinarily attendant upon trials in which the life of man is concerned.

For example, whether a homicide, in this case, were actually committed; whether Edward Selfridge, the person of whose murder the prisoner stands charged, be actually *dead!* In many cases, this question as to the actual death of the party alleged to have been slain, and which, indeed, is the first position to be established in every prosecution for a homicide, is not, unfrequently, attended with the most perplexing doubts and difficulties. Not so is it in the case now at bar. The *corpus delicti*, an actual presentment of the body of the deceased, is indeed wanting even here.

No one is here who witnessed the agonies of his death, or who saw him cold and lifeless, before the body was committed to the waves. The perpetrators themselves, and the Omniscient God, who is present and always regarding the actions of man, could alone have witnessed the last scenes of the expiring victim.

Yet, such were the circumstances, all conspiring together in this case, to establish the certainty of *the death* alleged in this indictment, as to bid utter defiance to human incredulity! A brief review of the evidence on this point, would show, said Mr. B., that he did not speak too strong-

ly; for, notwithstanding the lamentable *story* of the *cruel uncle* and his *niece*, and the variety of other *pathetic narratives*, that had been cited from books of cases, and which ingenious counsel never failed to press into the service of a hopeless, desperate cause, it was impossible they could have stirred up a doubt or a scruple, in the mind of any man, on the present occasion.

What, then, said Mr. B., were the facts and circumstances tending to establish the position beyond a reasonable doubt, that *Edward Selfridge*, whose death is alleged in this indictment, is, in reality, dead?

From the testimony of Mr. Cunningham, one of the respectable owners of the schooner Fairy, we have it in evidence that she was an excellent vessel, of about eighty tons burthen—almost new, having been built but a year ago; that she was tight, staunch and strong, well provided and equipped for this voyage; that she was furnished with one long boat, and that the only boat of any description attached to her; that she was placed under the command of Edward Selfridge, a native citizen of this place—a young man well known among us, as a man of experience and skill in his profession, and of amiable and excellent character; that the family of this gentleman, consisting of a widowed mother, (now doubly *widowed* by the untimely death of a favourite son, her only prop and support!) and several brothers and sisters, are also now resident among us; that the second officer of the vessel, was Thomas P. Jenkins. He also a native citizen of Massachusetts, of respectable family and connexions, who now are and have been for a series of years, inhabitants of this city.

It is moreover stated to you by these witnesses, that the crew which was shipped for this vessel, and who went on the voyage, consisted of, precisely, four persons, and only four, namely, the prisoner at the bar, his companion Marchant, Murray, the steward and cook, and John Hughes, a foremast hand, each of whom, the witness has, completely, identified. That, thus officered, manned and equipped, and with a valuable cargo on board, this little vessel was sent forth on her voyage to Gottenburg, on or about the 19th of August last, and apparently under the most favourable auspices. The season was the mildest of the year; the weather fine, and the wind fair, on the day of her departure from Boston, and continued so for several days thereafterwards.

This is the last which the owners have ever seen or known of their vessel. More than four months have since

elapsed, and not a syllable of intelligence has ever been communicated to them by the officers of the vessel, or either of them; that until the return to this place, of Murray and Hughes, the only information or rumour of any sort, they had heard respecting her, was a brief statement in a Gazette published in a neighbouring town in the Commonwealth, giving some account of her abandonment at sea, and the arrival of her *only* boat, and her crew, on the shores of *Nova Scotia*. We have then, the testimony of Mr. Loring and Mr. Curtis, two highly respectable citizens of this place, both for a long time, and intimately acquainted with the mother and family of Edward Selfridge, and since the time of his departure, *they* have had not a word of intelligence from him, or concerning him.

Mrs. Abigail Jenkins, the *widow* mother of one of the *victims*, is also alike ignorant of what may have befallen her son, since the morning she bade adieu to him, in the month of August last. We are next told by captain Hook, and his mate Mr. Pike, of the schooner Sally, two witnesses for the prosecution, whose intelligence and fairness have been apparent at the trial, and whose purity and integrity are beyond the reach of suspicion, that being at Labradore with their vessel, at about the 30th of August last, they were present at the arrival by the shore of that place, of a sail boat, since ascertained to be the same which belonged to the Fairy at her departure, having on board four men, who are now recognized as being precisely the same four, which constituted her crew, when, a few days before she sailed from the port of Boston.—We learn from these witnesses, moreover, that two of these men, namely, Curtis and Marchant, appeared to have the command and controul of this boat, and the other two, as being merely secondary and subordinate;—that in answer to the enquiries which were very natural in such a case, Marchant and Curtis were the *spokesmen*, and undertook to give to Mr. Pike, the narrative of their recent perils and escapes.

They were, as they said, a part of the crew of a brig, called the Fame, captain Adams, master, from Philadelphia, bound from thence, on a voyage to Labradore, for a cargo of fish; the vessel belonging to a Mr. Avery of the city last mentioned; that in the course of the voyage, this vessel had sprung a-leak; that being in a sinking condition, the officers and crew had found it necessary to abandon her, the captain and mate, with two of the men, having betaken themselves to one of the boats, and

they, Marchant and Curtis, and the other two, having resorted to the other; that the distance being several leagues from the land, at the time of the disaster, and a fog springing up, soon after the boats left the *brig*, they had lost sight of the captain's boat, and did not see it afterwards; presumed, however, that he had steered towards Halifax.

Now it so turns out, said Mr. B. that this same story is no other than a tissue of falsehoods, from beginning to end. It was not the *brig Fame*, of which these fugitives had been mariners; the crew of their vessel did not consist of eight individuals, nor were there two boats to favour the escape of those who were on board, in case of any marine *disaster*.

This, however, even in the mere general view, I am now taking of the subject, said Mr. B., is not all!—

From the testimony of captain Hook and Mr. Pike, it is furthermore proved, that the two associates, *Marchant* and *Curtis*, after a variety of suspicious evolutions, and being apparently aware of the danger of detection, by reason of the disclosure that might be made by their innocent fellow seamen, Murray and Hughes, very speedily betook themselves to flight; that they fled in different directions, and to places several miles distant from the point at which they had landed; but being closely pursued by captain Hook, and a considerable number of men, whom he by this time had rallied to his assistance, they were, ultimately, overtaken in their respective hiding places, and seized; that they were apprehended, at different times, and at places remote from each other, yet that each, at the moment of being seized upon, seemed to have anticipated the cause of the *pursuit*, and the *arrest*.

Each, on being charged, avowed at the instant, not indeed the *murder*, but the *killing* of their captain and mate, each endeavouring, however, to extenuate his own crime, by charging his associate as the principal agent in the mischief.

Such, said Mr. B., is a part, and but a small part, of the evidence existing in this cause, tending to establish the fact, that a *homicide* has been committed; that Edward Selfridge, the person by that name, referred to in this indictment, is not now living; and it would not escape the observation of the jury, that the evidence, thus far, stands wholly aloof, and independent of all aid from the declarations of Murray or Hughes, and from the ample confessions which were subsequently made by the fu-

gitives, at their examination before the magistrates, at *Sydney* and at *Halifax*.

Even this portion of the evidence, however, said Mr. B., is sufficient, abundantly sufficient, to maintain the first position which was to be established in this cause ; and though he should, hereafter take occasion to connect, with this general view of the subject, the more precise and specific evidence upon the point in question, which had been derived from the testimony of Murray and of Hughes, yet he should do so, rather for the purpose of "*making assurance, doubly sure*," than because the case had seemed to him as requiring any such aids and appliances.

It is obvious, therefore, said Mr. B., that upon this question of *homicide*, the case is entirely relieved, as was remarked in the outset, from all the doubts and uncertainties which, in the absence of the *corpus delicti* are so frequently attendant upon trials for murder.

II. Again, when the fact of a homicide shall have been established, it often is found to be a most puzzling, *perplexing* question, what in a legal point of view, may have been its character and degree ; whether it were *justifiable* or *excusable*, on the ground of self-defence, or less than murder, by reason of some *sudden provocation*, and that the deed was perpetrated in the mere fury of the mind.

Indeed, in cases of homicide, the degrees of criminality are, frequently, so indistinct, their different shades so blended and confounded, that the wisest judges and the soundest lawyers of the land, have often been at a loss to settle the proper, legal discrimination between one degree of guilt and another.

Not so surely, is it in the case now on trial! *Here*, if *the killing* have been established, we are under no necessity of turning to our law books, to ascertain its definition.—The law which was promulgated *on Sinai*, the *mandate* of our decalogue has given us all the legal rules and sanctions which can be necessary for the occasion; for all the evidence for the prosecution, on this point, is either founded on the most wanton and wicked perjury, or is a mere chimera, a dream, or the killing, if it had been proved at all, can have been nothing less than a foul and deliberate murder.

III. Furthermore, said Mr. B., in cases where even the *homicide, the murder*, have been fully established, it is often a most serious and difficult question, who are the perpetrators ? Murders, like other great crimes, are, for the most part, engendered in secret, and so are consummated. Glens

and cavẽrns are the abode of the Murderer; clouds and darkness *his* element; he takes no witness with him to attest to the execution of his fell purpose. He, ordinarily, knows *when* and *where* and *how*, to strike; and would always, if he could, so strike, as that the "*assassination* should *trammell up its consequence.*"

If, like a tiger, he steals upon his unwary, *sleeping victim*, like the tiger also, having glutted himself with blood, he shrinks back to his covert.—He has done his deed in secret; no *mortal* eye was upon him. He would escape, and the wide world is before him to favour his flight. He mingles again with the vast multitude of his fellow beings, and if he bear not the *blasting mark* of the murderer about with him, how shall he be singled out from the crowd, as the *real* or *suspected* offender?

Such are some of the difficulties which, not unfrequently, are attendant upon the detection of crime, when committed upon the land.

Not so is it, in the case now on trial. If any crime, like that described in the present indictment, have been committed, the compass of our inquiry after its perpetrators, is extremely narrow and limited. It is, necessarily, confined to the exact limits of this one little vessel. Her decks were the arena, upon which the work of butchery must have been achieved.

It is then, to this vessel, and to her little crew, composed of, precisely, four individuals, that we must look for the authors of this mischief; and if the *two*, who have once fled under a consciousness of their crime, and have more than once *confessed*, avowed it, may still be holden innocent, it is obvious that their companions, although, for ought appearing in the cause, as free and clear of imputation, as the air we breathe, cannot and ought not to escape the condemnation.

IV. In another point of view, also, said Mr. B., it had been to him, and he doubted not, it would be to the jury and to the court, a source of satisfaction, that no question can have arisen as to the *quality* or the *degree* of the evidence which had been adduced in support of the present prosecution.

In many, perhaps, in most instances of prosecution for great and aggravated offences, the government must, in the nature of things, have been under the necessity, either of giving impunity to the offender, or of drawing the evidence requisite to his conviction, from impure and polluted sources, *Huts* and *Hovels* are the usual

haunts of the malefactor, and the by-standers who, *there* associate with him in his revels and excesses, are, for the most part, the only persons enabled to bear witness of his other misdeeds.

It sometimes happens too, that *kindred* and *friends* or *adversaries* of the accused, with all their prejudices and biasses in favour, or against him, are, from the necessity of the case, called to testify. A single witness too, and in a cause reaching to the very life of a human being, is often received and, necessarily received, as sufficient for the condemnation. Accomplices, moreover, with consciences, yet labouring under the sense of their own participation in the guilt alleged, are, frequently qualified, and called to bear witness against their own associate in the crime. He would repeat, said Mr. B., his acknowledgment of the great relief he had felt, that the case then on trial, was, entirely exempt from any difficulty and embarrassment of the kind he had adverted to; that the witnesses for the prosecution, were numerous, and in a high degree, respectable; that with the exception of one individual only, they were all our fellow citizens; their families and their friends, in the midst of us; and above all, that the principal testimony in the cause, was founded on the declarations of men, who, until within a very few months past, were utter strangers to the accused, and ignorant of every circumstance connected with their lives.

Having submitted these preliminary observations which, said Mr. B., he had considered as being seasonable and appropriate, not only, in reference to the elaborate arguments of the learned counsel, on the other side, but in regard, also, to the general character and aspect of the case, he would now proceed to a more particular examination of the testimony, and its application to the several points which had been made in the cause.

In doing this, he should consider the whole evidence in two principal points of view, and afterwards, devote a few cursory remarks upon the *grounds*, or more properly speaking, the series of *slight circumstances*, which had been relied on by the learned counsel for the prisoner, in his defence.

1. First, then, he would enquire what would be the posture of this case, and what judgment must be pronounced upon it, abstracting, entirely from the mass of evidence which had been introduced, the testimony of the only objectionable witnesses, Murray and Hughes, and leaving it to stand or fall, upon the unassisted evidence derived from the respectable owner of the vessel at Boston,

the relatives and friends of the deceased and the explicit statement of captain Hook, and his mate, Mr. Pike.

It has already been shown, that the vessel was a good one; that she was set forth, on her voyage, with the most favourable prospects before her. The chance of reaching, in safety, the port of her destination could not, surely, be better exemplified than by the fact, which has been proved, that the cost of her insurance, was but a per cent and an half, for the voyage, thereby showing, that in the opinion of judicious and calculating men, the probabilities in her favour, were more than as a hundred to two, against any fatal and overwhelming accident.

She is, nevertheless, at the mildest season of the year, and a few days only from port, deserted at sea;—Her officers are missing, and the boat, the only one, affording, in the case of any marine disaster, the possible means of escape to these officers, is found, on a neighbouring coast, in the possession of her crew.

In place of the solemn declarations and protests, which every subordinate seaman, as well as the most experienced commander that ever navigated a ship, well knows the necessity of, for his own security, in a case of accident at sea, an insidious, and lying tale is substituted. The fraudulent men have, however, their misgivings; they are suspicious, and distrustful as to the success of their plans of secrecy and concealment. They betake themselves to flight, are pursued, seized; and when all hope of escape is foreclosed, and dispair has swallowed up every other feeling and sentiment, they, freely confess their malefactions. Not, indeed, to the full extent of their criminality, (for even *despondency* itself will naturally hold something in reserve for the sake of mitigating the degree of execration and abhorrence, which is felt at the development of great and flagrant crimes,) but enough, most assuredly, for all the purposes of the present prosecution. But it is argued by the learned counsel, and a multitude of cases and precedents are arrayed to sustain the position, that confessions are, at least, but an uncertain, precarious species of evidence, which in a case affecting the life of a human being, it would be unsafe to rely upon.

Permit me to say, in reply, that they may be so or not, according to the particular circumstances under which they are made or received. If the confession be extorted; if it be the apparent consequence of terror or persuasion; if the hopes or the fears of the supposed delinquent, have been, artfully, wrought upon; and especially, if his declarations were, *in his chains;* or, as the learned counsel on the

other side, have argued, (without, however, the shadow of ground for such a supposition derived from any evidence) if he were interrogated, with the "*bayonet of the soldiery at his breast*," in any such case, it could not indeed be denied that his declarations, whatever may have been their import, would, as a part of the evidence in the cause, have been open to the objections which, both the learned counsel for the prisoner had, so ingeniously and elaborately urged. Permit me, said Mr. B., to remind you, gentlemen of the jury, how different from any of the cases, before supposed, is the one now at bar, as it stands, in relation to this point, upon the proofs that have been exhibited.

When the *confession* of the prisoner was made, in the presence and hearing of captain Hook, it is certain that the former was, entirely, free from any *physical* or *moral restraint*. He knew, indeed, that he was suspected, had been apprehended, and would speedily be requested to give some account of himself, and his adventures; he was apprized, moreover, that Marchant, his companion in crime, had already been interrogated, and had, probably, disclosed *some* of the *damning secrets* of their recent malefactions;—still, more especially, it was known to him, that *Murray* and *Hughes* had been examined, and that, by witnesses like these, not a *part only*, but *the whole* of the truth, had doubtless been developed; *that they* would not have hesitated to give to "*his worst of deeds, the worst of names.*"

Such was the situation of this prisoner, when a few moments before the time had arrived for his own examination before the magistrates, he made to captain Hook, then sitting by his side, the declarations that have been repeatedly adverted to.

Fearful that such a mass of testimony might, already have been recorded against him, in the books of these magistrates, as his own single asseveration would not be sufficient to confront, it is surely not surprising that, in revolving these difficulties in his mind, he should have deemed it *expedient* to *confess*, or more properly speaking, to *admit* a *part* of the truth, though it should be at the *possible* hazard of his life.

For, said Mr. B., it cannot be doubted that this man, who is obviously shrewd and cunning, and probably well versed as to the extent of his rights, according to *the criminal code* of that or any other country, could not but have known, at the time of his conversation with captain Hook, that not all the powers of magistracy in Nova Scotia, could have compelled him, against his will, to open his

lips. He might, on that occasion, as he more recently did, before the examining magistrate, upon his arrival at this port, have *stood mute*, neither *confessing* nor *denying* his participation in the crimes imputed to him; thus leaving the law and its officers to the proof of their case, and to do their best or their worst against him.

His confessions, therefore, or rather, as I should say, his excuses and his extenuations, on the occasion alluded to, were not hasty or inconsiderate; they were on the other hand, free and unconstrained; and manifestly the result of careful premeditation.

I say, "excuses and extenuations," for what the learned counsel, in the course of their argument, have been pleased to denominate the *confessions* to captain Hook, and to the magistrates, I have, myself, said Mr. B., regarded as a statement, intended not for the purpose of an open avowal, but with a view to concealment, and the keeping out of sight what was the full measure of his iniquity. Accordingly, if you can confide in his own representations, it was not he who had any participation in the actual murder of *Jenkins*. He did not, actually, wield the fatal axe, when it fell upon the head of this first of the victims.—He, forsooth, was engaged at the helm at this time, and did no more than, merely, stand by, a listless spectator of the scene of butchery which was going on before him.—*He* had, indeed, some few days antecedently, received from his *friend* and *associate*, a plain intimation of the tragical events that were to ensue, but *he* did no more than *barely* to treasure up the fatal secret in his bosom, and thus carefully conceal it from the officers, and the crew. He was *invited*, but would not *promise* to take part in the *actual* perpetration of either of the murders, but when the deed should have been accomplished, he was *only* willing to lend a helping hand, (which it seems he had stipulated) in committing the lifeless bodies to the ocean!

Such seems to be the tenor of his admissions as to the murder of the mate.

With respect to the murder of the captain, it was obvious that, in the prisoner's statement to captain Hook, and before the magistrates, on the occasion alluded to, he must have seen the expediency of adopting a different method of exculpation. His associate in crime had already been examined; faithful to their first intent, *Murray* and *Hughes* had made their full disclosures before the magistrates.—If they had spoken the truth, (and, he was aware they would not speak otherwise), it was, now, impossible for him to disavow, against such a mountain of proof, that he

was the principal agent, ostensibly at least, in the perpetration of this latter murder.

Even in this dilemma, his shrewdness does not, however, entirely forsake him. He is willing to admit that *he* did, indeed, in the silent vigils of the night, and with the deadly implement in his hands, descend to the cabin; creep like a tiger, to the bed-side of his sleeping and defenceless victim; that *killing*, not *murder*, was the purpose of this visit; but that his too sensitive heart revolted at its execution.

That he did, indeed, speedily afterwards, resume the fatal enterprise, he is willing to admit; and that eventually, *he struck the blow*, thus commencing the work of death; but alas! that all this was but at the bidding of his more sanguinary companion; and that it was by his hands, not the prisoner's, that the bleeding, and dying victim was at at last dispatched.

At this stage of the evidence, said Mr. B., as far as I have proceeded, (and it stands, entirely, independent of all that is derived from Murray or Hughes), I desire you, gentlemen of the jury, when you shall have retired to your deliberations, to make a pause; and to consider if any thing be wanting to establish every essential fact which is set forth in this indictment. With the confessions, or rather, the avowals of the prisoner, in the presence of captain Hook, you will of course, connect the suspicious circumstances under which the strange boat first made her appearance near the shores of Labradore, the false and fabricated statements of the two principal men who were seen in possession of this boat; their visible, but premature agitation and alarm; especially that most significant of all indications of guilt, their flight, for, as to some purposes, it is, even a maxim of the law, "*fatetur facinus qui judicium fugit;*" take, I repeat, these circumstances into consideration, in connection with the indisputable evidence we have received from other sources, of the manner in which the vessel was, originally, equipped, and sent forth on this voyage, and then say if, as intelligent and reasonable men, you could, upon your oaths and consciences, hesitate, for a moment, to pronounce a verdict of conviction.

We are not, indeed, informed by any of the testimony which has yet been adverted to, as to the precise latitude and longitude of the vessel's position at the time of the catastrophe, nor the hour of the day or the night, when the work of blood was begun or ended, nor which of the

murderers was the leader, and which the follower at the onset. These, however, are but the mere non-essentials of the cause. It is enough if you have assurance that the vessel was on the ocean; that at some time between the twentieth and thirtieth of August, the lives of her two officers were destroyed by foul and unnatural means, and that the prisoner at the bar was one of their murderers.

Here, said Mr. B., if the cause now on trial, were of any common and ordinary character, he should certainly feel it to be no relinquishment of any public duty, were hē to submit it without further argument or comment. But the crimes, if any had been committed, were attended with circumstances of most unusual, unexampled depravity, and in such a case, he could not feel justified in omitting the use of any jot or tittle of the means that had been placed in his power to bring them to certain and condign punishment.

I shall now, therefore, for the first time, invite your attention to the testimony of *Murray* and of *Hughes*; premising, however, that both the learned counsel for the prisoner have been most egregiously in error, throughout the whole of their argument, by supposing that I had contemplated relying upon the statements given by these men, as being very essential, much less as constituting the principal and fundamental support of this prosecution. On the other hand, I can assure you, that I have, from my first acquaintance with this cause, regarded the declarations and statements of these witnesses, as being proper to be introduced into the cause, only for the purpose of satisfying the eager and anxious curiosity, which seems to have been felt by this community, and of supplying a few details that were wanting to complete the history of all the nefarious deeds which have been referred to, than because any supplementary evidence were wanting for the maintenance of any material allegation in this indictment. That two *foul murders* were committed on board the schooner Fairy, a few days after her departure from Boston; and that these, in all human probability, were accompanied, or speedily succeeded by flagrant acts of piracy, and by a series of other offences, in equal degree of criminality, I consider to have been already most clearly and incontestibly established.

It is, nevertheless, desirable that you should be somewhat further informed, as to the incidents and particular circumstances connected with these transactions; such as the *exact time when*, the *place where*, these murders were

perpetrated, and the nature of the means or implements which were employed for their accomplishment—circumstances which, after all, may serve rather to fill up the mere chinks and interstices of the evidence, than as constituting any part of its force or substance.

Accordingly, we learn from these two witnesses, (I shall not detain you by a minute recapitulation of their testimony,) that it unhappily fell to their lot to have been fellow-mariners with Marchant and Curtis, on board the schooner Fairy, upon her last *dismal* voyage. That the vessel was such an one as her owner, Mr. Cunningham, had described. That, in the month of August last, while she was receiving her cargo on board, at the wharf where she was lying in this harbour, some little disagreement took place between Marchant and the mate, Mr. Jenkins; *that some sharp and angry words passed between them* on that occasion, but nothing serious ensued, and nothing afterwards was said of it. That the vessel, with a cargo consisting of rice and sugar and tobacco, and sundry other articles of merchandise, and bound on a voyage to Gottenburg, took her departure from the port of Boston, on or about the twentieth of August; that she came to anchor, for a short time, in Nantasket roads, and proceeded on her voyage, the ensuing day; the weather being mild, and the wind favourable. That the crew, exclusive of the officers, Selfridge and Jenkins, consisted of, precisely, four persons, and no more, namely Marchant, and Curtis, Murray and Hughes; that two watches were arranged on board; and that Murray having shipped as *cook* and steward for the voyage, and being, therefore, exempt, from all duties of this kind, these watches were thus established; namely, *Hughes* and *Curtis* for the first, or captain's watch, and *Marchant* and *Jenkins* for the other; that the births of all the crew, were of course, in the forecastle; that the birth of Curtis was directly opposite to that of Murray.

Thus the watches were arranged when the vessel departed from her moorings; that the last land they saw was the high lands of Cape Cod, on, or about the 22d of August; that, at the time of the vessel's sailing, she had on board, among other articles of her equipment, two common axes, and one hatchet; that the latter instrument was accustomed to hang up by the bulk-head, in the cabin; and that three or four days after the vessel's sailing, this *hatchet was removed from its customary place, and was missing*.—Enquiry among the crew was accordingly made for it, but was ineffectual, the *hatchet* could not be found, and was never seen afterwards.

For the frrst few days, no other unusual incident occurred, except that, *on one occasion*, Marchant enquired of Murray, the cook, if there *was any money on board the vessel*, and being told by Murray, he supposed there was not, observed, in reply, *there must be some*, or otherwise she would not be enabled to pay the port charges, at the foreign port to which she was destined. In addition to this, *then apparently* trivial circumstance, it seems, that Marchant had, occasionally complained in the presence of Murray and Hughes, that the captain had ill-treated him, in requiring him to remain, four hours, upon the stretch, at the helm, when two hours were as much as could reasonably be required of him; and that, on this subject, Marchant had, occasionally, given utterance, to some *harsh* and abusive expressions, in regard to captain Selfridge; that Curtis, also, had sometimes, in their presence, spoken abusively of the captain, saying that he, Selfridge, had once thrown a bucket of water upon him when asleep, *and that he was a damned rascal for doing so!*

That, on the night of Sunday, the 27th of August, the vessel being then near the Banks of Newfoundland, and as was supposed, about four hundred miles from any land, Murray went below, and turned into his birth, at the hour, of about half past nine. This witness, when he went below, is sure he left the scuttle open, as was the custom at night, at that sultry season of the year. He slept soundly, hearing and noticing nothing peculiar during the night, and until four in the morning, when he awoke and putting on his clothes, attempted to pass up through the scuttle, as usual, to the deck, but found it closed and apparently fastened from the outside; attempted to force it open, but did not succeed. He returned to his birth and while groping in the dark, and feeling around, amongst the other births, discovered, that Curtis was missing, but *his hat was lying on a chest*, near his lodging place. Upon further examination of the forecastle, he perceived that Hughes was the only person then remaining there, and he was in his birth.

This was at about the hour of four, in the morning; in the course of a half hour, or a little more, afterwards, the scuttle door was re-opened, and a voice heard from the deck (whether proceeding from Marchant, or Curtis, he is not certain,) calling the watch from below. Upon this, Hughes immediately arose, and making his way for the deck, was closely followed up by Murray. Upon reaching the deck, the only persons they saw there, were Marchant

and Curtis, the former at the helm, and the other standing forward. Hughes' appearance of agitation at seeing no others there, promptly and anxiously, enquired for the captain and mate ; and was instantly answered, by those significant expressions which must ever be remembered in this cause, "We *have killed the damned Rascals, and thrown them overboard !*"—Curtis, as before stated, was present, and within hearing at this time. His response on the occasion will not be forgotten. I will not defile my own lips, nor shock your ears, gentlemen of the jury, by an unnecessary repetition of the foul and blasphemous, I may almost say, infernal language, in which his accordance with the fact which had been announced by his comrade, was expressed. It is sufficient, at this time, that I bestow upon it this single, passing remark, that his language was of such a nature as to signify most demonstrably, not only his admission, but a sort of ferocious, diabolical exultation, that he had been a joint partaker with his comrade in whatever scenes of bloodshed had been going on, that night.

As to the appearances about the vessel, on the morning of the 28th, it will be recollected, that the statements of the witnesses, are precisely in accordance ; that the bed clothes of captain Selfridge, were missing ; that traces of blood were seen on his pillow ; on the ceiling above his head ; on the casks near his birth ; on the floor of the cabin, ; on the stairway leading from it, on the deck, and at the margin of that port hole, through which both the lifeless bodies were probably cast into the seas.

They are also entirely agreed and consistent, in their testimony, as to all the ulterior movements and operations of these monsters, after they had accomplished the murders, and were in sovereign authority over the vessel ; that they proceeded, immediately, as might have been expected, to a search *for plunder* ; that the cabin was ransacked ; the desk of the captain brought on deck and rifled ; the letters and papers examined, and the letter bag thrown overboard ; that they a few days afterwards proceeded to the dismantling the vessel, throwing overboard, cables and anchors, staving in water casks, cutting down and throwing over spars and rigging, with a view, without doubt, to give her the exterior appearance of a wreck, and as preparatory to the ultimate intent of scuttling and sinking her. The parting of the garments, also, of the captain and the mate, was not, according to the testimony of these witnesses, omitted on the occasion alluded to. These

were divided between *Marchant* and *Curtis*, each taking to himself his proper dividend of the booty. The pistols, also, four in number, which it seems had belonged to captain Selfridge, were equally divided between the murderers; nor did they omit to display these implements of death, frequently in the view of their helpless and defenceless companions, for the purpose, without doubt, of striking terror upon their minds, by showing that the means were ready, and at hand, for *more murder*, in case of any misgivings, or disobedience. The auger also, used in boring holes through the floring of the cabin and forecastle of the vessel, was alternately employed by Marchant and Curtis. In a word, according to the testimony of the witnesses, *these two men*, having by their murders brought the vessel into subjection, they were united and co-operative in every act of spoliation and outrage, which subsequently ensued. Neither pretended to assume to himself exclusive dominion; their orders were given out by one and the other, promiscuously; in power and authority they were equal, co-ordinate. Such is the substance of the evidence derived from Murray and from Hughes, as to the occurrences on board the Fairy, on the night of the 28th of August, and the two or three succeeding days, so far as each was in a situation to witness the same events.

There are, however, several most important circumstances in the testimony of Hughes, which, before we quit the vessel, and accompany the malefactors in their boat towards the shore, it will be proper for me, in this connection, to bring to your recollection.

It will be remembered, that, on the night of the murder, Murray, as he belonged to no watch, retired to his birth, at the hour of half past nine; and as he remained below until near sunrise, in the morning, he was of course in no situation to know the arrangements, or to notice the events that might have occurred on deck, in the course of that night.

This little chasm in the evidence is, however, most abundantly supplied by the testimony of Hughes. From the declarations of this witness, we learn that, on the night of the 27th, it was his watch on deck, from the hour of eight to twelve; that the captain left the deck, and retired to his birth, at the hour of ten, giving to witness the charge of the deck, and directing that he, (the captain) should be called up at midnight; that at twelve, the witness called up *Marchant* from the forecastle, and then, ac-

cording to the order, proceeded to call the captain, who, however, after some enquiries as to the state of the weather, the course of the vessel, &c. &c. did not get up, but turned, and fell to sleep again.

The witness then called Jenkins, who immediately came upon deck, and at once ordered the witness to go below, which he accordingly did. Curtis, at this time, was in his birth, opposite to that of Murray, which, at this hour, was his proper position.

Such, according to the statement of this witness, was the exact posture of all the individuals on board this little luckless vessel, at a few moments past midnight, and perhaps, an hour before the subsequent tragical scenes ensued :— the captain *asleep* and *defenceless* in his birth, *Murray* and *Hughes* also, in the same condition; Curtis also, in *his birth*, not, as may be presumed, asleep, but probably listening, with impatience, for the *concerted* signal to be given by his comrade from above.

Thus it is seen, that at the hour of twelve, or a little afterwards, on that fatal night, *the mate* and *Marchant* were alone, on the deck of this little vessel, and the residue of her crew circumstanced, as has just been described. Surely, then, it must be admitted, that if any foul scheme of murder had been premeditated by the assassins, "*with thoughts black, hands apt, and time and place, thus agreeing*," this was the exact moment most propitious for its consummation.

Having thus briefly noticed some of the most prominent circumstances which occurred on board the vessel on the night of the twenty-eighth, and in the course of the two or three following days, I must now proceed to show you, by a brief recurrence to the remaining evidence in the cause, how completely the presumptions arising from those circumstances, are sustained and confirmed.

Before, however, we entirely lose sight of the dismantled and half sinking vessel, I should not omit to refresh your recollection as to *one* circumstance, which, as it is peculiar in its application to the case of Curtis, is certainly deserving some regard. I allude to the fact that it was no other than the prisoner at the bar, who performed the very last act towards completing the destruction of the vessel; for it will be remembered that it was he, with his axe, who cut the holes at the water's edge by her waiste, because she was not yet sinking so rapidly as he desired.

We next find that the boat, with her stock of provisions and utensils, (the *pistols* especially not neglected,) and

freighted with the bloody spoils of the murderers, is prepared to receive them. In accompanying them towards the shore, it is only necessary for me to remark, that, among other incidents on their way, they did not fail to renew, under what penalties *express* or *implied*, it would be preposterous to consider, their injunctions of secrecy and silence. It appears, moreover that, in their passage towards the shore, their fears, as might, reasonably, be supposed, were in a state of constant alarm; their invention on the stretch; and a multitude of schemes and devices proposed by one and the other, in order to screen themselves, upon their arrival, from detection, or suspicion.

The false story of the Fame, with all its plausible incidents and circumstances, as heretofore enumerated, is eventually, agreed upon; and was afterwards related to Pike and to Hook, exactly as it was heard and understood, at its first conception, from the mouths of the murderers, by Murray and by Hughes.

Such, gentlemen of the jury, is the whole amount of the testimony, when put together, which has been adduced in support of this interesting prosecution; and I must take occasion here to repeat the remark, which was heretofore made to you in anticipation, that it does appear to me, the evidence is of such a character that no reasoning in my power to bestow, can make it stronger, and no ingenuity on the other side, can have had the slightest tendency to invalidate. If, nevertheless, against such a weight and combination of proofs, all agreeing, uniting, running in the same direction, and leading to one and the same conclusion, you can still feel a doubt upon any of the points in this cause, I can only say, that there may, *on some occasions*, exist a species of sickly incredulity, in the human mind, which, nothing less than a revelation from Heaven would be sufficient to appease.

It appears, however, that the learned counsel for the prisoner, relying, perhaps, in some measure, upon their own never failing resources, but, still more upon the sympathies and sensibilities of jurors, which are sometimes easily wrought upon, when sitting in judgment upon the life of a fellow being, have endeavoured to confront this evidence, strong as it is, with an appearance of zeal and earnestness which would betoken a confident expectation of success. And it is, surely, but a tribute of praise which is justly due to their exertions, when I say, that if they should be disappointed in this expectation, it will be because every circumstance of law or fact, which learning and talent,

and the most indefatigable industry could have brought to bear on their cause, must, from the nature of the case, be entirely unavailing. What then, gentlemen, are the specific grounds, either in point of law or of fact, which have been assumed in this defence? In behalf of the prisoner, no witnesses have been called, no testimony of any kind adduced. He must, therefore, stand or fall, according to the weight and bearing of that same evidence upon which I have heretofore had occasion, so largely, to comment. It is conceived, however, by the learned counsel for the prisoner, that I have overestimated the force of these proofs; and they have brought in review before you, a variety of petty circumstances, and imagined discrepancies in the testimony, which, as they have argued, relieves the case of their client from the toils and embarrassments, in which, upon a more general view of the subject, it might seem to be involved.

Slight as these circumstances, taking them separately, or together, have appeared to me to be, it is nevertheless, in a case like the present, my duty to notice them; and I shall endeavour to do so, in the order in which they were suggested. I cannot, however, enter upon the examination of such details, without premising, that, in my judgment, all attempts to ascertain the true character of a cause, like the one now on trial, by a nice and scrupulous attention to a few of its circumstances and incidents, must forever, be utterly vain and preposterous. As well might you attempt to scrutinize a single drop of ocean, in order to ascertain the whole power of its wide, and "*multitudinous*" seas; or a grain of sand from the fields of Arabia, with a view to measure the extent of that mighty scene of desolation, as you could propose to determine the weight and strength of the evidence now before you, by descending to such particularities.

The learned counsel for the prisoner, have, in the first place, endeavoured to draw a line of discrimination between the prisoner and his associate, who has been convicted, by supposing that the latter was the principal offender, and the former, if not entirely blameless, at most, as being chargeable only as accessary after the fact, and therefore, as guilty only, of a mere misdemeanor.

Gentlemen, I will venture to say to you, that a bolder effort of counsel than this, was never attempted before this, or any other judicial tribunal. It is nevertheless the *hypothesis* of the learned gentlemen, and permit me to say in the first place, it is indeed mere *hypothesis* and nothing

more. It is obviously founded upon the excusatory statements and representations, the half confessions, and evasions, which they have heard from the mouth of their client since they became engaged in his cause .

In this attempt to draw a line of discrimination between the prisoner at the bar and his associate, we have indeed, exhibited before us, in this court, nothing more or less than that same schcme of deception, of mutual crimination and recrimination, which, as appears from the evidence, was, alternately adopted by the two culprits themselves, when successively arraigned before the magistrates, at Sydney, and at Halifax.

It was manifestly, with a view to this ground of defence, that the learned counsel for both the prisoners, so anxiously, insisted upon a severance of the trials; so that each of their clients, in his turn, might have the opportunity of explaining away, not the fact of the murders, but his own guilt, by shifting the burthen upon his associate. I need not say, the *pretext* was unavailing, on the former occasion, and, surely, it cannot be less so, on the present.

But the learned counsel for the prisoner have endeavoured to sustain their fanciful speculations upon this point, by a reference to one or two circumstances in the evidence which, from the length of time that was employed in their argument upon this point and the earnestness with which it was pressed upon you, would seem to have inspired them with considerable confidence of success.

The principal circumstance here relied upon, seems to be that which is developed in the course of Murray's examination, that the *hat* of Curtis was seen upon his chest in the forecastle, at the hour of *four*, on the morning of the 28th, when he himself at that time, was missing from his birth. Trivial as this little incident would, in the abstract, certainly, seem to have been, yet an attempt has been made to give to it an interpretation, from whence are deduced several most important inferences in favour of the prisoner. That the *hat* was left behind, it is said serves to shew, that his visit upon the deck, at an unusual hour of the night, when his proper place was below, must have been sudden, unexpected, and on the spur of some *occasion*. That he had, probably, been roused from his slumbers, by the noise of some *disturbance* upon deck; that this noise might have been none other than that which arose from the last struggles of the mate, and while wreathing within the grasp of Marchant his murderer. It seems indeed to be admitted, that Curtis might possibly, and not

improbably, have been present, and have witnessed the expiring agonies of this victim, but that the favourable circumstance of *his hat left behind*, is sufficient to show that his presence, on the occasion, was merely fortuitous, unpremeditated, and therefore, to exempt him from the imputation of having had any agency in this first of the murders. Gentlemen, the circumstance which has been alluded to, and which, I confess, in the midst of the various other strong and irresistible proofs, existing in this cause, I should but for the industry of the learned counsel on the other side, have entirely overlooked, is, in my mind susceptible of a very different, and much more natural interpretation than that which has been given to it ; and I cannot but feel some surprize, that the learned gentlemen, who, as to most other points of their defence, have certainly manifested a great degree of forecast, should have ventured, unnecessarily, to bring forward a point like this, for discussion.

It will be remembered, that in a former part of my argument, it was insisted that there were sundry proofs in this case, tending to show the improbability that either of the murders could have been the result of any sudden impulse or provocation ; and that both together, with all the ulterior operations which succeeded, were much more likely to have been the offspring of a long premeditated scheme of insurrection. The previous quarrel between *Marchant* and the *mate*, while the vessel was taking in her cargo ; the grumbling and harsh expressions of the former towards his captain, on account of the pretended severity of the duty imposed upon him, with regard to standing at the helm ; *his significant enquiry*, a few days before the murders, *if there was money on board ;* the grumbling and complaints of Curtis, on account of the supposed indignity, that he also imagined he had received, at the hands of the captain ; but more especially the *missing of the hatchet*, and the concealment of the *heaver*, were it was urged, sufficient indications, that motives and incentives were not wanting, to minds already nurtured and predisposed to mischief, for forming the plan of those scenes of horror, which ultimately ensued.

May I not now, since the learned gentlemen have reminded me of it, add to the list of circumstances first enumerated, the very *affair* of the *hat*, which they have attempted to construe, so favourably for the cause of their client ? To my mind, there is something, in this little incident, of a lowering and portentous aspect. To me, it

speaks not of that haste and precipitancy, with which its owner had risen from his bed, and hurried to the relief of some imagined difficulty upon the deck. It looks to me, on the contrary, very much like another symptom of that same preconcert and confederacy, so strongly indicated by other circumstances that have been alluded to. That when he left his birth and went upon deck, at the hour of midnight, he was well apprized of the bloody business in which he was about to engage. If I mistake not, the murderer requires not his hat, or *his coat*, or his *cloak*, especially, on a summer's night, as necessary appliances to aid in the accomplishment of his purpose.

All such trappings are, to him, but so many incumbrances. Like the butcher at *his slaughter house*, or the pugillist, or gladiator at their combats, he would rather bind a fillet about his head, lay by his ordinary apparel, and see that nothing should be left, to inpede the freedom and certainty with which he had intended to inflict his blows.

I humbly submit to you, gentlemen, that taking it in connection with the other proofs, as relative to what occurred antecedently, and subsequently to the murder in question, the construction I have put upon the circumstances so much relied upon by the learned counsel for the prisoner, is, by far, the most reasonable and natural !— I dismiss it without further comment. But it is furthermore contended by the learned counsel for the prisoner, (and this point also has been pressed upon you with much apparent confidence) that even, admitting that he might have been instrumental, in some degree, according to the tenor of his reiterated confessions, in destroying the life of captain Selfridge, still that whatsoever he did, on that occasion, was the natural result *of fear*, and *coercion*, and done in the exercise of his lawful rights, under the pressure of a power he could not resist ; and hence, that it was merely an effort for self preservation. I will not, at this late hour of the day, attempt to follow the learned gentlemen into an examination of any of the cases or elementary books they have referred to, in order to support the principle, as relative to this point, for which they have so strenuously contended.

Whether, certain circumstances may not be supposed, wherein, by the law of nature, or by the law, civil or municipal, a man would be justified in taking the life of an unoffending fellow being, for the sake of preserving his own, must, indeed, be a subject of serious consideration,

whenever the occasion may demand it. It is, however, sufficient for me, on the present occasion, to remark, that from the proofs in this case, it is impossible that any such question can, fairly, have arisen ; and hence, it would be useless to enter into a discussion of the law respecting it.

I will, however, briefly recur to the facts, upon which the learned gentlemen have assumed this ground of their defence. It will be remembered that a part, although a small part, indeed, of the evidence upon which I have relied in a preceding stage of my argument, was derived from the *confessions*, or as I have heretofore, called them, the *concessions* of the prisoner now on trial.—Now, it is admitted, as a sound principle of the law, that, when this species of evidence is adduced and relied upon, the whole of the confession must be taken together ;—it cannot, properly be garbled, one part selected and another laid aside. If there be in it, a mixture of truth and of falsehood, the former may stand, but the latter must in most cases be disproved by evidence, independent of the confession itself.

What, then, in reference to this principle, and to the question under consideration, is the state of this case? In their remarks upon this branch of the cause, the learned counsel for the prisoner seem to have admitted, what was questioned in another part of their argument, that Selfridge, the person referred to in this indictment, is actually dead ; that their client did, indeed, inflict the first blow, and was therefore, in some measure, instrumental to the eventual destruction of his life.

What then, is the evidence, which has been pointed out to you by the learned counsel for the prisoner, for the *actual* homicide being admitted, the burthen of proof now rests entirely upon himself, that he was propelled to the perpetration of the deed, by the *presence of some superior power*, by the influence of any impending and direful necessity which could not have been resisted? Gentlemen, the circumstances upon which the learned counsel have relied in support of this position, have appeared to me as being almost too light and trivial to justify a comment.

It is, indeed, said, but even *this* is derived from no other evidence but the stinted and studied declarations of the prisoner himself, that, although he was present, and a spectator of the scene, yet it was Marchant, alone, who despatched the mate.—That Marchant then armed himself with an iron bolt, (the dimensions of which we are left to conjecture,) and threatened death to his associate if he did

not descend, *with his axe*, to the birth of captain Selfridge, and complete the half finished business of that night.—In obedience to the mandate, he did indeed descend, the implement of death was in his hands, he approached the bedside of his victim, and not however without some pretended faultering and misgiving, the work of death was accomplished.

Such is the substance of the prisoner's confession; and such are the circumstances of *duress*, of *terror*, and *extremity*, which his counsel have endeavoured to persuade you, are sufficient, in law, not merely to extenuate, but even to justify his acts, on the occasion alluded to.

Need I remind you, gentlemen, in reference to the whole evidence in this cause, how frail and imbecile is this lame and limping apology?

You now see at that bar, the guilty man, in whose behalf it has been urged; he is, obviously, a man of no ordinary muscular power and strength; in powers and faculties of every kind, perhaps, but little, if at all, inferior to *him*, who occupied the place where the prisoner now stands, a few days ago.

From what you knew of his character, if it be *that* only which has been derived from the developments in this cause, you cannot doubt that he is, surely, not a man to be shaken from his purpose, by any vain and imaginary fears; to be appalled by any common and ordinary dangers.—What then was his situation, by what *uncontrollable* impulse was he actuated on the occasion alluded to? What was it that propelled him, *against his will*, and, as pretended, with a sinking, fainting, fluctuating heart, thus to creep upon the slumbers and to imbrue his hands in the blood, of a sleeping, defenceless, and unoffending fellow being?

What, let me ask, is the answer which is given to this enquiry? Why that his comrade had bidden him to the deed, and with an *implement of some sort in his hand*, had threatened him with death, in case of disobedience!

I pray you to consider for a moment, what was the exact posture of *these two associates*, at the crisis now referred to. The mate was disposed of; *his* mangled body had already been consigned to the waves. There were five living and active men, yet remaining in the vessel. Marchant was alone in possession of the deck; and if armed at all, certainly with no implement of any very dangerous or frightful aspect. Curtis was below, and in possession of a *good weapon*, with which he might have hewn his path

through a multitude of opponents. He was, moreover, in the presence, and at the very bedside of *his captain*, whose *moral* influence on board his ship, would have been as a host against one disorderly and refractory seaman. He was nearly in the presence also of Murray and of Hughes, whom he must have known he could depend upon, in an emergency, and whom, by a whisper, he could have awoke from their slumbers.

Under such circumstances, to talk of *trepidation*, of *duress*, of *extremity*, all arising from some imagined superiority of a single individual, I need not say how idle, preposterous! It is almost impossible for me to treat the argument with that gravity which is suitable to the present occasion. No, Gentlemen of the jury, you may rest perfectly well assured, that when the prisoner went, with *his axe* to the cabin, on that fatal night, he did not relent; all this is but the defective, rotten part of his confession, which must be cut out and rejected; be assured that his stout heart did not misgive him, (as is pretended,) at any stage of his bloody enterprise; and that his work was accomplished, promptly and effectually.

That I do not speak too strongly on this point, will, I think, be clearly manifested, when you shall have taken into contemplation the circumstances that *preceded*, and more especially, those which *succeeded* the night of these murders. The horrible annunciation by one, and the still more horrible response of the other of these assassins, on the ensuing morning, as to the nature of their exploits, when they were *both* yet fresh and just reeking from the scenes of blood, in which they had been engaged, are all in this connection, worthy of your special remembrance and regard. Not less so, are the subsequent acts of plunder and piracy, in which it is, I believe, admitted, if not, is proved, that both the parties were entirely united and co-operative.

But, it is insisted by the learned counsel for the prisoner, that all these are but circumstances foreign from the precise subject of the present indictment, and ought not, therefore, to be regarded as proper matter for your consideration; that the specific charge in this indictment is, the murder of *a certain individual*, and that whatever crimes may have been perpetrated, antecedently or subsequently to that event, can have no bearing upon the question now before you. I must be permitted to express my dissent from the doctrine here advanced. The crimes, like the virtues, are prone to cluster and dwell together;

rare indeed, is a solitary crime. If then you should be satisfied from the evidence, that the prisoner at the bar was indeed ever prompt and ready to co-operate in the plunder and rapine, the dismantling and scuttling, which speedily suceeeded *the murders*, and in all probability were their very end and object, it is indubitably a strong circumstance, independently of all other proofs in the cause, to show that he also must have been concerned in the original scheme of mischief.

The connection between the principal and his accessary, either before or after the fact, is, as you have seen by the authorities that have been read to you, extremely intimate; and nothing but *personal presence* at the perpetration of any foul deed, is wanting to involve them both in equal criminality.

It is most material, then, that upon this question of a confederacy, you should take into consideration, not only the particular scenes which ensued on the night of the 28th, but also every suspicious fact and circumstance tending to show a union and co-operation between the two persons accused, which occurred from the day the Fairy sailed from the harbour of Boston, until the offenders were brought back, and in fetters, to the place of their first departure.

In this view of the subject, I will venture to pronounce, that it is utterly impossible for the most visionary fancy, to perceive that line of distinction between these parties, which, in reference to the principal question in the cause, the learned counsel have laboured with so much zeal and ingenuity, to establish.

It is manifest that, as respects all the nefarious transactions on board the schooner Fairy, these men were absolutely, in legal contemplation, *one* and *indivisible*. When Marchant, with his axe, dispatched the mate, it was the arm of Curtis as well as his, which wielded the fatal instrument—when Curtis went down to his work of butchery, in the cabin, it was Marchant, also, who, in a legal view, went with him, and assisted at the sacrifice—which may have been first, and which the last, on either of these occasions, is a matter of total indifference. To my view, they were joint, and several in every thing.

The *Gemini*, in our Zodiack are not more inseparably linked and *twinned* together, than are Marchant and Curtis, and Curtis and Marchant, in regard to every essential fact and circumstance in this cause.

If the latter be *innocent*, the former has been *wrongfully*

convicted; and if *he* were guilty, his associate, now on his trial, cannot be *rightfully* acquitted.

They were, *obviously*, associated in their crimes, and they must be so, in their *destinies*. In weal, or in woe, they must inevitably stand or fall together!!

But it is furthermore contended by the learned counsel for the prisoner, and this, it will be perceived, is an argument which applies with equal force, as well to one of the murders, as to the other, and to both of the accused, indiscriminately, that the testimony of Murray and Hughes is incredible, and that also of Pike and of Hook, and indeed all the evidence which has been adduced in support of the prosecution, because it is said, that if he be believed at all, it goes to the proof of the most heinous and horrible crimes, without exhibiting, at the same time, any presumable motive, or incentive to their perpetration; that a disposition to evil deeds does not spring up spontaneously in the human mind, and that the existence of a great crime, without some pre-existing temptation, or assignable inducement, is a kind of anomaly which nothing short of the most demonstrative evidence can be sufficient to establish. It is said that, in this case, avarice, cupidity, could not have been the motive, for it was previously well known to the accused, that there was no money on board, and nothing, indeed, which, in any event, they could take to themselves, in the way of booty, or gain. That revenge could not have been the incentive, for that if any pre-existing dispute or provocation had been proved in the case, it was of so slight and trivial a nature as to render it impossible it should have been attended with any serious results.

Gentlemen, in answer to all arguments of this tendency, it would be sufficient for me to say, in general terms, that it is no part of the duty of the public prosecutor to demonstrate before you the exact motives and passions by which a party may have been prompted to the perpetration of the crime, with which he stands charged. All the powers of civil government cannot enable its officer to penetrate the recesses of the human mind, to extract from thence the secret workings, which may there lie hidden and concealed.

It belongs *to him* only, who seeeth in secret, and who searcheth the heart of man, fully to comprehend and expound its invisible motions and operations.

For me, and for you, frail and short sighted mortals as we are, it is sufficient, if, by credible and competent proofs, the fact be established, that a homicide was committed.

As to *motives* and *intentions*, as to what may be urged in defence or extenuation, I must take occasion to remark, and I do so upon the clearest authority of law, that all, all this must be made out, satisfactorily, by the prisoner himself. If he have shed the blood of a fellow being, by the laws of Heaven and of earth, he must answer for it, and show his warrant or his excuse for the deed.

But, gentlemen of the jury, I am not sure after all that the proof of a motive of some sort, is wanting in this case. That there was none of considerable force or magnitude, or in any degree proportionate to the horrible consequences which ensued, I most readily admit; but in the same breath, I must be permitted to say, so much worse, therefore, is the case, for the party offending. It is, if I mistake not, a fundamental principle of our ethicks, that the degree of criminality is to be estimated according to the inverse ratio of its inducement, its temptation. Thus it will be seen, that from the very creation of the world, the worst of crimes have been those which have proceeded from none, or from the least of motives. It was for such a dire proneness to evil, that the very angels fell; that sin first came into our world; and if the very hatred of purity and piety were not the motive, there surely was none when the *first murder* on earth was perpetrated.

I have said however, that from the proofs in this case, it would not be difficult to gather the materials upon which to found at least an opinion, of the exact motives, which may have prompted the murderers, already predisposed to mischief, to all those scenes of horror and barbarity, in which they are supposed to have been concerned.

There was, it seems, a shrewd inquiry about money in the vessel; and in the course of the voyage, each of the malefactors was complaining of some imaginary grievance at the hands of their officers, the one from the captain, and the other from the mate; and it is here, perhaps, worthy of note, that *where* the *supposed* provocation was, *there* the *great axe* fell; each man selected his appropriate victim!!

Have we not then, from these little incidents, trivial as they certainly would be, in any common and ordinary case, abundant authority to infer, that they afforded to *such minds*, a sufficient inducement to the murders? It may be that cupidity was the motive, for there was *some* money, and *some* other booty which these cut throats, eventually, and speedily after their murders, actually shared together.

It may be, and this I admit to be more probable, that the motive was *revenge!* Not indeed, that passion as it is commonly exemplified in the actions of mankind, but as it sometimes takes root from the slightest germ of provocation, and forthwith grows, and flourishes in the rank, luxuriant soil of wicked and desperate minds.

The bold plea of the murderer, may be, in some cases, as we have it from one who has given us a striking personification of the passion alluded to, briefly this, and no more; "*I hated, I despised, and I destroyed.*"

In fine, gentlemen of the jury, it is one of the peculiarities in the case now on trial; one, by which it seems to be distinguished from all other precedents, at least, all with which I have myself, been conversant, that we have in it, the clearest proofs of the most heinous and flagitious offences, and are yet left in some doubt and uncertainty as to the real incentives which may have led to their perpetration. All this, however, I must be allowed to repeat, is matter rather of aggravation than extenuation, which it is incumbent on the prisoner at the bar, by the aid of his learned counsel, to meet, and to explain away, to your entire satisfaction.

As the case now stands upon the evidence, it seems indeed to present to us, precisely, that most hideous and appalling characteristic of the murderer, which is spoken of by one of the learned writers, who has been quoted on the other side, "*a heart devoid of all social duty, and fatally bent on mischief.*" So far, indeed, as regards the question of motives, it is exactly that case, in which for the first time, in the course of my official duties, I might take occasion to apply in its literal sense, to the party under accusation, the *technical* phraseology of the indictment, "*that he was moved and seduced by the instigation of the Devil.*"

It will furthermore be remembered, that in the course of the remarks that were made to you, by the learned counsel for the prisoner, an intimation was thrown out, which did not, however, appear to assume the form of a serious argument, that, not only as to the point last under consideration, but in relation, also, to every other question in the cause, the testimony which you have heard from *Murray* and from *Hughes* ought either to be entirely rejected, or at least, if received at all, to be treated with great suspicion and distrust; and several circumstances were mentioned in support of this suggestion.

In the first place it was said, that they might, perhaps, have been, themselves, the very perpetrators of all the out-

rages now complained of; that being seamen on board this vessel, present on the occasion alluded to, and having, therefore, the same opportunity, and probably the same inducements, as their two associates, they would but for the accidental circumstance of being called as witnesses, and thus enabled, on the present occasion, to become as it were, their own expurgators, have been equally liable with their companions, to the imputation of these murders.

Again, it was said, that if the grounds of suspicion were not strong against them, as having been principals in the transaction alluded to, yet they were so that they must, at least, have been accomplices; and in either view of the subject, that their testimony should be disregarded.

In support of this objection, it will be recollected, that several circumstances were alluded to, but principally this, that these witnesses, after they had reached the shore with their boat, and were now in the midst of a civilized community, who in case of an emergency would have afforded them all necessary protection, nevertheless preferred clinging to their companions, and were remiss and tardy in making their ultimate disclosures.

Knowing as I well do, said Mr. B., that you cannot have misapprehended the real state and tendency of the proofs on these points, I do assure you, gentlemen of the jury, that it is rather for the sake of vindicating the character of these respectable witnesses, (especially that of Murray) against this most injurious and unfounded imputation, than on account of any possible effect it could have upon the event of this cause, that I have felt it to be my duty to bestow a single remark, upon any suggestion of the kind here alluded to.

It is intimated by the learned counsel for the prisoner, that Murray and Hughes are enjoying a kind of privilege, an exemption, by being brought forward *merely* as witnesses, at these trials; and that if, on the other hand, they were now arraigned at the bar, and Marchant and Curtis were to occupy their place on the stand, the case now before the court, might, perhaps, assume a very different aspect.

Gentlemen, I can say to you with the most perfect sincerity, that were the reputation, the safety of these witnesses ever so near and dear to me, I should not feel the slightest apprehension of danger, were the relative posture of the parties reversed, in the manner that has been suggested.

Let us suppose, for an instant, that Murray were now

standing in the place of the prisoner at that bar; that the men now accused, were, in *their* turn, to become the accusers, and were arrayed as witnesses against him, without knowing what might be the drift and scope of their testimony, permit me to inquire, what, upon the mind of any discerning tribunal, could be its possible weight and effect? Against the damning proof of their false and ill concerted story of adventures, the evidence of their flight, their deliberate and reiterated confessions and avowals, let me ask, of what avail would be their asseverations, that others, not they, were, after all, the real malefactors?

In the case supposed, it is most manifest, that my innocent witness would be in no jeopardy; the presence of captain Hook and Mr. Pike would be as a legion, to confront his accusers. The same remarks are applicable to the condition of his companion, my other witness in the cause.

But it is said, that after their safe arrival at the shore, both of them were remiss, in regard to the time and manner of their disclosures. Least the circumstances which were developed in the evidence, upon this point, may not now be entirely fresh in your recollection, I must here be permitted to advert to a few of the most prominent particulars. Without confiding implicitly in the statements of *Murray* or *Hughes*, any farther than they stand supported by the evidence of Pike and of Hook. I submit to you, if from the evidence in the case, it be not then perfectly apparent, that from the first moment the boat of the Fairy reached the shores of Nova Scotia, to the time of the pursuit and arrestation of the fugitives, the two men, now appearing as witnesses, were not in a state of constant unremitted duress? The murderers, it seems, even before they reached the shore, had each selected the man of whom he was to be the supervisor, and who was to accompany him as his shadow, in all his subsequent movements and operations. The pistols too, had already and frequently been displayed and essayed in the view of these subordinates; and whether expressly, or by implication, I consider the decree to have been passed, that instant death was to be the penalty of deviation.

Accordingly it is perceived, that after their arrival, and in their several visits to the shore, Marchant and Hughes, and Curtis and Murray, were respectively, constant and inseparable companions. As to Murray, however, it is objected that on one occasion, more especially, he was so circumstanced, in relation to his *guide* and *overseer*, as that

he might then have made his disclosures with safety, and that his omitting to do so is a circumstance strongly against him. The occasion here alluded to, is that, when he and Curtis made their first visit together on board the vessel of captain Hook, in order to engage their passage, as was pretended, to some port in Massachusetts. Accompanied, and without doubt, closely watched here, as he had been every where, by his eagle eyed follower, Murray, now found himself on board a strange vessel, in a strange country, whose laws, and whose customs were unknown to him. He was, indeed, now in the presence of three ordinary seamen, (the master and the mate of the vessel being absent) but they also were utter strangers to him, men whom he had never before seen. Unarmed, as these were, they might, or they might not have been competent and prompt to interpose for his relief, upon a sudden emergency.

He well knew, moreover, the character of *one* of the individuals who were standing before him—*one* who he knew was reekless, and desperate; still reeking with the life-blood of two fellow beings, perhaps yet thirsting for more. It was probable, also, nay, almost certain, that *this* man was well armed; that the pistols he brought with him from the shore, were yet his constant accompaniments; and that he would not hesitate to employ them, whenever his malignity, or his fury might prompt him to annex the *trifle* of *one* more murder, to the long list of his crimes.

Under such circumstances, said Mr. B., I submit to you, gentlemen of the jury, if this was the proper time and place for the young man to whom I am alluding, to have made his disclosure? On the contrary, would it not have been the extreme of temerity if he had ventured to do so? In my judgment, if he had made the attempt, his lips would have been sealed in silence, and in death, at the first word he should have uttered, in the way of complaint, or accusation.

Besides, admitting that the murderer might possibly, on the occasion alluded to, have been restrained by any circumstance, from acting in the manner which the first impulse of passion would have suggested, yet might he not, would he not, have retorted upon his accuser, thrown back upon him the foul imputation, and thus have placed himself in the view at least of the *three men* they were addressing, and who were equally, strangers to them both, on an exact footing of equality?

Need I say to you, that the natural, the inevitable consequence of such a retort, must have been the instant detention and arrestation of them both?

In fine, gentlemen of the jury, I beg leave to put it to yourselves, as a question to be considered at your deliberations, which of you with whatever feeling of zeal, in the cause of public justice, would have acted otherwise than as Murray did, under the circumstances that have been described?

If however, his silence on the occasion alluded to, should seem after all, to have been under the circumstances which have been stated, in the slightest degree questionable, it surely cannot be doubted that his conduct, a few hours afterwards, was of such a nature as affords the fullest and most satisfactory explanation. It appears from the evidence, that after remaining a short time on board the vessel, he was induced, at the earnest solicitation of Curtis, to accompany him to the shore. The two landed in the boat together, and proceeded a considerable distance to the highlands; when Murray is next seen running towards captain Hook, whom he espied at some distance. Breathless with haste, and with the agitation very naturally occasioned by this effort to escape from the grasp of his dangerous companion, he reaches captain Hook, and reveals to *him then*, as he did afterwards to the magistrates, and more recently in your presence, his artless story of those scenes of horror of which he had been a witness.

Gentlemen, I do submit to you as a fact beyond the power of contradiction or scruple, that the moment which he selected for this purpose, was the very first one when he could have fulfilled with impunity, this sacred duty to his conscience and his country.

With regard to the other witness (Hughes) I do not remember, said Mr. B., that any circumstance was developed in the course of the evidence, affording grounds for a suspicion, that *he* was at any moment, so free from the immediate presence or influence of Marchant, who was *his* attendant, as to have been warranted in making his communications more seasonably.

But it has, furthermore, been suggested by the learned counsel for the prisoner, and even this circumstance is dwelt upon, with considerable emphasis, that it is inconsistent with the supposed guilt of either of the parties under accusation, that they should have, voluntarily and unnecessarily, spared the lives of the two witnesses, who alone could have had knowledge of their crimes, and whose presence, in this court, was indispensable to their conviction.

In reply to this suggestion, I beg leave in the first place

to remark, that whatever might have been its application to the case of *him*, who was a few days ago upon his trial, it certainly comes with very diminished force from *him*, who now stands at that bar, for if I can rightly interpret the *significant expressions* which escaped him, when he first accosted his *friend Charley* in his difficulties, it was surely owing to no *forbearance* on the part of the prisoner, that he happens now to be furnished with this ground of exculpation.

It is at any rate, easy, and that too, without presupposing any thing in the slightest degree favourable to the cause of the accused, to account for the circumstance, that in the midst of their other foul deeds, they still consented to spare the lives of their two remaining, harmless, and inoffensive associates.

It will be remembered, that when the murders were committed, the vessel was on the broad ocean; at a distance of several hundred miles from any land; she was a vessel of considerable size, and of course a degree of manual labour and skill were requisite for performing the ordinary business of her navigation.

Two men might, perhaps, by dint of unremitted vigilence and effort, have been sufficient for this purpose, and for conducting her in safety to some port.

All this, however, would have been an interference with that propensity to relaxation and repose, which the murderers may, very naturally have felt, after the bold and bloody exploits which had placed them in their new stations of sovereign command. With regard to the young man, Murray, who, at this time was *cook* and *steward* of the vessel, it is scarcely necessary for me to say, that the very nature of the office he sustained, would seem to have been sufficient at least, for a time, to have ensured his safety from the vengeance of the assassins. With all that humility, and modesty, and meekness of disposition, which were so strikingly exemplified in his demeanour, as a witness on the stand, he had now become, by the sad reverses of that fatal night, the *servant* the very *slave* of the renegado's. He was the purveyor to their appetites, and in every thing essential to their ease and gratification. The same observations are applicable, except that *he* was acting on board the vessel, in a different capacity from that of his friend, to the circumstances of *Hughes*.

In fine, it is made manifest, by all the evidence in the case, that it was not the clemency, but rather the *self-love*, the *timidity* of the murderers, which permitted these wit-

nesses still to live, and happily, for the cause of public justice, to stand before you on the present occasion.

Yet another circumstance has been mentioned, and with no inconsiderable emphasis, by the learned counsel for the prisoner, as having a most favourable bearing upon his cause, so far at least, as concerns the question of his participation in the murders alleged.

It is said, that soon after his arrival at the shore, he actually engaged to take passage on board the vessel of captain Hook, for a port in the neighbourhood of this city, and with this view, had already deposited his chest and other baggage on the deck of that vessel; and this it is argued, he surely would not have done, were he conscious of guilt in regard to the crimes now imputed to him.

Gentlemen, with reference to what I well recollected, were the proofs in regard to the incident here referred to, I was, I confess, absolutely struck with astonishment, that the learned counsel should have ventured to rest, for a single moment, the cause of their client, upon this most dangerous and treacherous ground; thus voluntarily bringing afresh to your observation, all the particular facts and circumstances connected with this transaction. That they nevertheless did choose to do so, appeared to me, I must say, as indicating a degree of infatuation in the minds of those learned gentlemen, on this particular occasion, which seemed to be wholly inconsistent with what I knew of the high and very deserved reputation which they both sustain, for acuteness and all other professional qualifications.

What then is the complexion of those particular facts and circumstances, to which I have just alluded?

It is in proof, that on the morning after the boat, with the four seamen on board, had returned to shore from the position she had taken for the night, a short distance from the land, the prisoner did indeed, for a time, leave his other companions, and accompanied by Murray, visited the vessel of captain Hook. He spoke of taking passage with that gentleman, and whether it be in proof or not, I am willing to admit, as has been contended on the other side, he did in fact engage one. His chest also, and his baggage, were *duly* and *properly* brought on board, and thus ostensibly, every requisite preparation made for the voyage. This is the evidence upon which, as regards this part of the case, the learned counsel have so confidently relied.

Here permit me to inquire, if it were the real intention of Curtis to embark in this vessel, as pretended, why did

he not so? Why was this intention, without any visible change of circumstance, so speedily relinquished? The solution of these questions will, I think, be readily found in the few little supplementary particulars which are furnished by the proofs, and upon which the learned counsel for the prisoner have declined to bestow a comment.

It must not be forgotten, that his visit on board the vessel of captain Hook, was but of a few moments duration; that his chest, instead of being carried below, as would naturally be desired by a person really intending to take passage, was, by *his express directions*, suffered to remain upon the deck. Moreover that the short time he was on board, was most industriously employed, in opening and examining this chest, in selecting the garments, and other portions of its contents, and in packing them in that same bundle which he took along with him in his flight.

Thus prepared, he leaves his chest behind, proceeds with Murray to the shore, takes himself instantly to flight; is pursued, arrested, with his illgotten booty upon him, at a distance of nearly twelve miles from the vessel, in which a few hours previously, he had pretendedly made such formal arrangements to embark.

Gentlemen, the few circumstances, last here adverted to are quite too plain in their import, to require or even to admit of further elucidation.

We may be assured that it was never, in reality, the prisoner's intention to trust himself, as a passenger with captain Hook, on a proposed voyage to a port in Massachusetts. All his movements, therefore, apparently with a view to that object, the depositing of his baggage on board the vessel, and every thing else, must have been mere pretext and nothing more. In this evolution, his real purpose undoubtedly was, to beguile the vigilance of his innocent and unwary companion, but more especially to gain a little time, and by finding a convenient resting place on board this vessel for examining his chest, and packing up his bundle, he might thus be prepared for the accomplishment of his ultimate intention to escape!

To the view I have thus briefly taken of this circumstance, so much relied upon by the learned counsel for the prisoner, I would merely subjoin one additional consideration, which to my mind, if it were single and alone, would be quite sufficient to overthrow, at once, the fanciful speculations on the other side, that his connection with the *running away* and *scuttling of the vessel*, which seems to have been admitted by the counsel, in the course of their

argument, must naturally have formed in the mind of this man, an objection against returning to a place, where he would speedily be called to an explanation by his employers, quite as forcible as would any apprehension of being exposed and detected, as an agent in the murders.

For these last mentioned offences, as well as for the murders, he must have known he had, by the laws of his country, twice incurred the penalty of death. It is, therefore, wholly incredible that he could ever have seriously contemplated returning to his native land, especially in company of the man, of all others, best acquainted with his misdeeds, and thus expose himself to certain, inevitable detection.

In fine, gentlemen of the jury, the whole cause so far as I have any concern with it, will speedily be submitted to you. I am aware that the length of time which I have myself had occasion to employ in its discussion, may have appeared to you as having been unreasonably, perhaps unnecessarily protracted. If however, this be a fault on my part, you may be assured it is one which has arisen from perhaps, an over estimate of what belonged to my duties as a public officer on such an occasion, but surely not from any consultation with my own individual feelings and inclinations. Whatever may be the degree of your own fatigue and exhaustion, you may depend upon it, it cannot be quite equal to that which I have myself endured on this, and on a former recent occasion of a similar kind. The cases however, which in both instances, it was my duty to bring into view, were such as are of no common or ordinary occurrence. The lives of men were involved, but not more deeply than the peace and safety of the community, in the result of these enquiries. The cases are those of murder, and attended too with circumstances of most uncommon aggravation. They are of murders on the *high seas*, and I need not say to you, that this of itself is a circumstance which must necessarily have tended to show, that somewhat more than any common degree of malignity and depravity must have prompted to their perpetration. The very occupation of a mariner, his whole life and experience are of such a nature as one would think, must render it morally impossible that he should be merciless and cruel towards his fellow beings; hardened and abandoned; and accordingly it may be remarked with truth, and to his credit, that such vile qualities are seldom found to exist in the character of this useful and valuable class of our fellow citizens. Of the seaman it may be said, that he is always,

when pursuing his vocation, most peculiarly in the immediate presence of his Creator. His frail and shivering bark, while it courses upon the ocean, he must constantly perceive, is sustained alone by those fickle and restless waters, which the "*Almighty holds as in the hollow of his hands*," and which are subject at every moment to *his* sovereign controul and disposal. The most gallant ship that the seaman ever navigates, he must well know, is but a shell on the rude and boisterous seas; yet that its thin partitions, *as it were of a mere hair's breadth dimensions*, are all which form the line of separation between him and eternity. In short, every circumstance and object that is presented to the view of the mariner, is particularly calculated to impress his mind with awe, and with a deep sense of his own frailty and dependency.

It would seem, indeed, as if the crew of a little vessel upon the ocean could not but be disposed, (and for the most part they certainly are so) to dwell and act together, as a band of brothers, and that none but the best and kindliest feelings towards one another, could ever, but for a moment, hold a place in their bosoms.

More especially would it be supposed, that a sense of their common danger, the obvious necessity of joint efforts for their common preservation, and above all, the consciousness which they must always feel, that while traversing the wide ocean, their several destinies are perhaps, inseparably united; and when disaster comes, they must "swim or sink together." It would naturally be supposed, I say, that reflections like these, would at least debar the possibility of any premeditated, flagrant acts of mutual enmity and violence.

Permit me then, here to inquire, how obdurate, how profligate, must be the heart of that man, who is found wholly insensible to every feeling and sentiment of the kind that has been suggested? How more dark and black than *Erebus*, *the thoughts* of that man, who, in the midst of all the scenes of danger and terror, thus feebly and imperfectly described, could nevertheless coolly and deliberately meditate the murder of an innocent, harmless, unoffending companion?

Need I say to you, gentlemen of the jury, it has been established, beyond the possibility of a doubt, that *such a man* is now standing at that bar, in your presence. *His* victims, moreover, were not taken promiscuously from among the number of his ordinary associates; the crime soars higher; *his* hands were imbrued in the blood of those

to whom he owed a kind of temporary *allegiance*, and to whom he was bound, by an implied oath of fidelity; the essential quality of treason, that which stands at the summit, on the black catalogue of human transgressions, is thus superadded to the other characteristics of his guilt.

Surely, gentlemen, *such a man* can lay no claims to that *sympathy* and forbearance, which have been so earnestly, and eloquently invoked in his behalf.

Gentlemen, I have done! According to the measure of my health and my strength, and the humble faculties I possess, I have endeavoured to discharge fully and faithfully, the heavy duties that were upon me.

This cause is now with you; dispose of it in such a manner, as I doubt not you will, as shall be consistent with the sacred duty which you owe to your God, and your country!

Mr. Blake closed on the part of the government, a few moments before three o'clock, when Mr. Justice Story charged the jury. He recapitulated all the facts and circumstances of the case, as detailed in the evidence, and laid down the principles of law to be applied to them;*—examined the various grounds of the defence, which, said he, have been so fully enlarged upon and enforced by the learning, talents and zeal of the gentlemen who have been good enough to appear in behalf of the prisoner; and reserving the question of law for an after consideration, concluded his observations about half past four in the afternoon, when the jury retired, and the court adjourned for two hours.

At half past seven o'clock in the evening, the court re-assembled, and the Jurors having answered to the call of the Clerk, returned a verdict of GUILTY.

After the verdict was rendered, two motions, signed by the prisoner, were filed by his counsel—one for a new trial, and the other in arrest of judgment—assigning in each the same cause, viz.—That a copy of the Indictment had not

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* See the Trial of Marchant, *ante* p. 41.

been delivered to the prisoner two days before his arraignment, according to law. The court directed the prisoner's counsel to be prepared to argue in support of the motions the next morning, and then adjourned.

Friday Morning, December 22, 1826. The Court meet according to adjournment, and the counsel for the prisoner were called upon to proceed with their argument.

Mr. Jarvis opened. The motion is founded on the fact, that a copy of the indictment was not delivered to the prisoner, within the time required by the Statute of the United States which provides for the punishment of the crime whereof he stands convicted. The copy was delivered to him two days before the impannelling of the petit-jury, but not until fourteen or fifteen days after he was arraigned and had pleaded to the indictment. It should have been delivered before arraignment; for the arraignment is part of the trial.

The Statute 7 Wm. III. c. 3, provides that all persons accused or indicted for high treason, shall have a true copy of the whole indictment, *five* days at least before they shall be *tried* for the same, whereby to enable them to advise with counsel thereupon, to plead and make their defence.

The Statute 7 Ann 6. 21. sec. 11. provides that copies of all indictments for treason or misprision of treason, with a list of the witnesses to be produced on the trial, and also a list of the jury, shall be delivered to the party indicted *ten* days before the *trial*.

In the case of the King *vs.* Dr. Hensey, indicted for treason, a copy of the indictment was delivered to the prisoner five days before he was arraigned; which, according to the report of that case, was the construction upon the Statute 7 Wm. III. Burrow 643.

Also in the case of the King *vs.* Lord George Gordon, indicted for treason, it was considered that, according to the statute of Ann, the prisoner was entitled to the copy and lists, ten days before the arraignment, and this was considered the settled construction. 2 Doug. 590.

Besides these decisions, the reasons assigned in the Statute of Wm. III. appear conclusive in favour of delivering a copy before *arraignment*. They are to enable the party indicted "to advise with counsel thereupon, to plead and make his defence." How can he plead without the

copy? The very definition of, as well as the incidents to arraignment, presupposes a delivery of the copy. "To arraign, is nothing else but to call the prisoner to the bar of the court, to answer to the matter charged upon him in the indictment." 4 Blacks. 322. How can he answer to the matter charged therein, without having ascertained what that matter is? And how can he ascertain what that matter is, without previous examination? This, without proceeding farther, is conclusive.

By the Statute of the United States which provides for the punishment of treason, murder, and other crimes, the prisoner indicted for treason is entitled to a copy of the indictment, three entire days before he shall be tried for the same. It is not to be supposed that this Statute should be less favourable to the accused than those of England; and if English judges have given the English Statutes a construction favourable to the accused, as the only construction intended by the English Legislature, the Statute of the United States providing for the punishment of the same crime, and containing similar provisions and similar phraseology, must receive a similar construction. Therefore, the provision of this Statute which requires, in an indictment for treason, a delivery of copies before *trial*, must be construed to mean a delivery before *arraignment*. In the same section of the same statute, is a provision for furnishing a prisoner indicted for other capital crimes, with a copy of the indictment two entire days before *trial*. Similar terms and in the same section of the same Statute, must receive the same construction. Therefore, a prisoner indicted for murder under this Statute, is entitled to the copy two days before *arraignment*. 2 U. S. Laws p. 98, c. 36, sec. 28, 1790.

But what are the incidents to arraignment? The prisoner may plead to the jurisdiction of the court; he may demur; or he may plead divers other pleas, necessary to be pleaded *at that time*. How can he plead to the jurisdiction, without previous examination of the indictment? Whether the court have jurisdiction, depends upon the nature of the crime, the place of commission, and the manner of charging it. These are to be learned only from the indictment; and as from the nice and technical manner in which these must be alleged, the prisoner, especially if not learned in the law, cannot readily ascertain whether the court have jurisdiction, the inference is irresistible that a copy, whereby to enable him to determine this point and to prepare this plea, should be furnished before the arraignment. 1 Chitty 437.

The prisoner may *demur*, and for defects in the indictment both of form and substance. To enable him to demur for defects in *form*, it is manifest that he must have a copy; for how can he determine, except from careful and critical examination of the indictment, which the law requires to be drawn with the utmost strictness, whether every thing therein be formally alleged? He may demur for defects in substance; among which is charging him with that which is not indictable. How can he ascertain whether the matter charged be indictable or not, without opportunity to examine said matter? 1 Chitty 439.

He may plead divers pleas; among which is that, he is not the person described in the indictment. How shall he plead this, without examination of the description? From this examination only, for which a copy is necessary, can he determine whether he be the person described. 1 Chitty 423.

He may plead in abatement, and divers pleas; among which are a misnomer, a former acquittal, a former conviction. To plead a misnomer, he must know by what name he is styled in the indictment. How can he know this, except from the copy? To plead a former acquittal, or former conviction, he must know whether the matter charged in the indictment be the same with that for which he has already been tried and acquitted, or tried and convicted. 1 Chitty 423—4.

Therefore, according to the reasons assigned for the provision concerning copies in the English Statutes, according to the English decisions thereon, and from the nature of, and incidents to arraignment, it is manifest that *arraignment* is a part of the trial, and that a copy of the indictment must be delivered to the person before *arraignment*. And such must be the construction of this Statute of the United States, the provisions and language of which are similar to those of the English Statutes.

Mr. Blake in reply. It would, said he, be remembered by the Court, that the point now under consideration was, for the very first time, suggested yesterday at a late hour of the day, and at the very end of the concluding argument that was addressed to the jury by the senior counsel for the defence. Under these circumstances, it must be obvious to the court, knowing, as they well did also, the fatigue and exhaustion which must necessarily have been produced by the mere labour of following, without the least delay, and for several hours together, in re-

plying to the elaborate arguments of the learned counsel on the other side, that he could have had, since the hour of adjournment last evening, but little time if he had strength, for any deliberate consultation of authorities upon the subject now to be discussed. He did not, however, complain of any want of opportunity for preparation, for, if he rightly understood the nature of the question to be considered, it was one, which with the aid of the little common learning that was familiar to him, and without a recurrence to many books or cases, he should find no difficulty in disposing of.

The question then, said Mr. B., arises upon the construction of a statute of the United States, and upon what is the legal acceptation of a *single word*, of two syllables, which is found in that statute. In entering upon the argument of such a question, he would beg leave, in the first place to remark, that if ever a case could occur before a court of this union, in which the books of authority from abroad, and the learning and opinions of the great men of other countries and times might very safely be dispensed with, this would certainly have seemed to him, as being a case of that description. It would, indeed, said Mr. B., be a most humiliating consideration, if the high judicial officers of this nation, whose learning, experience, wisdom and talents, more that those of any other department of our government, had been the subject of pride and admiration among its citizens, should nevertheless find themselves incompetent, without resorting to foreign aids of any kind, to understand the plain words of an old and familiar law of their own country, which now for the hundredth time they are called to administer.

It will, however, said Mr. B., be readily admitted, that if upon any question that might be made upon the construction of even a statute like the one last adverted to, an act of the British Parliament were adduced, and found to have been made in *pari materia*, with precisely the same view and object, and agreeing exactly in its words, the uniform settled construction which may have been put upon it by the learned judges of that nation from which we have derived so large a portion of our jurisprudence, would undoubtedly, ever here be received, not indeed as binding, yet with considerable attention and respect. But said Mr. B., he should presently endeavour to show that the instances which the learned counsel on the other side had attempted to put together, were by no means parallel, and that the court were still left free to interpret,

in its own way, and without the aid or the interference of any foreign adjudication whatsoever, the true sense and meaning of the Act of Congress now under consideration.

The statute referred to, he said, was of no recent enactment; its date is April 30th, 1790, and of course is nearly cotemporaneous with the first organization of the Federal Government. It has of course oftentimes since been brought into use; in every circuit of the United States, many and many a capital trial must have been regulated by its provisions, and I have reason to believe, said Mr. B., although he did not pretend to have any absolute knowledge of the fact, except in so far as related immediately to the practice in this particular district, that the provisions of that section of the act, now under consideration, have uniformly been received and acted upon in our Courts, in conformity with that construction for which he should now contend.

The section of the statute which comprizes the questionable *phrase* that has been referred to, is the 29th, and that part of it which has any immediate connection with the point now under consideration, is in these words, viz.

"That any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the trial, for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him, at least three entire days, before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment, and list of the jury, two entire days *before the trial*," &c. &c.

Now, said Mr. B., the precise question is, what is the legal meaning and signification of that *one word* "TRIAL," as it is employed in connection with the anterior provisions contained in this section; and whether the process of arraigning the party at the bar, for the purpose of ascertaining, and receiving, and recording, his plea, be or be not a part of the proceeding which was contemplated by the legislature, in adopting the word *trial* as before mentioned.

Now, said Mr. B., he certainly should have supposed, but for the earnestness and apparent confidence, with which the learned gentlemen on the other side, had pressed their argument, that unless there be some difficulty arising from certain adjudications to which they had referred, on the other side of the Atlantic it could not have required the aid of law books, either at home, or from

abroad to establish the position to the satisfaction of any legal mind, that in a criminal proceeding, the "*arraignment*" is one thing, and "*the trial*" another, and very different thing. If, said Mr. B., we might be allowed, in such a case, to rely in any degree, independently of all technical rules, upon common notions, and *common parlance* among men, it would seem to him that the words, *form and substance*, *antecedent and subsequent*, were not more distinguishable in their respective significations, than were the words, *arraignment* and *trial*, in the language of the law.

To show that he was not mistaken in this position, he would beg leave, said Mr. B., to refer to an author of the highest respectability, Sir William Blackstone, the book which he, Mr. B., had happened this morning, first to lay his hands upon, but from whose analysis of the course of proceeding, in criminal prosecutions, he thought, might be deduced all the law which could be necessary for the present occasion.

In 4th Blackstone's Commentaries, p. 322, first alluding to several antecedent stages of a criminal prosecution, the learned author remarks, that, "When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon, which is the fifth stage of criminal prosecution."

"To arraign," says he, "is nothing else but to call the prisoner to the bar of the court, to *answer* to the matter charged upon him in the indictment."

Upon the question whether a prisoner, except in the case of being refractory, could properly be brought to the bar in his shackles, either for the purpose of *arraignment* or *trial*, upon which the author has referred to the principle, as laid down in the ancient books, he goes on to say; "But yet in Layer's case, A. D. 1722, a difference was taken between the time of *arraignment* and the time of *trial*; and accordingly the prisoner stood at the bar, in chains, during the time of his *arraignment*; and referring to Wait's case, (Leach 34) he adds, it has since been held that the court has no authority to order the irons to be taken off, *till the prisoner* has pleaded, and the jury are charged *to try* him."

Further on, at page 324, the author remarks, "that when a criminal is arraigned, he either *stands mute*, or *confesses* the fact, which circumstance we call *incidents* to the *arraignment*; or else he pleads to the indictment, which is to be considered as the *next stage* of proceeding," &c. &c.

Again he says, that "immediately upon issue joined it is enquired of the prisoner, by *what trial* he will make his innocence appear; and he then alludes to the well known response, familiar in all the courts in our own country, *by God and my country.*"

Such, said Mr. B., are the views of this eminent expounder of the common law, as to *what* is the *arraignment* and what the trial, and what circumstances and incidents may be considered, as properly and respectively belonging to the one, and to the other. Hence it is obvious that he considers them as being separate and distinct *stages* (to use his own phrase) of the prosecution, and that, in legal contemplation, they are as much unconnected as the *verdict*, and the *judgment*, which though constituent parts of one judicial proceeding, may, nevertheless, subsist separately, and independently of each other.

It is, said Mr. B., perfectly familiar to us all, that the usual formalities observed in our courts at the trial of criminal prosecutions are all in perfect accordance with the idea here suggested.

At the arraignment, the language which is addressed by the clerk to the prisoner before him, is, "Hearken to an indictment," &c. &c. *At the trial*, the address to the prisoner is clothed in different phraseology, as it should be, in order to adapt itself to the now, different *stage* of the proceedings. Accordingly the prisoner is informed, that he is "*now set to the bar to be tried*, and these good men, &c. &c., are to pass between you, &c. &c., on your *trial.*" In short, said Mr. B., the office of the *arraignment*, is obviously nothing more nor less, than a necessary preparatory step to the business of the trial. Its purpose is, to ascertain and receive the plea, to afford an opportunity for forming the issue, without which there could, in no case, criminal or civil, be any such thing as a *regular trial.*

I trust, said Mr. B., it has been made sufficiently apparent, by the few observations I have had the honour to submit, that, according to the technical language of the common law, the matter of *an arraignment*, in a criminal prosecution, is altogether distinguishable, from the matter of *the trial;* and as it certainly must be presumed, that in framing the statute alluded to, our wise law givers must have intended, by introducing the word *trial*, into their enactment, to employ it in its proper, legal, technical sense, there would seem to be no doubt, unless the common sense of our own country must be made to yield to the subtleties and refinements of another nation, that

the construction now contended for, on the part of the government, must be adopted.

Proceeding, however, said Mr. B., for the sake of the argument upon the supposition that the decisions in the English courts, to which the learned counsel for the prisoner had referred, were to be received in this court, if not as binding authority, still with deference and respect, it is nevertheless conceived, that upon a proper examination of those cases, they would be found to establish no principle, interfering, in the slightest degree, with the doctrine he had endeavoured to maintain.

It will have been perceived, said Mr. B., that all the cases that had been cited by the learned counsel for the defence, were cases depending solely upon the construction of certain provisions in the statute of William, for regulating trials in cases of treason and misprision, &c. &c. and of the subsequent statute of Anne, touching the same subject. Now, said Mr. B., if he was rightly informed upon the point, it would be seen, on looking into these statutes, that the provisions of the latter, as relative to the matter in question, except in so far as they might be found repugnant and contradictory to those of the former, could not have the effect to repeal them. It would be found also, upon examination, that such a repugnancy did not exist; on the contrary that the provisions of these two statutes, although the former contains several *most important words*, which are omitted in the latter, are nevertheless, entirely consistent, and in harmony, and may, therefore, well stand together as making one law.

If he was correct in this view of the subject, said Mr. B., it would only be necessary as relative to the question now under examination, to consider the import of that *particular clause* in the statute of William, which was adverted to by the counsel on the other side, and which would undoubtedly be found to have been the precise grounds of decision in each of those cases from the English books, which had been cited at the bar on the present occasion.

Let us then, said Mr. B., look for a moment to that clause in the statute of William which had been referred to. Omitting a part of the preamble, the words of importance are the following, viz.

Shall have (referring to the party accused) a true copy of the whole indictment, delivered unto him five days at least before he or they *shall be tried* for the same; *whereby to enable them or any of them, respectively, to advise with counsel thereupon, and to* PLEAD *and make defence.*

Such are the words of this provision, and upon comparing them with the words employed in the statute of the United States, it would at once be seen that there was a wide and most essential difference in the two cases. The statute of the United States, in a very few plain words merely, directs "that the party accused shall have a *copy of the indictment*, and *list* of the jury, two entire days at least before the trial," but as to *what end*, for what *particular purpose*, the copy and the list are thus to be delivered, the clause is totally silent.—That the granting this privilege to the party accused, could not have been intended for the special purpose of "*enabling him to plead*," as in the statute of William, was, said Mr. B. most clearly to be inferred from two (among others) very plain and obvious considerations.

First, if it was so *intended* it certainly would have been so *expressed*, especially if it were known by the framers of the act, as it surely must be presumed to have been, that there had theretofore existed among the learned judges in England great doubts and difficulties in putting a construction upon the statutes of *William* and of *Anne*, in reference to the same subject matter.

It would indeed seem altogether incredible that the wise Legislators of this nation, having a knowledge of the circumstance last adverted to, and especially when employed upon the *momentous* subject of regulating the *course* of trial in cases affecting the life of their fellow citizens, should nevertheless have omitted to clear away, from their own legislation, the doubts and difficulties that had been adverted to, which they surely might have done by the supplement of a *single word*.

But secondly, there is, said Mr. B., another and yet more formidable objection against adopting the construction now contended for on the other side, of the clause before alluded to, in the statute of the United States. If this construction be adopted, the consequence is inevitable, that the same wise law givers who have been spoken of must have been, not only totally uninformed as to the ordinary course of judicial proceedings in criminal prosecutions, but ignorant, even as to the meaning of the most familiar, technical terms of the law; an imputation surely, not even admissible in the mere form of supposition.

In a word, if the case supposed be admitted, it is clear they could not have been apprised, that the "*arraignment*," was but a mere preliminary part of the proceedings, or that the *trial*, and the *arraignment* were, as had been al-

ready abundantly shewn, different "*stages of the prosecution*," and of a character, respectively, entirely separate and distinct; for if they were aware of this distinction, it was utterly unaccountable, that in place of the words, "*two days before the trial*," they should not have substituted, "*two days before the arraignment*."

From these considerations, and others of nearly equal force, that might be, but he presumed, need not be suggested, it had, said Mr. B., appeared to him as being absolutely impossible, consistently with any legal rule of interpretation, that the statute of the United States could admit of the same construction in this particular, as had been given by the learned judges of England, to those of *William* and of *Anne*.

The words in the former of these last mentioned statutes and which are wanting in that of the United States, made a difference in the two cases, of a much more serious nature than the learned counsel for the prisoner had seemed to apprehend. The words are plain, intelligible, and not susceptible of any diversity of interpretation. The party accused, "*shall have a copy of the Indictment, &c. whereby to enable him to plead*," *&c.*

Now, if he would plead at all, he must, according to the unquestionable rules of law do so, *at his arraignment*, and cannot do it afterwards. It seems, therefore, to follow as a consequence, that unless *the copy* were to be furnished, antecedently to the *arraignment*, or, in other words, the time of prefering the plea, the whole provision must be entirely nugatory and inoperative, as to the very *end* and *object*, for which on its face, it purports to have been introduced.

In this view of the subject, it would seem to him, said Mr. B., much less a matter of surprise that a construction such as from the cases cited at bar, appeared to have been given to the statute of *William*, should have been adopted by the English judges, than that there should ever have existed a doubt or a difficulty of any kind, upon the subject. Had it so been, that *words* of the same obvious import as those here alluded to, were found in the act of Congress, and in the same connection, in which they appear in the statute of William, he was sure, said Mr. B., that whatever might be the incongruities in which they would certainly have involved the whole subject of the present inquiry, he could never have contended for any other construction of them, than that which they appear to have received in the English courts of judicature.

In short, a moment's attention to the cases that had been referred to by the learned counsel on the other side, would be quite sufficient to show that it had never been contemplated at an English bar, to put any other construction upon the word "*trial*" than that which had been insisted upon in behalf of the prosecution on the present occasion; but merely that the proper legitimate technical signification of that term, was made on those occasions, to yield to the force of *those other words* connected with it, which had declared too peremptorily to be controuled, that *for the time*, it must be received in a different sense.

The circumstances attending the case of Lord George Gordon, which had been cited on the other side would serve, said Mr. B., to illustrate the truth of this last position. That was the case of an indictment for high treason, subsequent to the passage of the statute of Anne; and the question was, whether, according to the terms of that statute, which provides that the party accused shall "*have the list of witnesses for proving the indictment, and of the jury,* &c. &c. *ten days before the trial,*" the prisoner was entitled to these lists, that number of days before *the arraignment.* From what he had seen of the case he did not know, precisely, what if any thing was said by the court, on that occasion.

It appeared, however, that the attorney-general, who had charge of the indictment, acting no doubt from abundant caution, intimated to the court, that the words, "*before trial*" as employed in that statute, had been construed to mean "*before the arraignment*;" and, accordingly moved for a rule on the sheriff, to deliver a list of the jurymen he intended to return on the panel, so that it might be delivered to the prisoner in conformity with this construction.

Now it is impossible for any one to conceive, said Mr. B., for the reasons already so fully stated, that it could have been the statute of *Anne* only, and independent of its connection with that of *William*, then also in full force, that was alluded to by the high officer of the crown, on that occasion. On the contrary, from the whole scope of this case, it seemed manifest, that it must have been with reference to the two statutes when taken together, that he meant to say, the words in the former had been construed in the manner suggested.

As to the case of *Commonwealth* against *Hardy*, which had been cited from the Mass. Reports by the learned counsel for the prisoner, it was observed by Mr. B., that he could see in it nothing having the slightest bearing, one

way or the other, upon the question now under consideration. That was the case of an arraignment for murder before *a court*, or rather before an *individual*, then supposed, in himself, to constitute a court for the purpose, but as was afterwards adjudged, not having even the pretence of jurisdiction in such a case. The prisoner was, indeed, subsequently to this arraignment, subjected to all the usual forms and ceremonies of a solemn trial. Accordingly he was put to the bar to be tried, indulged in his challenges, was heard by his counsel, and the verdict was against him. It was however decided, and very properly decided, that all these proceedings were merely nugatory and void, by reason of the fundamental error that was found to have existed in their inception.

By this decision, all that was settled amounted to this, and no more, that the *due* and *legal* arraignment of a party accused, is absolutely essential to a *legal* conviction; that if the *arraignment* be void for any cause, the defect vitiates and renders void, all the subsequent proceedings.

Secondly, that where this deficiency in the arraignment had arisen from the want of jurisdiction, and the defect in this particular, be apparent on the face of the record, no waiver by the prisoner, either implied or expressed, would be sufficient to legalize the proceedings. In other words, that it could never be too late for him, in such a case, even after verdict (and it might have been added) even after *sentence*, to demand a rehearing.

Such is the substance of the case alluded to. The question arose upon the construction of a statute of our Commonwealth, and the point to be settled was, whether a single judge of our highest court of judicature, when sitting single and alone, had any cognizance whatever, of a capital case.

On this point, the determination was in the negative, and of course all the consequences followed that are alluded to in the decision.

He need not remind the court, said Mr. B., how entirely different from all this, was the case then under consideration. In the preceding part of his argument, it had not been contended, nor ever would it be by him, that the *arraignment* was not a part, a very essential part, of every criminal prosecution. It had only been insisted, that in legal contemplation, it could not be considered as constituting any part of the *trial*.

But, said Mr. B., before he could dismiss entirely this branch of the subject, he must beg leave to notice anoth-

er ground of argument which had been assumed by the learned counsel on the other side.

It had been said that *those few words* in the statute of William, upon which he had heretofore taken occasion to comment at some length, were not to be regarded as being of much import, inasmuch as they were, obviously, introduced as the words of a preamble commonly have been, merely with the view of indicating some of the reasons and objects of *the law*, and not as forming any part of the law itself. Hence, it was argued, that as the Congress of the United States, in framing the act under consideration, were undoubtedly influenced by the same reasons which led to the enactment of the statute of William, although those reasons are precisely stated in the latter, and not at all in the former, yet that both must now receive the same construction. It surely would not be denied, said Mr. B., that the *reason* of the law, or in other words, its spirit and intent, are circumstances *pretty material* to be considered in seeking an interpretation of the letter of its provisions. But he must be permitted to remark, that the whole argument of the learned gentleman on this point, as relates to the matter of fact from whence their conclusions are deduced, is obviously founded upon a mere assumption.

On referring to the statute of William, we know, because it is so expressly declared that one, perhaps a principal one, of its intents, was to "*enable* the party accused *to plead.*"

If we look to the act of Congress, we cannot learn from any thing therein contained, that a like *intent* ever entered the mind of its framers.

On the contrary, for the reasons already so fully stated, we have the best authority to infer, that the particular purpose here alluded to could scarcely by a possibility have been within the view of this enactment.

But it had further been argued by the learned counsel, that if it were not for the purpose of "*enabling the party to plead,*" the whole of the provision, as to furnishing him *the copy of his indictment, and the list of his jurors*, was manifestly vain and illusory.

In answer to this suggestion, he would beg leave briefly to remark that although an opportunity of deliberating upon the manner in which he *shall plead*, would without doubt be a very desirable privilege to a party who is shortly to be put to the bar for his life, yet surely, it is a privilege also, of *some* worth to him, that he may receive a few days befere his *trial* the "copy," and the "*list,*" which the law in its lenity has provided for him.

One would naturally suppose, it could not be a matter of trifling consideration, that he and his counsel are thus afforded an opportunity, brief as it was, of knowing something of the precise nature of the accusation before the moment had arrived of being called to defend against it. Above all, that he must be anxious to know, a day or two beforehand, at least, the names and as much as possible of the character of the *good men*, who would be called to sit in judgment upon his case. Even these, however, were immunities, trivial as the learned counsel for the prisoner had been pleased to consider them, which by the laws of that country from whence were drawn their precedents for this occasion, would not and could not have been acceded to him.

Upon the whole, said Mr. B., it must be constantly borne in mind, that the provision of the act here referred to, is the grant of a privilege, a new one, which in any case but treason was unknown to the common law. Like every other enactment, under such circumstances, it must be interpreted, with due attention to the letter as well as spirit, in which the will of the framers has heen expressed.

But, said Mr. B., admitting he had been in error throughout the whole course of his reasoning upon the point last considered, there was yet remaining, as he thought, another very satisfactory ground of objection against the motion that had been submitted by the learned counsel for the defendant.

If according to the construction that had been contended for by the prisoner, he were entitled to his *copy* and *his list* before the time of his *arraignment*, he had surely lost that advantage, by reason of his acquiescence in the proceedings which had subsequently ensued. As had before been remarked, a beneficent law of his country had proposed to secure to him a privilege ; it was one, which at his own option, he might accept or reject. Like all others of his privileges, this also was one, which even when accepted, he might afterwards surrender if he pleased ; for the right whatever might be its value or importance, could not, it was presumed, be regarded as belonging to the class of those which were said to be inalienable.

It was therefore, in his power to waive or surrender this privilege ; and if he could do this at all, it would seem to follow, that upon common principles, if there were no express law to the contrary, his assent to the surrender might as well be manifested by strong implication from circumstances as by any express declaration to that effect.

What then, said Mr. B., were the circumstances denoting such assent on the part of the prisoner at the bar? He was arraigned, and at the instant of giving in his plea, was fully apprized by the court, of his right to require the aid of counsel, learned in the law, to assist him in his defence. Counsel of his own choice was accordingly assigned to him; and it may be said too, that the day for his trial was almost literally, one of his own appointment. He was subsequently, not, however, until the lapse of many days, put to the bar to be tried; was indulged to its fullest extent, peremptorily, or for cause in his privilege of challenge. His cause was heard most faithfully, and ably defended; but he was convicted; and it may be added too, by a jury almost of his own selection.

What more than all this, said Mr. B., could be requisite to show his assent to the relinquishment of all exceptions to any matter of form which it might have been competent for him to have urged, at a former stage of the proceedings? To his view, said Mr. B., the circumstances here alluded to afforded as sufficient evidence upon this point, as though the actual and express waiver of the right had been entered and made matter of record in this court.

As to the case of *Hardy*, which had been cited with reference to this point also, as well as others, it was only necessary to say that it was a case wholly different, in every feature of its character from that now under consideration. The defect complained of there, was one he would repeat, that existed, at the very inception of the proceedings; it was an error in the first concoction; and was therefore, even with the consent of the party accused, utterly incurable. In a word, it was a defect of original jurisdiction. The party accused was *arraigned* before a tribunal, or rather an individual having no legal cognizance of his case; and it is most manifest that he could no more on such an occasion, either expressly, or by implication, have made any valid relinquishment of his rights to be tried according to the customary forms of the law, than he could have appointed any indifferent man in the community to be his judge, and in case of conviction, his executioner.

With these remarks, said Mr. B., he would most humbly and respectfully submit the case to the judgment of the court.

Mr. Dunlap in the close, said, that if this was a quibble, he would say in the language of the late chief Justice Parsons, in the case of the Commonwealth *vs.* Hardy, reported in the second volume of the Massachusetts Reports :—"If quibbling is at any time justifiable, a man may quibble for his life." He did not consider this a quibble, for it involved an important consideration, the privileges of the accused in capital trials. The statute of the United States, of 1790, chap. 36, sec. 28, provides,

"That any person, who shall be accused, and indicted of Treason, shall have a copy of the indictment, and a list of the jury and witnesses—to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses, and jurors; *delivered* unto him at least three entire days *before he shall be tried for the same*, and in other capital offences, shall have said copy of the indictment, and list of the jury, two entire days, at least, *before the trial.*"

The words, "before he shall be tried for the same," and "before the trial," evidently mean the same thing, and are to have the same construction as the words "before he or she shall be tried for the same," in the statute of 7th Wm. 3, chap. 3, and the words "before the trial" in the statute 7th Anne chap. 21, sec. 11. The words of the statute of Wm. 3, are similar to the words of our statute in relation to trials for treason; and the words of the statute of Anne are the words of our statute in relation to trials for other capital offences. It will be unnecessary to attempt to prove, that all these expressions in the English statutes and the statute of the United States, mean one and the same thing. It is obvious that they should then have the same construction. The English statutes from which ours is evidently copied, are those of the reigns of William and Anne. The provisions of the statute of William, applicable to this case, are,

"All and every person and persons whatsoever, that shall be accused and indicted for High Treason, whereby any corruption of blood may or shall be made, to any such offender or offenders, or to any heir or heirs of any such offender or offenders, or for misprision of such treason, *shall have a true copy of the whole indictment, but not the names* of the witnesses, delivered unto them, or any of them, *five days at the least* before he or they shall *be tried* for the same, *whereby to enable them, and any of them, respectively, to advise with counsel thereupon, to plead, and make defence, his or their* Attorney or Attorneys, Agent or Agents, or any of them, requiring the same, and paying the officer his reasonable fees for writing thereof, not exceeding five shillings for the copy of every such indictment."

Those of the statute of Anne are,

"When any person is indicted for High Treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for

proving the said indictment, and of the jury—mentioning the names, profession, and places of abode of the said witnesses and jurors—be also given at the same time, that the copy of the indictment is delivered to the party indicted, and that *copies* of all indictments for the offences aforesaid, with such lists *shall be delivered to the party indicted* ten days before the trial, and in presence of two or more credible witnesses, any law or statute to the contrary notwithstanding."

These statutes, made after the Revolution in 1688, and at the time of the establishment of what is called the British Constitution, gave in treason trials, privileges unknown at common law to those who were accused. Our statute extends them, to those who are accused of any capital offence. The question is, when is the copy to be delivered, according to either mode of expression, "before he shall be tried," or "before the trial?" This is considered as settled in England. The copy must be delivered before the arraignment. Foster so says in page 230, speaking of the statute of William:

"By the letter of the act, the copy is to be *delivered* five days before the trial. But upon the true construction of it, the copy after the bill is found, for till then it is no indictment, ought to be delivered five days before the *day of arraignment*, for that is the prisoner's time for pleading.

In 1 Burrowes, 642, Rex *vs.* Hensy, is the following, relating to the practice under the statute of William:

"Mr. Attorney General then informed the Court and the defendant, that there was an indictment of high treason found against the defendant—which indictment was so found by the Grand Jury by itself singly, and brought into court singly by them on Tuesday last; with which indictment, the defendant being now charged, and being called upon by the Secondary of the Crown Office to hold up his hand, the court ordered the indictment to be read to him.

"But the court (*before* it was read to him) asked him whether he desired counsel to be assigned to him. And if he did desire to have counsel, then "Whom, by what name, he desired to have assigned to him."

"He named, and accordingly the court assigned him, Mr. John Morton, and the Hon. Mr. Thomas Howard, and Mr. John Peirce, for his Attorney.

"The indictment was then read verbatim to him, by the express direction of the court, (*although he had a copy of it five days ago, agreeable to* 7 W. 3d c. 3d. for regulating of Trials in cases of Treason and misprision of Treason."

The same construction has been given to the language of the statute of Anne, as appears in the proceedings in the celebrated case of lord George Gordon, 2d Douglas, 590, and in Hardy's trial, reported in the State Trials. In the case of lord George Gordon,

"An indictment for high treason having been found against Lord George Gordon, the Attorney General moved in the last term, on Saturday, 11th November, for a Rule upon the Sheriff of Middlesex,

to deliver to the Prosecutor a list of the Jurymen he intended to return on the pannel, in order that the Prosecutor might be enabled to deliver such list to the prisoner, according to the provision of the Statute of Queen Anne, at the same time with the copy of the indictment. He said this seemed the only method of complying with the meaning of the Statute. The *words* are, that a list of the witnesses that shall be produced on the trial, for proving the Indictment and of the jury, mentioning the names, &c. be delivered to the party indicted ten days *before the trial.* This he said had been construed to mean *before arraignment.*"

Whatever may be the most strict meaning to be given to the word "trial," the most liberal construction should be given to this law, in favour of the accused, and in favour of human life. Certainly the courts of a Republic will not give a more harsh construction than the courts of a Monarchy, to a statute of this nature. It is true, as has been said by the District Attorney, our own courts have the right as they have the power, to construe our own statutes. But when our national legislature have evidently copied the language of these statutes, it is fair to conclude that they adopted the humane constructions which had been made, else they could have guarded against those constructions by using different language—excluding those constructions in our law.

It is also said that the arraignment is no part of the trial. On the part of the prisoner, it is contended, that every part of the proceedings, after he is brought into court, on a charge, till final judgment for or against him, is a part of the trial. One of the most important parts of the proceeding is the arraignment; then he is to plead in abatement, to avail himself of formal defects, to demur, to plead a former acquittal or conviction, and many other matters. For all these purposes, he needs before his arraignment a copy of the indictment; and for these purposes, the law of the United States requires that it shall be "delivered" to him "before his trial." He needs the copy more at that time than at any other. The law intends that he shall lose no advantage by his ignorance, for it also provides for the assignment of counsel. The Supreme Judicial Court of Massachusetts must have considered the arraignment a part of the trial;—for in the case of the Commonwealth *vs.* Hardy, 2 vol. Mass. Reports, it was holden, where a statute provided that all indictments for capital offences should be "heard, tried, and determined" before three Judges, that a prisoner could not be arraigned before one Judge; and in that case, the judgment was arrested. Whatever distinctions are attempted to be made between the various meanings of these words, "heard,

tried, and determined," it is contended that they each mean the same thing. This is no more than the usual tautology of statutes. If so, the decision must rest upon the ground, that the *arraignment* is a part, and an important part, of the trial.

It is also said, that the statute of William has the following clause: "to advise with counsel thereupon, to plead and make their defence," which is not in our statutes. The answer to this suggestion is, that the Parliament were merely stating the reason of the law, as was formerly more the practice than at present. Preambles were formerly in use, containing a history of the causes of a law. Now they are disused, and the causes of a law must be sought for, not in the statute book, but the history of the times. The statute of Anne is silent as to the reason as well as our statute, but the same construction has been given to the statute of Anne as to the statute of William, that "before the trial," means before the arraignment. If in the time of William it was necessary for a person to have a copy in order that he might be enabled to plead correctly, it was just as necessary in the time of Anne, and is now in the United States as necessary as in England. It is not to be supposed that in later times, and especially in this country, that any disposition can exist to lessen any privileges formerly granted to prisoners. Governments and courts of justice have not been losing, but gaining in liberality.

As to the proceedings when the prisoner is arraigned, and the question put to him, "how will you be tried"—It is but an ancient form, there is but one way in which he can be tried, and but one answer to be given. The whole is then a mere matter of form and ceremony.

With respect to the waiver of his privileges. When arraigned he had no counsel assigned, he knew not of his privileges, and therefore by pleading, cannot be supposed to have waived them. He is to be presumed ignorant of the law, else there would have been no necessity for the provision of the statute requiring the court to assign him counsel. No advantage ought to be taken of his pleading without having had his copy. Besides the statute does not require him to ask for the copy, but it declares that it "shall be delivered" unto him "before the trial." It is said in the case read in the argument to the jury on this point from the 3d Mass. Reports, p. 133. that in criminal cases there must be to constitute a waiver of a privilege, "an express relinquishment," and in the 16 vol. Mass.

Reports, p. 423, that a party improperly put upon his trial, "is entitled to a verdict." It is true Mr. Chitty in 1 vol. Chitty's Criminal Law, p. 330, says,

"Although these *Acts* mention only the whole indictment. The prisoner ought to have a copy of the caption also delivered to him, for this is as necessary to enable him to conduct himself in pleading as the other, and such is now the constant practice. But if he plead without having claimed these advantages, or when they have been imperfectly granted, he cannot afterwards take advantage of the defect, for his pleading has cured the objection.—4 Harg. St. Tr. 746. 7 Fost. 230. 2 Salk. 634. Comb. 5.

But it happens that Mr. Chitty is not supported by one of the authorities which he cites. The case in Comberbach, referred to by him has not a word bearing on this matter, and was decided in the reign of James the 2d, before either of these statutes were passed. Foster, whom he cites does not support him, for he is speaking merely of defects *in* the copy—not a defect *of* the copy; and his observations are upon the statute of William. The other authorities are the 4 Harg. State Trials, p. 746, and 2 Salk. 684, the case of Cook in both these books. This case was under the statute of William. So that Mr. Chitty's remark in the plural number, "these *acts*" is entirely unwarranted. There is this difference between the statutes of William and Anne; by the former, the prisoner is to *require* and *pay* for his copy, and if he pleads without it, it is his own fault; but by the latter, it is to be "*delivered*" unto him "before the trial." The law of the United States requires that the copy "shall be delivered" unto the prisoner "before the trial." How can he waive what it was the duty of the government to have done? It is also contended, that the matter should have been left to the jury. It may be safe for a jury to leave a man in the hands of this court; but if a court should be disposed to deprive a party accused of his privileges, there would be no safety in leaving him to the court. The only hope of patriotism and innocence in high political times, must be the independence of the jury. There is no danger in this case, in these times, and before this court; but bad precedents may be established, unhappy times may come, and unprincipled corrupt men, the agents of a corrupt government may be, as they have been, elevated to the bench.

The counsel of Marchant who were present, being asked by the court if they had any thing to add in his behalf, as he was in the same situation as Curtis, in relation to this matter of the copy. Mr. Warner read the form of proceeding in the trial of Hardy, in England, and suggested, that

if upon the arraignment, Marchant had pleaded guilty, nothing more would have remained to be done, except to pronounce the judgment of the law. The party would have been tried and convicted, and he would not have had what the statute declares he shall have "before the trial" a copy of the indictment, &c.

The arguments of the counsel on both sides being finished, the opinion of the Court upon the motion in arrest of judgment and for a new trial, made in behalf of the prisoner, was delivered in substance as follows, by

Mr. Justice Story. If the Court entertained the slightest doubt upon the present question, as it is a capital case, we should take farther time for deliberation.—But having carefully examined all the authorities which have been cited, and deliberately considered them, I shall now proceed to state the opinion which we have formed.

The point submitted is, that the prisoner was entitled, of right, to a copy of the indictment two days at least before his arraignment thereon; that no copy was in fact furnished him until after his arraignment; and that this omission now entitles him to have a new trial, or to have the judgment arrested. In point of fact the prisoner was arraigned and pleaded not guilty before the District Judge on the 29th day of November last, and at the same time, at his request, counsel were assigned to him by the court, and he selected on that occasion the gentlemen who so ably defended him at the trial.—From various causes the trial was postponed until the 15th day of December instant; and when the prisoner was at that time about to be put on trial, he objected that he had not received a copy of the indictment until the day preceding, and at his suggestion the trial was then postponed until the 19th day of the month, to enable him to make more thorough preparations for the trial.—No suggestion was made at that time of a desire to retract his plea, nor any hint of the objection since raised, that he ought to have received a copy of the indictment before his arraignment; nor that he desired to have a new arraignment. At the trial no such objection was raised before the jury was sworn; nor indeed was the objection stated until all the evidence was fully gone through, and the counsel closing for the prisoner was about to finish his argument. He then contended that the objection was fatal to the trial, and the prisoner was entitled to a verdict of acquittal. The court immediately suggest-

ed both to the prisoner and to his counsel, that if the prisoner, even at that time, was desirous to retrace his steps and withdraw the cause from the jury, to be arraigned anew after receiving a copy for two or more days, there could be no objection on the part of the court, whatever might be their opinion of the law of the point, to allow him that indulgence. Both the prisoner and his counsel declined the offer, and put the prisoner upon his legal rights, without intending to waive any question in the present posture of the cause. Under these circumstances the court have a right to conclude that no actual prejudice has been intended or has in fact occurred to the prisoner; that the slip, if any, was wholly without motive; and that the point is one to be decided as of mere strict right. It has in fact been so argued at the bar; and certainly if well founded and the prisoner is now entitled to the benefit of it, however formal, or unconsequential the error may seem to the merits of the case, he may now demand from the court its full legal effect.

The argument proceeds upon the foundation of being fully sustained by the 29th section of the Crimes Act of 1790, ch. 9. That section declares "that any person who shall be accused and indicted of treason, shall have a copy of the indictment and a list of the jury and witnesses to be produced *on the trial* for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least *three* entire days *before he shall be tried for the same;* and in *other capital offences* shall have such copy of the indictment and list of the jury two entire days at least *before the trial.* And that every person so accused and indicted for any of the crimes aforesaid shall be allowed and admitted to make his defence by counsel learned in the law; and the court, before whom such person shall be tried, or some judge thereof, shall and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire," &c. &c.

This being a statute of our own government, it is doubtless the right and duty of the court to give it a sound and reasonable construction according to the true import of its terms. But in giving such construction it is highly proper to consider what has been the construction, if any, put upon like words by other courts, and especially by the judges of England, from which country we derive our notions of the common law and much of our jurisprudence.

The question is, what is meant in this statute by the

words "before he shall be tried," and "before the trial," for they are doubtless equivalent. Do they mean that the copy shall be delivered two days before the jury is sworn to try the cause upon the issue of fact; or do they mean before the party is arraigned on the indictment and put to plead, and before it is ascertained, whether by his plea there will be a trial by jury, or not?

I will state in the first place, what in the opinion of the court would be the true construction of the statute, supposing the point were for the first time suggested for argument; and in the next place, how for that construction is affected by any English authorities. And we are clear in opinion, that upon the statute itself the true meaning is, that the copy should be delivered two days before the cause is tried by the jury, and not before the party is arraigned on the indictment.

The reasons that lead us to this conclusion are first, that this is the natural exposition of the interest and object of the enactment, and secondly, that it is the legal and technical meaning of the word "*trial*," in the sense of the common law.—It is admitted, that the legislature may use technical words in an untechnical sense; and when from the context this is ascertained, it is the duty of the court to construe the words according to the legislative intent. It is equally its duty to follow such intent, when the legislature uses untechnical words in a technical sense, in each case, indeed, the duty of the court is the same, to carry into effect the object of the legislature, so far as it is expressed, and to give a suitable exposition of the terms according to the fair import of the language. But where the legislature uses words which have an appropriate sense in the common law, that sense is supposed to be the one intended by the legislature, unless the context shews, that a different sense was in fact intended.

Now in the sense of the common law the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding; and until the party has pleaded, it cannot be ascertained whether there will be any trial or not. The elementary books are full to this purpose. Mr. Justice Blackstone in the passage cited at the bar, (which is a mere transcript from Lord Hale,) says, "to arraign is nothing else, but to call the prisoner to the bar of the court to answer the matter charged upon him by the indictment."* If upon the arraignment the prisoner pleads

* 4 Bl. Com. 322. 2 Hale P. C. 216, ch. 28.

guilty, there can be no trial at all ; for there remains no fact to be tried ; the whole charge of the indictment is admitted, and nothing remains but to pass the proper judgment of the law upon the premises. The same may be said as to other pleas, as a pardon, *auterfois*, *convict* or *acquit*, which, if admitted, supercede any trial. Indeed, the very forms of the proceeding upon the arraignment are so complete evidence of the legal meaning of a trial, that of themselves they are decisive.—When the prisoner upon his arraignment pleads not guilty, he is then asked, how he will be tried, and the response in case of a trial by jury, is that he will he tried by God and his country.* "When, therefore," says Mr. Justice Blackstone, "a prisoner on his arraignment has pleaded, *not guilty*, and for *his trial* hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors," &c. &c.† So lord Hale says, "after the prisoner hath pleaded and put himself upon the country, the next thing in order of proceeding is *the trial* of the offender."‡ And Sir Michael Foster, in treating on the subject, in the very paragraph preceding that cited at the bar, says he will range the proceedings under the following heads; "What privileges the prisoner is entitled to, and what is incumbent on him *previous to the trial*, and what *during the trial;*"§ and under the former he places all the privileges of a copy of the indictment, and list of jurors, &c. allowed by the law of England in cases of high treason. And the like distinction between the arraignment and trial was taken in Layer's case, in 1722 ;‖ and is universally recognized. The very form too, of calling the prisoner, when he is to be put on his trial by the jury, shows the legal sense of the term. He is then told by the clerk, in the language of the law, that he is now set at the bar to be tried, and he is to make his challenges before the jurors are sworn.¶ In short, so far as authorities, or reasoning, or forms go, there can be no legal doubt, that by the term "*trial*" is generally intended in the law, the actual trial of the prisoner by the jury. The constitution of the United States, too, in the sixth amendment, which provides, that the accused shall enjoy the right to a speedy

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* 1 Chitty Crim. L. 416, 417. † 4 Bl. Comm. 350.

‡ 2 Hale P. C. 259. ch. 34.

§ Foster C. L. 227. See also Hawk.P. C. B. 2. ch. 28. ch. 39. ch. 40.

‖ 4 Bl. Comm. 322. Wait's case. 1 Leach. C. C. 33. 43.—1 Chitty Crim. L. 415. 419. ¶ 1 Chitty Crim. L. 532.

and public trial by jury, manifestly uses the term in the same sense; and indeed it pervades the general structure of our laws.

There is not the slightest reason, in our judgments for presuming, that Congress, in this section of the act of 1790, used the term in any different or wider sense—on the contrary, every portion of its language is entirely consistent with, and supports this construction. The object of the legislature was to enable the party to make his defence in the best and most perfect manner. Not only is a copy of the indictment, but a list of the witnesses in treason, and a list of the jurors in all capital cases, to be delivered to the prisoner. But unless he has already been arraigned, and has pleaded, how can it be supposed, that witnesses or jurors can be necessary? The witnesses can only be heard upon an issue of fact; and the jury can only try an issue of fact. Until therefore there has been an arraignment and plea, on which a trial may be had, it would hardly seem worthy of legislative interposition to prescribe the delivery of a list of witnesses or of jurors. If, then, the natural interpretation of the clause, so far as witnesses and jurors are concerned, is that the list should be delivered the three or two days before the time of the actual trial by the jury, the same interpretation must be applied to the copy of the indictment; for the same language, in the same connexion, is applied to both.

It has been said, that a copy of the indictment may be important in some cases to enable the prisoner to plead. Without question it may be so; but in such cases he would upon the ordinary principles be entitled to a copy for that purpose. Even in England, where no copy is provided for in any capital trials, except for treason, it is not uncommon to grant the prisoner a copy at his request, where it is shown to be important to his pleading or defence.* But it is one thing for the legislature to prescribe a thing, as a matter of right in all cases before arraignment and pleading, and quite another thing to grant it, as a matter of fair discretion in the course of judicial proceedings, where it may further public justice.

It has been further said that a copy of the indictment can be of no use, unless for the purpose of pleading. But this is certainly a mistake. It is of great importance to ascertain in many cases the precise form of the charge, in order to shape the evidence, so as to meet it, or to disprove

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* 1 Chitty Crim. L. 404.

the material allegations. In indictments for treason, the *overt* acts must be laid in the indictment, and it is or may be of the very highest importance to the prisoner to know the precise form of every charge of this nature, so vital to the indictment. The same thing may be said in many cases of homicide, as to the manner of the death, the instrument which inflicted it, and the place where done, &c. If in a case of murder, the means of the death are not proved by the evidence substantially as laid in the indictment, the party is entitled to an acquittal. If, for instance, the death in the present case had been laid in the indictment to have been by drowning only, and not by a hatchet, and the proof had established the latter mode of death, the prisoner must have been acquitted. So where the indictment alleges the offence to be committed on the high seas, this is vital to the jurisdiction of the court in many cases; so that, if not substantially proved, the indictment fails, even though the place may be within the general admiralty jurisdiction. Some crimes by statute are only punishable when committed on the high seas, and some are punishable when committed in any other place within the admiralty jurisdiction. The distinction may often be most material to the defence at the trial. It cannot, then, be admitted for a moment, that in a capital case, a copy of the indictment may not essentially aid the prisoner in his defence, both in point of merits and legal exceptions. It can rarely happen, that the want of a copy at the time of arraignment can prejudice the prisoner, because it must be presumed, that every court, solicitous for justice, will grant a copy, and delay the pleading for a reasonable time, to enable the party to avail himself of all his rights. In point of fact in criminal cases, few defences do arise, of which the prisoner has not the full benefit under the plea of *not guilty;* and other pleas are of rare occurrence.

Such is a summary of the reasoning, which induces the court to declare, that if the point were entirely new, it would feel bound to decide, that the true construction of the statute, whether considered upon its obvious terms, or intent, requires that the copy of the indictment should be delivered two days at least, not before the *arraignment* of the prisoner, but before his *trial by the jury.*

But in cases of this sort, the court will listen to the opinions expressed on like occasions by other judicial tribunals with the most anxious attention; and, if upon similar words in any statutes, having similar objects, a different construction has been maintained, and acted upon, it ought to have very great weight here.

Let us see then, how the case stands upon the statutes and authorities cited at the bar. The statutes cited, are the statutes of 7 William 3, ch. 3, s. 1, and 7 Anne, ch. 21, s. 11, respecting trials for treason. Before I proceed to comment on them, I would state, that the latter section, (11th of 7 Anne, ch. 3,) on which so much reliance has been placed, is a mere supplement to, and not a total repeal of the former. It authorizes a list of the witnesses to be delivered, which was not provided for by the statute of 7th of William; and requires, that the list of jurors should be delivered *ten* days before the trial, the statute of William requiring it only *two* days, and also a copy of the indictment *ten* days before the trial, the statute of William requiring it only *five* days. In all other respects, it left the statute of William in full force and operation; and therefore the statute of Anne, being a mere supplement, has been governed by the construction previously put upon the statute of William, substituting only the enlarged period of ten days for the prior periods.— This accounts at once for the reason, why the statute of Anne has never received any judicial construction. In point of fact, it did not take effect, as indeed it was upon its own terms, not to take effect, until after the death of the Pretender, which did not occur, until the reign of George the third. Indeed, the first trial for treason, upon which the statute of Anne operated, was that of lord George Gordon in 1781. The case is reported in Douglas, 590, and upon that occasion the Attorney General moved, that a list of the jurors intended to be returned by the sheriff for the trial of the prisoner, should be delivered to the prosecutor, that a copy might be delivered to the prisoner ten days before his arraignment, that having been the construction put upon the terms, "*before the trial*," in the statute of William. A rule upon the Sheriff was granted accordingly; and the Attorney General remarked upon the peculiarity of the statutes; and said, "as there is no issue till arraignment, there can be no jury, strictly speaking, because no jury process can be awarded, until issue joined." And the Reporter in a note observes, that the statute of Anne is but an *extension* of that of William; and thence deduces the inference, (at least by implication) that the construction of both statutes on this point must be the same. The practice then must be considered as regulated exclusively by the statute of William; and I will now proceed to examine the terms of that statute. Upon that examination I think it will conclusively appear,

that the construction put upon it by the English Judges is perfectly correct; and that the presence of language not existing in the statute of the United States, compelled them to desert the ordinary sense of the word, "*trial*," in order to carry into effect an apparent and expressed object of the legislature, that the copy of the indictment should be delivered before the arraignment. It provides, that "all and every person and persons whatsoever, that shall be accused and indicted for high treason, &c., or for misprision of such treason, (for other offences are not comprehended in the English statutes,) shall have a *true* copy of the whole indictment (but not the names of the witnesses,) delivered unto them or any of them, five days, at the least, before he or they *shall be tried* for the same, whereby to enable them and any of them respectively to advise with counsel; thereupon, *to plead and make their defence*, his or their Attorney, &c. requiring the same, and paying the officer his reasonable fees for writing thereof, not exceeding five shillings for the copy of every such indictment." Now, it is to be observed, that in this clause a copy of the indictment only (and not of the list of jurors) is provided for, and the avowed object is to enable the prisoner to advise with counsel, and *to plead* and *make* defence. According to the course of practice in England, the prisoner is obliged to *plead*, *instanter*, upon his arraignment; and therefore the very object of parliament, expressed on the face of the enactment, would be defeated, unless the copy were furnished five days before the arraignment. The courts, therefore, in construing the statute, upon its plain intendment, were driven to say, that the terms, *before he or they shall be tried*," must in this connexion, be construed to mean, before arraignment, because in no other way could the object be effected. And this exposition is so reasonable and just, that the only surprise is, that it should ever have been made a question. Sir Michael Foster in the passages cited at the bar, (Foster C. L. 228. 230) gives the reason for it, which has been already stated.* The statute proceeds in the next sentence to recognize the true legal difference between the *arraignment* and *trial*, for it declares "that every such person so accused and indicted, *arraigned*, or *tried* for any such treason as aforesaid, &c. shall be received and admitted to make his and their full defence by counsel learned in the law, &c." Here,

* See 1 East. P. C. 111, 112. 114, 115. 4 Bl. Comm. 351. Hawk. B. 2. ch. 39. 1 Chitty Crim. L. 405.

the arraignment and trial are distinguished, as progressive acts, and that counsel are to be permitted in each; and thus in the former clause the inartificial use of the words, "*shall be tried*," is completely established. The provision, that the prisoner "shall have copies of the panel of the jurors, who are to try them, duly returned by the sheriff and delivered unto them, &c. two days at the least *before he or they shall be tried for the same*," stands in another (the seventh) section of the act. I have been curious to ascertain, whether under the act of William it was the practice to deliver the list of jurors also before the arraignment. In Sir Michael Foster's report of the trial of the Rebels, in 1746, he speaks expressly, as to the delivery of the copy of the indictment before the arraignment; but says nothing as to the list of jurors. And in his subsequent discourse he alludes to the provision, as to the list of jurors, in very general terms, leaving it somewhat doubtful, whether the list of the panel was ever delivered, until after the arraignment and plea, and trial assigned.* But upon examination of The King *vs.* Rookwood and others, in 4 State Trials, 661. 667, the very point arose, and lord Chief Justice Holt and the other judges on that occasion held, that the list of jurors was to be given, not before the arraignment, but two days before the trial by the jury. In fact, in that case, the jury were not summoned until after the prisoner had been arraigned and pleaded. The practice under the statute of Anne from necessity led to the delivery of all the copies before the arraignment; because it expressly requires, that the lists of the witnesses and jurors "shall be also given *at the same time* that the *copy of the indictment is delivered* to the party indicted."†

From this examination of the statutes of William and Anne, it is apparent, that the terms are not the same with our act of congress; and that the court have been driven to give an exposition of the provisions different from their natural imports, in consequence of explanatory phrases which could in no other way be rationally interpreted. There is no reason to suppose, that the learned judges could have given a different exposition from that, which we think the true one of the act of congress, if the language had been in all respects the same as ours. In point of authority, then, there is nothing binding on the conscience of the court, or that justifies it in abandoning the natural sense of the words used in the act of Congress.

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* Douglas R. 591.

† Foster, C. L. 1. 230.

But, suppose the acts were the same, and required the same interpretation, and that the prisoner was entitled to a copy of the indictment and list of jurors before arraignment, the question would still remain whether he could now avail himself of this omission. A party may have a legal right to an exception which he cannot take in every stage of the cause. The law points out an order in its proceedings, and requires, that the party should take his exceptions, and demand his privileges at such times as general justice and convenience require, otherwise he is deemed to waive them. A party is certainly at liberty to waive any privileges introduced solely for his own benefit; and if he is satisfied with going on without them, and sustains no prejudice thereby, there seems no ground to arrest the judgment, or grant a new trial upon this account.

The law is perfectly settled upon this subject in England under the strictest construction of the statutes of William and Anne. We have seen that the prisoner is entitled to "a *true* copy of the *whole* indictment;" and yet, if he has received an imperfect copy, or if being entitled to a copy of the caption of the indictment, he has received a copy without the caption, and he proceeds to plead, it is too late to take the exception. Sir Michael Foster. (Foster P. C. 230) says "but if the prisoner pleadeth without a copy of the caption, as some of the assassins did, he is too late to take the objection, *or indeed any other objection that turneth upon a defect in the copy;* for by pleading he admitteth, *that he had a copy sufficient for the purposes intended by the act.*" Now a false or imperfect copy is in intendment of law no *true copy*, and therefore, as none. But the sole object of the act being to enable the party to plead, if he is willing and ready to plead without a true copy the law supposes his defence does not turn upon any such fact; and that he is sufficiently apprised of the whole charge and of his own defence to it.

Mr. East, in his very accurate work on Crown Law, (1 East, P. C. 113,) lays down the rule even more broadly. He says, "but after *pleading*, it is too late to object, *either to the want of a copy*, or to any insufficiency in it; for that admits it to be sufficient." And he is well warranted in the statement, for in the case of Rex *vs.* Cook, reported in 4 Hargrave's State Trials, 738, 746, (S. C. 13, Howell's State Tr. 311,) and very accurately on this point, also, in 2 Salk. 634, it was so expressly decided by the court. In that case, the prisoner, after plea, but *before the jury was sworn*, took an exception by his counsel, that he

had not had a copy of the indictment, and therefore he could not be tried. But the court said, "By the words of the act, (statute of Will. 3,) he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this case he has pleaded; therefore this benefit is waived, and the prisoner has admitted he has a copy, or did not think it for his service to require it, but was able to plead without the help of it." The same doctrine is recognized by all the other elementary writers, to which we have had access.* It was in fact decided and acted upon by the circuit court, sitting in Rhode Island, on a trial for murder, in the case of the United States *vs.* Cornell, (2 Mason, R. 91, 103.)

In the case now at bar, the prisoner has been held to no strictness whatsoever. After he had pleaded, and after his cause was fully before the jury, the court, in tenderness to human life, was willing to allow him to withdraw the cause from the jury, not indeed, as a matter of *right*, but of *discretion*. He declined it; and if ever the waiver of a benefit was intentional, and without prejudice to the party, I am justified in saying, that the present is such a case.

It remains only to remark upon some cases, cited from the Massachusetts Reports. This court is entirely satisfied, that those cases were rightly decided. The case of the Com. *vs.* Andrews, (3 Mass. R. 126,) turned upon the well known principle, that an accessary could not be tried without his own consent, unless his principal were also on trial, or had been convicted. And if he were tried by his own express consent, no judgment could pass upon him, until the principal was subsequently convicted. The court said, that they would not presume the assent of the prisoner to the trial, much less his desire to be tried, before the principal was tried and convicted, from the mere fact, that he was put on trial. It did not appear, that he knew his rights, or that he had given any consent; and that in criminal cases an express relinquishment of a right should appear before the party should be deprived of it. The right here attempted to be presumed to be waived, was vital to the whole prosecution; and the language of the court must be interpreted to refer to such cases.

In the Commonwealth *vs.* Hardy, (2 Mass. R. 303,) the question was a question of jurisdiction. The statute of

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* 1 Chitty, Crim. 405. The same point was decided in Rookwood's case, 4 State Trials, 661, 667.

1805 declared, that "all indictments which may be found for any capital offence, shall be *heard*, *tried* and *determined*, &c. by three or more of the said justices" of the court. The arraignment of the prisoner for a capital offence was before *one judge* only. The court held the arraignment was *coram non judice*; and that the intent of the statute was, that a prisoner capitally indicted, should not be put upon his defence, unless three justices, at least, were present. The case is so plainly right on the very words of the statute, "*heard*, *tried* and *determined*," that it is scarcely susceptible of legal doubt.

This is the substance of what I have to say as to the opinion formed by the court. Our judgment is that the motions be overruled.*

Judge Davis expressed his concurrence in the opinion of Judge Story, and added some illustrative remarks; and the Court soon after adjourned.

* *Note* added by Judge Story.—Since this opinion was delivered I have had an opportunity to examine the case of the King *vs.* Rookwood and others (4 State Trials 661,) at large. The very distinction insisted upon by this court was admitted and insisted upon by the counsel and court in that case. Lord Chief Justice Holt, in particular stated, that the interpretation of the first section of the statute of William, as to the time of delivering a copy of the indictment, was altogether governed by the explanatory words "*to plead and make their defence;*" and that otherwise the interpretation would be the same as that of the seventh section as to the list of jurors, viz. that the time of trial by the jury was intended, and not the time of arraignment. When it is considered that this case was decided the very year that the statute of William 3. first took effect, and by such eminent judges, as lord Chief Justice Holt and lord Chief Justice Treby, its authority is absolutely irresistible as to the true exposition of the statute of William. It confirms in an unexpected manner the view already suggested by the present judgment.

ATURDAY, DECEMBER 23, 1826.—THE Court assembled at ten o'clock. *Marchant* was soon after brought up, and with *Curtis*, his coadjutor, placed at the bar. The District Attorney moved that the judgment of the law should be pronounced upon the prisoners; and the Court enquired of them severally, if they had any reasons to offer to the contrary. *Curtis* answered in the negative; but *Marchant* protesting that he was innocent of having wilfully killed the Mate, made a few disconnected observations. Mr. Justice STORY then addressed them—not, as he said, for the purpose of harrowing up their feelings, or reproaching them for the dreadful crime which they had committed; but in order to warn them that they must prepare themselves for that doom, which the law made it his duty to pronounce upon them. And he concluded his very solemn and appropriate remarks, by sentencing each of them to the following effect:

SENTENCE.

IT is considered by the Court, that *John Duncan White*, otherwise called *Charles Marchant*, and *Winslow Curtis*, otherwise called *Sylvester Colson*, be, and they are, hereby severally deemed, taken and adjudged to be felons; and that they be hanged by the neck until they are dead. And it is further ordered and considered by the Court, that the Marshall of this District or his Deputy, do on peril of what may fall thereon, cause execution to be done in the premises aforesaid, upon the said John Duncan White, otherwise called Charles Marchant, and upon the said Winslow Curtis, otherwise called Sylvester Colson, on the first day of February next ensuing, between the hours of ten o'clock in the fore-

noon, and two o'clock in the afternoon of the same day; and that the said John Duncan White, otherwise called Charles Marchant, and the said Winslow Curtis, otherwise called Sylvester Colson, be now taken from hence, to the gaol in Boston, in this District, from whence they came, there or in some other safe and convenient prison, within the same District, to be closely kept until the day of execution, and from thence on the day appointed for execution as aforesaid, to be taken to the place of execution, there to be hanged as aforesaid.

SCARCELY had their sentences been promulgated by the Court, ere MARCHANT and CURTIS both burst forth with the most violent exclamations. "This," said Curtis, "is the best news I have heard these six months;" and, "If this," cried Marchant, "is to be my sentence, I wish the time to be altered.—I am willing to die to-morrow—I shall die contented and happy; for I did not wilfully kill the mate. He struck me twice before I struck him once; and I have too much English blood in my veins, to receive two blows from a Yankee, without returning one.—No! I will never suffer any man to strike me the third time without defending myself.—I am happy—I wish to-morrow was the day fixed for my death.—But I did not wilfully kill the mate—I shall die contented.—This man here, Curtis, knows that I did not wilfully kill Jenkins—and I am not afraid to meet him before my God!" As he proceeded, his articulation grew more rapid and incoherent—his eyes rolled wildly in their sockets, and his hands became clenched;—the blood rushed into his cheeks, and a demoniacal laugh hung quivering upon his lips—his brain seemed

to be reeling in despair; and for the honor of mankind, it is to be hoped, that no human being could be in his right mind, and thus stand, as it were, upon the very threshold of eternity, and call down upon the heads of those around him, such blasphemous denunciations—such frightful imprecations, as fell from the mouth of this unhappy man. A more appalling scene cannot be imagined. The spectators appeared to shrink back with horror, as from some unearthly spectacle; and were not relieved from their painful situation, until the officers bound the prisoners and conducted them from the Court House.

After the prisoners were remanded, Mr. Justice Story commended in just terms the conduct of Captain Hook, in apprehending Marchant and Curtis; and expressed a desire, that the Attorney and Marshall of the District would recommend him to the national government, as an individual deserving of public bounty.