AN ARGUMENT

IN THE CASE OF

THE UNITED STATES

VERSUS

PHILEMON T. HERBERT,

TRIED FOR THE

MURDER OF THOMAS KEATING.

DELIVERED IN THE CRIMINAL COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA, ON THE TWENTY-FOURTH OF JULY, 1856:

BY WILLIAM P. PRESTON, Esq.

Taken in Short-hand, by P. B. Templeton, Stenographer.

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The first examination into the circumstances of the homicide was conducted before Justices Daniel Smith and James H. Birch, on the day of the deed, which examination was adjourned to, and continued on the following day, Friday, the 9th of May. After hearing the testimony and listening to arguments by the prisoner's counsel, (Mr. Bradley, Hon. John B. Weller, Hon. Percy Walker and Hon. P. Phillips,) in favor of a release of their client from custody, and District Attorney Philip Barton Key in reply, the examining Justices, on Saturday morning, concluded not to take bail, but to refer the matter to the Criminal Court as the proper tribunal. Immediately upon this the accused's counsel procured a writ of *habeas corpus* and brought their client before Judge Thomas Hartley Crawford, in the afternoon of Saturday, when the testimony was repeated. The Judge reserved his decision till the Monday following, the amount of which decision was that "*a conviction for murder should not take place*," and that the prisoner be admitted to bail in the sum of $10,000, to answer a charge of manslaughter. The sureties were Joseph H. Berrett and James Owner. Herbert was then released from the custody of the Marshal.

On the 2d of July the Grand Jury of the County made a presentment for *murder* against *Philemon T. Herbert*, who was forthwith arrested and placed in jail. His trial was set for Wednesday, the 9th of July, and accordingly on that day, after considerable trouble and the freest exercise by the traverser's counsel of the right to challenge, a jury was completed. The names of the jury are as follows :

Edward M. Edelin,	Enoch Moreland,
Peter F. Bacon,	George W. Cochran,
John Scribner,	Nimrod Garrettson,
John T. Bradley,	Henry Wilson,
John Sessford, Jr.,	John F. Bridgett,
Robert Cohen,	Henry D. Gunnell.

On Thursday, the 10th, the trial commenced by the arraignment of the prisoner, (who sat in the dock surrounded by numerous personal and political friends, consisting in part of members of both houses of Congress,) the opening addresses of the District Attorney for the prosecution, and Mr. Daniel Ratcliffe, associate with Messrs. Bradley and Percy Walker, for the defence, and the examination of the witnesses on the part of the government. These witnesses were as follows : Patrick Keating, (brother of the deceased,) Thomas Broderick, John Enbright, Charles Quinn, James Quinn, Jeremiah Riordan, Henry

H. Willard, Frederick Warren, Dr. Thomas Miller, Gabriel Devenois, (the French Cook at Willard's Hotel,) Michael Carroll, Francis Maynard and John Riley. The two last mentioned were not examined at the trial, having left the city.

On Friday, the 11th, the witnesses for the defence gave their testimony.—They were Hon. James Bishop, M. C., from New Jersey; Hon. John B. Weller, Senator from California, Messrs. John W. Reynolds, Wm. A. Gardiner, of California; Arnold Harris, A. J. Smith, Captain Corrie, Justice Daniel Smith, Col. McKay, Dr. O. M. Wozencraft (both of California) and Archibald Quantrill. After this testimony had been heard, John M. Brewer, Esq., who, at the request of the deceased's relatives was associated with Mr. Key, commenced an address to the jury which he concluded on the following morning. He was followed by Mr. Percy Walker, in an address (we copy from the *Daily National Intelligencer*) "which occupied about two hours in the delivery, and was distinguished by much ingenuity, ability, and eloquence.—Mr. Bradley followed on the same side in an argumentative speech, directed chiefly to the details of the testimony and a comparison of the credibility of witnesses for the respective sides. This occupied about an hour and a quarter. Mr. Key, as by his right, closed the pleadings. His address was not excelled by any that had preceded him in closeness of analysis, force of deduction, or imminency of conclusion, and towards its close kept the learned counsel on the other side very much on the *qui vive* with exceptions, interposals, and explanations, showing the severity of the process through which the District Attorney was putting their theory of the case. The ability of Mr. Key's effort, despite his admitted personal friendship for the prisoner and the pain of his position thus arising, was such as to impose on the defence the necessity of framing a set of *instructions from the Court to the Jury*, which the Judge without hesitation accepted, and which we now append."

INSTRUCTIONS TO THE JURY.

"1st. If a sudden affray arose between the accused and the deceased, and afterwards several other persons interfered to assist the deceased, and by these assailants the defendant was borne down and beaten, and had reason to believe that he was in imminent danger of great bodily harm, from which he could not safely escape, and while in this position fired the pistol by which the deceased was killed, it was in judgment of law a case of excusable homicide, and it is immaterial, in the absence of premeditation and malice, by whom the affray was commenced. And it is also not material that the accused might have escaped before the imminent peril came upon him, if at the time the peril came he had reason to believe himself in imminent peril of life, or of great bodily harm, and when he fired the pistol he could not safely escape.

"2d. To have authorized Herbert to take the life of Keating the necessity for doing so need not be *actual;* for if the circumstances were such as to impress his (Herbert's) mind with the reasonable belief that such necessity was impending it is sufficient.

"3d. If the jury believe, from the evidence, that at the time the pistol was discharged Herbert was being pressed by superior numbers and was in danger of death or of serious bodily harm, from which he could not safely escape, he was justified in taking life.

"4th. If the jury entertain reasonable doubts as to any material facts necessary to make out the case for the government they must give the benefit to the defendant."

After reading these instructions to the jury, Judge Crawford handed them to the clerk for record, during which time informal conversation took place between the Court and the different counsel. In answer to some remark of counsel the Judge observed sufficiently loud to be heard all around, to this effect, "That for his own part he looked upon the act as a clear case of self-de-

fence." Hearing this the District Attorney promptly interposed, "*That* is the business of the jury to determine." It will not be wondered at if the Judge's expression of opinion took other auditors of it, as well as the District Attorney, quite by surprise.

The case was given to the jury on Saturday afternoon. They returned into Court on Tuesday about mid-day, declaring themselves unable to agree. They were then dismissed by the Judge. The relative standing of the jury with respect to a verdict was, seven for acquittal and five for returning a verdict of manslaughter.

SECOND TRIAL.

On Wednesday the Court sat to commence a new trial of the accused, on the presentment of the Grand Jury. Seventy-nine talesmen were summoned by the Marshal's deputies and balliffs, out of whom, for various causes, only eight were selected, as follows: Francis B. Lord, Thos. Milstead, Samuel Owen, John G. Robinson, Leonard Storm, Richard Butt, John Ball, and John D. Scrivener. The usual questions were put to each of the foregoing as to their having formed or expressed opinions for or against the accused. In two instances, namely, those of Mr. Lord and Mr. Owen, it was admitted without hesitation that they had both formed and expressed opinions on the subject, and Mr. Owen yet further acknowledged that the opinion he had so formed and expressed he still retained. (Mr. Owen, still further, had even visited the accused in prison during the former trial.) The District Attorney took strong exception to allowing persons, who had thus avowed themselves, to sit upon the jury, but the Court overruled the objection, taking the words of the parties, that they should not be swayed by any bias so as to prevent their rendering an impartial verdict.

After a recess of an hour or two, which was compelled by the exhaustion of the list of talesmen, the Court resumed, with the result of adding the four other requisite jurors, three of whom were sworn. They were John D. Evans, Joseph F. Hodgson, Michael Coombs, and James Crandell.

The jurors were sworn in on Thursday, and all then took their seats on their bench.

The prosecution was assisted by Mr. Wm. P. Preston, of Baltimore, the counsel for the defence remaining as before.

The case for the prosecution was opened by Mr. Key, followed by Mr. Bradley for the defence, when the testimony on both sides was again delivered. It occupied from Thursday, the 17th, to Friday evening, the 25th of July.—The prosecution introduced two new witnesses, viz., William Scherger and Robert Schwartz; the defence also two, viz., Mr. De Ponte, and John H. Stewart.

On Wednesday, the 23d, the prosecution moved the Court to instruct the Jury according to the tenor of a series of propositions which they produced, and which are as follows:

First. If from the evidence the jury believe that on the day mentioned in the indictment, Philemon T. Herbert, the accused, armed with a pistol or pistols, entered the breakfast room of Willard's Hotel, and then and there, without provocation, made use of language and acted in a manner ordinarily indicative of a wicked, depraved, and malignant spirit, and within said room, shortly after the use of said language and the doing of said acts, by means of the pistol or pistols aforesaid, shot to death Thomas Keating, who was then and there unarmed and in the lawful discharge of his duty, such shooting and killing is in judgment of law murder.

Second. If from the evidence the jury believe that on the day mentioned in the indictment, Philemon T. Herbert, the accused, being a guest or boarder at Willard's Hotel, entered the breakfast room of said hotel for the purpose of

obtaining his breakfast; that, having in a proper and lawful manner ordered said breakfast, the servant to whom he gave the said order declined to comply therewith, unnecessarily delayed the execution thereof, or, by insolence of manner, words, or gestures, insulted or provoked said Herbert; and thereupon, under such insult or provocation, suddenly, in heat of blood and under the influence of mere passion, by means of a pistol or pistols, which he casually had about his person, said Herbert shot to death a certain Thomas Keating, who then and there, in the opinion of said Herbert, took part in the insult and provocation aforesaid, and by words and actions manifested a disposition to commit an assault and battery on the said Herbert, such shooting and killing is in the judgment of law manslaughter.

Third. If the jury believe from the evidence that the prisoner at the bar made an assault and battery upon the deceased, and the brother of the deceased, Patrick Keating, interfered to pacify the prisoner and to protect the deceased from said assault; and that the prisoner then advanced upon the said Patrick Keating with a chair and a loaded pistol, whereupon the said Patrick Keating seized the said pistol and endeavored to wrench it from the grasp of the prisoner, and that the deceased then came to the assistance of the said Patrick Keating; and that the *deceased* and *Patrick Keating* and one *Gardiner*, a friend of the *prisoner*, and the prisoner, then became engaged in a conflict and struggle, and that the said parties thus engaged were separated by one De Venois, and that the said Patrick Keating fled; and that the prisoner *then seized* the deceased by the collar of his coat or jacket and shot him with the said pistol, which caused his death, *then*, in the absence of premeditation and malice, the prisoner is guilty of *manslaughter*.

Fourth. If the jury believe from the evidence that the prisoner *first assaulted* the deceased with a deadly weapon, and the brother of the deceased, Patrick Keating, interfered to protect the deceased, and the prisoner then advanced upon the said Patrick Keating with a deadly weapon, whereupon the said Patrick Keating seized the deadly weapon and endeavored to wrench it from the grasp of the prisoner, and that the deceased then came to the assistance of the said Patrick Keating, and that the *deceased* and *Patrick Keating* and one *Gardiner* and the *prisoner* then became engaged in a conflict and struggle, and that the prisoner then used the deadly weapon upon the person of the deceased, which took his life, then, in the absence of premeditation and malice, it is *manslaughter*, notwithstanding the jury may believe from the evidence that the prisoner had reasonable grounds to apprehend great bodily injury.

Fifth. If the jury believe from the evidence that the prisoner, even if *he* were assaulted, could have retreated without endangering his life, or without receiving great bodily injury by so doing, and *did not* retreat, but pressed on the attack and took the life of the deceased, then, in the absence of premeditation and malice, he is guilty of manslaughter.

Sixth. If from the evidence the jury believe that on the day mentioned in the indictment, Philemon T. Herbert, the accused, being a guest or boarder at Willard's Hotel, in the room referred to in the evidence in this cause, made an assault upon Thomas Keating with a loaded pistol, and that out of said assault arose an affray, in which affray the said accused shot to death the said Thomas Keating, that, then the accused is not justifiable under the law in making the plea of self-defence.

Mr. WALKER rose to complain of the numerous new authorities he had observed in the hands of the opposing counsel, and which, of course, his side could not have time to consider with care. He also characterized the remarks just delivered by Mr. Key in defence of the foregoing instructions, as more addressed to the jury than the judge, and in conclusion requested that the defence should have the right to reply to the authorities to be cited by the prosecution.

Mr. PRESTON, in consideration of a remark from the counsel last up, proposed that the jury should retire under charge of a bailiff and be kept out of court until the arguments of counsel on the instructions had been concluded.—He cited a case in which Lord Campbell sat where this course had been taken.

Mr. RATCLIFFE said the practice of this court was to keep the jury in the court room.

Mr. BRADLEY claimed that as the defence had first given in instructions, they would have the right to open and close the arguments on them.

Mr. KEY explained his view of the case, contending for the fairness and reasonableness of the course of the prosecution and the groundlessness of complaint by the defence.

Mr. PRESTON then furnished the defence with the authorities on which he would rely. They are as follows : 4th Blackstone, pp. 199 and 200, for the first proposition ; Marginal p. 201, Keeling's Reports, Queen vs. Mawgridge, (this Mr. Preston said he deemed the best discussed case in the books, the best indeed in the English language ;) 4th Dallas, pp. 135 and 136 ; 2d Ashmead, p. 74 ; Foster, 256, 257.

For the second, third, fourth, and fifth propositions he cited Foster, 290 ; Wharton's American Law of Homicide, p. 194.

For the sixth proposition, 1st Russell ; Wharton, 219 ; 2d Comstock, p. 197, Wharton, p. 377 ; 2d Ashmead, p. 56. Mr. Preston said, with reference to the statement as to the application of the instructions given at the former trial, that he did not consider them to apply, as there was new testimony, and a new state of facts had been adduced.

Mr. WALKER rose to reply, and occupied two hours in his address to the Court. He considered that the propositions of the prosecution had proceeded from a misconception of the principles of the law. His speech was truly able and ingenious.

After a recess, Mr. PRESTON answered Mr. Walker in a speech of much force and acumen, which he continued till half-past six o'clock, P. M., when the discussion on the instructions was closed.

The first business presented to the Court on its being opened on Thursday morning was the reply of Judge CRAWFORD to the prayer of the *prosecution* to have the instructions moved by them on Wednesday committed to the jury. The Judge's decision upon them was as follows :

Qualification to the first Instruction.—The instruction prayed above is abstract. It presents a naked proposition, without reference to any fact disputed in the case, or any fact sworn to on either side, except only the presence of the prisoner at Willard's Hotel on the 8th of May last, having a pistol in his possession, and the shooting by him of Thomas Keating, which facts are not contested. It is the duty of the jury to give their verdict on the whole evidence adduced on this trial, and on that only, in connexion with the law as it shall be given to them by the Court. The Circuit Court has decided uniformly that the Court is not bound to grant an abstract instruction, and the same Court has gone so far as to decide, in a case which went from this Court, that if the Judge, in answering a prayer, gives an opinion when he modifies the instruction asked for on an abstract point of law, it is error.

Second. The jury may believe the above statement of facts and yet the defendant not be guilty of manslaughter, by reason of additional facts which the evidence, in the opinion of the jury, may have established. If so, all the facts are to be weighed together by you. The prayer sets forth not only a part of the evidence, but so small a portion of it as to have very little application to the case. It excludes all the material facts that have been sworn to on botn sides, and which are in controversy. All these you are to weigh and decide upon. The case supposed would be manslaughter, but, unless all the testimony on either side is thrown out of view, it is not this case.

Third. The above statement of facts would make a case of manslaughter if they are believed by you from the evidence ; but it embraces only a part of the evidence, and, as already remarked, it is your especial province to draw your conclusions of the guilt or innocence of the accused from the entire body of testimony, and to give credit or not to any one or more of the witnesses on either side.

Fourth. On the statement of facts in this prayer it is granted. But the Court thinks the first statement in it is capable of misconstruction as to the nature of the assault said therein to have been made by the accused upon the deceased with a deadly weapon. Whether there was such an assault, and, if there was, what was its nature, whether the pistol was pointed at deceased and used as a deadly weapon, or whether it was used as a man might use a stick or other instrument, are questions for you to decide ; and this and all other questions involved in the cause trying you will determine, not on any partial statement of facts, but upon the whole evidence. This remark in regard to your duty has been repeated, and will be again, because the District Attorney has insisted that to grant the prayer of the defendant would be to exclude a part of the evidence from the consideration of the jury, and I should regret very much if such an erroneous idea should find a resting place in your minds.

Fifth. This instruction is granted, with the remark that the time when retreat was incumbent on the accused was the moment when the danger became apparent.—(4 Blackstone, 184.)

Sixth. This Court and the Circuit Court have both decided that the Court should not instruct the jury that upon the whole evidence the defendant is entitled to an acquittal.—(United States *vs.* Dayton, 2 Thomas H. Crawford's Opinion, pp. 39, 46.) To grant the instruction now asked would be more erroneous, for it rests on only a part of the testimony. The defence in this case is that the pistol was fired in self-defence. To instruct the jury that the plea of self-defence cannot be maintained on this trial would be to take the decision of facts from the jury. The instruction is refused.

Judge CRAWFORD then gave his decision upon the instructions which had been asked by counsel for the *defence*, which instructions (being nearly the same as those given to the jury at the first trial) the Judge explained as follows:

The instructions asked by defendant were given substantially at the last trial, with such short explanations as seemed to be calculated to aid the jury in comprehending them. They will be given again with fuller but still brief explanation, out of respect to the counsel who have argued for and against the prayers. The jury, as has been already mentioned, should look to the whole evidence and not to any statement of facts made by either side short of the whole of it.

The first instruction asked for is in these words:

"1st. If a sudden affray arose between the accused and the deceased, and afterwards several other persons interfered to assist the deceased, and by these assailants the defendant was borne down and beaten, and had reason to believe that he was in imminent danger of great bodily harm, from which he could not safely escape, and while in this position fired the pistol by which the deceased was killed, it was in judgment of law a case of excusable homicide, and it is immaterial, in the absence of premeditation and malice, by whom the affray was commenced. And it is also not material that the accused might have escaped before the imminent peril came upon him, if at the time the peril came he had reason to believe himself in imminent peril of life, or of great bodily harm, and when he fired the pistol he could not safely escape."

The branch of the instruction asked which I will first notice is, whether it is material who struck the first blow under the circumstances in evidence.

In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow.—(1 Russ. on Crime, (845) 587-8) If, upon a sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, unless he had a previous intention or made previous preparation to use such a weapon in the course of the affray, (1 Russ. on Crime, 588;) that is, when the contest continues as it began, and there was no addition of force to either side or change of parties, and no danger nor reason to believe there was danger to life or serious bodily harm; or if one party should be joined by other individuals, and by his and their active co-operation there was such danger and no power to retreat, then the right of self-defence arises. (1 Russ. on Crime, 661, Foster's, 277.) As in the case of manslaughter upon sudden provocation, when the parties fight upon equal terms, all malice apart, it matters not who gave the first blow, so in the case of excusable self-defence, it seems that the first assault in a *sudden affray*, all *malice apart*, will make no difference, *if either party quit the combat and retreat before a mortal wound be given.*—(1 Russ. on Cr. 662.) He must endeavor to retreat, in the language of 4th Blackstone's Com. 1391; that is, he is obliged to retreat if he can safely; but if by reason of the fierceness of the attack, or by surrounding obstacles or impediments, or by his having been held, and so prevented from moving away, he could not retire from the contest and retreat with safety, the law does not require it of him, but he is excused in the same manner as if he had fled.—(1 Hale's P. C. (1847) 482. Whart. C. S. 256. 1 Russ. on Cr. 661. U. S. vs. Noah Green. 2 T. H. C.'s opinions 179, decided by this Court at December T., 1851.) The moment when a man is bound to retreat is that in which the danger becomes apparent. Up to that time there is nothing to retreat from. A man may, to be sure, decline a combat when there is no existing or apparent danger, but the retreat to which the law binds him is that which is the consequence. (Foster, Cr. Law.) Several blows were struck before the retreat, and several cases cited by counsel on *both sides* show this to be law. From these well established principles it results—

That if you believe, from the whole evidence which you have heard on this trial, that a sudden affray arose, without malice on either side, between the de-

ceased and the accused, and that afterwards several other persons interfered to assist the deceased, and that by them the prisoner was borne down and beaten, and had just reason to believe that his life was in danger, or that some grievous bodily harm was impending over him, from which he could not safely retreat, and that, thus situated and so circumstanced, he fired the pistol to save his own life from destruction or his person from grievous injury, it is a case of excusable homicide.

If you believe from the evidence that there was an absence of all malice, it is not material who struck the first blow. The defendant was bound to retreat, *if he could*, before he can be excused on the foot of self-defence ; but if you believe from the evidence that he had, under the circumstances mentioned above, good ground to believe that his life was in danger or that he was about to receive some grievous personal harm, and that at the time this danger was apparent and when he fired the pistol *he could not safely retreat*, it is not material that he might have escaped at the commencement of the affray.

The following are the remaining instructions asked for by the defence, and Judge Crawford's decisions thereon :

"2d. To have authorized Herbert to take the life of Keating the necessity for doing so need not be *actual ;* for if the circumstances were such as to impress his (Herbert's) mind with the reasonable belief that such necessity was impending it is sufficient."

There is, strictly speaking, no *authority*, except the order of the law, for taking a man's life, but a homicide may be excusable.

If the defence of an accused party is put on the ground of the act charged being necessary to save his own life, or his own person from great bodily harm, the question is, had he just foundation, proper reason for the belief that he was in danger ; not what he thought, but whether the circumstances which surrounded him were such as to create the apprehension of said danger in the mind of a reasonable man? And that is a question for you to determine. If circumstances did exist that would justify the apprehension of danger, then it is not necessary that the danger in point of fact existed. (United States *vs.* Cook, December term, 1845 ; U. S. *vs.* Usher, June term, 1847, iva. 107, 1 Hale, P. C. (1847) 481, 482, 1 Russ. on Cr. 669.)

"3d. If the jury believe, from the evidence, that at the time the pistol was discharged Herbert was being pressed by superior numbers and was in danger of death or of serious bodily harm, from which he could not safely escape, he was justified in taking life."

This is but the first prayer condensed or put into smaller compass, and if you believe from the evidence that the several facts detailed in the first prayer, and in the answer to it, existed as therein stated, then the response to that first prayer is an answer to this one.

"4th. If the jury entertain reasonable doubts as to any material fact necessary to make out the case for the Government they must give the benefit to the defendant."

There are gentlemen on this jury who could themselves answer this prayer, I presume, from the instruction it asks having been given so often, and probably to themselves as jurors on many occasions. The law is so.

Immediately after the instructions had been disposed of Mr. Bradley arose, by direction of his client, and again apprised the Court of his willingness to submit the case to the jury without argument.

Mr. KEY said he made the same answer now which he had done to the same proposition before—a negative.

A delay of an hour occurred whilst the process of making copies of the instructions and answers was undertaken by the clerks, subsequently to which, at 10 minutes past 12 o'clock, Mr. Preston commenced the opening address to the jury on the part of the prosecution, which continued, saving the intermission of about twenty minutes, till nearly 5 o'clock, when the adjournment took place.

Upon resuming the case on Friday morning Mr. Ratcliffe made the opening address for the defence which occupied the Court till past 11 o'clock. Mr. Walker followed, and continued speaking till 4 o'clock, when, after a recess of an hour, Mr. Key made the closing address to the jury, occupying 2½ hours in its delivery.

The Court then read to the jury the instructions submitted by the defence ; after which the jury retired at about 8 o'clock at night, (the Court continuing in session,) and in less than an hour returned into Court with a verdict of *acquittal.*

ADDRESS TO THE JURY.

Mr. PRESTON said:—May it please the Court; GENTLEMEN OF THE JURY: A large portion of time has necessarily been consumed in this trial, not alone in relation to the evidence in the case, but also in respect of the legal principles bearing upon that evidence. It cannot be matter of surprise when the Grand Jury have thought proper to indict a man for the highest crime known to the law, *murder*, that there should be an anxious solicitude to ascertain whether the indictment thus found can be and ought to be maintained before a petit jury. I confess, gentlemen, that, so far as the discharge of duty here devolves upon me, if left entirely to my preferences as to professional position, I would prefer that position which would place me on the side of the defence. It has been throughout my professional life where I have generally been found. Not that this preference in any measure depends upon the desire to defend that which is in itself wrong, but from the fact that however wrong an act in itself may be, my nature inclines me to the belief, that even the greatest criminal may in some measure be regarded as an unfortunate person—unfortunate, that he has even for a short time permitted himself to forget what he owes to himself, to his God, and the laws of his country. Viewing, therefore, any party charged with an offence, as in a position covered by the word unfortunate, and entertaining a profound respect for the legal maxim, which presumes every man to be innocent until he is proven to be guilty, I repeat, that my feelings naturally incline me towards the support of that presumption of the law, and to the advocacy of that humanity which necessarily grows out of that presumption. But there are cases, and there may arise causes, where in the ascertainment of the innocence or guilt of one accused, however painful may be the discharge of duty, it must be faithfully and conscientiously performed. In such cases duty becomes imperative, and what is done is not alone due to the profession, the public, and the law, but to every consideration, social and moral, which binds man to his fellow, or gives to society its importance or value.

Such a cause, gentlemen of the jury, I regard this, and it is upon a conviction in my own mind that principles not improperly deemed of vital consequence to the American people, are involved in this controversy, that I have consented to take part in this prosecution. My consent could have no foundation in individual emotion; it could not arise, gentlemen, it certainly does not arise, from the slightest disposition that I could have to prosecute the accused. To me he is an entire stranger: I only know him in his public character and as the subject of this indictment. In common with my distinguished colleague, the learned District Attorney, I can only entertain a desire to see that the law is fairly and justly carried into effect; and all the remarks which in the progress of this trial and in the hearing of this jury, have in any degree suggested the idea that it is unusual, censurable, or in any measure attributable to hardness of heart, that this prosecution is to be carried on, or, to use the language of one of the distinguished counsel of the other side, "aided" by what he has been pleased to denominate "a strong and a fresh intellect," may well be answered by remarks which were made on a somewhat similar occasion, by one of the most distinguished jurists in the annals of our land, and whose name and fame will go down to remote ages as among the earliest benefactors of the Republic, and one of the wisest expounders of its laws.

On the trial of Knapp, for the murder of Joseph White, the lamented States-

man, Daniel Webster, appeared in behalf of the prosecution. Then, as now, the counsel for the defence, intimated that it was unnecessary, if not improper, that any means should be used additional to those ordinarily employed in behalf of the government. That able and deservedly distinguished lawyer, whose piercing and profound intellect enabled him to see all actions in their true relations, whose integrity in the exposition of individual right or professional propriety, no man would for a moment question, made remarks to which I will call your attention, and which I think may properly be referred to, on the present occasion. Gentlemen, Knapp's case, like this, was one of murder. Then, as now, the prisoner was on trial for his life, the jury was charged as this jury is now charged, to ascertain the guilt or innocence of the accused,—then, as now, the counsel for the defence, inveighed and bitterly against excitement which they said had been sown and fostered in the public mind, a sharp and a loud outcry was made, and the manner of the prosecution was characterized as unnecessarily severe, particularly in bringing to the aid of the government the overpowering weight and influence of Mr. Webster's presence and ability.

The similitude between my position and that of the great man, whose intellectual glory adds light to the stars of our Union, can only exist in the subject discussed, and the consciousness of an equally honest disposition to discharge a sacred duty, with a perfect knowledge that he achieved in life, and enjoyed the full fruition of a fame, rarely meted out to man, until the mists of time and prejudice have cleared away, with no pretension, except to emulate his great example, and knowing well that he was advanced in public estimation, immeasurably higher than I can ever hope to be, I read to you from the Salem edition of his speech, pages 33, 34 and 35, as much of his remarks as I deem applicable, to the undeserved comment of the very able counsel of the prisoner at the bar.

"Much," says Mr. Webster, "has been said, on this occasion, of the *excitement* which has existed, and still exists, and of the extraordinary measures taken to punish the guilty. No doubt there has been, and is, much excitement, and strange indeed were it, had it been otherwise. Should not all the peaceable and well disposed naturally feel concerned? Was it a thing to be slept upon or forgotten? Did you, gentlemen, sleep quite as quietly in your beds, after this murder, as before? Was it not a case for rewards, for meetings, for committees, for the united efforts of all the good? If this be excitement, it is an unnatural, or an improper excitement?"

Gentlemen—these remarks were made upon a trial for murder—I grant you it was a murder under very different circumstances from the murder presented by this trial. This is not, in the common acceptation of the term, a diabolical murder—the result of long settled hatred, or revenge. The unfortunate man, who upon this occasion met a swift and bloody death, was not the sleeping victim of grasping avarice, nor did the Moloch of infuriate jealousy crush him to the grave. I grant all this, still, gentlemen, it is a question for you to consider, and one which your duty to the community will teach you to ponder well, whether murder equally unmerited by the deceased, and fully as pernicious to society, may not be perpetrated under very different circumstances.—The cases of murder, such as may be regarded as common or usual, where deadly hatred—consuming revenge, insatiate avarice or resistless cupidity, are the motives—are from their very nature startling, frightful, and of rare occurrence; such murders are necessarily few and scarcely susceptible of emulation. They never operate by example upon the depraved heart. It is homicide committed under circumstances which involve a debased conception of heroism, which is most dangerous to society, where from the concomitant of it, and all surrounding circumstances, you may have a similar thing to-morrow, the next

day or the day after. In my judgment, a homicide of this nature, is of more serious consequence, more terrible in its results, more dangerous to the peace of society, and more at war with the true prosperity of every peaceful man in the land, than those diabolical murders which depend upon the workings of deep seated human passions.

Mr. WEBSTER goes on to say :

"It seems to me, gentlemen, that there are appearances of another feeling of a very different nature and character, not very extensive I would hope, but still there is too much evidence of its existence. Such is human nature, that some persons lose their abhorrence of crime in their admiration of its magnificent exhibitions. Ordinary vice is reprobated by them, but extraordinary guilt, exquisite wickedness, the high flights and poetry of crime, seize on the imagination, and lead them to forget the depths of the guilt in admiration of the excellence of the performance, or the unequalled atrocity of the purpose. There are those in our day, who have made great use of this infirmity of our nature; and by means of it done infinite injury to the cause of good morals. They have affected not only the taste, but I fear also the principles, of the young, the heedless, and the imaginative, by the exhibition of interesting and beautiful monsters. They render depravity attractive, sometimes by the polish of its manners, and sometimes by its very extravagance; and study to show off crime under all the advantages of cleverness and dexterity. Gentlemen, this is an extraordinary murder—but it is still a murder. We are not to lose ourselves in wonder at its origin, or in gazing on its cool and skillful execution. We are to detect and to punish it; and while we proceed with caution against the prisoner, and are to be sure that we do not visit on his head the offences of others, we are yet to consider that we are dealing with a case of most atrocious crime, which has not the slightest circumstance about it to soften its enormity.

"A tone of complaint so peculiar has been indulged, as would almost lead us to doubt whether the prisoner at the bar or the managers of this prosecution, are now on trial. Great pains have been taken to complain of the *manner* of the prosecution We hear of getting up a case—of setting in motion trains of machinery—of foul testimony—of combinations to overwhelm the prisoner—of *private* prosecutors—that the prisoner is hunted, persecuted, driven to his trial, —that every body is against him;—and various other complaints, as if those who would bring to punishment the author of this murder were almost as bad as he who committed it.

"In the course of my whole life, I have never before heard so much said about the *particular* counsel who happens to be employed. As if it were extraordinary that other counsel than the usual officers of the Government should be assisting in the conducting of a case on the part of the Government. In one of the last capital trials in this country, that of Jackman for the Goodridge robbery, (so called,) I remember that the learned head of the Suffolk Bar, Mr. Prescott, came down in aid of the officers of the Government. This was regarded as neither strange nor improper. The counsel for the prisoner, in that case contented themselves with *answering* his *arguments*, as far as they were able, instead of *carping* at his *presence*.

"It is said, that here even a Committee of Vigilance was appointed. This is a subject of reiterated remark. This committee are pointed at, as though they had been officiously intermeddling with the administration of justice. They are said to have been 'laboring for months' against the prisoner. Gentlemen, what must we do in such a case? Are people to be dumb and still, through fear of overdoing? Is it come to this, that an effort cannot be made, a hand cannot be lifted to discover the guilty, without its being said there is a combination to overwhelm innocence? Has the community lost all moral sense? Certainly a community that would not be aronsed to duty upon an ocasoin such as as this was, a community which should not deny sleep to their eyes, and slumber to their eyelids, till they had exhausted all the means of discovery and detection, must indeed be lost to all moral sense, and would scarcely deserve protection from the laws.

"But the learned counsel for the defendant take a somewhat loftier flight still. They are more concerned, they assure us, for the law itself, than even for their client. Your decision in this case, they say, will stand as a precedent. Gentlemen, we hope it will. We hope it will be a precedent both of candor and

intelligence, of fairness and of firmness ; a precedent of good sense and honest purpose, pursuing investigation discreetly, rejecting loose generalities, exploring all the circumstances, weighing each, in search of truth and embracing and declaring the truth when found."

Gentlemen, I endorse these sentiments, and I only ask the full benefit of them for this prosecution. With a desire similar to that which was entertained by the distinguished jurist who uttered them, I merely request that in the ascertainment of truth, and looking to impartial justice they may receive a proper share of your reflection.

The gentlemen on the other side have in the progress of the trial, made remarks which as it were grew out of the position they bear towards their client. They had a solemn and responsibly duty to perform, and characterized by the earnest solicitude which distinguishes the profession and awakens zeal and anxiety and at all times warms an honest lawyer's heart, they are aroused, and vigilantly watching every conceivable channel. The latent energies of nature are all awake in order to see that by no mistake—no over-sight, the party whose interest or whose life is confided to their care is improperly dealt with or unjustly convicted. All this I can appreciate, all this I can understand. It is the living spirit of the profession to which I belong, and therefore I do not wonder, that, in the efforts governed by professional zeal, by the deep solicitude to which I have referred, and by its well known influence upon the human heart and mind, that gentlemen should temporarily, if you please, entertain misgivings of the propriety of additional aid to the prosecution. Similar feelings, no doubt gave rise to the objections to Mr. Webster, but calm and deliberate reflection puts all such cavil utterly to flight. It was so in the case of Knapp. He was tried—tried twice. Mr. Webster's remarks which I have read to you were made upon the second trial, and upon the verdict then rendered. Knapp was hanged. But gentlemen will say the case to which I have called your attention had remarkable characteristics. I say, gentlemen, the case at bar though not surrounded by such startling, terrible an d romantic incidents, as the case of Knapp, is also one of an extraordinary character. Why do I say so ? Here in the midst of the throbbing heart of this great nation, at the very seat of your government, at this centre upon which the eyes of the civilized world are turned—aye, in the very midst of a quiet community—in one of your first Hotels, inhabited by male and female—in the breakfast room of the establishment at the very table where the bread and salt of peace and hospitality might fairly be presumed to guaranty quiet and refinement, even here, what do we find, not a mid-night assassin, not a robber intent on plunder—not a man who supposes his honor has been invaded, not one in any way rationally conscious that he has been wronged. No! but in the midst of this quiet place, even in the broad day, when every man, woman, and child had the right to suppose that the usual and common quiet which belongs to the domestic scene would remain unbroken, the public ear, amid the amazement of men and the shrieking of women, is startled with the cry of "murder." Tell me that this is not to be regarded as remarkable! Tell me that because the deed is not dark and mysterious or fringed by the shadowy glimmerings of the moon, that therefore it is terrible. Why, gentlemen, the very boldness of the deed has terror in it. It placed a bloody stain upon the smiling face of day. Here too, where the eyes of all men must necessarily gaze upon it, where the representatives of every civilized government upon earth are assembled, here and in th is presence, at noon and in the very bosom of the domestic sanctuary, a man is shot down ! Yet we are to look quietly upon it, or consider it as a deed of small account! Not so gentlemen. A fearful responsibility attaches. If this be not crime, what

is it? Whatever it is, it will become your duty, gentlemen of the jury, to examine it as men true to your country and true to her laws—as men who owe a duty to each other, as men charged with the peace, security and safety of this land. You, have gentlemen, after you have carefully examined the whole of the evidence to endorse the act, and say it was right, and by your verdict set free the man who did it, or by your verdict say it was wrong, and true to the obligations of your oaths, proclaim that wrong in the face of God, and the world.

At the close of the Court on yesterday, in your hearing, and particularly for your notice, as stated by the learned counsel who made the remark, and who, without meaning to compliment that gentleman, is really eloquent and very able, your attention was called to the case of Lord Ferrers, and you were informed that it was a case entirely different from this, a case of atrocious murder under circumstances to which there is no parallel. I propose gentlemen, before I comment upon the evidence in the case now before you, simply to refer to the cause to which your attention was directed by the learned gentleman who brought that book into court.

The case of Lord Ferrers has always been regarded as one of melancholy interest, of painful interest ; but it stands boldly forth in English annals as an exemplification of the justice of that people, and the firmness with which they carry out the law. Lord Ferrers unhappily had had some difference with his wife ; John Johnson an old and faithful servant of the family, and his steward afterwards, was supposed by him to have taken some part in relation to the affairs of lady Ferrers, and perhaps to have been instrumental in causing an act of Parliament offensive to him to come into existence. At all events this nobleman called upon this man, on a given day and asked him to contradict what he then pronounced a calumny. The man refused to do it, an altercation took place, and he shot him dead on the spot.

Gentlemen of the jury, it is a remarkable fact that although these are the circumstances of the case, his lordship as soon as he had done the deed, sent for a surgeon as quickly as he could, and caused the wounded man to be carried up to a bed in his own house and there manifested kindly attentions to the unfortunate victim of his malice, fury and rage.

In this trial, my friend will find at page 918, of 19th State trials, the question was put by one of the lords to the physician :

"*A Lord*—When he told you the direction of the ball, did he mean that tenderly to assist the unfortunate man ?

"*Kirkland*—I took it, that he was directing me to enquire into the nature of the wound.

"*A Lord*—Could he direct you with any other view than to assist ?

"*Kirkland*—I remember when I told my lord the ball could not be extracted, he said, I do not intend to direct you, pursue your own method, and do the best you can for him."

I only point to this to show you that there was at least this characteristic in his conduct, because it is brought out by the questions which were put by the nobleman who tried this unfortunate Earl.

Gentlemen of the jury, after an elaborate and careful trial the Lords pronounced him guilty, and he was condemne to die as a felon, although in point of fact he was one of the most distinguished noblemen of the British nation. It was of no avail that he quartered arms with the Crown; they sat in judgment upon *his case*, and fairly and in view of all the circumstances, without the slightest reference to his exalted rank looked alone to the *quality of the act;* and when they believed him guilty, pronounced him guilty. This case gentlemen, teaches a stern but righteous lesson. It proves that even in aristocratic England, the descendent of the noble Earl of Essex, could not with impunity take the life of his ser-

vant. Such lessons are for all time, they command respect—promote the security of human life, and add to the dignity of a nation. It is gratifying too, to know that the Court that tried Earl Ferrers was governed by these consideration. The Solicitor General at page 946, in summing up the case to the Lords, says :

"The fact of killing Mr. Johnson, by the prisoner named in the indictment, is admitted as well as proved. The noble lord at the bar only derives the consequences, that the fact is murder. For he tells your lordships, that upon considering all the circumstances he is satisfied, that he was incapable, knowingly of doing what he did ; and therefore insists upon an incapacity and insanity of mind in his defence.

"My Lords, it is certainly true, that the fact is not murder without malice ; so natural justice says ; so the law says on which the indictment is framed, and malice must depend in every case, upon the *will* and *understanding* of the party. If the defence is founded in truth; as the noble prisoner at the bar, has seen the anxiety of your lordships, to give it due weight, through the whole course of the trial, so now in the conclusion, he will receive from you, as his judges, the full benefit of that defence in his acquittal. If it is not founded in truth, I am persuaded that no other consideration, respecting the *rank* and *quality* of the *noble* prisoner, and his relations to your lordships will turn your attention from the *evidence*, nor make the least impression upon the *firmness* of your *justice.*"

And so say I now ; and so said Mr. Webster at Knapp's trial, and when the Lord High Steward in this same court came to pronounce the opinion of the court he too adverts to the necessity of stern and inflexible justice. His remarks will be found at page 958, and are these :

"Lawrence Earl Ferrers, His Majesty, from his royal and equal regard to justice, and his steady attention to our constitution, (which hath endeared him in a wonderful manner to the universal duty and affection of his subjects) hath commanded this inquiry to be made, *upon the blood of a very ordinary subject*, against your lordship a peer of the realm ; your lordship hath been arraigned ; hath pleaded, and put yourself on your peers, and they (whose judicature is founded and subsists in wisdom, honor and justice) have unanimously found your lordship guilty of the felony and murder charged in the indictment."

Gentlemen, the trial of Earl Ferrers, abounds with reflections well calculated to command the respect of every honest mind—of every honorable man ; it looks to the uphoping of the law, and while upon the one hand, there is an invocation for allowance to the infirmity or imbecility of human nature, upon the other, with equal firmness, and with a determination to see that the law is carried into effect, there is an inflexible and rigid observance of the rules of impartial justice.

The Lords who tried the case no doubt tried it with pain and anxiety to themselves. They were trying as you are now, one of their equals. Every consideration called for caution and circumspection, the prisoner was an hereditary peer of the Realm, and a member of the British Parliament, yet he stood before that court as stands the prisoner at the bar this day, *indicted for murder.* He had slain his humble servant, slain him maliciously—unjustifiably—and for that act he paid the forfeit of his life, and died a felon's death upon the gallows. The unfortunate nobleman sought to be beheaded, but his sad petition was refused. In vindication of the outraged laws of his country, he died by the common hangman upon the gallows tree at Tyburn. Gentlemen in the case at bar as in all other cases, it is impossible to shut one's eyes or the eye of reason and judgment, to the surrounding circumstances which characterize it and give quality to the act. You might as well suppose that you could shut the eyes of this nation to the enquiry now pending before this jury. You might as well say that you could resist the judgment of mankind in reference to the verdict that may be rendered in this case. It cannot be done, the character and quality of this homicide is known and understoood.

I have said it was perpetrated under circumstances truly startling. Circumstances well calculated to arouse not only surprise, but indignation. I might have added, circumstances sufficient to awaken in the heart of every right minded man, who could for a moment contemplate the subject, poignant regret. We have herad it intimated that the counsel for the prosecution have permitted a severity bordering upon harshness to prevail. Far from it—every man who reflects at all, instead of being influenced by harsh feelings must entertain emotions of sorrow. No man of right principles can contemplate the situation of the accused without regret. The exercise of honorable ambition—the cherished hopes of future usefulness—the ceaseless toil and struggles by which men reach the high places of this world, are all calculated to arrest attention—or if you please to challenge admiration. To see these in a moment dashed to earth by the consequences of real or supposed crime, is quite enough to cause grief, not harshness The constant inclination of the mind is to influence the heart almost to sympathy. But, sirs, we are not at liberty to indulge such sympathy at the expense of plain and natural justice. If a man's life has been unjustly taken, and unnecessarily taken, it ought to be avenged, the insulted and outraged law must be vindicated. The consideration and sympathy which under other circumstances might be entertained for the living are properly transferred to the dead. We turn, with pain it is true, but with justice, nevertheless, from the beaming hopes of the living man, to the poor remains of that man's victim mouldering in his bloody grave. At the side of that tomb we ask ourselves, what is due to the occasion, and a whole people looking for security and protection to the firm administration of the laws, answer with one voice, *fair and impartial justice.*

Gentlemen of the Jury, the remarks which I have already had the honor to submit to you may be regarded, in some measure, as preliminary to the immediate inquiry before you. I now propose to call your attention directly to the evidence in this case, to discuss that evidence in connection with the law, as laid down by his Honor in the several propositions which he has thought proper to grant, and to show you in what way that law applies to this evidence.

As I have already intimated, this indictment is for murder. Without troubling you, by a reference in words, to Coke's definition of murder, I deem it sufficient to say, in plain phrase, that murder means a *malicious* homicide, a homicide perpetrated with malice ; and I intend to discuss before you, in connection with the evidence, three questions :

First. Is this case murder, as contemplated by the indictment?

Second. Is it manslaughter?

Third. Ought you, according to the evidence, to gratify the hopes of the accused, and give your assent to his plea of self-defence?

His honor, the Judge, in performance of the duty incumbent upon him, has thought proper to reject the first prayer presented by the prosecution, and also the last. I confess that my own nature beats responsively to that broad humanity which characterizes the presiding officer of this tribunal in the rejection of that first prayer. I am not mistaken in saying that it is Judge Foster, who very beautifully in a portion of his admirable work—to which I cannot now refer by page—but it is he who makes the remark that, "where there is a chance that the heart is free from guilt—especially the deliberate guilt of murder, God forbid the Crown should be hunting after life."

I therefore say, gentlemen, that that tender regard for human life which induced the learned Judge here to reject that prayer, upon the ground that it may have been too abstract, or did not sufficiently define, agreeably to the

evidence, the lines upon which the supposed malice should be based, finds not the least repulse in any emanation of my mind. I understood, and I think I understood correctly, his honor as leaving to you to say—and, necessarily, that must have been at all times the view of the prosecution—that it a question for the jury whether, from the whole evidence, this is to be regarded as a *malicious* homicide, or as a homicide committed in the heat of blood. That is the responsibility which attaches to the jury ; that is the question which the jury upon the responsibility of their oaths must determine, and that determination must be regulated by a fair, rational and humane view of the entire evidence in the case. It would be far more pleasing, gentlemen of the jury, to be able to come to the conclusion that there is no evidence of malice in this cause. I am constrained to think differently. Despite nature's struggling in behalf of suffering humanity, we are unable to say, there is no evidence that this was a malicious homicide. The duty which every man is bound by, which you cannot desert, and a sense of which will never desert you, forbids the idea. There are circumstances surrounding the transaction which you cannot fail to see—the force of which you must inevitably feel, and these circumstances point out a solemn duty to be performed ; you cannot shake the responsibility off, and wherever it leads you, to that conclusion you must come ; you cannot deceive yourselves; you cannot deceive your God. It may be painful duty, but from it there is no escape. As living and responsible men you are bound to discharge it—fairly—honestly—and, I will add, gentlemen, in a merciful, humane, and rational spirit.

Gentlemen of the Jury, let us now look at the facts. They embrace a domestic scene, and it is necessary for the proper understanding of them that you should mentally transfer yourselves to the room of Willard's Hotel on the morning of the 8th of May.

It will require no very great stretch of imagination to take within your view the whole scene; if you please you may see quietly seated at one of the round tables, pointed out on this diagram, the Representative of his Dutch Majesty, and a couple of gentlemen from California entering at rather a late hour of the morning for breakfast; I think, gentlemen, the proof will establish that the moment one of them, the prisoner at the bar, had taken his seat, an humble man, the witness Jerry Reardon, was addressed in these words:—"Let us have some breakfast; and let us have it damned quick." There is something in that very expression, and in the manner of it, that inclines my mind to the conviction that Jerry has in fact told you the simple truth, and that was really what occurred. I can also very well understand, gentlemen, and it is in proof in this case, that there were certain regulations in that house, which, having reference to that particular hour, made it incumbent upon the subordinate to act in a particular manner. I can equally well understand that Jerry, on that occasion, in the gratification of the gentleman's wish, did endeavor to be "damned quick," and that he walked into the kitchen, as he has told you, and without going up to the accustomed monarch of that particular place, approached the two colored men that were there, and obtained a part of the breakfast withbut saying a word. Jerry tells you at that particular time De Venois and Patrick Keating were standing a little distance off, and were talking about matters indifferently; he had obtained what the gentlemen called for, as he thought, and went back with it to meet their behests. All that is plain—plain as my hand. I have it mentally before me, and can comprehend fully the incipient stage of this melancholy transaction. I can also understand that in the mean time from the roughness of manner and the rude expression, "damned quick," heard by

Thomas Keating, who was but a short distance from the party, that it was regarded by him as rather rough, unsuited to the place, and offensive; that governed by a feeling of human nature, which is not to be condemned, he felt some degree of sympathy with his fellow servant—the humble, the obsequious, the obedient Jerry—and that, therefore, when he was additionally called upon and told to get breakfast, in no smooth, easy, or gentlemanly way, that he should have replied, "You have one servant waiting upon you, and that is enough." There was nothing shocking about—nothing, even, if you please, that could disturb the nice nerves of a nice gentleman. I can comprehend, even, that there was a propriety in it. The prisoner had been rough to one servant, and it was natural that the other—servant as he was—in declining to serve a rude man, should say, "You have one servant waiting upon you, and that is enough." The business of the house, too, made it necessary; it was after the usual breakfast, and the propriety of the occasion seemed to demand it. What follows?—According to the proof, before Jerry returned what did Mr. Herbert do? What does his friend Mr. Gardiner say he did? He says that he got up, took out his pistol, which turns out afterwards to be loaded, advanced towards Tom Keating with the pistol in his hand, and said, "You damned scoundrel, clear out of this room, or get us some breakfast," or, as one of the witnesses testifies, "You damned Irish son of a b——, get us some breakfast." Now, gentlemen, human nature is human nature. There is an old distich which says:

"Let the world say what it will,
Dame nature will be nature still;"

and let it be a gentleman who is a member of Congress, or the humble individual who stands behind his chair, nature asserts her prerogative; and when the one so far forgets himself as to invite the other to a certain platform, we cannot wonder that the terms should be accepted; that if, in point of fact he accosts him by saying either "You damned scoundrel," according to Gardiner's proof, or "You damned Irish son-of-a-b——," according to the other witness, it was quite natural that there should have been some recrimination—some manifestation of human nature—some repulse of a similar kind—some return of words similar to those cast at the subordinate. But, gentlemen, the proof is clear—it is not denied, that Mr. Herbert approached the man with a loaded pistol. Will any man on earth, or any man in that jury-box, explain to me the necessity of drawing forth or exhibiting that pistol? Sirs, if human acts are indicative of human feeling, if the malice of the heart is to be ascertained by reason of the act done, if we are in any measure to understand what emotion and what feeling prevails; I say that this jury can have no difficulty in understanding and measuring the resolutions of the two parties at that particular point of time. It is not pretended that the prisoner entered the breakfast room and in the manner of a celebrated gambler, who inspired terror wherever he went, spread out his bank notes, drove his dagger through them, pinned them to the table, and then went on to play with the weapon gleaming in the gas-light, it is not to be supposed that in a similar manner Mr. Herbert laid his pistol down by the side of his cup, and while it lay there called for his breakfast. No; in right reason, and as the proof shows it, the pistol was in his pocket, Say, if you please, it was casually there, I ask why was it taken out? It required an effort of the will to put the hand into the pocket—to draw the pistol out, to go across the room—to approach the man; and I care not whether it was held in the manner described by Gardiner or not, the act was indicative of intention, and, I fear, of malicious—murderous intention; yes, gentlemen, it had its meaning; it would be futile and vain to say that it

had no meaning. The very act of thrusting the hand into the pocket, and approaching the servant at that moment of time, is sufficient to convince me, and I think will work that conviction on your minds, that the design was to make that man sensible of the fact, that he had a pistol; and that he intended to use it. The evidence is, that Herbert had returned towards his chair before Keating had taken up the plates or had used the offensive expression attributed to him. The wonder is, that the man did not do more. True, he was an humble waiter at the establishment, but still he was a man; and what man seeing another progressing towards him with a pistol in his hand which he had every right to suppose was loaded, as it afterwards turned out to be, would not have done more than Tom Keating did? I say that nature gave him the right forthwith to arm himself to the best advantage. It would be, under the strong influences of nature's teaching, paying her but a poor compliment to suppose that a gentleman, a member of Congress, or any one else, would have the privilege to draw a pistol and approach the humblest man in the land, and that man not have the right at once to arm himself and act upon the defensive. It is no answer to say that Herbert, if he had intended to use the pistol when he first drew it from his pocket, would have used it *then*. I ask, why did he draw it all? That he did intend to use it is best proven by the fact that he did use it. It is unreasonable to suppose that in the first instance, and without even an apparent provocation, he would step forward and ruthlessly shoot Tom Keating down. His act, bad as it is, lacks the demoniac quality of such unblushing murder; besides, an act of that sort would have been pregnant with certain death to the actor. It would have precluded the possibility of any such defence as is set up here, and the prisoner knew it. It is no uncommon thing to discover close and guarded selfishness in acts of murder—especially where the deed is committed in an open and public place, under the eye and observation of those who may subsequently become witnesses.

I would indeed have been presenting the envenomed chalice to the lip unmixed, to strike down and destroy without even pretext, without even the disguise of necessity for doing so. This he did not dare to do and though moved and seduced, by the instigation of the devil, though malice may have blackened his heart, and every line of his face, still at the same time, under the very teachings of Lucifer, he dared not do it. It takes in the language of Shakespear, in King John:

> "A fellow framed and fashioned,
> By the hand of nature,
> To do a deed of blood,—
> All have not the quality of instant daring."

He turned from the man and walked across the room to his chair—the pistol still in his hand. How far that interval of time was used for meditation upon what so swiftly followed it, is for you gentlemen of the jury to determine. Mr. Gardiner says he placed his hand upon the chair, and gives it as his opinion that it was for the purpose of setting down. Other witnesses place the act in a different light. Do you believe gentlemen, that he took hold of that chair in order to take his seat, or rather was it not for the purpose of throwing it.—Even Gardener, who certainly was not disposed to put an ill construction upon his friend's conduct, tells you that it was not until then that Keating took up the plates. What would you have him do? Stand and be shot down like a dog! The law declares that a man with a dangerous weapon is not to be trusted. It was natural therefore, that he should take up something. Who would not! The prisoner had already made use of expressions indicative of malicious feelings, expressions which showed that he held the other ineffable con-

tempt, the weapon was in his hand ; and when a man under the influence of demoniac feelings, or under any influence which teaches him to place a low value upon human life, the right reason of the party attacked is "I must be careful, I must have something wherewith to defend myself, that man would as soon shoot me as he would a dog. The weapon is in his hand. He looks upon me with contempt, there is nothing to restrain his vile emotions, and if the impulse seizes him, I am to be shot, I must do the best I can." In addition to all this, the very intimation as coming from Herbert's own lips, was calculated to cause Keating to make a remark equal to that to which Gardiner has testified. There was no authority in Mr. Herbert to accost the man in the manner he did, and human nature, in the shape in which God had moulded it, animatihg the deceased, humble though he was, taught him to reply in the manner in which we have been told he did reply. Taking the difference of the two men into fair and serious consideration of positions, we can more easily excuse the coarseness of the servant's response, than find an apology for the grossness and rudenesss of an expression so unsuited to the lips of a gentleman. Follow the evidence, what takes place? At that moment of time, Gardiner tells you that he cannot say whether the plates were thrown first, or the chair. Gentlemen, Gardiner's evidence in ordinary reasoning, I suppose would not be likely to be at all too favorable to the other side—in other words, if there is any bias at all, it would be more likely to lean towards his friend, Mr. Herbert. He had taken him there for breakfast; he had been his companion through the night ; had known him for fifteen years, Is as he has told you, some twenty three years of age—consequently he has known Mr. Herbert from childhood, and every bias he could possibly feel, would naturally be strong in relation to his friend, especially when that friend's life is at stake. It would be expecting too much of human nature, to suppose that under such circumstances it would be free from bias.

A very able jurist has made some remarks on the subject of bias which I think may be very properly addressed to this jury at this particular point. At the same time it must be borne in mind that these remarks are equally as applicable, to any bias on the part of the witnesses for the prosecution as to a bias on the part of the defence. Baron Gilbert in his work on evidence, page 223, says :

"Where a man, who is interested in the matter in question, would also prove it, it rather is a ground for distrust than any just cause of belief, for men are generally so shortsighted, as to look to their own private benefit, which is near them, rather than to the good of the world which is more remote. Therefore, from the nature of human passions and actions there is more reason to distrust such a *biased* testimony than to believe it. It is also easy for persons who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence, and therefore the law removes them from testimony to prevent their *sliding* into perjury."

Now I say if ever a man stood on slippery ground—on ground where he might *slide* without taking a single step forward, and as this learned Judge says, by bias and interest unconsciously "*slide* into perjury," it is this witness, Gardiner, who stands here in defence of his friend's life. Admit, if you please, the strong feeling and strong bias of the fellow-servants of Thomas Keating, I deny that it is stronger than would be likely to influence several of the witnesses for the defence. Men even with the best intentions see things very differently. We want no better evidence of the fact than the conflict of proof presented in the progress of this trial. In what way, then, are we to reconcile these contradictions ; how explain them ; how account for them? Baron Gilbert solves the difficulty. He very justly says, men are generally so short-

sighted as to look favorably upon that in which they are most interested; in other words, they are biased; and I say, gentlemen, this is the position of Mr. Gardiner; under every conceivable influence of human infirmity, the transaction, to say the least of it, was calculated to warp that witness' judgment; to place him where Judge Gilbert has placed every man warmly interested in the result—upon *slippery ground*. I do not design to say that he would intentionally utter what he knew to be false; but I do say, when he testifies to a fact contradicted by other witnesses, it is the duty of the jury to consider whether he has not been misled by bias in behalf of his friend, and whether the witnesses who give a differemt version of the affair and who are less interested in the result, ought not to be more fully relied on. It is very certain that equal credit cannot be given to both sides, for one contradicts the other. Weigh then, gentlemen, the respective bias and judge accordingly. I think it is Solomon who says, "a living dog is better than a dead lion." True, sirs! and our experience of human life teaches us daily that a majority of mankind, like the Persians, worship the *rising* sun, and turn their backs with indifference on that which has *set*. He, whose life has been extinguished in the darkness of a bloody grave, too frequently shall find but few friends to recollect his virtues, vindicate his memory, or ask that justice may be done on those who, without a moment's warning may have hurried him from this bright and beautiful world into the fearful presence of his God. The wisdom of Solomon is the fruit of experience, and the impulse which thousands of years ago, led men to give regard to a dog *living* rather than to a lion *dead*, still sways, with powerful influence, the human heart. Innumerable considerations look to the living—the dead have none to offer. I therefore say, gentlemen, that wherever the isolated testimony for the defence is contradicted by more than one witness for the prosecution, you are bound to receive such evidence with many grains of allowance. *Cavendo tutus* is a good maxim, and there never was a cause to which it could be more forcibly applied than that which is now before you. The whole effort of the defence has been to throw the entire odium and culpable responsibility of the miserable scene of bloodshed and brutality upon the unfortunate man who has gone down to the grave.

Gentlemen, the very incipiency of the transaction establishes the injustice of such an effort. Gardiner, Riordan, Quinn, Enbright, all the witnesses, give substantially but one account of the first part of the affair; and the rule which enables us to judge of the size of the statue by a measurement of the foot, may be well applied here: if I show you but the foot of this transaction, it is to lead you on to the measurement of the whole figure. If I show you, in the early stage of it, unmistakable evidence of a reckless and malicious spirit, it is for you to say whether such recklessness and malice did not prevail throughout, and if it did, the responsibility will attach to you, gentlemen, to determine what is the grade of this crime:—whether it was murder or manslaughter. His Honor, the learned judge, in the prayers he has granted, and in the whole of this case, has very justly and very properly left it to this jury to say whether the finding of the Grand Jury is right—whether this is really a malicious homicide—homicide in the heat of blood, or a justifiable homicide. Whatever difference may be entertained by counsel in respect of prayers, whether the first prayer be granted or not is immaterial; for after all, the granted prayers place upon the jury the whole responsibility of saying whether or not this was a case of malicious killing. Gentlemen, in my judgment, this can only be ascertained by tracing the whole transaction step by step, and however painful it may be to press this branch of the case upon your attention, it is my duty to do it. I shall endeavor

fairly to review the facts, and with equal fairness to apply the authorities to them. It is a duty which I owe to the oath I took in your presence, on coming into this Court on Thursday last, when I was admitted to practice at this bar. I then swore to uphold to the best of my ability the Constitution and laws of my country; and I shall endeavor to do so;—neither you nor I are at liberty to disregard our obligations. We are each in our respective spheres accountable to God and the country.

We will in the first place ascertain from the law books the meaning of the word "malice;" and for this purpose I will read to you the definition of Judge Foster, an authority universally acknowledged and respected wherever the common law is known.—At pages 256-257, of his Discourse on Homicide, he says:

"When the law maketh use of the term *malice aforethought* as descriptive of the crime of murder, it is not to be understood in that narrow, restrained sense, to which the modern use of the word malice is apt to lead one—*a principle of malevolence to particulars*—for the law by the term *malice* in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit."

I have already said to you, gentlemen of the jury, that we are to look to the incipiency of this transaction in order to ascertain whether it was malicious or not. I now say to you, in the language of the authority, if you believe that it was attended with circumstances such as are ordinarily the symptoms of a wicked, depraved, and malignant spirit, then you will be constrained to say that it was a malicious homicide. The Court tells you that in order to give the defendant the benefit of the instructions granted in his behalf, you are to believe in the absence of all malice; because if you believe that the malice is there—if in your consciences you are constrained to conclude that the thing originated in such manner as bore the marks of a wicked, depraved, and malignant spirit, *then* it is a malicious deed. You are the judges of that; and as you shall answer in a few years, when the things of this world shall have passed away; as you shall answer to your God, so are you obliged to judge of these constituents.

At page 257 the same writer says:

"I believe most, if not all the cases, which in our books are ranged under the head of *implied malice*, will if carefully adverted to be found to turn upon *this single point*, that the fact hath been attended with such circumstances as carry in them the plain indications of a heart, regardless of social duty, and fatally bent upon mischief."

As honest and as judging men, I now ask you was not the conduct of the prisoner on this occasion, referred to the indication of a heart regardless of social duty, and fatally bent upon mischief? I ask you if social duty was not in this case, trampled under foot? I ask you if that heart was not fatally bent upon mischief, when in the saloon of that hotel, in that quiet house, an unarmed man was shot to death with a loaded pistol, which had been wilfully taken from the prisoner's pocket? I may regret, gentlemen, the necessity which brings me to these conclusions, or even the necessity which compels me to present them; but the facts are there, and they are to speak for themselves.

The responsibility of that obligation you have to deal with, and you are to judge of these facts as you find them.

Sirs, there is another case to which I shall briefly advert. The case of the Queen against Mawgridge. It has been read; and I shall simply refer to the special verdict to show what was deemed by that jury, and what was held by the judges upon full deliberation to have constituted murder in that case.

The verdict will be found in Kelyng's Report, page 120, and is in these words:

"That William Cope was Lieutenant of the Queen's Guards in the Tower,

and the principal officer then commanding there, and was then upon the guard in the guard room ; And that John Mawgridge was then and there, by the invitation of Mr. Cope, in company, with the said William Cope, and with a certain woman of Mr. Cope's acquaintance, which woman, Mawgridge did then and there affront, and angry words passed between them in the room, in the presence of Mr. Cope, and other persons there present, and Mawgridge there did threaten the woman ; Mr. Cope did, thereupon, desire Mawgridge to forbear such usage of the woman, saying that he must protect the woman ; Thereupon, Mawgridge did continue the reproachful language to the woman, and demanded satisfaction of Mr. Cope to the intent to provoke him to fight ; Thereupon, Mr. Cope told him it was not a convenient place to give him satisfaction, but at another time and place he would be ready to give it to him, and in the meantime desired him to be more civil, or to leave the company ; Thereupon, John Mawgridge rose up and was going out of the room ; and so going, did suddenly snatch up a glass bottle, full of wine, then standing upon the table, and violently threw it at him, the said Mr. Cope, and therewith struck him upon the head, and immediately, thereupon, without any intermission, drew his sword, and thrust him into the left part of the breast, over the arm of one, Robert Martin, notwithstanding the endeavor used by the said Martin, to hinder Mawgridge from killing Mr. Cope, and gave Mr. Cope the wound in the indictment mentioned, whereof he instantly died. But the jury do farther say, That immediately, in a little space of time, between Mawridge's drawing his sword and the giving the mortal wound by him, Mr. Cope did arise from his chair where he sate, and took another bottle that then stood upon the table, and threw it at Mawgridge, which did hit and break his head ; That Mr. Cope had no sword in his hand, drawn all the while ; and that after Mawgridge had thrown the bottle, Mr. Cope spake not. And whether this be murder or manslaughter, the jury pray the advice of the court."

In this case, after the most elaborate argument, the court ruled that it was murder, and the ground on which the court placed it, as you have heard, was, that this quarrel did not commence upon *equal terms ;* that if it had been on equal terms, it would have been manslaughter ; but not having been commenced upon equal terms, it was not to be regarded as manslaughter.

Mawgridge in the first instances seized a bottle and threw it at Cope. You perceive it must have been an instantaneous malice, because, in point of fact he was there by the invitation of Cope. He appears to have been a friend of Cope's, but he rudely insulted a woman who was there, and Cope told him to desist. This act must have been the work of an instant. He took up a bottle, threw it at Cope, and then drew his sword ; but not until Cope had thrown a bottle at him. The court say this is murder, because he took advantage of Cope. The court say that Cope had a perfect right to cast a bottle back.— Here was equality in the act. He might resist. It became a justifiable thing : it was blow for blow ; but that, Mawgridge had no right to draw a sword, Cope's sword not being drawn.

Gentlemen of the jury, this case was argued with great ability, I desire to know if it is not parallel to the case at bar? Here the prisoner at a public table, unnecessarily draws from his pocket a loaded pistol, and proceeds in a threatening manner towards another with it in his hand. There is no use in caviling about the particular manner in which he held it. It is enough to say that he took it out of his pocket and approached the deceased with it in his hand. The action it is true does not appear to have been quite so swift as in the case of Mawgridge. In that case, one Robert Martin was there, and momentarily interfered ; but, notwithstanding his presence, he plunged the sword over the arm of Martin, and passed it into the breast of Cope. He spoke not afterwards. He died of the wound.

What happens here? According to the evidence, Herbert takes a loaded pistol in his hand. I care not that Gardiner says he held it in a particular way—it

was exhibited by him; and it is for you to determine whether the exhibition of a loaded pistol by an angry man, who with it in his hand approaches another, does not constitute an assault? Now, the Court says, in regard to the prayer that that is a question for the jury on the evidence. The counsel for the defence say the jury are to believe that he drew it, pointed it and intended to use it as a *deadly* weapon. All I mean to say is, that the Court has not excluded from the jury the particular act. The act is to go to the jury in order that they may determine what that act was. The proof is, that at that moment of time only one other witness saw the act; the boy Reardon says, when he went out for breakfast he saw De Venois. Patrick Keating says he was not there. Gardiner does not say that Patrick was there; he speaks of Thomas Keating—(interruption.) I am speaking of the *origin* of the transaction and cannot be mistaken about it. I do not think, gentlemen of the jury, that I am mistaken. My memory is strong, it attaches to facts with great tenacity. I do not often forget, and I believe I correctly remember now. Reardon says that he saw Keating down in the kitchen talking to De Venois. Gardiner tells you De Venois was not there at the commencement. At all events, it is admitted that Herbert approached Keating with a pistol. True, he did not shoot him then, and, as I have already remarked, the question is, did not the delay give a peculiar character to the act of the prisoner; because if the jury are to come to the conclusion he drew the pistol, and did not in the first fury of passion use it, but returned to the table, and, in the meantime deliberated on what he intended to do, it is malice in the eye of the law—the very malice to which Foster refers. I will show you from a case in Dallas, that such an act is in fact the deliberation contemplated by the law. It may be insisted upon that he came back with the pistol in his hand and put it into his pocket at the time he put his hand upon the chair; it is exceedingly doubtful, because Patrick Keating tells you that when he entered the room he saw both the chair and the pistol in Mr. Herbert's hand. The whole affair occupied but a minute and a half; yet he had gone as far as the table, and had the pistol in his hand when Patrick Keating came into the room. What followed? Patrick Keating seeing his brother in conflict with a man armed with a pistol, rushed forward and interfered. Did he do any more than was done by Robert Martin in the Mawgridge case? You see a man in a breakfast room at eleven o'clock in the day with a pistol approaching a servant; the very exhibition of the pistol was calculated to spread terror among all that were there. The collective terror became an individual thing; each man might feel that the bullet in that pistol was intended for him. Under the teachings of nature, and I say, such is the policy of the law—there being but one deadly weapon, every man had a right to act and resist its progress. It became, as it were, the cause of every man in that room. That some were dreadfully terrified you cannot doubt. Quinn told you that he rushed off instantly, and never stopped till he got to the top of the house, or somewhere else. I don't wonder at it. Patrick Keating alone, under that strong feeling which the Almighty had placed in his heart as the brother of the party assailed, rushed forward and attempted to arrest the deadly purpose. It was a brave act and one which the law gave him or any other man a right to do; unfortunately he was not able to accomplish what he had the courage to attempt. And a scene like this is to be called an affray! I see a man in the breakfast room of a hotel, with a loaded pistol in his hand, moving towards another man; one man, or a dozen men, try to prevent him from doing mischief, and that is to be called an affray! The effort—the manly and courageous effort—to save human life when it was endangered, and prevent a breach

of the public peace, by a violent, exasperated and dangerous man, that is to be called an affray ! In my judgment, gentlemen, the law does not so consider it. And I assert without fear of successful refutation, had Herbert been stricken down at that moment with the loaded pistol in his hand—slain if you please—the act of the slayer might under the law have been justified.

Gentlemen, it must be so, otherwise there is no security for human life, once establish the law that a man by the use of foul language, or the exhibition of deadly weapons, has the right to provoke a difficulty, and then taking advantage of his own wrong, shoot the man whom he has provoked, and there is an end of all the boasted advantages of civilzation. Such was not law as laid down by the judges in Mawgridge's case, nor do I understand it as being the law laid down by the learned judge presiding over this tribunal. The error of counsel appears to be in characterizing that as an *affray* which in reality ought to be regarded as an attack. Mawgridge attacked Cope, add Cope repelled him, Martin interfered to arrest the progress of Mawgridge's violence, and in the course of the struggle, Mawgridge put Cope to death, was it ever pretended that this was an affray, and that Mawgridge under it could shelter himself from the guilt of murder—yes, gentlemen, it *was* pretended. In his case as in this, it was set up as a defence, the jury found a special verdict, and that finding the judges of England, pronounced murder. Suppose one of you were assailed by a man having a loaded pistol, a friend seeing your danger, interferes, and between you and your friend, you place the life of your assailant in jeopardy, or in danger of great bodily harm, shall your assailant who imposed upon you the necessity of placing him in danger, take advantage of his position, put you to death and justify the homicide? This is precisely what the defence seeks to accomplish in this case, Herbert commenced the difficulty.—He it was who, by his violence and the exhibition of a deadly weapon produced the struggle. In the midst of that struggle, he took the deceased's life.—Shall he now have advantage of his own wrong, and justify that homicide? No gentlemen, such is not the law. The act of the accused is either murder or manslaughter, and it is for you to determine the grade of the crime. To enable you to do this, I have already called your attention to the language of Judge Foster, and now read to you from the text of Sir Wm. Blackstone, who in the IVth Book of his Commentaries, at page 200, says :

"If a man kill another suddenly, without a considerable provocation the law implies *malice*, for no person, unless of a abandoned heart, would be guilty of such an act, upon a sight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to *chastise* and not to kill him, the law so far considers the provocation of contumelious behavior, as to adjure it only manslaughter and not murder."

This is the law of England, and of the United States, and wherever the question has become before our own Courts, the ruling of the judges have unvariably been similar, a leading American case in which the opinion of Chief Justice McKean, of Pennsylvania, was pronounced, fully illustrates the doctrine. I read from 4 Dallas, page 136. In this case a number of negroes had assembled for a frolic on Easter Monday, a fight sprang up with fists, when one of them seized an axe and with it knocked out the brains of one of the party—the perpetrator was indicted for murder, and on the trial the learned judge says:

"From these facts we are to inquire what crime the prisoner has committed? Murder in the first degree, is the *wilful*, *deliberate* and *premeditated* killing of another: there are various inferior kinds of homicide, but, on the present in-

dictment, our attention is confined to the consideration of the highest and most aggravated description of the crime.

Then let us ask, did the prisoner *wilfully* kill the deceased ? It is not pretended, that there was any *accident* in the case; and therefore, the act must have been *wilful*. Was the killing *deliberate*, and *premeditated* ? or was it the effect of sudden passion, produced by a reasonable provocation ? There had been a contest with fists ; but this was over, when the prisoner without any new provocation, first procured a club and losing that weapon afterwards armed himself with an axe. It cannot surely be thought that the original combat, was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled, by a battery more violent, but the life of a fellow creature must not be taken unless in self-defence."

" *Intention* is as much as ever, the true criterion of crimes, in law, as well as in ethics ; and the *intention* of the party can only be collected from his words and actions.

" In the present case, the prisoner declared, that he would split the skull of any fellow who would be saucy ; and he actually killed the deceased in the way which he had menaced. But, let it be supposed, that a man, without uttering a word, should strike another on the head with an axe, it must on every principle by which we can judge of human actions, be deemed a premeditated violence.

" Tenderness and mercy are amiable qualities of the mind ; but if they are exercised and indulged beyond the control of reason and the limits of justice, for the sake of individuals, the peace, order and happiness of society, will inevitably be impaired and endangered. As far as respects the prisoner, I lament the tendency of these observations ; but as far as respects the public, I have felt it a sacred duty to submit them to your considerations."

Here you will perceive the case turned upon *three points*, the *equality* upon which the quarrel commenced, the *brief* time for the formation of malice, and the *nature of the weapon* used to carry into effect the will of the slayer. The case at bar gives rise to similar questions, you cannot fail gentlemen to see the application, and in the discharge of your duty it is incumbent on you to make it.

The next case to which I will call attention, will be found in 1st Russell on Crime, page 531, cited in " Wharton's American Law of Homicide," page 193. It is the case of the King against Anderson, and is a noted case drawing with great distinctness, the line between murder and manslaughter.

Judge Bayley said :

" If after an interchange of blows on *equal terms*, one of the parties on a sudden, and without any such intention at the *commencement* of the affray, snatches up a deadly weapon, and kills the other party with it, such killing will be only manslaughter. But if a party under color of fighting upon equal terms, uses from the beginning of the contest a *deadly* weapon, without the knowledge of the other party, and kills the other party with such weapon, or if at the *beginning* of the contest, he prepares a *deadly* weapon, so as to have the power of using it in *some part* of the contest, and *uses it accordingly* in the *course* of the combat, and kills the other party with the weapon, the killing in both these cases will be murder."

Here you will perceive it looks to the fact that the affray commenced on *equal* terms. I deny that the case at bar presents in any aspect an equality of terms. To say that when one man is armed with a loaded pistol and the other happens to have a chance of picking up a plate, that terms are equal, is to assert that in which no fair or honest man in the land will concur. There can be no equality between a man *armed* and a man *unarmed*. Besides, observe with care the distinction marked by this authority. It may be made familiar by supposing that Herbert had been at the table and was using a knife, and instantly seized it in the heat of blood, and slew the man. Then the case would present a very different act from putting his hand into his pocket and drawing therefrom a loaded

pistol, a certain instrument of death in a majority of cases. You may stop a man with a knife, and there is some chance of escape in most instances; but the moment you place a pistol opposite a man's heart, if it is properly loaded, the chances for escape are very, very small. As Mr. De Venois very truly says, "when the blood comes out like as it was from one bul-lock," it is all over.

If a party, under color of fighting on *equal* terms, uses from the *beginning* of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon, or prepares such weapon to use in the *course of the combat*, and with it kills his adversary; in both these cases it would be murder. And why should it not be so? Place any man living in a situation where he is brought into conflict with another, and where, perchance, the man so placed has no deadly weapon, the other uses a deadly weapon against him, has he not the advantage?—Should not that very advantage, by every principle of natural law, by all that is sacred in human nature, and by every duty to God and man, teach him to forbear? If he will not forbear, but relying on the advantage of his deadly weapon, presses forward to the destruction of human life, shall he not be answerable for the consequences? Shall men be permitted to cast aside the magnanimity and courage of manhood, and because they have the advantage strike other men dead at will? Gentlemen, such a rule would outrage savage life. There can be no such rule. If you, by your verdict, give it existence, in vain do we congratulate ourselves upon our boasted privileges; in vain do we point to our constitution; in vain would we say that our country under the sheltering ægis of the law, is an example to the world! If outrages such as this are to be permitted with impunity, let us forever after hold our peace. If human life can be stricken down, and the deadly weapon in the sanctuary of domestic ease can thus be ruthlessly drawn and recklessly used, and a man by the motion of another man's hand, dismissed from earth to the presence of his God, I say in vain are all our boastings of security under the law. No, gentlemen of the jury, this cannot be the law. Neither you, nor I, nor any man, would be safe, if such a doctrine could prevail. If it ever does prevail, farewell our boasted security! In that day shall be found scattered throughout this land, from one end of it to the other, "Vigilance Committees," and every other kind of contrivance to curb and control the savage passions of of the depraved heart. Men would rise up in the majesty of nature to protect themselves from wrongs from which the laws would afford them no protection. Our glory is, and it is the glory of our country, that ours is a government of laws, and that the laws are equally and impartially administered. One of the gentlemen, in his argument said, an erroneous judgment of a jury is more destructive to civil liberty than even an armed force. I entirely concur in that remark of the learned counsel. It would be more destructive to civil liberty and rational freedom. Every man in the jury-box, proud of his country and her laws, must willingly subscribe to that sentiment.—Not only must he subscribe to it, but under its influence he must admit that human life cannot be jeopardized or passed away without an accountability on the part of him who takes it. If he permits it to be done with impunity, that juror forgets what is due to his country's glory. He contributes as far as he can by the verdict he renders to establish a disgraceful doctrine, which he writes in characters of blood upon the American escutcheon. The high position which we now occupy among the nations of the earth, and which naturally awakens the envy and admiration of mankind, is chiefly attributable to the confidence and devotion which every citizen bears to the law. Let not this confidence be lessened, this devotion weakened.—Smear not with blood the brightest jewel in Freedom's glorious crown.—

Let it not be said that here at the very centre of this Union, within the throbbings of the national heart—the responsibility which man owes to man, and man to God, has been misappreciated or misunderstood. The intellectual radiance which sheds a hallowing light upon the jurisprudence of America, forbids it! Sirs, it cannot be; every feeling of the heart, every movement of the mind, repels the idea. As an humble worshipper at the shrine of Justice, I look with undiminished confidence to the cloudless sun which illumes the Constitution. I regard it as the beacon-light of the world; and as my mind recurs to the glorious epoch when it arose, I pray for its zenith.—I pray that it may beam to the remotest age; and I feel that whenever it does disappear, it shall not set in darkness and bloodshed, but like the star of the morning melt away into the purer light of heaven.

Gentlemen of the jury, the subject invites your attention, nay demands it—the humblest man among you as citizen of this Republic, and guardian of the law, equals in majesty the noblest British peer that tried Lord Ferrers. They but tried their equal, you are here to discharge a similar duty. The common law was placed in their keeping—to-day it is in yours. The assembled Lords of England upon review of the whole testimony, were constrained to find their kinsman guilty, and I say, if upon review of the testimony in this cause, you are compelled to believe that Philemon T. Herbert maliciously took the life of Thomas Keating, you are bound by every obligation to pronounce a similar verdict. Painful and solemn as the duty may be, you cannot shrink from it, and we deal with principles—aye, gentlemen, with principles which had existence before our birth, and shall continue to exist when we are ashes.

Thomas Keating sleeps in his bloody grave. Herbert lives so far as either or both of these men are concerned, in comparison with the question to be decided, the principle to be perpetuated, both of them sink into immeasurable insignificance. One of these men is already dead—the other at most can live but a few short years, both are mortal, principles are eternal. The decision of to-day is a precedent for to-morrow, and other men and other times are more or less to be governed by the decisions of the past. But, sirs, let it not be supposed that while I thus invoke you to guard with jealous care the principles of the law, I desire that you shall in the least degree overlook the rights of the prisoner. God forbid! If from a calm review of all the evidence you can believe him innocent, set him free, restore him again to society—I only ask for such a result as shall meet your approbation through your lives, and in aiding you to come to this, I desire to read to you the remarks of one of our ablest Judges—a man of whose moral attributes and legal attainments, every American may be justly proud.

Judge King, upon the trial of Williams, for murder reported in 2 Ashmead, page 74, said :

"In trials for murder in Pennsylvania, the jury before they can convict of murder of the first degree, must be satisfied, not only that the criminal has committed the felonious homicide of what he is charged, but that, in its perpetration he *intended* to take away the life of his victim. It is rare, indeed, that this last feature of this high crime, can be shown by positive proof. Almost universally the jury are left to infer the existence of such a dead intent, from the *manner* and *circumstances* of the homicide established. Felonious intention, guilty knowledge, malice and other vital elements of crime, are only ascertainable in the same way."

And the same learned judge in the case of the Commonwealth vs. Murray, at page 56 of the same volume, also says :

"The existence of the intention to kill is always, of course, a question of fact for the jury ; often, however, free from difficulty, but sometimes delicate

and embarrassing. When the homicide is committed with a weapon, *deadly* in its character, such as a loaded pistol, a sword, a sharp axe, or other similar instrument of deadly violence, the fatal intention of the perpetrator presses on the mind with irresistible force."

Gentlemen, I have now presented views in accordance with the prayers and upon the supposition that there is evidence in this case of a malicious intent to be collected from the nature of the weapon used as also from the time and circumstances under which it was used. I refrain from the expression of my own opinion in regard to the evidence ; I conceive that I discharge my duty when I present the facts to your consideration, and apply the law as I understand it to these facts.

Before I close my remarks on the first proposition, permit me to briefly review the transaction. It is clear beyond controversy, that while Herbert and his companion were at the third round table, Riordan came in the manner I have described, Herbert used the rude language referred to, and exhibited to Thomas Keating, a loaded pistol, and walked towards him, and afterwards, when he returned to the table, and upon the passing of words between the parties, he placed his hand upon a chair in a manner that must have been construed to mean one intention or the other. Putting his hand on the chair as he did, and having exhibited the pistol to Keating, Keating had a right to suppose that he was going to use the chair with violence. Keating's taking the plates, and using the language he did, was no provocation whatever for Herbert's doing as he did; and cannot be so regarded. In fact, the attack was made by Herbert, and in addition to that, his throwing the chair and going into the melee and fight indicated that he designed it from the commencement. I do not mean to say that he walked into that hotel, and passed into that room with the full design previously entertained of killing Thos. Keating, or any one else ; but I do say that he went there in that frame of mind indicated by the language used, with a heart regardless of social duty, and fatally bent upon mischief. The evidence undeniably proves that, and if a man, without designing to kill any one has a heart impregnated with general malice, who has loaded pistols in his pocket, and who upon slight occasion uses them, I say he is in the attitude of the "devil, going about, seeking whom he may devour." Such a man is as dangerous if not more dangerous than the man who has a particnlar hatred towards a particular man, because many things may prevent the execution of *particular* malice whil e*general* malice is seldom or never prevented: if they put themselves in that attitude, and then do certain acts, they must bear the consequences of them. The same laws you are aware, would preval, no matter, I need scarcely say, the law would be the same, no matter how humble the individual might be who became the victim of this general malice. It might be the humblest individual, or it might be the President of the United States. The law, necessarily covers all, and takes notice of the act in the same way. It is omnipresent, and its violations knows neither persons nor place. Violate the law in this or that particular place, no matter where the violatlou occurs—and you violate it every where, in this Court-room, on Pennsylvania avenue, or if you please, in the sanctuary of God.

Gentlemen, I have argued the first proposition upon the supposition that the jury from the evidence, would be constrained to say that it was a case of malicious homicide. I have presented you, as I told you I would, the facts, and the law. In doing so, I have refrained from giving to the question, the character and force of my individual opinion entertained by me. There is a distinct duty to be performed by the jury, irrespective of that of the counsel. That duty I know you will perform.

The learned judge told you, that in the absence of this malice, and if you believe certain facts, this crime will not be murder, but manslaughter. Gentlemen, I will as briefly as possible discuss the second proposition, and call your attention to the crime of manslaughter. This will particularly involve the facts which transpired further down the room; that is to say, after Patrick Keating came in. Up to this stage of the argument I have argued the question in relation to those witnesses who were present at the origin of the transaction. It is not pretended that Col. McKay. Col. Smith, Capt. Blanding, or any other witness, either Mr. Arnold or Mr. Harris, or any one else was in the room at the commencement of the affair; and I have adverted but slightly up to this time upon the evidence of Enbright, the old man who described the general features of the occurrence as I have detailed them to you. Looking at the view entertained by the counsel on the other side, you will find that they get down to that part of the room where they say the contest was going on, and where other witnesses are brought in, namely, Col. McKay, Mr. Harris, Col. Smith, and Capt. Blanding, who saw the transaction at that particular time. The counsel seek to make the case depend upon that moment, and out of the *then* state of the transaction create their right of self-defence. First let us see what is meant by manslaughter, and then what is the immediate state of the case the moment you take into consideration what the gentlemen call the struggle near the pantry door. I will first read to you from 4 Blackstone's Commentaries, p. 191, his definition of manslaughter:

"If upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter, and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion, and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also, if a man be greatly provoked, as by pulling the nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter."

Here you will perceive, it depends entirely upon the indignity and the battery which is considered in the way of a provocation, the qualification being that if a man pulls a man's nose, or offers him other great indignity. The jury are to consider what is a great indignity. It seems to be left open as to what constitutes an indignity. How far it should be regarded as an indignity, that a servant should use a rude expression in reply to a rude one first made use of by one who happens to be a member of Congress, is a matter for you to consider. The word "indignity" doubtless has its meaning, and I am not here to say it has this or that force. But whatever else it means, it certainly does mean that the party insulted shall presume the indignity afforded sufficient provocation for *instantly* putting a man to death. Whether the act is to be equal to that of pulling the nose, or some other great indignity is for you to judge, bearing in mind that the law looks to the fact that no words whatever that may be spoken, no looks, nor gestures, nothing of that kind will do.

Every man living is interested in this result; because, set it down as a rule that a man may take life for a mere indignity, and you shall have life taken on the merest pretext, the law being that the slayer shall go free. Under the English law if a man kills another, whom he takes in the act of adultery with his wife, it is manslaughter. The laws of Solon, the Roman civil law and the laws of the ancient Goths made a distinction. If the adultery took place in the husband's house, the killing was justifiable homicide. In England, however, it is the lowest degree of manslaughter, because of the grievous provocation. And I think the distinction taken by the laws of Solon, the Roman law and the

laws of the Goths is well taken--because, a stranger meeting a woman in a strange house, might not know she was a married woman, but if he violated the rules of hospitality and entered the husband's mansion, the presumption would be that he knew she was a married woman. Blackstone also says :— "manslaughter on a sudden provocation differs from a sudden act of revenge."

Blackstone in viewing the law has incorporated into it every quality of humanity, and viewed it in every respect in regard to human infirmity, so far as it was practicable.

In the same way Judge Foster, commenting upon manslaughter in his 2d Discourse, page 290, says :

"The cases falling under the head of manslaughter which most frequently occur are those where death ensueth upon a sudden affray and in heat of blood, upon some provocation given or conceived. Whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of the jury. The presumption of law is against him until that presumption is repelled by contrary evidence. Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder ; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person.

"The difference between the cases is plainly this : in the former the *malitia*, the wicked, vindictive disposition already mentioned, evidently appeareth ; in the latter it is as evidently wanting. The party, in the first transport of his passion, intended to chastise for a piece of insolence which few spirits can bear. In this case the benignity of the law interposeth, in favor of human frailty ; in the other its justice regardeth and punisheth the apparent malignity of the heart."

Judge Foster has, I think, drawn the lines between murder and manslaughter broader and plainer than Blackstone ; and I have read the whole of the page, because in the discharge of duty I conceive it to be just to present every consideration which may enable the jury to fully discriminate in relation to the guilt or innocence, or in relation to the grade of guilt which may be ascertained under the indictment.

The third proposition contemplates an inquiry into the prisoner's plea of *self-defence*. As the lines between manslaughter and justifiable or excusable homicide are so very thin, I think we may, with propriety, discuss the two propositions together. It will save repetition of facts and afford an equally fair opportunity of showing where manslaughter ends and self-defence begins. With this view I will first read to you the ruling of Judge Parker in Selfridge's case, and which is cited at length in Wharton's Law of Homicide, page 456. He says :

"*First.* A man who in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise to save his own life, or prevent the intended harm—such as retreating as far as he can, or disabling his adversary without killing him ; if it be in his power.

"*Secondly.* When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary, without retreating at all.

"*Thirdly.* When from the nature of the attack there is reasonable ground to believe, that there is a design to destroy his life or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

The first proposition, as you will perceive, looks to the case of a man in the lawful pursuit of his business, and who being thus engaged is attacked by another. This was not Herbert's case. He was not attacked. It was rather the case of Thomas Keating, who was attacked by Herbert, and, on

the authority of Judge Parker's ruling, if Keating had slain Herbert, he might have pleaded self-defence, or at most the killing would have been manslaughter.

The second proposition appears more immediately to bear upon a portion of the facts in this cause, yet there is a broad distinction between the case there put and this. It is unquestionably the law that if a party attacks me with a design upon my life, or with an intention to do me some great bodily harm, and under circumstances, where my attempt to retreat would but increase my danger, I may instantly kill the assailant; but was this Herbert's case? Who had attacked him? Who had made any attempt upon his life? Who prevented his retreat? Of whom could he be afraid? He was in fact the attacking party and the only man in that room armed with a *deadly* weapon. His Honor calls our attention to a case recently tried in this Court where a man upon a flight of stairs was attacked, and unable to retreat, slew another. I can well understand that under such circumstances a homicide might be excused; but that is not this case. Mr. Herbert, I insist, made the first attack—made it with a deadly weapon. Mr. Herbert might have retreated if he had thought proper to do so; he never was in danger of life or limb; and yet with a deadly weapon, without retreating, and in no danger except the danger of being prevented from doing what he intended to do and did do, he slew Thomas Keating; and we are to be told that this was self-defence.

The third proposition involves the other two, and constitutes a man attacked the judge of the danger to which he is exposed at the time he takes his assailant's life. In Herbert's case, whatever his apparent danger he brought it upon himself.—Even this third proposition cannot cover his case, because it, like the others, presupposes that he had been attacked by one who had a design upon his life—a fact not borne out by the evidence.

You will observe, gentlemen, that Judge Parker's ruling, and it is the strongest upon record in favor of the prisoner at the bar, goes altogether upon the supposition that the slayer has been attacked with a design to take his life or do him some great bodily harm, not that he has been the assailant or has commenced the affray. Familiarize this for a moment by putting a plain case:—I walk down Pennsylvania Avenue, and on my way I meet a man with a pistol in his hand; the man approaches, and for some reason manifests a determination to use the weapon; it is in my power to avoid him; the law says it is my duty to do so; it is not in my power to avoid him, and he presses on me with the weapon drawn;—the law says I may kill him rather than forfeit my own life. Self-defence means nothing more, it is the *necessity* under which a man may *kill* rather than *be killed*. It follows, gentlemen, that unless from the evidence you can believe that Herbert was the party upon whom the attack was made, and not the attacking party, you cannot give him the benefit of his plea, but must convict him either of murder or manslaughter.

Let us again look to the evidence, we have heard a great deal about discrepancies. Is it to be wondered at that discrepancies exist? It would be strange, indeed, if every one saw this transaction from the same point, or brought to bear upon it precisely the same powers of memory. I can well understand that witnesses may be greatly mistaken and still be perfectly honest.—Col. McKay tells you that he did not see De Venois at the time the fatal shot was fired, De Venois tells you that he was present. The jury will bear in mind that De Venois is unimpeached. He is well known in Washington, and if there had been the slightest reason for not believing him upon his oath, the

defence would have found numerous witnesses who would have testified to his bad character. McKay might be mistaken, De Venois could not be mistaken; McKay merely swears that he did not see De Venois; De Venois unless he swears positively to what he knows to be false swears truthfully to that upon which his eye rested. The transaction from its very nature was well calculated to create confusion, and when men under such circumstances swear to the presence or absence of persons with whom they had no acquaintance, they may without intending it swear to that which is not true, besides, Col. McKay does not swear that De Venois was not present, he merely says that he did not see him, on the other hand De Venois knows whether he was present or not, and knows whether or not he saw Herbert fire the fatal shot, and he tells you that he did see it and stood close to the prisoner at the time he did it. It but rarely happens that you can find three witnesse who are able to give the same account of the same transaction, one may be looking in one direction, another in another direction, the third in a direction different from the other two. Let each describe truthfully what he saw, and the statement of either will materially contradict the others. It is the idlest thing in the world to suppose that all the witnesses to a transaction are all looking at the same thing in the same moment of time; but if a man swears that he did a certain thing at a certain time and place, that is a matter within the man's own knowledge. If another man says I did not see him, that may be; but the man who did the thing cannot be mistaken. Either in such case he must swear voluntarily, wantonly, wickedly, to that which is false, or else he must speak what he knows to be true; he cannot be mistaken. On what conceivable grounds is it possible, to believe that De Venois had sworn to a lie? I do not believe it. Here is a peculiarity about truth, characteristic in itself and scarcely to be mistaken. Well judging men will see it; and I never in my life saw a more straightforward or emphatic witness than De Venois.

Mr. Ratcliffe, and you never will again.

Mr. Preston, (not noticing the interruption,) it has been said—

> "Truth is a towering dame, divine her air
> In native bloom, she walks the world with state,
> But falsehood is a meretricious fair—
> Painted and mean and shuffling in her gait."

There was no shuffling, no hobbling about this witness. He came up and stated plainly, in broken English I admit, but plainly what he knew of the transaction; his very countenance indicated that he spoke the truth. One of the gentlemen of the other side says, I shall never see such a witness again; I dare say I might see such a one to-morrow, if I am to see a French witness.

Gentlemen of the jury, there is a corroborative fact in this cause, which fully confirms the testimony of De Venois. Sometimes we are able to ascertain the truth of anything from circumstances, which as it has been justly said cannot lie. There is circumstance in this case, sufficient of itself from its very peculiarity, to establish the truth of the De Venois statement. Dr. Miller testifies that the ball passed horizontally through the body; Col. McKay represented the unfortunate Thomas Keating as standing in an upright position. Now I cannot conceive it possible, that a pistol could be discharged from the position in which it has been attempted to place Herbert, and pass the ball horizontally through Keating's body. In the case of Lord Ferrers, it is proved that the pistol ball passed diagonally through the body; and one of the questions put to one of the witnesses on the trial, proves that the victim in that case must have been kneeling. At page 913, volume 19, of State Trials, the following questions and answers will be found.

"*Attorney General.*—Did he at that time say that he had reeeived any wound, and where was it. *Dr. Kirkland*, I looked and found the wound below the lowest rib on the left side.

"*Attorney General.*—How large was that wound ? *Dr. Kirkland*, I put my little finger into it. I then took a director to search the wound. My lord told me, Mr. Kirkland, you mnst pass your instrument slanting downward. I held the pistol in this manner, when I shot him. After that, my lord asked me whether I could find the ball ? I said no, it was lodged in the abdomen."

He describes it as a diagonal wound, I refer to this case to show that in this case there is a circumstance which goes to confirm the evidence of De Venois, and to show you that in wounds given by a pistol shot, the diagonal character of the wound is descriptive of the manner in which the wound was given. Dr. Miller tells you that if a spirit level had been passed over the wound it would have been rectangular with the body. We asked him "How was that man standing when he received the shot ? He answered "If I had to swear either way, I would say he was erect." Of course he would say so, because as a professional manhe well knew that if a man was in a recumbent position when a ball passed between his ribs, the straight line could not be kept up. He said therefore that if he had to swear either way, he would swear that the act was done while the man was in an erect position.

Gentlemen, I am not presenting a theory as connected with this matter, but I am calling your minds to a fact which certainly belongs to this case, and which is illustrative of the testimony of one of the chief witnesses as a most effeceive corroboration.

In addition to the testimony of DeVenois, who gives us an account of the position of the man who was shot, we find from the testimony of another witness that there is every reason to believe what he testifies to, because of the fact that the direction of the wound is found to correspond with what he said :

On the other hand we have reason to suppose that in the satement made by Mr. McKay, that gentleman was most unquestionably mistaken. He actually swore, evidently laboring under some mistake that Patrick Keating had hold of Herbert at the time the fatal shot was fired.

Mr. Bradley. Certainly he did.

Mr. Preston. But any gentleman in that box will see that it could not be possible.

Mr. Bradley. Jerry Reardon said no such thing, but the reverse.

Mr. Preston. This is one of those characteristic facts which undoubtedly has an important bearing on the question you are trying, Patrick Keating tells you that which is so exceedingly natural. He tells you that the De Venois ran into the room crying " Save, save, save;" that he supposing himself to be in danger and having received a blow from a chair, rushed out of the room with his hands to his head. Beyond doubt Mr. McKay is mistaken, and if he is mistaken about this he is mistaken about other matters. He goes on to state that there were five persons in the room. One of them went off, leaving three besides Herbert. Two of them were near Herbert, and the other was holding a chair; and yet he tells you that he could not see Herbert because the man was " surrounded." It is a thing too plain not to be perceptible as an error. His not being able to see Herbert because he was surrounded, is something like the case of the Irishman in the revolution, who by some miraculous chance, finding a party of British soldiers at a spring who had stacked their arms, seized their weapons and marched them all into Washington's camp, and on being asked by the General how he had taken them, replied, " Why, your hon-

or, I surrounded them." (A laugh.) It was pretty much such an idea as we have presented in Colonel McKay's testimony. That he should have been standing in that room only three or four paces from Herbert and not see him because he was surrounded by three persons is inexplicable; you are to believe this, and yet when the cook came in and cries "Save, save, save," and when he says that he saw the blood come out like "one bul-*lock*," you are to disbelieve him and take his emphatic manner as a reason for disecrediting his whole statement. Why should this be done? Is it because the one is a French cook and the other Colonel McKay? If there is any reason, why you should visit upon De Venois the imputation of perjury, whereas if you refuse the testimony of Mr. McKay, you merely charge him with a mistake? Patrick Keating and the other witness tell you that he (Patrick) rushed out with his hands to his head, yet Colonel McKay did not see this. The idea that this witness is perjured is not to be thought of. Gentlemen, under all the circumstances, it is going far, very far, to indulge the idea that this poor man, Thomas Keating, was shot down in the heat of blood. If by any humane and merciful construction of law and evidence you can come to the conclusion that this is not the crime of murder, if you can believe that it was a homicide in the heat of blood, certainly you can go no further. To say that it is self-defense, is to say that a man shall be permitted to violate the sanctity of domestic life, and go into a hotel in the middle of the day and there discharge his pistol when his chance bullet might have taken the life of any one standing near—thus recklessly to deal with human existence is going too far! There is no phase of this case that will authorise the indulgence of such an idea for a moment. It is undeniable that Mr. Herbert commenced the affray, if you can call that an affray which has no mutuality about it; I do not call it an affray where a man with a loaded pistol walks in a threatening mannnr towards another who is unarmed. I call it an attack. It was an attack if it was anything, and so far as self-defense is concerned it was the deceased who undoubtedly had the right of self-defense! Where was the necessity of anything like self-defense from Thomas Keating? Had he attacked Mr. Herbert? Why should he attack him? The distance between the two men, shall I say it, was immeasurable; no not immeasurable; but at all events it was very great, and the altercation could never have occurred until Herbert by his own act had placed Keating in the position of self-defense. As my colleague has told you if the right of self-defense was any where, it vested with Thomas Keating. In the act of the prisoner there is no single quality of self-defense. To pronounce such an act one of self-defense would be to startle public judgment, the entire profession, and the laity—in short every man who would reflect upon it; all, would regard it and justly too, as an enormity.

A man guarding against the attack of another has a right of self-defence. If Thomas Keating had killed Herbert, then there would have been an opportunity for saying something about self-defence, because the attack was made by Herbert upon Keating; but looking at the incipiency of this transaction, and tracing it down through the minute and a half which it occupied—I say you can only regard Herbert as the offending party; and Gardiner also took part in it, if he did not absolutely share in the still greater violation of the law.

Where is there, throughout this whole affair, the slightest evidence of anything like peace on the part of either Gardiner or Herbert? Was there any disposition manifested, at any moment of time, to retire from the conflict? No; it was Herbert and his particular friend, Gardiner, whose power enabled him to do as he did do, aided and abetted by him at the time. The only wonder is, that Gardiner, too, has not been indicted. Without manifesting the slight-

est disposition to make peace, but, on the contrary, infringing the peace of that quiet place, the witness was, to all intents and purposes, a *particeps criminis*. At the first of it they were in the glorious position of clearing all before them, and doubtless they passed down that room with this triumphant view. Patrick Keating fled ; and as to the French cook, there was nothing belligerent about him ; but, say the counsel, there were other men. Gentlemen, you have seen the other men, and I say, and you will say, that Herbert, with a loaded pistol in his hand, aided by this powerful, athletic young man, Gardiner, wielding a chair, was more than a match for twice as many. A pretty scene, truly! Alas! What mistaken views are entertained in respect of that which constitutes glory! Think, for a moment, of a member of Congress, with his pistol drawn at Willard's hotel, a terror to women and children, the cause of affright to the startled waiters of the dining-room!! Was this the place for such an exhibition? Was this the scene for heroism? It was a false field for glory, and, let me say, gentlemen, there was none achieved upon that occasion. This shameful transaction bears upon its face the indelible sentence of disgrace. It blots the American name, and imprints a stain upon the page of Congressional history from which every true American heart must shrink with horror and disgust. Gentlemen of the Jury, what did it achieve? It struck down to death this poor, humble, toiling servant. He has gone—I repeat it, swiftly and suddenly, by the act of the prisoner, to a bloody grave ; and when witnesses are asked if they gave the fainting, bleeding, dying victim their assistance?—they answer "No ;" and tell you that, prompted by humanity, they simply led the victor from the room. Mistaken, misplaced humanity ! Gentlemen, it was a deed of horror. It sent to instant death—unnecessarily and unjustifiably—a fellow-man. His spirit walks this land—aye, even this presence—and cries aloud for justice ; it asks that the law—the outraged law—may be vindicated, that the blow that made that poor man's hearthstone desolate—that robbed a wife of her husband, and left her children fatherless, shall not go even here on earth unpunished or without its just reward. We are told of the sufferings and privations of the living. Sirs, there is something due to the dead. I admit that Thomas Keating has gone down to the grave, and it is true that—

"For him no more the blazing hearth shall burn,
Or busy housewife ply her evening care,
No children run to lisp their sire's return,
Or climb his knee the envied kiss to share."

I allow that he shall be seen no more on earth, that he is gone to "that undiscovered country from whose bourne no traveller returns" but I insist that he has been sent there under circumstances of bloody violence which do not bear the shadow of justification and in his name, and in the name of justice, I ask that the law, trampled under foot, and outraged in his death may be faithfully, honestly and impartially vindicated. To you, Gentlemen, as a jury of the country, as men bearing the American name, and charged this day to preserve, protect and perpetuate the peace and security which fairly administered laws give to society, I make the appeal, and I ask you with an earnest, solemn and conscientious sense of duty, that duty which as members of the community, we all owe to the law, not to allow this deed of blood to pass unpunished. I ask your verdict to discriminate between an act of outrage and act of self-defence.

Gentlemen of the Jury, my object here is to vindicate the law. I seek to do it ; I seek only to do it. I may, perchance, have some mistaken views of what the law is ; I may labor under error ; but if ever a man had an undying consciousness and faith in the truth of principles asserted, I feel that impulse now. I ask you to do no wrong. God forbid that I should. I ask you not

rashly or improperly to take the prisoner from society; but, sirs, however exalted his position, however lofty his place, whatever considerations may be existing, try him by the evidence, and by the evidence acquit him or convict him. I say with Mr. Webster, in the additional remarks which he made on the occasion to which I have already called your attention, and which will be found on page 35 of that trial.

"The criminal law is not founded in a principle of vengeance. It does not punish, that it may inflict suffering. The humanity of the law feels and regrets, every pain it causes, every hour of restraint it imposes, and more deeply still every life it forfeits. But it uses evil, as the means of preventing greater evil. It seeks to deter from crime, by the example of punishment. This is its true, and only main object. It restrains the liberty of the few offenders, that the many who do not offend, may enjoy their own liberty. It forfeits the life of the murderer, that other murders may not be committed. The law might open the jails, and at once set free all persons accused of offences, and it ought to do so, if it could be made certain that no other offences would hereafter be committed. Because, it punishes, not to satisfy any desire to inflict pain, but simply to prevent the repetition of crimes. When the guilty, therefore, are not punished, the law has so far, failed in its purpose; the safety of the innocent is so far endangered. Every unpunished murder, takes away something from the security of every man's life. And whenever a jury through whimsical and ill-founded scruples, suffer the guilty to escape, they make themselves answerable for the augmented danger of the innocent."

That, gentlemen of the jury, is the solemn truth. The distinguished statesman who has left us, the light of whose intellect sheds imperishable glory upon American character, who has added so much to the American name, uttered these sentiments, and they are unquestionably just. They are the sentiments which gave to the character which belonged to him its beauty and its force.—He knew how to value that peace and security which may well be considered as the greatest blessing of society. I simply ask you to indorse them.

I might, gentlemen of the jury, enlarge upon the subject: I might read to you other authorities. I think, however, I have illustrated the subject sufficiently to establish the conclusion to which the evidence has brought my mind. Additionally, it is within my knowledge that this case is to be closed by a gentleman of astuteness, learning, and power, who will be able fully to detect any fallacy of the arguments of the very able gentlemen who are here as the prisoner's counsel. Everything that ought to be done will be done by my learned colleague:—Wherein I may have overlooked anything, or have erred, he will correct or supply what I may have omitted.

Gentlemen,—I have endeavored, as I have repeatedly said, to discharge my duty, to properly fill the place I consented to take in this prosecution. It has not been to me an agreeable duty, but I have tried to perform it faithfully, fairly, and impartially. In the act which forms the subject of this indictment, I think the law has been grossly outraged, and ought to be properly vindicated. It is to be regretted that it ever occurred. I have not dwelt upon the whole of the evidence; my able colleague will do so. I have merely directed your attention to what I conceive to be the leading characteristics of the proof. I feel for the unfortunate accused, but neither you nor I, sirs, are at liberty to indulge our feelings. I ask you, in the name of all that is dear and sacred to justice and humanity, to do your duty to your country and your God.