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REPORT

OF THE TRIAL OF

BRADBURY FERGUSON,

ON AN INDICTMENT FOR THE MURDER OF

MRS. ELIZA ANN FERGUSON,

AND A

REPORT

OF THE TRIAL OF

GEORGE F. WILLEY,

ON AN INDICTMENT FOR THE MURDER OF

DAVID GLASS;

AT THE TERM OF THE

COURT OF COMMON PLEAS,

HOLDEN AT PORTSMOUTH,

IN THE COUNTY OF ROCKINGHAM,

ON THE THIRD TUESDAY OF FEBRUARY,

A. D. 1841.

BY C. E. POTTER.

CONCORD :

MORRILL, SILSBY, & CO.

1841.

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The notes of the following trials, were taken with a view to as much accuracy as the occasion would admit. The reporter, in addition to his own notes of the evidence, was furnished with those of the court, and in *revision* he has availed himself of the advantage those notes afforded for comparison and correction.

The remarks of the counsel engaged in the trial, have been kindly furnished by the several gentlemen so engaged, as also the charge of the court, for which kindness the reporter returns his sincere thanks.

It is believed that this report contains all that is necessary to a correct understanding of both cases, and as these were the first trials for the crime of murder under the statute of 1836, and *that* statute was commented upon at large, in the pleas of the counsel, and the charge of the court, it was thought a report of the same would be of interest to the public.

Entered according to Act of Congress, in the year 1841,
in the Clerk's Office of the District Court of New-Hampshire.

IN THE COUNTY OF ROCKINGHAM
ON THE THIRD TUESDAY OF FEBRUARY
A. D. 1841
BY C. E. POTTER
COMPOSED BY
NORRIS, SHERRY & CO.
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REPORT.

BRADBURY FERGUSON, of Exeter, on the 8th of October, 1840, was examined at Exeter, in the county of Rockingham, before Mr. Justice Hoitt, on a complaint for murdering (his wife) Mrs. Eliza Ann Ferguson, at Exeter, on the 1st of said October, and was ordered to stand committed.

At the February term of the court of Common Pleas for said county of Rockingham, the Grand Jury returned the following indictment.

STATE OF NEW HAMPSHIRE.

ROCKINGHAM, SS.

At the Court of Common Pleas, holden at Portsmouth, in and for the county of Rockingham, on the third Tuesday of February in the year of our Lord one thousand eight hundred and forty-one—

The jurors for the State of New Hampshire, on their oath present, that Bradbury Ferguson, of Exeter, in said county of Rockingham, hatter, on the first day of October, in the year of our Lord one thousand eight hundred and forty, with force and arms, at Exeter aforesaid, in the county of Rockingham aforesaid, in and upon the body of one Eliza Ann Ferguson, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Bradbury Ferguson, a certain gun of the value of five dollars, then and there charged with gunpowder and leaden shot, which said gun he, the said Bradbury Ferguson, in both his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Eliza Ann Ferguson; and that the said Bradbury Ferguson, with the leaden shot aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by him so discharged and shot off as aforesaid, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said Eliza Ann Ferguson, in and upon the belly of her the said Eliza Ann Ferguson, then and there giving to her with the leaden shot aforesaid, so discharged and shot off as aforesaid, out of the gun aforesaid, by him the said Bradbury Ferguson, in and upon the belly of her the said Eliza Ann Ferguson, one mortal wound, of the depth of four inches, and of the breadth of two inches, of which said mortal wound she the said Eliza Ann Ferguson then and there died. And so the jurors aforesaid, upon their oath aforesaid do say, that the said Bradbury Ferguson, her the said Eliza Ann Ferguson, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

CHARLES F. GOVE, *Att'y Gen.*

This is a true Bill—

NATHANIEL B. MARCH, *Foreman.*

On this indictment the prisoner was arraigned and pleaded *Not Guilty*.

Tuesday of the second week of the Term having been assigned as the day for the trial, there were present,

HON. JOEL PARKER, *Chief Justice.*
HON. NATHANIEL G. UPHAM, *Associate Justice.*

HON. BRADBURY BARTLETT, } *Judges.*
HON. DUDLEY FREESE, }

HON. CHARLES F. GOVE, *Attorney General,*
HENRY F. FRENCH, Esq. *Solicitor.*

Hon. Ichabod Bartlett and James W. Emery Esqr. were assigned, by the Court, as the prisoner's counsel.

The prisoner was set to the bar and forty-eight jurors appeared and answered.

The Clerk then addressed the prisoner as follows:

"Bradbury Ferguson—These good men who have been called, and have answered to their names, are those who are to pass upon your trial. You have a right to object to twenty of them without giving any reason, and to more, if you can show sufficient cause. If therefore, you wish to object to them, or any of them, you may challenge them when called to be sworn, and before they are sworn, and you shall be heard."

The list of jurors was then called over in the form and manner usual in capital cases. The Clerk, as each juror was called, and had risen, repeating—*"Juror, look upon the prisoner—prisoner, look upon the juror—what say you—have you any objection?"*—and the jury were selected as follows:

Benjamin Blanchard	of Windam	Challenged.
Simeon Jewell	Stratham	

Mr. Bartlett of the counsel for the prisoner, proposed that this juror should be questioned as to his vicinity to the place of the transaction, and whether or no, his opinion as to the matter, had not been influenced by conversation and common report. After the juror had been questioned by the Court touching these points, and had said that his opinion had not been thus influenced, the

Attorney General observed, that some men from philanthropy or other causes, doubtless satisfactory to themselves, pro-

fessed to have conscientious scruples as to the right of Government to take the life of an individual in the course of the administration of the law, and he should ask the Court to question every juror upon this point.

Mr. Bartlett thought the statute of '37 very definite upon this subject. That statute obviated all difficulty on the score of conscientious scruples. It is so framed, said he, that the juror who has conscientious scruples as to the right of the Government to take life, *may* go for the conviction of the prisoner for murder in the second degree.

Mr. Bartlett then read the statute.

“*Sect. 1. Be it enacted by the Senate and House of Representatives in General Court convened—That all murder hereafter committed by poison, starving, torture, or other deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, may be murder in the second degree. Every Jury who shall find any person guilty of murder, hereafter committed, shall also find by their verdict, whether it is of the first or second degree. If any person shall plead guilty to an indictment for murder hereafter committed, the Justices of the Court having cognizance of the indictment shall determine the degree.*

Sect. 2. And be it further enacted—That if any person shall commit the crime of murder in the first degree, such person shall, on conviction thereof suffer death. And if any person shall commit the crime of murder in the second degree, such person shall, on conviction thereof be punished by solitary imprisonment not exceeding three years, and by confinement to hard labor for life.”

It appears evident, continued Mr. Bartlett, from this statute, that the conscientious scruples of a juror should be no cause of challenging or passing him. The statute has not made it binding upon him to bring in the prisoner guilty of murder in the first degree—he *may* do so, or *may* not, as his opinion is in favor or against capital punishment. If this had not been the intention of the Legislature, if they had not *purposely* left the matter at the *discretion* of the jury, they would have made the statute peremptory—they would not have said the jury *may* do thus and so—they would have said *shall* do thus and so—No, the Legislature have clearly left the matter with the jury out of mercy—it is an advancement with the age—it is a

stride in the march of civilization—it is a page in the history of *penal legislation*, that speaks much in favor of the progress of the principles of humanity.

The Attorney General said, he agreed with his learned brother to a certain extent—It was true the Legislature had *classed* the crime of murder—this was in favor of the principles of humanity. The jury, by the statute, could not bring in a verdict against the prisoner at the bar of guilty of murder in the first degree, if he had merely committed murder without *malice aforethought*. The Legislature had *classed* the crime of murder—so that the jury could not pass from one class to the other in their verdicts, either by *mistake*, *prejudice*, or *scruples*. The question of *degree* must be settled by the *evidence*, not by the *scruples* of the jurors. If the evidence fail to show murder in the first degree, it is reduced to the second degree—but the *scruples* of the jurors are not to do it. The jury are to be free upon the panel—such is the oath—and that juror must be guilty of perjury, who, after taking the juror's oath, from *conscientious scruples*, refuses to find a verdict of guilty of murder of the first degree, if the evidence clearly proves the crime within *that* degree.

The Court ruled, that the statute does not effect the question. That an individual having conscientious scruples as to the right of Government to take life in the administration of the law, is not a competent juror, for he cannot render a verdict—he cannot execute the law—it is therefore a cause for challenge, and the juror having such scruples should be passed—he should not be upon the panel. The Court then put the following question to the juror.

“Have you such conscientious scruples in regard to the right of the Government to take the life of an individual in the course of the administration of the laws, that you could not in any case, whatever, might be the evidence, render a verdict which might subject the prisoner to loss of life!”—The juror answering, that he had no such scruples—was

Sworn.

The same question was put to each juror, by the Court, at the request of the Attorney General, before he was sworn.

Daniel Wiggin,

Thomas J. Goodwin,

Joshua Currier,

Stratham,

South Hampton, Do.

Sandown,

Challenged.

Do.

Stephen G. Johnson,	Seabrook,	Challenged.
Joseph Rand, jr.	Rye,	was questioned by the
Court, at the request of the Counsel for the prisoner, whether he		
lived near the scene of transaction and had formed an opinion		
upon the same—bnt answering in the negative was		Sworn.
Joseph L. Seavey,	Rye,	Challenged.
John Wallace,	Raymond,	Do.
Joseph Sanborn,	Poplin,	had formed an opin-
ion upon the subject, and was		Passed.
Joshua Johnson,	Portsmouth,	Challenged.
Nathaniel Clark, jr.	Plaistow,	had doubts as to
the expediency of capital punishment, but it being recognized		
upon the statute book, he could agree to execute the law		
according to evidence, and was		Sworn.
John L. Pickering,	Newington,	Do.
David Marston,	North Hampton,	Do.
Simeon Rowell,	Newtown,	Challenged.
George Vennard,	New Castle,	Sworn.
John Tarlton,	New Castle,	Do.
Samuel Smart,	New Market,	had formed
an opinion upon the subject, and was		Passed.
Ephraim Day,	New Market,	had formed
an opinion upon the subject, and was		Passed.
Asa Parks,	Nottingham,	Sworn.
Daniel Harvey,	Nottingham,	had formed an
opinion upon the subject, and was		Passed
Miles Knowlton,	Northwood,	Sworn.
John B. Tasker	Northwood,	Do.
William Plummer,	Londonderry,	Challenged.
Robert Mack,	Londonderry,	Do.
Jacob Webster	Kingston,	Do.
Henry Elkins,	Kingston,	Do.
Stephen Brown,	Kensington,	Do.
Emery Batchelder,	Hampton Falls,	Sworn.
Obed S. Hobbs,	Hampton,	Challenged.
David Towle, Jr.	Hampton	Do.
Tristram Little,	Hampstead,	objected to by
the Attorney General, on account of the juror's conscientious		Passed.
scruples, and was		
Amos Seavey,	Greenland,	Challenged.
Joshua Pickering,	Greenland,	Do.

Robert Shute,	Exeter,	living at the place
of the transaction, had formed an opinion, and was	Passed.	
Benjamin R. Perkins,	Exeter,	living in the vicini-
ty of the transaction, had formed an opinion, and was	Passed.	
John Blaisdell,	Epping,	living in the vicini-
ity of the transaction, had formed an opinion, and was	Passed.	
William S. Batchelder,	East Kingston,	Challenged.
Osmond Spofford,	Danville,	Do.
William Anderson,	Derry,	Sworn.

William Anderson, Esq. was appointed Foreman, and the jury was called over as follows:

William Anderson,	George Vennard
Simeon Jewell,	John Tarlton,
Joseph Rand, jr.	Asa Parks,
Nathaniel Clark, jr.	Miles Knowlton,
John L. Pickering,	John B. Tasker,
David Marston,	Emery Batchelder.

The jury having been empannelled, the Clerk read to them the Indictment, and then addressed them as follows—

“To this indictment the defendant has pleaded not guilty, and has put himself on the country for trial, which country you are; and you have been sworn to truly try the issue. May God send him a good deliverance—Good men and true, stand together and hearken to your evidence.”

Mr. French, the Solicitor, then opened the case as follows;—
Gentlemen of the jury,

If the unfortunate man who has been arraigned before you, is guilty of the high crime of which he stands accused, his situation is awful indeed, but if he is innocent, he has nothing to fear. So many are the safeguards thrown around every man by our constitution and laws, and so great are the precautions against injustice, that it may be said with confidence, that it is impossible that an innocent man should suffer. To some of the steps preliminary to this trial I shall briefly advert. Before any man is even put upon his trial for a crime, the accusation against him is first laid before a Grand Jury, sworn to present no man for envy, hatred, or malice, and the witnesses before that jury are sworn to testify the whole truth and nothing but the truth. Twelve at least of the Grand Jury must agree that the accused shall be *presented* for trial. An indictment is then drawn, in which

by the requirement of the constitution, the offence is "fully and plainly, substantially and formally, prescribed," a copy of which is furnished to the prisoner before he is arraigned.

A list of all the witnesses which the counsel for the State propose to use upon the trial, with a list of the jurors returned to serve on the same, with their names and places of abode, is required to be furnished him at least forty-eight hours before the trial, that he may be the better prepared to examine the witnesses, and to impeach them, if their credibility is doubted, and to object to such of the jurors as he shall think proper.

To the prisoner is given the right to challenge, without assigning any cause, twenty of the number, and any further number against whom he can show cause of objection.

Counsel, learned in the law, are assigned him, and the process of the State is put into his hands to compel the attendance of the witnesses to be used in his defence. And lastly, he is put upon his trial before a jury of his country, sworn to render a verdict according to the law and the evidence. With all these precautions, I repeat it, it is impossible that the innocent should suffer.

The prisoner at the bar is indicted for one of the highest crimes known to the law—the crime of murder—under this charge, it is in your power, according to the evidence to find him guilty of any crime of a less degree of the same nature, and I deem it my duty therefore, to state to you plainly the laws in regard to what constitute the different classes of crimes of this nature.

Any killing of one man by another, is termed homicide.—Homicide of a less degree than manslaughter may be considered as falling into three classes.

Justifiable homicide, where the killing is in consequence of an imperious duty prescribed by laws, or is owing to some unavoidable necessity, induced by the party killed, without any fault in the party killing.

Excusable homicide, where the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to be partly induced by his own act.

Homicide by misadventure, where a man doing a lawful act, without any intention of bodily harm, and after using proper precautions, unfortunately kills another.—As where a parent intending merely to chastise his child, unfortunately takes its life.

The two remaining classes before our statute of 1837 were manslaughter and murder.

Manslaughter may be defined, where death ensues from sudden transport of passion, or heat of blood—although the act which occasioned death, be unlawful, yet it is without malice. The law in such cases makes allowance for the frailty of human nature, and so lessens the guilt of the offence.

But this is by no means a slight crime, as the punishment prescribed for it by our statute will show. Manslaughter is punished in New Hampshire, in either of these modes, according to the aggravation of the offence, at the discretion of the court. First, the punishment may be by fine of one thousand dollars or less.—Secondly, by fine not exceeding five hundred dollars, and imprisonment in the county jail not exceeding one year—and thirdly, by solitary confinement not exceeding six months, and imprisonment at hard labor for life.

Yes, Gentlemen, even for manslaughter, for killing in the transport of passion and heat of blood—even for this secondary offence, imprisonment for life may be inflicted as the punishment.

Murder is where a man of sound mind and of the age of discretion, kills any one with malice prepense, or aforethought, either express or implied.

Every man who has his right reason, that is to say, who is not *mad* or *insane*, may be said to be of sound mind. But loss of reason by drunkenness, which is sometimes a species of insanity, affords no excuse for crime, for a drunken man is at best but a *voluntary* madman.

Malice is the distinguishing mark between manslaughter and murder, and as it is all important that you should understand the *legal* signification of the term, I shall attempt to define and illustrate it.

The most obvious case of malice, is where the accused intends to take the life of a particular person, and deliberately effects his purpose.

But it is by no means essential to the true idea of *malice*, that there should have been malice against *any particular individual*.

If, for instance, one should poison a public fountain, where passengers are accustomed to stop and drink, and a stranger should be poisoned to death thereby, here would be *malice* and murder, although the murderer and his victim had never known or seen each other.

And it is not essential to malice, even that there should be an intention to *destroy life* at all, if the intent be unlawful.

As if he intend to *maim* merely, and use a deadly weapon and kill, this is malicious murder.

Again it is not necessary to prove express malice; it may be presumed or implied from the act of the accused. If one wilfully place poison in a cup from which another is about to drink, although no cause of previous enmity can be shown, and no express malice appears, yet malice is *implied*. The principle of law is, that every man intends the natural consequence of his act. If one deliberately aim a loaded gun at another and discharge it, and so take life, both the law and common sense, would necessarily infer or *imply* malice, or an intention to murder. Implied malice is merely malice proved by the nature of the means employed—the words *express* and *implied* relating rather to the mode of proof, than to the moral quality of the act. The principle is plain, although the application has sometimes been considered difficult, but is so, only when there is a doubt whether the means employed or instrument used, is of a nature probably to produce death.

Malice then is taken to be proved, or is *implied*, when a deadly weapon is used. Malice when thus implied, may be disproved by evidence of sufficient *provocation* by the deceased, to excuse the act in some measure, and reduce it to manslaughter.

It is essential that you should clearly understand what may constitute such a provocation as to palliate the guilt of the accused. Provocation by *words* is never a sufficient excuse to lessen crime from murder to manslaughter. No abuse by words merely, however violent or outrageous, is sufficient.

Nor is any act, by blows or otherwise, a palliation for crime, unless it be recent, so that the act is done in heat of blood.

And if there be proof of *express* malice at the time of the act, the provocation is of no consequence and cannot reduce the crime, because the act is not induced by the provocation. As for instance, if one set out with an express intention and declaration of a purpose to kill another, and upon the way meet his intended victim, who at once attacks him, and provokes him by blows and is killed, this is murder, for there was malice in the heart of the slayer, and a previous intention to take life, so that, whatever the provocation, it was not the inducement to his death.

Evidence of former threats, and enmity on the part of the prisoner, is admissible to show express malice.

Mr. French then read from Roscoe's Criminal Evidence the following passages—

Page 578-9—The malice necessary to constitute the crime of murder, is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act which may probably end in depriving the party of life. The malice prepense, says Blackstone, essential to murder, is not so properly spite or malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart, and it may be either express or implied in law,—express, as where one, upon a sudden provocation, beats another in a cruel and unusual manner, so that he dies, though he did not intend his death; as where a park-keeper tied a boy, who was stealing wood, to a horse's tail, and dragged him along the park; and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died. These were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 4 Bl. Com. 199. Also, continues the same writer, in many cases where no malice is expressed, the law will imply it, as where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. Id. 200. The Scotch law resembles our own in this particular, and the rule is well laid down by Baron Hume, "Our practice," he says, "does not distinguish between an absolute purpose to kill and a purpose to do any excessive and grievous injury to the person, so that if the pannel assault his neighbor, meaning to hamstring him or cut out his tongue, or break his bones, or beat him severely, or within an inch of his life; and if in the prosecution of this outrageous purpose, he has actually destroyed his victim, he shall equally die for it, as if he had run him through the body with a sword. The corrupt disregard of the person and life of another, is precisely the dole or malice, the depraved and wicked purpose, which the law requires and is content with." 2 Hume, 254, 256.

Page 591—If a man assault another with intent to do him a bodily injury, and death ensue, malice, sufficient to constitute murder, will be presumed, provided the act be of such a nature, as plainly and in the ordinary course of events, must put the life of the party in danger. 4 Bl. Com. 200. A remarkable case, which may be classed under this head, is mentioned by Mr. Alison. The deceased, a chimney-sweeper's boy, of eleven years of age, stuck fast in a chimney. The prisoner, having fastened ropes round the legs of the deceased, drew them with such force, that, notwithstanding his cries and remonstrances of those present, the boy died. Being charged with this as murder, the presiding judge, Lord Justice Clerk, with the concurrence of the court, laid it down as clear law, that this was an instance of absolute recklessness and utter indifference about the life of the sufferer, and that the law knew no difference between the guilt of such a case, and that of an intention to destroy. Rae's case—Alison's Crim. Law of Scotl. 4.

Page 95—Words of reproach how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder; neither are indecent or provoking actions or gestures, expressive of contempt or reproach, sufficient, without an assault upon the person. But a distinction is to be observed, where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill or to do some great bodily harm, in which case it will be murder, and the case where he strikes with a stick or other weapon, not likely to kill, and unluckily, against his intention, does kill, in which latter case it will only be manslaughter.

Page 596 — Although, under circumstances, an assault by the deceased upon the prisoner may be sufficient to rebut the general presumption of malice arising from the killing, yet it must not be understood that every trivial provocation which in point of law amounts to an assault, or even a blow, will, as a matter of course, reduce the crime to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in its manner or continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty, and is one of the symptoms of that which the law denominates malice, and the crime will amount to murder notwithstanding such provocation. Barbarity, says Lord Holt, (Keate's case—Comb. 408,) will often make malice.

Page 598 — In considering the question of malice where death has ensued after provocation given by the deceased in assaulting the prisoner, or upon other provocation, especial attention is to be paid to the nature of the weapon with which death was inflicted. If it was one likely to produce that result, as used by the prisoner, he will be presumed to have used it with the intention of killing, which will be evidence of malice; if, on the contrary, it was a weapon not likely to produce death, or calculated to give a severe wound, that presumption will be wanting.

Page 600 — In order to rebut the evidence of malice, it must appear that the provocation was recent, for in every case of homicide, however great the provocation may be, if there be sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. Foster, 296. With respect to the interval of time allowed for passion to subside, it has been observed that it is much easier to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. It must be remembered that in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received, to the very instant of the mortal stroke given, for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled, any time before the mortal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, it being attributable to malice and revenge, rather than to human frailty. 1 East, P. C. 252. 2 Ld. Raym. 1466.

Page 604 — As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there is proof of *express malice* at the time of the act committed, the provocation will not reduce the offence from murder to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide.

Page 71 — So the *declarations* of a prisoner made at a former time are admissible, where they tend to prove the intent of the party at the time of the commission of the offence. Thus on an indictment for murder, evidence of former grudges and antecedent menaces may be given to show the prisoner's malice against the deceased. 1 Phill. Ev. 169. So in treason, what was said by the prisoner with respect to what was passing at the time of the transaction laid as the overt act, may be received in evidence to explain his conduct, and to show the nature and object of the transaction. Watson's case—2 Stark. 134.

By a recent statute of this State, the crime of murder has been divided into two classes. This statute I will read to you.

*Sect. 1.—Be it enacted by the Senate and House of Representatives in General Court convened—*That all murder hereafter committed by poison, starving, torture, or other deliberate and premeditated killing, or which shall be committed in the

perpetration or attempt to perpetrate arson, rape, robbery, or burglary, *may* be murder of the first degree; and all other murder shall be of the *second* degree. Every jury who shall find any person guilty of murder, hereafter committed, shall also find by their verdict, whether it is of the first or second degree. If any person shall plead guilty to an indictment for murder hereafter committed, the justices of the court having cognizance of the indictment shall determine the degree."

As counsel for the State, Gentlemen, we feel it our duty to contend, that the prisoner has committed the crime of murder in the first degree, and having stated to you the law in reference to crimes of this nature, I shall now proceed briefly to state the facts which will probably appear in evidence, and apply the law to them in conclusion.

It will appear that the prisoner who on the first day of October last was a resident in Exeter—on that day in company with others from Exeter, attended a muster in Epping, from which he returned at about eight o'clock in the evening, having drank considerable spirit through the day, but not being intoxicated. At about nine o'clock, Mrs. Ferguson, the wife of the prisoner rapped at the door of a neighbor, Mr. Gordon, and said she could not stay with her husband—She was admitted, and soon after the prisoner sent his son, a lad of about thirteen years old, to tell Mrs. Ferguson to go home—She said she did not dare to go, and remained—Shortly afterwards, the prisoner himself went to Mr. Gordon's and demanded his wife—insisted upon having her, and declared he would not leave the house without her.

He conducted so violently there, that Mr. Gordon thought it prudent to go for the police, and the prisoner returned to his own house—The police called at the house of the prisoner, who was perfectly calm and apparently rational—He told them Gordon had secreted his wife, and he would not put up with it, and appealed to them to say whether they would bear such conduct, and said all he wanted was to have his wife return and stay with him—He denied entirely that he had abused his wife, and said if they would induce her to come home, she would not say before him that he had abused her—She was then sent for and went home—She was then asked in presence of the prisoner, whether he had abused her or not—She said he had. The prisoner denied it.

She then said she could state before God that he had abus-

ed her, both on that night and at many other times. He replied, show your wounds, and repeated it many times—She answered, “if I cannot show marks, you have abused me, you know what you threw at me and broke it all to pieces.”—Much conversation of a similar nature passed, which it is not necessary to repeat—In the course of it, the subject of a divorce was introduced, and the prisoner said he would sign one that night, if the officers would write it—He finally promised if she would remain with him that night, all should be made right in the morning—She was asked several times if she would stay, and at last replied faintly, “I will try to.” The prisoner then conducted the officers to the door, at about twelve o’clock, and after renewing his promises to treat her well, civilly bade them good night, but he declared, as he did so, that he would never live with her after that night.

Nothing was heard from the prisoner until between two and three o’clock in the morning, when his little sons, who slept in a chamber were awakened by the report of a gun in the house.

They immediately hastened down to the room of their parents, and saw their mother lying upon the floor, near the fire place, and met their father coming from her room—One of them asked him what he had done, and he replied “I have shot her,” and went out. He soon returned, and inquired of his wife where his clothes were, and she informed him that they were in a certain closet, and he went and got them. She then asked him to place her upon the bed, and he did so. She was observed to speak to her youngest son, but it will not probably appear what she said—The prisoner then told his oldest son that he might have the gun, and that he might call the neighbors, but remarked at the same time “It will do no good.” He then left the house, and his son immediately called in the neighbors, who found Mrs. Ferguson mortally wounded by the charge from the gun.

Her clothes were entirely burnt through, by the powder, so near to her had the gun been held.

She survived about fifteen minutes after the neighbors came in, but spoke nothing that could be understood. It will be proved that the gun, which was a small fowling-piece, had been loaded previously by his son, and that the prisoner *knew it*.

We shall contend, Gentlemen, as I have said, that the prisoner has committed murder of the first degree, and shall introduce evidence tending to show that he meditated her death

for a long time—Such evidence of malice long continued, and threats of violence often repeated, will be laid before you, that you will be asked to believe that this was a case of murder by deliberate and premeditated means. I will mention a few of the facts which will appear in evidence, showing the prisoner's previous conduct towards his wife. About two and a half years ago, the prisoner occupied a house, with a Mr. Clark, who will testify that there was frequent disturbance in the prisoner's family, and that on one occasion Mrs. Ferguson burst into the room and fell prostrate upon the floor, the prisoner being in pursuit of her, and exclaiming as she fell, "There, damn you".

About two years ago, the prisoner was heard to say to her, that he would have her heart's blood—She replied to him "Ferguson, you dare not, you dare not do it."

Soon after this time, the cry of murder was heard in the night, and the prisoner was seen out of doors with an axe, club or some other instrument, walking about and swearing that he would have her heart's blood. At a subsequent period, in 1839, the prisoner lived near Mr. Hoitt, who will testify to repeated acts of outrage and violence—that the prisoner frequently abused her, by striking and kicking her, and that he frequently would drive her from the house half naked by night in the cold and storm—Upon one night, which was cold and stormy, she was driven from the house and kept out until her night clothes were frozen—and at another time, the prisoner beat her cruelly with a chair.

It will also be proved that a few months before her death, the prisoner declared that if he could not be divorced from his wife, he would put her in a situation to trouble him no more.

And for all these menaces and acts of violence, Gentlemen, the prisoner, it is believed, can offer no excuse whatever—No provocation can be shown—On the contrary, Mrs. Ferguson it will appear, was a woman of amiable and unoffending character.

The prisoner himself in a full confession made since his arrest, does not even pretend that she did anything, which could palliate his crime. His account of what transpired after the police left his house, is that he went to bed and slept a few minutes, and awoke and saw that his wife still sat by the fire, that he asked her to come to bed, and she declined,

that he then told her she should come, and she said she should not—that he then sprang from the bed, seized the gun, which had been loaded by his son, and shot her. His only attempt at excuse was, that he hardly knew how the gun went off—The prisoner, it will appear, had not even the miserable excuse that he was intoxicated. His recollection of the facts that occurred on that night, was too clear to admit of the pretence that he was not perfectly in his right mind—Every fact confessed by him, compares precisely with the statement of his son—excepting indeed one. He states that he slept but a few minutes, whereas in fact he must have slept nearly three hours—He was not intoxicated apparently when the police left him—If he had been, a sleep of three hours would have dissipated all effects of spirit.

I have said that his recollection was perfect—Yes, Gentlemen, he even recollected that he examined the wound of his dying wife, to see if it were mortal—that at her request he laid her on the bed. He remembers to have asked her for his clothes, and all that passed between his sons and him. There are circumstances about the transaction, which show a fearful and remarkable deliberation and a perfect consciousness and recollection of every act. He knew the gun to be loaded, he went to the corner of the room for it, he cocked and fired, aiming accurately and holding it close to the person of his victim. And, Gentlemen, he gives the reason for this, with awful precision. He has said that he had to go close to her because it was so dark.

You will be perfectly satisfied that the deed was done without provocation on the part of the deceased, and with perfect deliberation on the part of the prisoner, when in perfect possession of all his faculties.

It has been more than intimated on the part of the learned counsel for the prisoner, that it will be contended that you have a discretion under our late statute, even if the crime is brought within the description of murder in the first degree, to render a verdict of murder in the second degree.—You will have the aid of counsel for the state, far abler than myself, and also of the court to expound the law upon this point.

But Gentlemen, if you have a discretion, then to your discretion do we confidently appeal to render a verdict of the highest crime of this nature. The design of punishment is

not revenge, nor is it alone to prevent a repetition of crime on the part of the prisoner, but it is chiefly to strike terror into the hearts of others, and deter them from crime, from fear of punishment, and the policy of the law. Justice to others—humanity itself demands that the punishment for crime of this nature, should be of that kind most likely to effect that object—And, Gentlemen, there is nothing that strikes terror into the soul of a wicked man, I may say indeed of any man, like the fear of death. Death is emphatically the king of terrors. Will it be urged that imprisonment for life is a punishment more fearful than death itself? It is not so, Gentlemen, it is not so—Ask of the man who is in full possession of liberty, unaccused of crime, and free from danger of its consequences, and he *may* perhaps thoughtlessly say that he should prefer death to perpetual imprisonment—But ask of him who has committed or ever meditated crime, who has thought of the punishment as likely to fall upon himself, and he will tell you that the fear of death is without a parallel in the list of punishments—Ask of the man who under sentence of imprisonment for life is living out day by day, the penalty of his guilt—Ask of him to appoint the day, the hour, the minute, when he will give the order for his own execution, rather than add one more day, and still another, and another to his miserable existence; and he will tell you that though life is a burden, death is still more terrible.

Ask of the prisoner who now stands before you accused of the horrid crime of the murder of the wife of his bosom, whom he had sworn to love and protect, ask of him whether *he* would choose the penalty of death rather than a life in prison—Ask of the learned counsel who will argue the defence, whether they believe that death is a lesser punishment than perpetual imprisonment—If the prisoner and his learned counsel ask you so to say by your verdict, then may we believe, that in one instance at least, our proposition is not sustained.

There always is in society a large class of unprincipled men, men who are deterred from crime only by the fear of punishment.

Many a poor victim of cruelty and wrong is subject to the control of men who are restrained in their malice and cruelty only, by the fear of the penalties of the law. Take from them the fear of this *worst* penalty, release them from the fear of death, and you will see an increase of crimes of this

nature, unparalleled in the records of guilt. The poor victim in the case before us relied alone upon this protection, but even this did not save her. She knew that the affection which he had once professed, if it ever existed, had changed to deadly hatred—that his plighted faith was broken, but still she relied upon the law for her protection—upon this principle of fear alone she relied—and she resolved, for the sake of her children, still to remain and bear her wrongs, and when he made the horrid threat that has been repeated, that he would have her heart's blood, she disclosed the reason why she still dared to remain with him, when she replied “Ferguson you dare not do it.”

Gentlemen, it is an unpleasant duty in which we are engaged, but still it is a duty and one which we are under the most solemn obligations faithfully to discharge.

If, upon a full hearing of the evidence and arguments of the learned counsel under the direction of the court upon the law, you can consistently with the oath you have taken, render a verdict of acquittal, or of any less offence than the highest known to our law, no one will be more gratified than the counsel for the state. But you will remember, Gentlemen, that your office is not that of *mercy*, but of *justice*, and I close with the expression not only of the hope, but of entire confidence, that your verdict will be such as to do justice not only to the prisoner, but to yourselves, your country, and your God.

After Mr. French had closed, the Attorney General observed to the court, that his ill health warned him not to proceed any farther, at this time in the case, and he would ask it as a privilege that the court adjourn.

The court then remarked to the jury, that, as usual in such cases, they must not separate until their verdict was rendered, that proper food and lodgings would be provided for them, and that the proper officers would be in attendance upon them.

Adjourned.

Wednesday morning, nine o'clock.

The jury were called, and all answering to their names—The counsel for the Government then proceeded to introduce the evidence in support of the prosecution.

John T. Gordon—sworn. Resides in Exeter, knows prisoner, his house being about eight rods from that of prisoner. On the

evening of the 1st of October last, about 9 o'clock, as witness was about retiring, heard a rap at his door—soon heard the voice of Mrs. Ferguson below, saying she could not stay with her husband—was afraid to, or was afraid of her life; don't know which she said. Mrs. Ferguson was admitted. Soon heard another rap at the door—pushed up the window,—it was the prisoner's boy,—wanted to speak with his mother,—soon heard a third rap, and the voice of the prisoner, demanding with very loud voice where his wife was, and saying he'd have her, and no one should keep her from him. Mrs. Ferguson, soon after, passed through the chamber where witness was, and went out at another door. Ferguson soon followed, came into the room, repeating many oaths. Witness told him to leave—said he wanted his wife—wouldn't leave the house till he had her. Prisoner then attempted to pass through the chamber, but witness stepped betwixt him and the door through which Mrs. Ferguson had passed, and told him he should not go about his house. Prisoner said he'd have his wife—witness said he should not. Ferguson then seized witness by the collar, pushed him aside, and passed out through the door in search of his wife. Witness told prisoner he'd have him taken care of. Prisoner then struck his hands together in a most violent manner—witness was afraid of his life, and went out for the police. On his return, he found Ferguson had gone home, and went with police to his house—rapped at his door; he opened the door partly, but seeing some one behind witness, prisoner attempted to shut the door, but not with violence. Witness kept the door open, and entered with the police.—They inquired what was the matter. Ferguson replied, nothing. They added, but a complaint has been made against you. He then said his wife had left him—witness had secreted her—and asked police how they would like to have their wives secreted or taken from them. He denied abusing his wife. Police thought witness should go and call Mrs. Ferguson.—Witness went for her, and she came over with him. Police asked her if her husband had abused her.—She said he had, and called God to witness that he had. Prisoner said he had not, and asked his wife to show the wounds. She said, "If I cannot show wounds, you know, Mr. Ferguson, that you have abused me," and called God to witness. The talk was contradictory betwixt prisoner and his wife—prisoner wanted his wife to stay, or if she preferred, she might go to witness'

house. Witness objected—he was unwilling to have Mrs. Ferguson in his house—did not feel safe—feared Ferguson would commit some act of violence if his wife should go to the house of witness. Mrs. Ferguson was asked if she was willing to stay with the prisoner, two or three times, and at last said, in a very faint voice, she would try to.

(The witness was here asked by the counsel for the government, if he recollected that anything was said about something being thrown by the prisoner at his wife.)

Witness recollects something was said when Ferguson denied to the police having abused his wife—Mrs. Ferguson said to him, “Don’t you recollect what you threw at me, and broke it all to pieces?” Something was said about a divorce. Ferguson said he would sign a divorce then, if the police would write one—that he would stay with his wife that night, but would not live with her after. The police then thought it best to leave. As they were going out, one of them, Mr. Foss, witness thinks, took up a gun and looked at the lock. Witness left with the police. Prisoner went to the door with them and bid them good night.

We left the house about 12 o’clock. Ferguson promised the police, that if they would go away and leave his wife there, he would not abuse her in any shape, manner, or form.

(The witness was here asked by the counsel for the government, to describe the situation of the room.)

There was a bed in the room—it was a lower room—and the bed stood in the centre of the room, towards the south—the head towards the south—the gun was in the corner of the room, about five or six feet from the bed, and nearest the head of the bed. There was a fire-place in the room, on the west side of the room, and nearest the foot of the bed.

(The witness was here asked by the counsel for the government, if he recollected if anything was said about a child.)

In reply, witness stated that while Ferguson was asking the police how they should like to have their wives leave as his had done, he went to the bed and turned down the bed-clothes, where was a child two or three years old, and asked them how they should like to have their wives go away and leave such a child. It was Mr. Adams, witness thinks, who asked the prisoner if he would let his wife remain, and not abuse her. The passion of the prisoner had calmed down—he did not appear as he did at the house of the witness—was much calm-

er, and less passionate. The witness says prisoner went to the door with police, but cannot say whether he took a light or not—but thinks he did.

Some time in the night witness again heard a rap at his door—it proved to be the prisoner's oldest boy who was at the door. The boy said his mother was *shot*, and was *dying*, and begged the witness to go over to their house *quick*. The witness asked the boy where his father was, and the boy replied that he didn't know—he had gone away. The witness thought it would not be safe for him to go over, and he called up a man in his house and sent him to the neighbors for assistance. In the morning witness went over to the prisoner's house. This was the third or fourth time Mrs. Ferguson had fled to his house under such circumstances—said she was afraid of her life—appeared much agitated, and trembled like a leaf. The deceased had stayed at witness' house two or three nights. Ferguson had come after his wife once or twice, and desired witness to ask her to come to the door. The witness says he had talked to him—had talked to them both—and Ferguson would promise that he would not injure or abuse her, if she would go home with him—his wife would then go home with him, and nothing more would be heard from them at such times. Witness thinks the prisoner has been to his house after his wife, three times previous to the night of the murder. He had lived near the prisoner from the spring, or the first part of the summer, until the time of the murder.

Cross-examined.—Does not know that the prisoner had been in the habit, for years, of drinking ardent spirits to excess, but should judge from seeing him on some occasions, that he drank ardent spirit. There was a training, or muster, at Epping on the day that Mrs. Ferguson last came to the house of the witness for refuge from the prisoner.

John H. Strickland—sworn. Resides now in Methuen, Mass., but lived with Mr. John T. Gordon, in Exeter, on the 1st of last October. Mr. Gordon's house is only a few rods from where Ferguson resided. The witness went to the muster at Epping with Ferguson on the 1st day of October, and returned with him the most of the way. The witness went to bed, and was awakened about 10 o'clock by Mr. or Mrs. Gordon, who told him that Ferguson was in the house in a great rage.

Witness got up and dressed himself. Upon going into the

room, Ferguson asked him where his wife was. Witness told him he did not know where she was, and could not tell him. Mr. Gordon then went for the police. Ferguson then went over the house after his wife. Soon after he put his hand into the hair of the witness, and asked him very earnestly where his wife was. The witness told the prisoner to take his hand out—he could not tell him where his wife was. At this time, Mr. Gordon, an old gentleman, father of the former witness, John T. Gordon, being awakened by the noise, came out of his sleeping-room, and told Ferguson to clear out of the house. Ferguson said he would not—he'd have his wife first. "Well," said Mr. Gordon, "I'll get my cane, and then I'll see if you won't go." While the old gentleman was after his clothes and cane, Ferguson left the house and went home, as witness supposed. The prisoner did not hurt the witness when he put his hand in his hair—he looked angry—supposed he done it to make him tell where his wife was.

Witness knew nothing more of the difficulty until two or three o'clock in the morning, when Mr. Gordon awakened him, and said that Ferguson's boy was down at the door, and said his mother was shot. Mr. Gordon wanted the witness to call the neighbors. He went to Messrs. Leavitt's and Fogg's, and then went to Ferguson's house. Witness found the prisoner's son William, standing at the side of the bed on which his mother was lying, holding a light—asked the boy if his mother was shot—the boy said she was—removed the cloth from the wound. The deceased looked up very wishfully. Witness thought she was going to speak, but she was unable to. Witness then spoke to her, but she did not answer. Witness then asked Mr. Leavitt to go for the physicians. She died in about 15 minutes after. The deceased was lying on the bed. There was no one there but witness, Mr. Leavitt, and the boy. The boy was standing by the bed with a light, shivering—it was cold. Witness did not see a gun in the room.

Cross-examined. Witness went to live with Mr. Gordon on the 16th of last April. Ferguson did not live near there then—he came to live near by Mr. Gordon's soon after—about the first of the summer. Witness does not know whether Ferguson used liquor to excess only from report—saw him drink musters-day a number of times. He was more

talkative at Epping than he was on the road up. Should think Ferguson knew what he was about. Left him at Mr. Falls', about 1-4 of a mile from home. Witness does not know that they had spirit there—a brother of witness, and one or two others went in—witness did not. They drank before they got there—witness thinks Ferguson drank twice—not certain—does not know that Ferguson drank when leaving Epping. They started from Epping towards night, got to Falls' about 8 o'clock. Witness did not know of Ferguson's having any difficulty at Epping—saw none—saw him at Fogg's—went there in the morning, and started from there at night—knows of no difficulty at Fogg's.

In answer to questions from the counsel for the government, witness replied—that he does not know the distance from Epping to Exeter—saw Ferguson drink once or twice on the way home—thinks it was at a shop or store.

Samuel W. Leavitt—sworn. Resided, on the 1st of October last, at Exeter, within 15 or 20 rods of the prisoner's house. No other family in the house. It is 8 miles from Ferguson's home to Epping. Witness went to the muster at Epping, in company with Ferguson, on the 1st of October, and returned home as far as his house with him. Ferguson went on—got home betwixt 8 and 9 o'clock. After this witness had been to supper, Mrs. Hook, one of the neighbors, called at his house and asked him to go over to Ferguson's house, and said he was quarrelling with his wife. The witness refused to go, as he wanted nothing to do with the matter—Mrs. Hook came a second time—the witness refused again to go—she came a third time, and again the witness told her he would not go. Afterwards witness concluded to go. He went without the knowledge of any one, that he might find out what the difficulty was between them. He went out of the back door—when near Ferguson's house, listened—went to the door—found it fastened—said, "Halloa, Ferg." He answered, "Halloa, Sam, is that you?" Witness went into the house—found Ferguson in a considerable of a rage. He showed witness his child, and asked him how he would like to have his wife serve him so—"It was too d—d bad." Witness laughed at him, and told him it was folly for him to act so and make such a fuss—that he injured himself by it. Ferguson then said his wife was at Mr. Gordon's. Witness told him it was a pity she could not come

home and live in peace, and if he would promise not to abuse his wife, he would go to Mr. Gordon's and get her to come home—Witness went to Mr. Gordon's, and there heard how Ferguson had abused Mr. Gordon's family—Gordon had gone for the police—did not enquire for Ferguson's wife—returned to Ferguson's house and found Adams and Foss there. Ferguson said he would not live with his wife after that night—he would sign a divorce—and much other talk—the same as Mr. Gordon has related. After Mrs. Ferguson came home, witness left the house, but stopped with Mr. Fogg at the door, until the police came out—went away with them—heard Ferguson say “good night,” to the police.—Witness then went home and went to bed. Betwixt that time and morning, witness was awakened by Strickland, who said that Ferguson had shot his wife. Strickland asked witness to get up and go to Ferguson's house---told Strickland to call Fogg. Witness then dressed himself and went with Strickland and Fogg to Ferguson's house---saw the boy, William, holding a light by the side of the bed. Witness asked the boy where his father was---he replied that he was gone. Asked him where the gun was---he said it is in the closet.---Witness took the light and went up to the bed where Mrs. Ferguson was lying---said she was dying. She opened her eyes and looked wishfully, as if she would speak---she put her hand to her forehead---her right hand, he thinks, but did not speak. Witness asked where the wound was---the boy told him. Witness then took off the covering, and saw the wound---it was on the belly. The deceased was lying on her back, a little inclined to her side, covered with a quilt---don't know whether she had clothes on or not, as he did not notice in particular. Witness went for Drs. Gorham and Perry---when he returned Mrs. Ferguson was not living. Don't recollect that he saw the gun.

Cross-Examined. Witness has known Ferguson six or seven years---does not know that he is in the habit of getting intoxicated---can't say that he has ever seen him under the influence of liquor---can't say that he has seen him drink often---have seen him drink---can't tell how often---don't know whether Ferguson drank or not on muster day---don't know that he'd work a week or two, and then have a *spree*---muster day was stormy---went and came with Ferguson---started from my house with him---went to Fogg's--went with

a carriage, can't say whether Ferguson drank or not, or whether I drank or not, or whether the party drank or not. I saw to the horse---all went in one carriage---Messrs. Fogg, Robinson, Strickland, Ferguson, and myself---trained in the same company with him---there were tents upon the field---can't say whether Ferguson drank at them or not, or whether I did or not. We were dismissed two hours before we came away---stayed at Fogg's in Epping, saw Ferguson a number of times. I drank at Fogg's before we came away, but can't say whether Ferguson did or not. We stopped once before we got to Exeter, to get something to drink. I took care of the horse, the rest went in. I don't know who drank, and who did not---some one paid the bill, don't know how much was paid for liquor. We then went to Col. Stevens' store in Exeter---stopped there to have a drink. I think Ferguson drank there. I think all the company drank there. Witness drank but once there---don't know how many were there, perhaps eight or ten---can't say whether Ferguson drank more than once or not. Col. Stevens' store was 1-2 or 3-4 of a mile out of our way---went there to have a drink---stopped at Fogg's after we left Col. Stevens' store---Fogg lives about a mile from Stevens'. Ferguson went in---I drank---can't say whether Ferguson drank or not---Fogg asked him to drink---don't know whether Ferguson ever declined drinking or not. Fogg's house is 20 or 30 rods from Ferguson's house. There was a dispute at Epping betwixt Ferguson and some one---it was at Fogg's tavern. Ferguson was threatening to fight with some one. I went in---think I took him by the arm, patted him on the shoulder, to pacify him---stopped in but a few minutes, then went out---don't know whether a man went out with me or not---left Ferguson there with some one---don't know who it was.

John Foss—sworn. Resides in Exeter---am one of the police of Exeter. On the evening of the 1st of October last, about 10 o'clock, some one rapped at my door, I asked who it was. He replied, Mr Gordon, and that he wanted me to go to his house and take care of Ferguson. I told him to call Mr. Adams. I then went to Mr. Norris', got a horse and chaise and went to Mr. Gordon's house. Ferguson's wife said he'd gone home. Mr. Gordon went with us to Ferguson's house---he went to the door and rapped, while we stood right behind him. Ferguson asked, who is it? Gordon said, it is me. Ferguson then opened the door, but as he saw us, he pressed the

door back as I thought. However we entered the door and went to go into the West room, but Ferguson went forward with a light into the East room, and said, Gentlemen walk in, and we went into the East room and sat down in a chair near the foot of the bed. I asked what the matter was, and he replied in the same manner as Mr. Gordon has already stated—the same conversation took place as already related by Mr. Gordon. As we were coming away I took up a gun which was in the corner of the room, and looked at the lock. It was a percussion lock. I can't say whether it had a cap on or not. While witness was there, Mrs. Ferguson said her husband struck her that evening. Ferguson replied, Mrs Ferguson, do you say I struck you? She answered, yes. Ferguson then turned round and smiled, but did not reply. His striking her was said to be the cause of her leaving the house that evening.

Cross-Examined. Witness has been acquainted with Ferguson, 10 or 15 years—never saw him in any affray, nor when he appeared intoxicated. He always appeared to me the same.

In reply to the counsel for the Government, the witness said Ferguson did not appear intoxicated that night.

Nathaniel S. Adams—sworn. Resides in Exeter, about one mile from where Ferguson lived on the 1st of October last—is one of the police of Exeter—was called upon on that evening by Mr Gordon, to go to his house and take care of Ferguson. Went with Mr. Foss—can't say anything as to what took place at Ferguson's house, other than what has already been stated by Messrs. Gordon and Foss. Have been called to take care of Ferguson, as a police officer, at other times previous to the 1st of October. Thinks he was called about a year since to take care of him for abusing his wife. Went to the house, asked about the difficulty. Ferguson said there was no difficulty. Mrs. Ferguson said the same. He then called in a Mrs. Clark who lived in the house, and she said Mrs Ferguson had screamed murder a number of times. Ferguson then started to go to bed, when witness clinched him and they both tumbled over the supper table, and put the lights out. Ferguson got away from him as he was much stouter—thinks he would have got away from 2 or 3 persons. As witness could not handle prisoner—he thought he would get out of his way as soon as possible. Mr. Nathaniel Pearson called upon witness about 8 months since, to take

charge of Ferguson, found him opposite Mr. James' store—no difficulty between him and his wife at that time.

Cross-Examined. Witness has known prisoner 5 or 6 years, has seen him drink liquor and cider every day two or three months—never saw him intoxicated—does not know of his drinking large quantities every day—don't know of seeing him drink more than once a day. When witness clinched the prisoner, his wife joined in and took his part.

John B. Ferguson—sworn. Is the son of the prisoner—Father came home from the muster on the evening of the 1st of October last, about 8 o'clock. Witness went to bed, and soon after, about 9 o'clock, he heard a noise in his mother's room, which was below stairs. When witness got up, his father was up stairs. He told witness to go over to Mr. Gordon's, his mother was over there, and to tell her to come home. Witness went over to Mr. Gordon's and asked his mother to come home, but she said she was afraid to. Witness then went back to the house, his father asked him if his mother was coming. He told him she wouldn't come home. His father then told him to go over again, and he sent him a number of times, but his mother would not come home—did not see his mother every time he went, but saw Mr. Gordon or some one of the family. They told me mother would not come home until the police come. When father come over to Mr. Gordons', I went home—was at home when father came home, and when the police came—was not in bed. After the police went away I went to bed—was in bed some time—heard the report of a gun, don't know how long after I went to bed the last time. Got up and went down stairs, did not dress myself—brother William who slept with me, went down with me—met father going across the entry from the room where mother was, into another room—asked father what he had done, and he replied that he had shot mother. Went into the room where mother was—she was lying upon the floor near the fire-place, her head towards the fire-place—did nothing as there was no light. Father returned and tried to light the lamp, but could not—he tried with matches. Witness then put a new wick and oil into the lamp and lit it. Thinks his mother spoke to his brother, but does not know what she said. William asked father what he shot mother for. He replied that she provoked him to it, but did not say how she provoked him. Father then asked mother where

his best clothes were, and she told him they were in the closet---the closet was in the room where mother was. He took the clothes and put them under his arm, I think— don't recollect whether he changed his clothes or not. Mother asked father to put her upon the bed, and he did so---don't remember as father said anything to her, except to ask about his clothes. Father looked at the wound and witness looked at it at the same time. It was before mother was put upon the bed, and thinks it was before father asked for the clothes, but not certain. The wound was upon the belly. Father told me I might call the neighbors, but didn't tell me not to go, till after he was gone. Witness dressed as soon as he could after his father told him he might call the neighbors. When his father was leaving the house, he told witness he might have the gun---went for the neighbors in a few minutes after his father left. Thinks father said mother would not live. Witness went first to Mr. Hooks, but could not wake them, then went to Mr Gordon's---returned home, found mother living, but she died soon after. Witness don't recollect as father said anything to mother as he went out. The gun was fathers---witness had used it a few days before---don't know the day---loaded the gun when he last used it---used it to kill squirrels and birds---thinks he brought it home loaded. It was loaded with powder and shot. The gun had a percussion lock---dont recollect whether he left a cap on or not---thinks he left the gun in the corner of the room---sometimes put it in the corner and sometimes in the closet. Left William with mother, when he went for the neighbors. Saw the gun in the corner of the room after father went away.

Samuel Tilton---sworn. Resides at Sanbornton---is a deputy sheriff. On the 6th of last October, witness was called upon by Mr. Thomas C. Haynes of Northfield, to arrest a man who he said had shot his wife at Exeter. A number of men went in pursuit of the prisoner---witness first saw the prisoner at a cider house about 2 miles from Sanbornton Bridge, and about 50 miles from Exeter. There were a number of people in the cider house---say a dozen in and about it. Witness arrested the prisoner, and asked him if he was the man who shot his wife at Exeter. He replied, yes. Witness then asked the prisoner why he shot her. He replied, I don't know. It is done and it can't be helped now, and I am willing to suffer for it. Witness then told the prisoner he must be searched

and go with him—Proceeded to search the prisoner, found nothing of consequence upon him—bound him and carried him to Sanbornton Bridge. Prisoner said he treated his wife well, but she had not treated him well. She would leave and be gone all night. She was more to blame than he was in the affair. On the way to Exeter, Ferguson told witness the particulars of the affair—He said he had been to muster, returned in the evening and found his wife absent. In the course of the evening she came home, and he went to bed. Left his wife sitting by the fire, asked her to come to bed, she refused. Prisoner went to sleep, waked up—his wife was still sitting by the fire. He again asked her to come to bed—she again refused. He then told her she should come to bed, and his wife said she would not. At the same instant, prisoner jumped out of bed, caught the gun and shot her. She fell upon the floor or hearth. It was so dark he could hardly see her—could hardly discern her person. As his wife fell she said, I guess you have done it for me now, or something to that purpose. Prisoner said he didn't know how he came to fire—the gun went off easy, he was sorry the moment he done it, and said he would have given a thousand worlds if he had not fired. He waited a short time, lit a lamp—stopped some time thinking the wound might not be mortal, examined the wound, thought it was mortal, and asked his wife for his clothes—she told him where they were. She then asked him to lay her on the bed, he did so. Prisoner said he then got his clothes, but hesitated whether to go or stay and be taken—concluded however to leave—got about 5 miles and thought he would go back and give himself up, but concluded to go on, as he might reach Canada. Witness asked prisoner if he was jealous of his wife. He at first said he was, but afterwards said he was not jealous of her. Prisoner said he first heard of his wife's death that day he was taken, from those who were in pursuit of him, as he was sitting behind a rock.

Witness told the prisoner he had better make no acknowledgment, he was under no obligations to, but he insisted on talking about the affair all the way down to Exeter.

Prisoner said the gun was loaded by his son to kill squirrels. Witness asked him what he done with the gun, and he said he gave it to his son.

Thomas C. Haynes—sworn. Was acquainted with Ferguson 15 years ago—has seen him once since his marriage, prior

to the day of his arrest. Had heard of the murder from Mr. Sheriff Dearborn, who requested him to be on the lookout as prisoner might pass that way. Soon after he passed his house. Witness did not know him at first—clothes were not such as had been described—knew him as soon as he had passed the house. Witness got his horse and went after prisoner. Went for Mr. Tilton—saw prisoner a number of times on ahead—left the carriage and next saw Ferguson getting over a wall. Witness alarmed the folks at work in the fields. People turned out and followed Ferguson into the bushes. Witness passed him, went through the bushes, returned and found him at the cider-house. Prisoner had taken a back track. He said he shot his wife. Witness and Mr. Tilton brought the prisoner to Exeter. Can state nothing more than what Mr. Tilton has just stated. Prisoner said it was so dark he could but just discern his wife. Don't recollect as he spoke of distance from her when he fired.

David W. Gorham---sworn. Resides at Exeter—is a Physician—was called to examine the wound of Mrs. Ferguson by Mr. Leavitt—went with Dr. Perry. It was about 4 o'clock in the morning—found the body of Mrs. Ferguson on the bed. She was dead when we arrived. Were told she had been dead 15 or 20 minutes. She was lying on her back a little inclined to the right side, covered with bed clothes. She had on a loose gown, and the usual underclothes. On removing the bed clothes saw no wound. Should think the wound was given before gown was put on. On removing the gown the wound was to be seen. A place was burnt in the underclothes 4 inches square. Thinks it was done with gunpowder, as it was blackened. No blood was to be seen on the clothes, very little upon the body. The wound was about 2 inches in a direct line below the navel, and about an inch in diameter, so small that we were in doubt whether it were done with a ball or with shot. We proceeded to examine farther, turned the body over to see if the charge had passed through it. Upon turning it over a large quantity of blood was discharged from the wound. There were two quarts or more of it, so much that it passed through two beds to the floor, and ran several feet upon the floor. The underclothes were burnt. The petticoat was of cotton flannel---the shift was of cotton. There were no other garments except a calico gown. No further examination was then made. After-

wards however, at the suggestion of a justice and in order to discover whether the deceased came to her death by a shot or ball wound, witness with Dr. Perry made a more minute examination. The wound was enlarged, it penetrated almost directly inwards, was doubtless given in a standing position, and we found the intestines literally shot in pieces. Found that the great artery that passes down in front of the back bone was wounded. The large discharge of blood doubtless proceeded from this artery. Four shot were taken out which had hit against the back bone. They were taken out by Dr. Perry, who has them in court. Whether death would ensue from injury to an artery, would depend upon the size of the artery, and manner of the wound. An artery torn by gunshot would contract and not permit the blood to run so freely as if cut. Death would not follow such a wound so quick as one from some other instrument. There are many cases on record in proof of this. The blood in the body and upon the floor, was sufficient to cause death.

William Perry—sworn. Resides in Exeter—is a physician and surgeon. Was called up 1-4 past 4 o'clock, to go with Dr. Gorham and examine the wound of Mrs. Ferguson; lives about 1 mile from Ferguson's house—requested messenger to have Dr. Gorham in readiness. Went in company with Dr. Gorham, and found her lying on the bed as he has already related. Her gown was open down to the pit of the stomach. The wound was obvious when the gown was removed. The under-clothes were burnt—skin was black—but very little blood was to be seen. Witness agrees with Dr. Gorham, except as to the position of the wound. Dr. Gorham has placed it too low. Witness measured the distance, and found the wound to be just 1 1-2 inch below the navel, an inch in diameter, and very ragged. We turned the body over, and there was a large discharge of blood—thinks from 3 pints to 2 quarts, at least. The under-clothes were burnt through. The petticoat was of flannel, and crisped. Witness is satisfied that the wound was the cause of her death.

Upon the second examination, at the suggestion of a justice, witness enlarged the wound—put in his hand—found the intestines much wounded; some pierced, others torn. Passed the hand through, and found where the shot had struck the spine and lodged, and found some of the shot—four of them—has them with him. (At the suggestion of the Attorney

General, the shot were produced and shown to the court and jury.) These are the shot taken from the wound. Witness concurs with Dr. Gorham in what he stated as to wounds in the artery causing death.

Samuel Clark—sworn. On the 1st of last October, resided in Exeter—resides there now—is a farmer—3 years coming March, witness lived in the same house with Ferguson. He moved out the following November.

Mr. Bartlett, of the counsel for the prisoner, here observed that he understood the counsel for the government intended to prove by this witness that difficulty existed between the prisoner and his wife some 2 or 3 years since. He thought such evidence inadmissible. He would submit to the Court whether such testimony was proper.

The Attorney General thought it would appear from the books that the government had the right to put in evidence of the prisoner's former treatment of his wife. The treatment had been *in continuendo*, as would appear from the evidence.

The Court ruled—That they could not exclude this testimony. There might be a point of time when the evidence of abuse would not be relevant; but if the abuse had been *in continuendo*, it would be difficult to limit *that* point. The evidence of abuse would be more or less relevant, as it was near the transaction. If there was no abuse at a time near the time of the crime, the evidence would have but little weight; but if it appeared there had been a continuation of abuse, it would have weight—let the witness proceed.

Witness said he moved out 2 years ago last November. In the October before he moved, saw prisoner abuse his wife. Witness was sitting by the door, in the first of the evening—the door burst open, and Mrs. Ferguson fell into the room upon the floor. Ferguson was close behind her, and his foot or hand was raised against her—can't say which—as she fell upon the floor. Ferguson said, "There, d—n you." Had often heard noise in their room—a continual buzzing—but couldn't say what the conversation was—it was not pleasant. At another time witness heard Ferguson say to his wife, "I'll have your heart's blood." She replied, "Mr. Ferguson, you dare not do it." This was before she burst into witness' room. Don't know how long—heard nothing more that could be understood.

In the September previous, Ferguson was noisy one evening, and witness told him to go to bed. Witness went to bed. In the night was awakened by the cry of murder—witness got up, and asked Ferguson what the matter was—said, “Ferguson, what are you about?” He answered, “You stop, Clark, and I’ll tell you all about it.” Witness didn’t want to hear, but told him to go to bed, or he would complain of him. The cry of murder was given by a sister of Ferguson’s wife. Witness afterwards saw Ferguson walking back and forth before the door with a club or some instrument in his hand, saying, “I can see her, and I’ll have her heart’s blood.” Witness understood him to mean the sister.

The counsel for the prisoner here objected to such testimony, as having no bearing; and

The Court ruled—That so much of the testimony of the last witness as related to the sister of the deceased, should be set aside.

Ira B. Hoitt—sworn. Lives in Exeter—has lived near the house of the prisoner. The prisoner moved into a shop just across the door-yard of the house the witness was building. While building house, witness was in the habit, as he passed from his office in the evening, of looking about his premises, to see to the safety of his lumber, and other building materials. On such occasions witness often heard loud talk between Mr. and Mrs. Ferguson, but does not recollect the exact language used by either of them upon all occasions.—Witness often listened, as he could not very well help it. Recollects that prisoner would often speak low, but Mrs. Ferguson talked in her usual voice. On one occasion, recollects hearing Ferguson call his wife “a d—d Portsmouth w—e,” and that she, in reply, said, “A Portsmouth w—e is as good as a Sandwich w—e.” On one occasion, witness thinks he saw the prisoner raise a chair and strike his wife over the head with it. Prisoner was abusing his wife—calling her bad names—she recriminated a very little. Witness is positive that he saw something similar to a chair pass the window, and is positive that he struck his wife or the chimney, as he heard the crash. Ferguson was sitting down—when talking, he jumped up, seized a chair, and struck at her, as witness saw the chair pass the window distinctly. She begged him to desist. Witness went to the door, but could not enter. The difficulty betwixt prisoner and his wife was con-

stant, and he was as constant in calling her bad names. One night in December, witness was waked by the cry of murder—the cry was so shrill as to wake up all the folks in the house—slept in an east room. While dressing, or lighting a lamp, the bell rang. Witness opened the door, and Mrs. Ferguson was standing at the door in her night clothes, and a child in her arms. It was a cold night. The light blew out—lit the light—the wife of the witness came out. Mrs. Ferguson was wet from head to foot—hair all over her head—her child was as wet as she was. She had stood out so long that their clothes had become frozen. She was in great tribulation—had merely her night clothes on—just as she came from her bed. Witness made a fire, and his wife covered Mrs. Ferguson with some comfortable clothing.

In a short time prisoner came in. Witness asked him what he had been about. He made no answer. Mrs. Ferguson said that while in bed, Ferguson turned down the bed-clothes and poured a pail of cold water on her and her child—that she then moved over, and he turned a second one upon them, and he kicked her out of bed, and then kicked her out of doors. Ferguson then made answer, “d—n you, that is just what you deserve—you are a d—d w—e.” Ferguson said he would have the child. His wife held on to it—witness was unwilling he should carry the child out, as it might freeze; but he persisted in having the child, and his wife gave it up, and he carried it away. Sometime after, Mrs. Ferguson went home, and witness observed that she stood some minutes at the door before she gained admittance. A week after, witness again heard the cry of murder—the family was awakened—some of the neighbors were disturbed—one woman was halloaing from the window—witness went to the door. Mrs. Ferguson was standing at the door with her child in her arms. She came in, and as she did so, she said, “Now, Mr. Hoitt, I *am* killed,” or words to that effect. This was about 2 o’clock—she was much agitated. Soon after, Ferguson came in—wanted the child—wrenched it from his wife, and began to abuse her; called her a w—e—turned to witness, and said, “Hoitt, I wouldn’t keep the d—d w—e in the house, *she’s all blood.*” Mrs. Ferguson answered, “you done it, you injured me.” Blood was visible upon her. She tarried 2 or 3 hours each time at the house of witness. When she went home, her husband wouldn’t let her in at first. Witness was disturbed as many as ten times during that winter,

by Ferguson's conduct—so frequently, that his family seldom went to bed without the expectation of disturbance from Ferguson's brutal treatment of his wife. In May, Ferguson was committed to jail for ill-treatment of his wife. Witness saw him in jail. He was very penitent, very anxious to get out of jail. Six or 8 weeks after getting out of jail, witness met him one evening near his gate, very much enraged with Mr. Pearson. Spoke of his wife—called her a bad woman; said that Pearson had her for his own use, and that he would be divorced from her. Witness told Ferguson that *he* could not get divorced from his wife, but that *she* might from him, because she had done nothing that could justify a divorce. Ferguson then said, "If I can't get divorced, I will put her in a way that she won't trouble me any longer." Ferguson moved in the fall of 1839. This was after he moved—can't recollect the precise time.

Cross-examined. When Ferguson was in jail, his wife visited him daily. Witness asked her why she went to the jail. Never knew that he was under the influence of liquor positively. Have been of the opinion, from his talk, that prisoner was under the influence of liquor—merely a matter of opinion, however; can't recollect the time of his committal.

(The Attorney-General here remarked to the Court, that he was prepared to go into the general character of the deceased. He was thus prepared, because the prisoner had persisted in charging his wife with the difficulties between them, and he wished to prove her perfectly pacific in her character, in order to disprove this charge of the prisoner. He would submit it to the Court for decision.)

The Court observed, that they were not aware of any rule that would permit the government to put in her general character, as disconnected from the rest of the evidence. It had not appeared, thus far, that the deceased was of a quarrelsome disposition.

John B. Ferguson called again by the Court and questioned. "Was your father dressed when you came down stairs, after you heard the report of the gun?" A. Thinks he had his pantaloons on.

The government here closed the evidence on the part of the prosecution.

Mr. Bartlett then observed to the Court, that the defendant

on his part, would offer no evidence for the consideration of the jury.

Adjourned.

Wednesday, 3 o'clock, P. M.

The jury was called, and all answered to their names.

Mr. Bartlett, on the part of the defence, addressed the jury as follows :

May it please your Honors :

Gentlemen of the Jury :

The situation in which I am placed is not new to me. Similar duties I have not unfrequently been called to perform. The ordinary avocations of our profession become familiar by repetition, and we may come to them with diminished anxiety and concern. But it is far otherwise on occasions like the present. Every renewed contemplation of the solemn duties in which we are now engaged, overwhelms my mind with the weight, the seemingly insupportable weight, of their awful responsibility. Slightly as any labors of mine may be connected with the result of this investigation, I cannot remove from my mind the impression, that my efforts may have some connexion, perhaps, for weal or woe, with the destiny of a fellow-mortal, here and hereafter. I cannot get rid of the feeling—the *conviction*, that, while deliberating to take, or not, the life of a fellow-being—that life, which is the immediate gift of God, we are assuming to do what is not granted to human power—what is not—cannot be—sanctioned of Heaven.

In what perils must erring mortals be involved in “using the attribute of divine power, without the infallibility which can properly direct it !”

You have been selected, Gentlemen of the Jury, by the prisoner, to pass upon the charge now made against him, not because he could have believed that you had lived beyond the influence of the popular excitement that has prevailed against him. He knows too well what exaggerated statements of his conduct have been made, to suppose, for a moment, that they have not reached the remotest residence in our borders. He has chosen you, in the confidence that you will *endeavor* to prevent any impressions heretofore received, from having an improper influence upon your judgment here. The circumstances with which he is surrounded, render it, if not impos-

sible, extremely improbable, that he can be impartially heard. Our abhorrence of the horrid crime for which he is on trial, creates a feeling of prejudice against the accused. The law, it is true, says he shall be "presumed innocent until he is proved guilty;"—but the law says what is practically untrue—impossible.

The place of confinement from which he came to this house;—the criminal's bar in which he stands, is associated with guilt; and we cannot now turn our eyes upon him and say we are uninfluenced by such associations. The immense throng who have followed in the street, and now crowd this house, are anxious to look, not upon a man they presume innocent, but upon "the murderer." A homicide, under any circumstances, committed by a person standing in the relation of the prisoner to the deceased, cannot have failed to impress upon every mind deep feelings of prejudice against the accused. I have no fear that you will give way to such feelings, when you become conscious of their existence.—It is their unseen, unperceived power, that is to be dreaded. Even the forms of arraignment and trial, which the counsel for the government has noticed as the securities placed around the prisoner for his protection, may have an indirect operation to strengthen impressions of his guilt. The *exparte* finding of a Grand Jury adds something of an official character to the vague charges of public rumor, and the technical forms of the indictment give all the aggravated epithets of criminal purpose to the facts set forth.

The counsel for the government has said, that under our forms of trial, "it is impossible that the innocent shall ever suffer."

"Impossible that the innocent shall ever suffer!" While these words are uttered, I would to Heaven that I could forget the horrible scene that has been so recently exhibited in a neighboring county;—the public execution,—no; by its true name, the *official murder*, of a poor insane boy, as irresponsible for his acts as the sleeping infant in the cradle.

The dangers from those errors which can never be retrieved,—the increasing doubts of the *right* of human tribunals to take life,—the strong conviction in the community of the *inexpediency* of capital punishment,—in a word, the progress of civilization and christianity, are fast hastening on that reform in criminal jurisprudence, which the christian dispensa-

tion demands,—a reform which will blot from the statute-book the bloody code of more barbarous ages.

By an act of the legislature of this State of the 13th of January, 1837, a most important change was made in the law upon this subject.

A large proportion of the legislature were opposed to the infliction of capital punishment in any cases ;—some doubting the *right*, and others questioning the *expediency* of such punishment ; and a bill was introduced to substitute imprisonment for death. The difference of opinion among the members of the legislature was compromised by the passing the act referred to.

I ask your attention to the provisions of that act, and the views which I shall present in relation to its construction.

The first section provides “That all murder hereafter committed by poison, starving, torture, or other deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, may be murder of the first degree ; and all other murder shall be of the second degree. Every jury who shall find any person guilty of murder, hereafter committed, shall also find, by their verdict, whether it is of the first or second degree. If any person shall plead guilty to an indictment for murder hereafter committed, the justices of the court having cognizance of the indictment, shall determine the degree.”

The second section provides that persons convicted of murder in the first degree shall suffer death ; and that persons convicted of murder in the second degree, shall be punished by solitary imprisonment, not exceeding three years, and by confinement to hard labor for life.

The third section provides the same punishment for treason, as for murder in the second degree.

The fourth section enacts, that where a person is convicted of a crime, the punishment for which is solitary imprisonment and confinement to hard labor for life, that in relation to contracts, matrimony, estate, &c., the person shall be deemed to be civilly dead, and his estate shall be administered upon, &c.

The fifth section enacts, that in cases of sentence of death, the same shall be executed in the walls or enclosed yard of the prison, and that certain persons, by the act designated, shall alone be allowed to be present.

The sixth section repeals all former laws inconsistent with these provisions.

Under this statute this prisoner is now to be tried. The usual points in controversy, in trials of this character, are not now in dispute. That a homicide has happened, and that the death was caused by the prisoner, is not a question. The particular circumstances attending that most unfortunate event will be considered in connexion with our remarks upon the degree of the offence committed.

Our first position is, that under whatever circumstances the death may have been caused, even if within the precise definition of murder in the first degree, it is competent for the jury to find him guilty only of murder in the second degree, if, upon any considerations, they so deem it expedient. The legislature were divided in opinion on the question of the *right* and of the *expediency* of capital punishment, and they seem purposely so to have varied the language in relation to murder in the first and second degree, as to leave to every jury who should have to pass upon the charge, to determine the question of capital punishment or imprisonment for life, by leaving to the jury to find all murder in the second degree, if they should deem it expedient.

The language is, murder of a particular description *MAY* be of the first degree; all other murder *SHALL* be of the second degree. It is true, that the word *may*, in our statutes, sometimes is read *shall*, but it can hardly be supposed that the legislature used the words *may* and *shall* in their immediate connexion and contrast in the first section of this act, without intending to give to each its technical and appropriate meaning.

It may perhaps be said, that while a certain definition is given to murder of the first degree, and that all other murder shall be of the second degree, if that so defined is not found of the first degree, it cannot be found to be murder at all,—as not coming within the terms, “all other murder.” In answer to this, we contend that the whole section is to be read together, and that the jury are to determine the degree, and that *all other murder* is “all other” than that which they *find* of the first degree.

I am aware, that from the question which the court have permitted to be put to the jurors in making up your panel, we may infer that they hold a different construction of this

section of the statute ; but with the most profound respect for the opinion of the court, the deep conviction I feel, that the intention of the legislature was such as I have suggested, and that the language of the law fairly admits of such interpretation, in a case of this awful import to him for whom I appear, I am not at liberty to forbear to urge the considerations which seem to me appropriate upon this view of the law.

If, then, the circumstances of this case were such that the offence could be found within the definition of murder in the first degree, I contend, that under the oath you have taken, you are at liberty to find the accused guilty of murder in the second degree, provided, that on the question of *right*, or *expediency*, you deem it better to substitute solitary imprisonment and hard labor for life, for the punishment of death.

With the endeavor to lead your minds to the conclusion to which mine has long since arrived upon this subject, I will briefly suggest some considerations why imprisonment and not death should be inflicted as a punishment for the highest crimes known to our law.—For every other offence but murder in the first degree, it has already, by our law, been substituted, and for that offence, as I contend, you are left to determine the punishment.

I make no apology for repeating suggestions which are not new, and which before have been urged by me on other occasions than those of professional duty.

Judges as you are of the law and the fact, and called upon to take the life of the prisoner, it is your right,—it is your *duty*, to inquire, whence comes that power. If you believe you possess it, if still it be *doubtful*, or if the exercise of it be of more than doubtful *expediency*, such doubts should deter you from assuming it.

If you *doubt* your right to take life, I demand of you to stay your hand.

If, possessing the abstract *right*, you doubt the *expediency* of entailing upon the community the irremediable evils of a public execution, then let me demand of you to pause, before you decree it.

But we are asked, Is not this power over human life given in so many words, in the statute book? Yes; and so once was the same punishment inflicted for robbery, arson, burglary, and witchcraft too ;—but whence does the legislature derive the power of so enacting? We may be answered, they

have the authority of all ancient time, and of almost every government. So has the rack, the wheel, and other engines of torture. Our immediate ancestors retained upon their list of offences punishable with death more than two hundred crimes, till the efforts of Sir Samuel Romily and other philanthropists recently reduced that bloody catalogue. With such a list of capital offences, with the aid of the engines of torture to make or extort proof, we need not be surprised to find that seventy-two thousand persons perished on the scaffold in England, during the reign of one prince alone, Henry the eighth. Light from Heaven has dispelled such darkness from our system of legislation and jurisprudence. The number of offences now punishable with death, by the laws of the United States, is only nine, and by the laws of this State, this is the only crime in which the jury are at liberty to take human life.

But where does the legislature find its authority even for giving that liberty? In case of murder, it is urged, that the authority is from Deity; that it is the express command of God; that the command is found in the text, "whosoever sheddeth man's blood, by man shall his blood be shed." The ecclesiastics of the early ages, who sought for and found in the scriptures pretences for the exercise of temporal arbitrary power, found like plausible justifications to shield their own heads from its penalties; and the *benefit of clergy*, as it was called, or in other words the impunity of the ecclesiastics in the commission of crimes, was derived from the text, "Touch not mine anointed, and do my prophets no harm."

It has by many of the learned been contended, that the text so often cited in relation to capital punishment is not the true reading of the original; but if it were, is a christian community to be governed by the ordinances of the Jewish Theocracy? Then must we take the whole law of retaliation "an eye for an eye and a tooth for a tooth." Then may we renew the shocking scenes of the seventeenth century, under the command, "thou shalt not suffer a witch to live." Then must we abolish the whole code of christian virtues and christian morals.

Is the language referred to a command or a mere prediction? Dr. Franklin says, "I suspect the attachment to death as a punishment for murder, in minds otherwise enlightened upon the subject of capital punishment, arises from a false interpretation of a passage in the old testament, and that is, "whoso shed-

deth man's blood, by man shall his blood be shed." This has been supposed to imply, that blood could only be expiated by blood ; but I am disposed to believe with a late commentator upon this text of scripture, that it is rather a prediction than a law. The language of it is simply, that such is the folly and depravity of man, that murder in every age shall beget murder. Laws therefore, (says this great philosopher) which inflict death for murder are as mischievous as those which tolerate revenge."

"Whoso breaketh a hedge, a serpent shall bite him,"—"Whoso removeth stones shall be hurt thereby," would equally well justify being construed into commands. The commentator, referred to by Dr. Franklin, was the Rev. William Turner, who says of that passage ; "To me I confess it appears to contain nothing more than a declaration of what will generally happen, and in this view to stand exactly upon the same ground with such passages as the following, "He that leadeth into captivity shall go into captivity." "He that taketh up the sword shall fall by the sword." The form of expression is precisely the same in both texts. Why then may they not be interpreted in the same manner and considered not as commands but as denunciations? And if so, the magistrate will no more be bound by the text in Genesis to punish murder with *death*, than he will by the text in Revelation to sell every Guinea Captain to our West India planters.

Whatever reading, however, is given to the text so often cited, it cannot be distorted into an authority for our process of punishment with death. It was only "at the hand of every man's brother," that such vengeance was predicted. No, the Law designed for universal application in all ages ; the law proclaimed by Jehovah himself in the thunders of Sinai ; the law unrepealed by the christian dispensation, is, "*thou shalt not kill.*"

Are we to be told, that the legislature have enacted that murder shall be punished with death, and that *there* you must stop your inquiries? Do not our courts judge of the constitutionality of laws and decide them void? To *you* in criminal trials is reserved the same power, and if our constitution had provided that death in no case should be inflicted as a punishment, would you be bound to execute the statute?—Whatever may be said of the union of church and state, I hesitate not to declare, that the principles of the christian reli-

gion are the foundation upon which our government rests, and that no republican government can exist, that does not recognize them. But for the sanctions of religion, what idle mockery would be the ceremony and forms and oaths even of this solemn tribunal? Religion imposes upon us obligations above the power of human law, and for the violation of which no human law can give us dispensation.

Again it is urged, that government acquires the right of inflicting the punishment of *death* by the compact into which individuals enter, when they form the social state. When individuals become members of civilized society, they do surrender a portion of their individual rights, and the society acquires the aggregate of all the rights, thus surrendered by the individual members, and no more. Has then the individual this right over his own life? either to exercise or surrender? In other words, may he commit suicide? If he may not take his own life, when weary of it, with his own hand, may he then depute another to do it? May he agree that five, ten, an hundred others shall unite in the act? Unless suicide can be justified, these questions admit of but one answer. I do not deny the right of the individual or society to take life. I admit only in the single case of self-defence, *to preserve life*. If my own or my assailant's life must be taken, I have the right to choose the preservation of my own. And so when the existence of society is endangered, but not for punishment. Can this theory of self-defence ever justify society in taking the life of a prisoner, who is completely in their power and who can be easily restrained from violence or from any act to endanger its existence or its peace?

I present these considerations with the view to ask you, whether you have *without any doubt*, the right which you are called upon to exercise; for I hold, that if you have doubts on this point, those *doubts*, in the discretion the legislature have given, should deter you from taking life. If the technical *right* were clearly shown, another consideration presents itself, as to the *expediency* of its exercise.

The expediency of the punishment of death is attempted to be justified upon the ground that the enormity of certain offences requires a punishment the most terrible in form, to deter persons from the commission of them. Now if the class of the community upon whom the punishment of death is intended to operate are but little influenced by its terrors;

if the infliction of it has a direct tendency to demoralize and degrade the public sentiment; if it is subject to other insufferable objections, which apply to no other mode, then its expediency cannot be sustained.

It is in the first place peculiarly unfitted to the object intended.

“Will it,” (says an eloquent writer,) “will it arrest the hand of the infuriate wretch, who at a single blow is about to gratify the strongest passion of his soul in the destruction of his deadly enemy? Will it turn aside the purpose of the secret assassin? Ambition, which usually inspires the crime of treason soars above the fear of death. Avarice, which urges the secret assassin, creeps below it. Passion, which perpetrates the open murder, is heedless of its menaces. Threats of death will never deter such men. They confront it in the very commission of the crime.” The uncertainty of the punishment reduces the chance of the risk to less than that, which is voluntarily incurred in many pursuits of life. Soldiers march gaily into battle, with a certainty that some of them must fall. If the fear of death could deter from the commission of crime, then we should not see in the history of the plague in London, the details of the rush of thieves into the places of thick infection, to plunder even the apparel from the dying victims of the disease; or accounts of similar scenes in our own cities during the prevalence of the yellow fever in ninety eight.

In the testimony laid before the British Parliament upon this point, a solicitor of twenty year’s practice in the criminal courts stated “that in the course of his practice he found the punishment of death had no terrors upon a common thief, indeed it is much more the subject of ridicule among them, than of serious reflection.”

“The certain approach of immediate death does not seem to operate on them, for after the warrant has come down, I have seen them treat it with levity.” He observed, “I once saw a man, for whom I had been concerned, the day before his execution, and on offering him condolence and expressing my concern for his situation, he replied with an air of indifference, “players at bowls must expect rubbers,” and this man I heard say “that it was only a few minutes—a kick and a struggle, and all was over.” The fate of one set of culprits, in some instances, had no effect even on those, who were next to be

reported for execution ; they play at ball and pass their jokes as if nothing was the matter. So far from being arrested in their wicked courses by the *distant possibility* of the infliction of capital punishment, says the witness, they are not even intimidated by its *certainly*. The ordinary of New Gate, the individual of all men, of the best means of observation, being asked on the same examination, what was the effect of the sentence of death upon the prisoners, answered, "it seems scarcely to have any effect at all upon them. The generality of people under the sentence of death are thinking and doing rather anything than preparing for their latter end."

It may perhaps be thought, if it fail to produce any effect upon the mind of the convict, it still may have a salutary influence upon others, by the public spectacle.

Far otherwise—In some instances public sympathy may be excited. Then the culprit becomes a hero or a saint. He is the object of public attention, admiration and pity. Charity loads him with her bounties and religion vouchsafes her blessings, and as in the case of the mail robber, Hall, he marches to the gallows with all the honors of a triumphal procession.

In other instances the ferocious passions are excited and other scenes are exhibited. The failure of any good influence from such a spectacle was illustrated at a public execution at Lancaster in Pennsylvania in 1822. An immense multitude attended the execution of a convict for murder. A paper of that city remarked, "It has long been a controverted point, whether public executions do not operate on the vicious part of community more as incitements to, than as examples deterring from the crime. One would believe, that the spectacle of a public execution produces less reformation than criminal propensity." At the execution referred to, twenty eight persons were committed to the jail on the night following for offences, such as assault and battery, larceny, and even murder. The pick-pockets generally escaped, or (says the editor) the jail would have overflowed. "The murderer who was afterwards convicted, was committed to the same jail and had the same irons put on him which had been laid off by the person executed, scarcely long enough to get cold."

At a recent execution in England for the crime of picking a pocket, (and there stealing to the amount of one shilling from the person was punished capitally) fifteen new offences were committed under the gallows at the moment the con-

vict was struggling in death. Another instance not less striking was related at a public meeting at South Hampton, England. An Irishman guilty of issuing forged Bank notes was executed, and his body delivered to his family. While the widow was lamenting over the corpse, a young man came to her to purchase some forged notes. As soon as she knew his business, forgetting at once her grief and the cause of it, she raised up the dead body of her husband, and pulled from under it a parcel of the very notes, for the circulation of which he had forfeited his life. At that moment an alarm was given of the approach of the police, and not knowing where else to conceal the notes, she thrust them into the mouth of the corpse, and there the officers found them.

Does not the most rational philosophy teach us to expect evil from the very *principle* as well as practice of this mode of punishment?

We say to the citizen, thou shalt not kill and attempt to enforce the law, by perpetrating the same act under judicial forms.

We denounce housebreaking and arson, and what would be the effect of sanctioning, by law, the breaking, or burning the dwelling of the offender? It would be to familiarize the mind with the act. It would be to cherish the savage feeling of retaliation. It would be to feed the morbid passions, which are thus ripened into acts of atrocity. It would be to inspire that spirit of barbarism, which was not long since exhibited in the interior of one of the largest states of the Union. A poor wretch was condemned to the gallows for murder. The multitude assembled in tens of thousands. The victim was brought out—all eyes in the living mass, that surrounded the gibbet, were fixed on his countenance, and they waited with strong desire for the signal fixed for launching him into eternity. There was a delay—they grew impatient; it was prolonged and they were outrageous. Cries, like those which precede the tardy rising of the curtain at a theatre, were heard. Impatient for the delight they expected of seeing a fellow creature die, they raised a ferocious cry; but when it was at last announced, that a reprieve had left them no hope of witnessing his agonies, their fury knew no bounds, and the poor *maniac*, for it was discovered that he was *insane*, was with difficulty snatched by the officers of justice from the violence of their rage.”

Pardon me for again alluding, in this connexion, to that awfully tragic scene which has been acted within our own borders. I can never obliterate its impression from my mind. A poor lunatic boy has been publicly executed to gratify the savage passions excited by the promised spectacle of a death upon the gallows. Yes; and the death of two other innocent persons was caused by the maddened fury of the multitude exhibited in the horrid transaction. Let the tripple murder of Prescott, of Mrs. Chase, and of her infant, stand as the last, the final admonition against capital punishment in New Hampshire.

The liability of such a provision of law to abuse, is not the least of the objections to it.

How have tyrants obtained the heads of those who resisted arbitrary power? How have revolutionary usurpers deluged whole countries in blood? Not by claiming to take life without law—not by enacting new laws for the occasion, but by bringing all offensive persons within the *constructive* operation of some law inflicting capital punishment.

The learned statesman and philanthropist, the late Mr. Livingston, has published an essay upon the penal code, for which his memory shall be cherished long after all his distinguished political honors shall have been forgotten.

In that essay, of which these remarks are a very imperfect abstract, he observes, “ History presents us the magic glass, on which, by looking at *past* we may discern *future* events. It is folly not to read,—it is perversity not to follow its lessons. If the hemlock had not been brewed for felons in Athens, the fatal cup would not have been drained by Socrates. If the people had not been familiarized to scenes of judicial homicide, neither France or England would have been disgraced by the useless murder of Louis or of Charles. If the punishment of death had not been sanctioned by the ordinary laws of those kingdoms, the guillotine would not have deluged the one with the blood of patriotism, science, innocence, or the axe in the other, made a Sidney and a Russel the victims to party and to tyranny. Every nation has wept over the graves of patriots, heroes, martyrs, sacrificed to its own fury. Every age has had its annals of blood. They may be traced to the existence of laws authorizing the taking of human life.

Another objection to this punishment, and an admonition to caution in inflicting it, is, that it takes away the possibili-

ty of correcting the errors of human tribunals, produced by mistaken testimony, false appearances, or perjured witnesses. Let not this danger be lightly esteemed by those who have adverted to the records of human fallibility, even amid all the guards of legal forms. One of the sources of this danger is where the afflictive dispensation of God is visited upon the mind of the unfortunate, and the melancholy effects of *insanity* are mistaken for the fruits of depravity. The mysteries of the human mind are known only to the Omniscient.

The history of criminal jurisprudence is black with records which show "*the danger, the impiety even, of using this attribute of Divine Power, without the infallibility that can alone properly direct it.*"

The objection, however, in my mind stronger than most others, and one upon which I cannot well express all that I feel, is in the attempt to make *death* a *punishment*, and to connect with it infamy and horror, and all the superstitious dread of ignorance and irreligion.

And what is *death*? Nature teaches us that it is the cessation or suspension of our physical powers and faculties. Our christian faith assures us that it is the transit from this state of probation to a more spiritual and permanent existence. What is the infliction of it, then, as a punishment?

If it be the mere pain of its sufferings, *that* is ordained to us all,—and perhaps in a much severer degree than is endured by him who dies by the hand of the public executioner. Let me ask any individual, who believes in the christian scriptures, if he would give his voice for the execution, as a punishment, of one whom he believed to be pardoned of Heaven, and that he would pass from the gallows to a state of perpetual beatitude? Would he be party to his death, in the belief that the termination of his existence *here* was the introduction to one of never-ending misery *hereafter*? Would he thus rebuke the delay of divine justice?—Then, indeed, do we assume "*to be as Gods!*"

The effect of this system is to associate death with infamy and horror, to surround the grave with gloom from the first impressions of childhood to the last period of consciousness. The influence of this, for evil, upon the character of individuals and upon the community, in all its extent, cannot be described.

When the associations connected with death by the inflic-

tion of it as punishment, shall have ceased,—when our conduct and our customs shall not say in language louder than our christian professions, that we look upon the grave only as a place of gloom and dark despair,—when our conduct and our customs shall better conform to a brighter faith, and drive from the portals of eternity the “Gorgons and chimeras dire,” with which they have been surrounded,—then may the mind elevate itself from the earth and chasten its contemplations with scenes beyond the hour of “life’s feverish dream !”

The improvement in the condition of society from the abolition of the punishment of death is not theoretical. The experiment, whenever made, has been attended with signal success.

The empress Elizabeth, of Russia, soon after she came to the throne, abolished the punishment of death in all her extensive dominions. Her reign lasted twenty years, and Beccaria speaks with enthusiasm of the consequences it had produced.

Three years after Elizabeth had ceased to reign in the north of Europe, her great experiment was renewed in the south. Leopold became Grand Duke of Tuscany, and one of his first acts was a declaration, rigidly adhered to during his reign, that no offence should be punished with death. The result was, in his own words, that “his system had considerably diminished the smaller crimes, and rendered those of an atrocious nature *very* rare.” During the twenty-one years of his reign, only five murders were committed in Tuscany, while in Rome, where the punishment of death was inflicted with great pomp and parade, *sixty* murders were committed in the short period of three months in the city and vicinity.

And it is remarkable, says Dr. Franklin, that the manners, principles, and religion of the inhabitants of Rome and of Tuscany were exactly the same.

The abolition of the punishment of death alone could have produced this difference in the moral character of two nations.

Called upon, then, as I contend you are, by the recent statute of the legislature, to determine whether you will, or not, give your voice for capital punishment, are not the considerations which have been suggested, deserving your serious attention ?

If my views may have differed ever so widely from yours on the subject thus far considered, in relation to our next position, I hope the evidence may have brought us to the same result;—that the circumstances of this case do not permit you to find the prisoner guilty of murder in the first degree.

While the government contend that the prisoner is guilty of murder in the first degree, my purpose shall be, by an examination of the facts, to show, that if the crime be above the grade of manslaughter, it is not above that of murder in the second degree.

Manslaughter has been defined to you, and by that you perceive, that though unattended with malice, still the killing may be unlawful. If the prisoner in this case intended to commit an assault upon the deceased, and not supposing the gun to have been loaded, it was accidentally discharged and caused her death, he would be guilty of manslaughter.

The distinction between murder of the first and second degree is now, for the first time, to be passed upon by you, under our recent statute.

To be of the first degree, it must be murder by *poison, starving, torture, or other deliberate and premeditated* killing, or which shall be committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, or burglary.

This is not pretended to be murder by poison, starving, or torture,—or in the perpetration, or attempt to perpetrate, arson, rape, robbery, or burglary.

It can, then, only be contended for as coming within the description of “*other deliberate and premeditated* killing.”

These terms, as here used, do not mean the technical *malice aforethought, malice prepense*, “wilful and malicious murder” of the common law;—all the meaning of those terms must attach to murder in the second degree. The statute, then, *means more* by this description of the crime.

The sense in which we are to understand the terms *deliberate* and *premeditated*, is to be obtained, in the first place, from their connexion in this section of the statute. It is the killing classed with *poison, starving, torture*, with the addition, or *other*,—that is, other *like* deliberate and premeditated killing.

In the next place, from the definition of the terms used, as given by the best authorities.

Deliberate, as defined by the great American lexicographer, Webster, is, “1st, Weighing facts and arguments with a view

to a choice or decision ;—carefully considering the possible consequences of a step ;—circumspect ;—slow in determining : 2d, formed with deliberation ;—well-advised or considered—not sudden or rash : 3d, slow.”

Deliberate, as defined by Walker,—“Circumspect ; wary ; slow.”

Premeditated, as defined by Webster,—“Previously considered or meditated, previously contrived, designed, or intended.”

Premeditated—by Walker—“To contrive, or form beforehand ; to conceive beforehand.”

In accordance with the sense of these terms, as derived from their connexion with the offences previously described in the same section, and as given by lexicographers, is also that understood in their common use and acceptation. The “weighing of facts and arguments with a view to a decision ;” “Well-advised or considered ;”—“circumspect ;”—“wary,” —“contrived beforehand.” The legislature are not to be presumed to have used words without a purpose. They have not said *deliberate* or *premeditated*, but have required proof of a “previously contrived” purpose deliberately,—circumspectly,—warily executed,—and not proof merely of a wilful killing with malice aforethought, which is necessary to constitute the crime of murder in the second degree.

I have dwelt upon this point, that, if possible, you may go to a consideration and application of the evidence with a distinct and definite idea of what the law has required.

In adverting to the evidence, I rejoice that I have no need to tax your patience or to try your feelings by a recapitulation of it. The clearness with which the facts have been stated, and the unremitted attention with which you have listened to the details, has rendered that task, painful as it would be both to you and to me, unnecessary.

In trials of this description, I have usually found the frailty of human nature,—the influence of feeling or passion exhibiting itself, in a marked propensity of witnesses to give a coloring to the facts and circumstances of aggravation against the accused. But I rejoice to say that this examination, in this respect, is eminently distinguished from any one in which I have heretofore been concerned. The witnesses for the government, almost without exception, have manifested an intelligence, candor, and fairness, deserving all commendation.

I bestow this praise the more cordially, from having seen, in other cases, how difficult it has proved for men of the most honest intentions, to stand unmoved—uninfluenced by the clamor around them. From the commencement of the history of the painful scenes of that wretched night, as narrated so distinctly by Mr. Gordon, and alike fairly, and still more minutely detailed by Mr. Tilton from the confessions of the prisoner, there is no contradiction or material variance. The facts, beyond all controversy, show that the death of Mrs. Ferguson was caused by the hand of her husband, the prisoner at the bar. Whether the circumstances preceding and connected with that homicide, constitute the crime of murder in the first degree, murder in the second degree, or manslaughter, is the question.

Gentlemen, you will not for a moment so mistake me, as to suppose, that I stand here for the prisoner, to contend for his innocence. No; nor to vindicate his reckless, brutal conduct. No; I hope before he shall be called to his final account, his reflections upon the horrors of his past life may not be unattended with the salutary inflictions of conscience.

The principal ground upon which the government require you to find the prisoner guilty of murder in the first degree, is the proof of his conduct and language toward his wife in former years, and the expression used on the evening of her death.

The testimony concerning his former manner of life comes from Mr. Adams, Mr. Clark and Mr. Hoitt. They show that both his language and his conduct were often that of a savage, but they show too, that she was no unwilling combatant in the war of words, and that even in personal contests, she disdained all foreign interference. Mr. Adams has informed you with what promptness, in the midst of one of their *domestic scenes*, she rallied to rescue her husband from his arrest and to toss him over the tea table into the street. Mr. Clark speaks of a personal quarrel between them more than three years ago; of his saying “he would have her heart’s blood;” so also of his threats at another time in the same language to her sister. But can you be asked to connect those matters with the act of the night of the first of October, as proof of a purpose then matured and then declared to take her life? It proves enough of brutal conduct and brutal language, but not a purpose of murder. If such a purpose were then form-

ed, why was it three years delayed? Were there no opportunities in which it could have been executed, and secretly too? If it may not be connected with the death, as a premeditated design, then formed and afterward executed, then those facts can have no legitimate bearing on this question.

Mr. Hoitt has given a more extended detail of their manner of life at a later period, disgusting enough in truth, but has it anything in it of a design to murder, by which to supply a *previous contrivance—carefully determined purpose* of death to the act of the night of October first. For if this be not its effect, it cannot, must not affect your decision of the great question. However much you may deprecate his conduct and language; however much you might desire to see the appropriate punishment inflicted for those offences; they are not now on trial; they are not now to influence this result, unless you believe, by his words and acts he *then* determined to murder his wife, and that *in pursuance* of this *deliberate design*, he afterward took her life.

Did the wife herself believe he had any such purpose?—surely not. In the most angry of those controversies, she always insisted in going back to his house and in the night time too. When the police had arrested him, she persisted in begging for his release.

Did the magistrate, Mr. Hoitt, *then* believe, that the accused had any purpose or design to kill his wife, or that there was any danger of such an act? Surely he did not, or, with the State's commission in his pocket, he would not have so palpably neglected his duty as to have left him at large.

When we come to the evening of the fatal act, we find that the prisoner said in the discussion of the conduct of his wife, that he would not live with her. At the moment of saying *that*, do you believe he had any reference to or thought of a design to take her life? If not, it bears not at all upon the present issue.

It is true, that his wife on that night expressed some unwillingness to return to his house. And might she not well have done so? not from the fear of his executing any *premeditated*, any *deliberate* purpose of murder, but from the fear of his want of deliberation—for fear of his thoughtless rashness, for fear of his uncontrolled passions maddened to insanity by intoxication.

I put to several witnesses the question, whether the prison-

er was in the intemperate use of ardent spirits—I did it not with the thought that crime could be excused by drunkenness. The fact, if it were so, that he was under the influence of liquor might account for rashness, which would rebut all presumption of deliberation. And although I was somewhat surprised, that so few *knew* what so many best acquainted with him have long believed and often stated, still in the testimony of that single day's movements, we have enough—more than enough proof of the extent to which he came home that night from the Epping muster, steeped in rum.

We do not rest with saying, that the government have failed to show, that this was a deliberate, premeditated killing, but do contend, that all the circumstances as proved, show the reverse of that position to be true; that the whole was the sudden, unthought-of act of the moment.

Had he harbored the settled purpose to kill for years—had no occasion occurred on which he could have done it and without giving an alarm, or calling witnesses? If he intended to kill, would he have retired to bed and *slept* for hours preparatory to the act? Why, if such was his purpose, did he not complete the act? When he left, his wife was living and could talk. Did he mean to leave her to testify against him? He told his son what he had done. He sent him to call the neighbors.

In these acts, we see not the conduct of the man who has perpetrated deliberate murder, but the unfortunate penitent over the act of thoughtless rashness.

Again take the confessions of the prisoner as related by Mr. Tilton, every word of which proves to be literally true, so far as the facts were in the knowledge of other witnesses. They are far from the story of one who had committed a “previously contrived”—“well considered” purpose of murder. The deliberate murderer would not have confessed at all, when cautioned, as he very properly was by the witness, or he would have devised some ingenious fiction in extenuation of the act. Not so with him. He related the circumstances previous to his retiring, as other witnesses have stated them. What transpired after the lad, his son, came into the apartment is confirmed by him. It is the evidence of the government, and as such we may ask you to heed it.

He says he retired about ten o'clock and slept; the time he judged of only by what passed after the event, which it seems

took place about three o'clock in the morning. When he awoke, his wife was sitting by the fire. He requested her to come to bed; she refused. This surely was no motive sufficient for the violence he exhibited. But was his mind in a state to consider—to deliberate? after the revels and excesses of that muster day as described by the witnesses, who accompanied him from Epping? Half waking, in the confusion of his brains, he sprang from the bed, seized the gun and as he says, unconscious of what he did, he was only sensible of the act by the effect of the horrid deed. Instead then of consummating the awful tragedy by putting it beyond human possibility for her to bear witness against him, he, at her request, placed her upon the bed, and when his son, aroused by the report of the musket, came in, he informed him what he had done, and sent him for the neighbors. Yes, so without design, without previous intent, was that act done, that in the expressive language of the prisoner, "at the instant, if he had possessed thousands of worlds, he would have given them all, if it had not happened."

The gun was not placed in its position in the corner of the room by him. It had not been loaded by him, nor does it appear that he even knew that it was loaded. His son had loaded it for shooting squirrels and had left it in that condition. Are not these facts conclusive that this was not deliberate, premeditated killing?

Satisfied as I hope you are that the prisoner cannot be found guilty of murder in the first degree; the only other question, which will be presented is, whether it is murder in the second degree, or manslaughter.

If the prisoner, not knowing that the gun was loaded, or knowing it to be loaded, seized it for the mere purpose of terrifying, with no design to discharge it, and it was accidentally fired, the offence would be but manslaughter. Are accidents by fire arms so rare, that in every case of death by them, you must find a wilful killing, with malice aforethought? This fowling piece had the percussion lock. Those of you who have used them, know the extra hazard of their being discharged without the intention of the holder. If the cock be drawn back by the thumb and be let go off, without extreme caution in placing it in its hold upon the rollers, or if it catch against your clothes or any other matter, moving the gun, it is certain to discharge itself. But it is my purpose

merely to suggest this point, without dwelling upon it. It would be but a poor reward for the long and most patient attention which you have given me, to detain you with further remarks.

Gentlemen, I have endeavored to discharge the duty, which was assigned to me by the court, and I here leave the prisoner in your hands. The court will instruct you that all reasonable doubts are to be removed from your minds, before you can convict.

We are all fast hastening to a common destiny, but whether our lives shall be longer or shorter, I hope your verdict in this case will be such, as not to embitter the remainder of our days, or the close of them, with the reflection, that we have dealt too harshly with an erring fellow mortal.

Mr. Gove, the attorney general, then rose and addressed the jury as follows:

May it please your Honors,

and you, Gentlemen of the Jury:

It is with no ordinary feelings, that I rise to address you upon the present occasion. The duties of a prosecuting officer, even in their mildest form, are any thing but pleasant or agreeable—but upon an occasion like this, when the life of an amiable and worthy member of society has been destroyed, and when the life of the prisoner may be exacted, as a penalty for his transgression, those duties become painful in the extreme. And when I contemplate the great responsibility, which devolves upon me in attempting to discharge my duties to the government, as well as to the prisoner, I cannot but feel most sensibly my inability to do so, in any degree commensurate with the importance of the occasion. You too, Gentlemen, have a duty to perform painful and unwelcome—a duty not of your own choice or seeking, but one imposed upon you by the laws of your country, and one, in the performance of which you have no alternative.

Whatever may be your opinions of the *policy* or *justice* of the law, you have only to administer it in its true spirit regardless of the consequences which may result to the unfortunate prisoner at the bar—ably and powerfully have your sympathies been invoked in behalf of the prisoner by his

distinguished counsel. Upon the sympathies of all, he certainly has strong claims, whatever may be his crimes, and no one can yield them to him more freely and cheerfully, than he, whose duty it is to conduct this prosecution against him. The frailties which have fallen to his portion beyond the ordinary lot of humanity, and which have brought him into his present awful and perilous situation, render him the object of universal pity and compassion. But he knew the provisions of the law, when he committed the horrid deed, and thereby voluntarily subjected himself to the hazard of incurring its penalties. He, therefore, and *not* the jury, is responsible for the consequence of its due execution. Besides, Gentlemen, *you* have an oath in Heaven, the obligation of which you are not at liberty to disregard. You have called your God to witness, "that you will well and truly try, and a true deliverance make between the State of New Hampshire and the prisoner, whom you have in charge according to the Law and the evidence given you." The law, here mentioned, is the law of the land as it *is* and *not* as you might wish it to be, and no juror without committing deliberate perjury, can take upon himself this obligation, feeling, that he has conscientious scruples, which would lead him to the consideration of other matters adverse to the law, and which would prevent him from rendering a verdict in accordance with its true intent and meaning. I make these remarks, not from an apprehension, that any juror is unmindful of his duty, or in any degree inclined to evade it, but merely to explain the reasons for asking the court, when you were empannelled, to propound to each of you an interrogatory upon this subject.

I regret, that the honorable counsel for the prisoner has deemed it proper to bring into the discussion of this case, much, which seems to me to be entirely foreign from the subject under consideration, and the discussion of which, at this time, can have little or no practical good effect. Although it is not my intention to reply to the whole of the very able and ingenious argument of that gentlemen, yet since he has been pleased to anticipate an argument, which he supposed I might make in favor of the right of government to take life, as a penalty for crimes, I feel bound to notice it.

With his usual ability, he has made for me an argument, which I might be proud to use upon an appropriate occasion, and with a master hand he has again demolished it. His ar-

gument upon this subject if made before a legislative body with a view of inducing them to alter, amend or repeal our statutes authorizing capital punishment, would be worthy of the distinguished source from which it emanates, but when addressed to a jury sworn to administer *the Law*, as it is, and not as they might wish it to be, loses much of its force and power. He begins by supposing I would say, that when we entered into the social compact, we gave up certain of our natural rights to the government, as a consideration for the protection and security which it affords us, and that one of these rights thus surrendered is that of taking life as a punishment for certain infractions of the laws—and he then proceeds to show, that as we could not surrender a right, which we never possessed, and as we never possessed the right to take away our own lives, that is, “to commit suicide,” we could not surrender that right to the government, and therefore the government, being the creature of the people and possessing no powers, but those given or surrendered to it by the people, does not possess the right to take life in any case.

But in my humble opinion, this argument of the gentleman, if it prove anything, proves too much. We have not the right to incarcerate ourselves in the state prison for life or for any length of time, nor to inflict upon ourselves any other corporal punishment, therefore we cannot surrender such a right to the government; and this argument is quite as good against the right of the government to inflict the very punishment, which the gentlemen contends for, a confinement in the state prison for life, as against the right to take life.

And if I should adopt the other argument, which the gentleman supposes I would, and contend, that the government derives this right from the principle of self-defence, I do not think his argument fully meets the point. He admits that all have the right to take life, when it becomes necessary for self-defence. If the people possess this right, then they can surrender it to the government. If a person attack me with a dangerous weapon and strike off one of my members, as an arm, I may to prevent his striking off my head, kill him. This right is possessed by all men. This right then can be given to the government, which is but the people in their representative or collective capacity. Then, when the government finds a person, who has made an assault upon the community and cut off and destroyed one of its members, and has thereby shown a

mind hostile to the safety and security of society, well may it, in defence of the lives and security of the people, take the life of the offender. This is but a rule adopted by the people collectively to do what each individual had a right to do in his own case.

But he contends that even an individual has no right to take life when he can secure his own safety without, and supposes it is in the power of government, in all cases, by confining the offender in the state-prison for life, to secure all its members from any further danger from his assaults. But the existence of this power in the government is first to be shown. The only way in which government can exercise such a power, if at all, is by close and solitary confinement. For if the prisoner is confined like ordinary prisoners in the state-prison with the privilege of healthful exercise and labor in the open air, what shall prevent him, if he take a notion so to do, from striking down his fellow or his keeper with the very axe or hammer which is put into his hand to work with? And if 20 or 30 are confined together for life, (and this is the highest punishment which the government can inflict,) and they agree to escape, and taking their tools in their hands, they make proclamation of their intentions, and that they wish to injure no one, but as they have no conscientious scruples about taking life, they shall do so if opposed; how shall they be prevented from executing their designs?

You cannot present a gun, a sword, or a spear to their breasts and threaten to kill them if they persist. They would taunt you with your principles, and ask you by what right you assumed to take their lives merely for attempting to regain their liberty, when you admitted you had no right to take it for the highest crime which man can commit? They would tell you it cannot be done under the plea of necessity in self-defence, for they do not wish to injure you, if you will just stand aside. "We," say they, "have no conscientious scruples against taking life; we, therefore, do nothing in violation of our principles; and shall you, who claim to be the virtuous and christian portion of the community, more pure, more virtuous, and more holy than we,—*you*, who ought to set before us good examples of being guided by your principles—shall *you* so far degrade yourselves below felons as to take our lives in direct and open violation of your avowed principles?" Let this appeal be answered, and then tell me

how these prisoners can be kept in their confinement, or be prevented from taking the lives of their fellows or their keepers. They are now undergoing the highest degree of punishment which the government has a right to inflict, and if they take a thousand lives, they can suffer no more. But will you say "Shut them up in solitary."—And can a man be kept in perpetual solitary imprisonment without impairing his health and shortening his life? Common sense says *No*. But hanging is only shortening life—we cannot tell how much, perhaps not an hour, or a minute, and close, solitary imprisonment is quite as certain to do the same thing, although by a little more protracted and cruel process. The *principle*, therefore, is the same, and is just as much against right in the one case as in the other.

The gentleman supposed I would quote a certain passage from scripture to prove that the right to take life existed by divine authority. But in this he was mistaken. I do not take it upon me to establish that right. The right has been exercised by the legislature in the passage of a law not inconsistent with the constitution of the United States, or of this state, and you have taken upon yourselves a solemn oath to render a true verdict according to the provisions of that law. By the constitution, you have no power to repeal, alter, or amend the law, whatever may be your views of its policy or justice. When you were called to be sworn, you severally voluntarily declared that you had no conscientious scruples which would prevent your rendering a verdict in accordance with the provisions of that law, if the facts warranted it.—Upon this condition you were sworn. Any argument, therefore, addressed to you by me, tending to dissuade you from disregarding the oath you have taken, would be either an admission of your right to do so, or betray a doubt of your integrity and honesty.

Neither do I intend to discuss the *policy* of capital punishment. With the *policy* as with the *right* of taking life, you have nothing to do in the trial of this case. It is enough that the law provides for taking it under a certain state of the facts, and that you have declared yourselves free to find the facts, and have taken upon yourselves the solemn obligations of an oath to return a verdict according to that law and the evidence given you, without regard to the consequences of such a verdict to the prisoner. I cannot, therefore, concur

with the prisoner's counsel in the propriety of arguing to you a point with which you, as jurors, have nothing to do. Were you sitting as legislators, these would be proper subjects for your consideration. Equally foreign from your present inquiries, also, is the moral tendency of such a law, and the propriety of making death, which is the final destiny of all, a punishment for transgression. The gentleman says this is confounding the evil with the good, and tends to associate death with infamy, which is contrary to our early associations, and to the principles of our christian faith. But is this so?—Does not the scripture teach us that death is “the wages of sin,” and that as by the sin of one man death came into the world, so death has passed upon all men, because all have sinned?

But there is one point in which I am happy to avow my concurrence in the sentiments advanced by that distinguished counsellor. I agree with him in condemning, in the strongest terms, all public executions. I am fully convinced of their demoralizing effects upon the multitude who assemble to witness them. The imagination paints the scene infinitely more horrid and appalling than it really appears to the beholder, and their frequent occurrence renders the mind familiar with them, until, at length, the horror of the scene subsides with its novelty, and we look upon them with all their parade, and circumstance, and pomp, and show, and bustle, rather as an exhibition intended to amuse, than as the awful visitation of retributive justice. But to the honor of New Hampshire, this obnoxious feature in her laws has been wiped from her statute-book. But it is with pain I find myself here compelled to part company with my learned friend. I cannot go with him in attributing to public executions all the evil effects which he thinks they produce. The 28 felonies which he tells us were “committed under the gallows” at one public execution in an interior town in Pennsylvania, I cannot consider as the effect of the execution, but only as a consequence. The public execution, by collecting together a vast assemblage of people, presented an occasion where the thief, the robber, and the assassin from the cities might gratify, with greater chances of escape, their wicked propensities, instead of creating such propensities in the minds of those who, before, were untainted with criminal desires. Any other assemblage, equally large and dense, might have afforded the

same results. The importance of executing the law, while it is recognized as such, cannot but be appreciated by you all. The object of punishment is not to avenge the crime committed, but rather to prevent its recurrence. It is the *certainly* more than the *severity* of punishment, which prevents crime, and there is no maxim in jurisprudence, the truth of which is more universally acknowledged, than that crime abounds in proportion to the chances of escape. If the laws, therefore, are doubtful and uncertain in their execution, it not only affords another chance of escape, but people lose their confidence in the security which they promise, and are driven to the necessity of seizing the sword and administering justice, each according to his own peculiar notions of right and wrong. And this is what we have heard of in other parts of our country denominated "Lynch law," the prevalence of which, in this State, I need not say, would be most deeply deplored by every patriot and christian. May God avert the awful calamity from this, our happy land!

The prisoner is charged with committing the highest crime known to the laws of this State. He acknowledges he committed the awful deed, and the evidence shows it to have been committed under circumstances of aggravation and cold-blooded cruelty and barbarity, to which the annals of criminal jurisprudence in this State afford no parallel. This admission has relieved you, as well as myself, from much of the labor usually incident upon trials of this nature. The inquiries, whether a homicide has been committed, and, if so, whether it was committed by the *prisoner*, usually require the greatest labor, and present the greatest difficulties in the investigation, as they often depend upon circumstantial evidence, frequently remote, and more or less uncertain in its character. But in this case these important points are admitted; and I do not understand the counsel to ask you to exonerate the prisoner from the penalty incurred by his acts. The only questions which remain, therefore, for you to determine, seem to be, 1st, whether the evidence brings the act within that description of offences denominated in the statute "*murder in the first degree*," and, 2d, whether the jury may, in their discretion, return a verdict of "*murder in the second degree*," although the evidence should show the act clearly of that character which the statute declares *may* be "*murder of the first degree*." Although the second branch of the inqui-

ry seems more properly to come within the province of the court, than of the jury, to decide, yet, as it is contended that you are both the judges of the law and the fact in criminal trials, I will attempt, in as concise a manner as possible, to give you my views of the construction of the statute upon this point.

I cannot admit the doctrine, in its fullest extent, for which the gentleman contends, "that the jury are the judges both of the law and the fact." They may judge of the application of the law to the facts, but the court must decide what the law is. Yet, if it *were* so, you would receive, with all due deference, the instructions of the court upon that point, and would pause long before you would undertake to overrule an opinion founded upon long experience, great skill and learning, combined with sound judgment and practical good sense. The decision of the jury upon the construction of a statute or its constitutionality, has never, in any country, to my knowledge, been recognized as a final settlement of that point.

The statute is in these words. "That all murder hereafter committed by poison, starving, torture, or other deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, *may* be murder of the first degree, and all other murder shall be of the *second* degree. Every jury who shall find any person guilty of murder, hereafter committed, shall also find, by their verdict, whether it is of the first or second degree."

The word "*may*," here, according to my understanding, is as imperative as though the word "*shall*" were used, and that it was so intended and understood by the framers of the statute I have not a shadow of doubt. The 8th article of the constitution of New Hampshire is in these words, to wit:

"All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offences."

No one can suppose that the legislature, with this consti-

tution in their hands, and which they were sworn to support, would undertake to violate its principles, so plainly and distinctly set forth, as they are in this section. What, then, did they undertake to do? Why, to act in accordance with the spirit of this section; and being solemnly impressed with a belief that even murder might be committed with different degrees of aggravation, and under circumstances which show a greater or less degree of depravity of heart in the offender, they undertook to carry out more fully than they had done by former statutes, "the real distinction in the crimes themselves," and to affix a punishment "proportioned to the nature of the offence," and not according to the peculiar notions of the jurors who try the case, upon the expediency or the right of the government to take life.

But the construction which the prisoner's counsel gives to this statute, destroys entirely this benevolent and humane object which the legislature intended to accomplish, by making a distinction between the most mild and the most aggravated characters of the offence, and affixing a lower or a higher degree of punishment, "proportioned to the nature of the offence."—Nay, more, the gentleman would have you believe that the legislature not only intended to "*exert the same undistinguishing severity against all offences*," but that they had abolished all legal distinctions, and left it to each particular jury to determine the offence and its punishment, according to their own peculiar notions at the time, whereby the mildest offence might, at one time, be visited with the severest penalty, and, at another time, the most aggravated offence might be visited by another jury with the lightest punishment. Suppose two persons were engaged in committing the same murder,—each has a right to a jury empannelled especially for his trial. And suppose, Mr. Foreman, that the prisoner at the bar had had an accomplice in the deed, for which he is now on trial; and suppose that accomplice was to be tried immediately by the jury on the other side of the house; and suppose your sympathies or conscientious scruples should induce you to find the prisoner guilty of murder in the second degree, whereby his sentence would be only imprisonment, while the other jury, upon the same evidence, should be influenced by no such motives, and should find the accomplice guilty of murder in the first degree, whereby his life would pay the forfeit;—think you that

the people would not see, with feelings of the deepest indignation, the injustice and unconstitutionality of a law which could thus destroy all proportions between "the nature of the offence" and the punishment?

I cannot but believe, therefore, that the legislature intended to make a CERTAIN and well-defined distinction between the different degrees of the crime, and to make this distinction to depend upon the evidence, rather than upon the peculiar notions of the jury; and that, if the evidence shows the crime to come within the first class, the jury must return that fact by their verdict, regardless of the consequences of that verdict upon the prisoner.

The next inquiry, then, is, does the evidence in this case bring the act within the first degree of murder?

That the act was not committed "by poison, starving, torture," "or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary," I admit. Was it, then, the "other deliberate and premeditated killing" contemplated by the statute? And here I think you will not resort to the dictionary to find the definition of the words "deliberate and premeditated." Our legislators probably did not invoke the aid of any lexicographer when they framed the statute. They are generally not "dictionary men," but are, like our jurors, men of good judgment and common sense, and use words according to their general acceptation, and not in their more refined and technical sense. What, then, is the meaning of the word "deliberate," in this sense? Why, it is used in contradistinction to "*rash*," "*hasty*," "*inconsiderate*." A deliberate act is one done designedly, and for a fixed and definite purpose. So with the word "premeditated." This does not necessarily imply a long-continued contemplation of the act for months, or weeks, or days. It is enough that it was designed before it was done; that the act should have been done in accordance with a design before conceived. It is not necessary, therefore, in order to bring the act within this description of the offence, that he should have prepared the gun for this purpose any number of days anterior to the committing the deed, nor that he should have loaded it for that especial purpose, and concealed it in a convenient place—or that he should have invented any ingenious pretext for decoying his victim into any obscure or safe place for him to execute his diabolical purpose. It is enough that he should have designed to take the life of the deceased, and that, in

accordance with that design, he should have gotten up from his bed for that purpose—that he should have gone across the room to where the gun stood—that he should have sought for and found it—that he should have cocked it and approached so near to the deceased as to avoid the possibility of missing his aim by reason of the darkness, which, he says, was so great in the room at the time, that he could but just distinguish her form. These, together with the circumstance that the gun could not, by his own confessions, have been visible, but must have been found by the aid of memory and reflection—all, all go to prove that the deed was “deliberate and premeditated.” And this definition of the words will be supported substantially by the lexicographers just referred to.

If he had sprang from his bed in the heat of passion, occasioned by some sudden provocation, and had, in the fury of his mind, seized a chair, because he happened, in the dark, first to stumble upon it, and had struck his victim to the floor in an instant, the case might have been otherwise. But here was evidently a deliberate choice of the weapon, sought for and found in the dark—prepared and cocked, and the distance so nicely calculated as to make the accomplishment of his purpose sure, beyond the hazard of a doubt; and what but the most “deliberate and premeditated design to take life, could have accomplished all this? But do you still doubt whether the deed was “deliberate and premeditated?” Review the whole history of that ill-fated family, so far back as it is given to you by the witnesses upon the stand. Go with me to that distracted dwelling 3 years ago, when the screeches of “*murder*,” “*murder*” from that tongue which is now silenced forever, were events of almost nightly occurrence, and of nightly expectation by the neighbors—when the deep and deathlike slumbers of midnight were broken by female cries and screeches of distress, which drove sleep affrighted from the neighborhood, and struck terror and dismay into the stoutest hearts—accompany me down to the summer and fall of 1839, when these scenes were going on multiplying and increasing in every enormity and characteristic which could prove them the work of a devil. Behold her, who is now cold and lifeless in her grave, kicked out of doors at midnight, in her night-clothes, with an infant in her arms, drenched in cold water, in a severe winter night in December, making her escape to a neighbor’s house, begging for protection for herself and infant child from the worse than brutal hand

of a husband and a father—with their clothes frozen and their bodies scarcely less cold than is hers now in the grave. See him bursting into the house with all the fury of a madman—heaping upon his unoffending wife worse than savage abuse, accompanied with epithets the most vulgar and obscene—tearing from her arms the affrighted and freezing infant, and carrying it off like the tiger to his den—behold him breaking a chair over her devoted head, when maternal affection, forgetting all danger to herself, drew her instinctively to the care and protection of her child.

But above all, go with me to the place of the last tragical scene, see the prisoner returning from the general training at 8 o'clock in the evening—driving his wife from the house at 9—first sending one of his little children, and then going himself after her at 10, breaking into the neighbor's house, and in a violent, menacing and threatening manner demanding that his wife should be turned out to share his tender mercies—smiting his fists, and pouring out imprecations and threats against the whole household, swearing he would have her, “let what would be the consequences”—laying violent hands upon Dea. Gordon and young Strickland, to compel the surrender of her who had fled in fear for her life to some secret hiding place—see him with the spirit of a demon pursuing his prey, and only relinquishing the pursuit, when the near approach of the police jeopardized his own safety—follow him again to his own house, see his craven spirit bending down in fear before the power of the police, and promising if his wife will return, to abuse her no more for the night, but swearing he would live with her no longer—see her brought back “like a lamb to the slaughter” full of fear and trepidation—hear him denying the charges of former abuse to her, and demanding the exhibition of her scars and wounds to prove facts as notorious as his own existence—Hear her asked three times whether she will consent to stay that night with him, under the most solemn assurance on his part, of good treatment, and hear her finally answering in a half-audible and subdued voice, that betrayed the fulness of her heart, and her prophetic foreboding of danger, “*I'll try to.*” See with what hypocritical mildness and good nature, he lights the police to the door and bids them good night—see him retiring to his bed, and ordering her to do likewise—the lamb to lie down with the tiger—see his fiendish spirit yielding to the influence of sleep, giving promise of peace and

safety for the remainder of the night—Stay ! he wakes—sleep flies affrighted—he orders her again to bed in the same angry tone as before—her dreams of security have fled—the blood rushes coldly to her heart—he springs from his lair—searches for, and finds the gun in the dark—approaches her cautiously to be sure of his mark—cocks the gun—adjusts the percussion cap—pulls the fatal trigger and in an instant the wife of his bosom, the companion of his youth, the mother of his children is weltering in her blood upon the floor—their two little boys, the eldest about 10 years, sleeping in the chamber above, are awakened by the report of the gun, and hastening down with their clothes in their hands, meet their father coming out of the room—in the awful apprehension of what had happened, they ask, “*Father, what’s the matter?*” “*I have shot your mother*” was the cool and deliberate reply, which fell like a death knell upon the ears of the affrighted children hardly yet awakened from their innocent slumbers—they run into the room, but O God ! what a sight !!!

He returns, lights a lamp, examines her wound, pronounces it mortal, and goes to collect his clothes, but soon returns and asks her where they are—she tells him—he collects and packs them up—she tells him he has killed her, and asks him to lay her upon the bed before he leaves her—he does so—but with a spirit unchanged and unsubdued, he speaks not—and yet he now says *he would have given a thousand worlds a moment afterwards that the deed had not been done.* Do you believe him ? Then why did he not speak to her one word of consolation and kindness ? Why, while enough of life yet remained to hear him, O ! why did he not bend over that fainting and dying form, and, in the language of penitence and sorrow, say, “*It was a rash and hasty deed—I repent me that I did it.*” O ! say, but with your dying breath, that I am forgiven, and thus mingle, if it be but a particle of comfort, in my cup of affliction, which is now filled to overflowing.” O, why, when he was about to leave that house forever, *why* did he not impress a kiss upon that cold and quivering lip, and whisper a kind farewell to her whom he had thus rashly and cruelly hurried into eternity ? Or why, when he was about to leave his little children bereft of father and mother, did he not bid even *them* a farewell, and give to *them* a father’s blessing ? Does this look like repentance and sorrow for an unpremeditated act of rashness and passion ?

Follow him still farther—see him coolly and deliberately making preparations to depart—starting off, and then telling his little son he might “*now call the neighbors*”—see him halting upon the threshold to make a present to his child of the worthless, and now *horrid* instrument, with which he committed the awful deed—see him without an apparent emotion, sever every tie which could bind a husband and a father to life—see him leave his dying wife, with only a young child in the house, holding a dim lamp, and gazing in ecstasies of grief and fear upon his dying mother, while the other child, scarcely ten years of age, was running from house to house amid such a scene, and at the dead hour of night, when the stoutest hearts quailed, to call the neighbors to witness the awful tragedy, which had just been enacted. Behold all this, Gentlemen of the Jury, and then say, is *this* “murder of the SECOND degree?”

That sacred, social institution, ordained by Heaven to be productive of the greatest happiness to mankind, has been ruthlessly violated, and by *him*, who had most solemnly promised upon the altar, before God and man, to observe it, to cherish it, to guard and protect it till death—a woman—that being upon whom God has impressed a form and qualities of mind almost angelic—she, of whom it is said in holy writ, that she will forsake father and mother, sister and brother, and cleave unto her husband—she, whose affections have been beautifully compared to the vine, which winds and entwines its soft tendrils around the sturdy oak, which supports it, clasping and binding together its shattered branches, when riven by the bolt of Heaven.—A *woman* has been torn from life and hurried into an untimely grave by the very hand which God ordained to be her defender, her support, her guide and protector—and is *this* “murder in the SECOND degree?”

The object of his early love—the partner of his youth—the wife of his bosom and the mother of his children—she, who yielded her heart before the altar with all the ardor and sincerity of a woman’s love—she, who resigned herself into his arms with all the assurance of a woman’s confidence—*she*, who with the untiring assiduity and never-dying affection of a wife, sought for and procured his release from prison, when incarcerated for worse than savage cruelty inflicted upon her person—*she* has been cut off from earth, from friends and from her infant children, and flung into eternity without a moment

for preparation, and by that arm upon which she leaned for protection, for support and for comfort—and is this murder of the SECOND degree?”

When you shall go hence, and mingle with your neighbors, and they shall ask you—When you shall return to your own happy homes, and *she*, in whom is centred all that makes home dear to you, shall meet you at the gate with a woman's welcome, and shall *ask you* “if this be murder in the SECOND degree,” what do you call “murder of the FIRST degree?” in the name of Heaven, Gentlemen, I beseech you, be prepared to give such an answer as will satisfy your own consciences, and that is all which can be required of you.

But allow me, Gentlemen, once more, to repeat my fullest confidence in your wisdom and integrity—that you will do what seems to you right in the premises, and with this, I shall be content. The late hour of the evening admonishes me, that I have already trespassed too long upon your time and your patience—The government thirsts not for the blood of the prisoner, but only asks at your hands, such a verdict as shall be a terror to the vicious, and thus secure to the people such protection as they have a right to expect from the due administration of the laws. I now leave the prisoner in your hands; and that God in his infinite wisdom may direct you to that result, which your consciences will approve, when the excitement of these scenes shall have passed away, and the feelings which they have produced shall have subsided, is the sincere prayer of him, whose feeble health and still more feeble efforts have been exerted (he fears in vain,) to aid you in the discharge of your arduous unwelcome duties.

CHIEF JUSTICE PARKER charged the jury as follows.

The case, he remarked, is one of the highest importance that can engage the attention of a court of justice. It is important to the prisoner, inasmuch as the indictment contains an accusation of a character that may affect his life. The charge is a general one of murder, and it is upon that charge the jury are now to pass. This crime by the law of England and that of civilized communities generally, is punished with death; and from the earliest settlement of this state, until recently, the punishment prescribed has been the same. Until

within a short period, but one class of murder has been known to our laws, and upon conviction of that, the penalty was death. Within a few years the legislature has made some change in the law upon this subject. The statute, which has been read, divides the crime of murder into two classes—murder of the first degree, punishable with death—and murder in the second degree, punishable by imprisonment in the State's prison for life, with solitary confinement not exceeding three years—and it has devolved upon the jury who try an indictment for murder, (if they convict) the duty of determining whether the crime committed is murder of the first, or second degree.

Such is the law of this state, as it is distinctly set forth in the statute book. We sit here acting under that law, and must be guided by its provisions.

The inhabitants residing within the limits of this state have made a compact for the maintenance of government among them. Their right so to do is one recognized by the principles of civilized nations. If government could not be instituted—if there was no rule by which communities might be formed, and laws framed, the inhabitants of the earth must be in a state of anarchy and violence. The only right which would be admitted would be the right of the strongest, and instead of pursuing the arts of peace—instead of the promotion and extension of the christian religion—the strong would oppress, and spoil, and murder the weak, without restraint.—There would be no security for property, and no encouragement to attempt its acquisition.

The Christian religion also recognizes a right of government, and power to make laws, and it enjoins obedience to those laws, as one of the duties of the citizen. It is no part of the commands of that religion, that governments, when formed, shall not make any law which may affect the life of an individual. There is no injunction in its testament, that individuals ought to obey those laws which they think right, and disregard or refuse to execute such as they think wrong. Nor is there any such principle known to the code of any civilized community. No one will contend for any such general rule. Such a doctrine would introduce a seminal principle subversive of all government. It is inconsistent with the very idea of government, for there is no government where every one may do according to his pleasure.

With the sanction of the Christian religion, then, for the

formation of a government, the people of this state have made a compact, and in accordance with the principles of civil liberty they have adopted a constitution, as their highest municipal law, except in certain matters provided for by the constitution of the United States, and which do not affect this case. The constitution of the state authorizes the legislature to make such wholesome and reasonable laws, either with penalties or without, as they may judge for the benefit of the state and the inhabitants, so as the same are not repugnant to the constitution itself. The legislature, in pursuance of the power thus given, has enacted various laws for the government of the people. So far as those laws are not repugnant to the constitution of this state, or that of the United States, they are binding on all the people. We can recognize no exception, nor any exemption. They are binding upon the public officer, as well as the private individual—upon the court on the bench, and the jury in the box. There is no dispensing power. There is no touchstone by which to try whether a law is binding upon us, except that of its constitutionality. If a conscientious repugnance to the institutions and laws of a government may be a good cause for revolution, it will not answer to set up individual conscience, in a civil tribunal, as a standard by which to try the validity of laws. The constitution recognizes no such test. One man's conscience rejects, what that of another approves, and if the consciences of individuals were to furnish the rule, there would be no certainty.

The legislature have enacted the laws against murder, and provided the punishment of death in certain cases. There is nothing in our constitution which renders such an enactment unlawful. On the contrary the right to make such a law is distinctly implied in some of its provisions.

We are organized here under that constitution and the laws passed in pursuance of it. We derive all our authority from them, and are bound by oaths to perform the duties they prescribe to us; and we cannot disregard their requisitions. If an individual is charged with an assault upon another, and the evidence shows him to be guilty, the jury are bound to find him so, and will have no regard to the punishment. If the indictment charges that the assault terminated in murder, and the facts which constitute that crime are proved beyond a reasonable doubt, according to law, the jury are just as much bound to convict in such case, without regard to the consequences

which may follow. The law places us in our seats to execute the laws, without exception. If we cannot do that, we ought not to occupy them.

Nor can we here consider the expediency of a law. If we would not ourselves make a law, such as we may find upon the statute-book, that makes no difference. We may think capital punishment inexpedient. We may think that executions tend to no good. If so, that is a reason why we should attempt to procure a different enactment. But we cannot offer that as any reason why we should here act different from those who entertain other opinions.

The charge against the prisoner, then, is one that by the laws of this state may affect his life, and those laws the court and jury are bound faithfully to administer. It is a case of the highest importance to him. It is a case also of the deepest interest to the community, inasmuch as a faithful and firm administration in the department of criminal justice tends to prevent the commission of other offences.

The rules of law are humane in such cases, and we must use our utmost endeavors to execute them in the spirit in which they are conceived. The law presumes every man innocent until proof is offered of his guilt, and the proof must place his guilt beyond a reasonable doubt. In this respect the rule of evidence is different from that applied in civil cases. In such cases there is a balancing of the testimony, and it is only necessary that a party should render his case more probable than that of his adversary. The evidence is weighed, and as one scale preponderates the verdict follows. But in criminal cases the evidence must be such as to remove all reasonable doubt of the guilt of the accused, otherwise he is entitled to an acquittal. It is not necessary that the evidence should remove all possibility of doubt. But the jury are to inquire whether the accused is guilty—whether, as reasonable men, they have doubts of his guilt, upon the whole evidence in the case; and if they have such reasonable doubts, the accused is entitled to the benefit of them, and to an acquittal, notwithstanding the jury may think it is rather more probable than otherwise that he is guilty. Mere probability of guilt is not sufficient to warrant a conviction.

Has the evidence, then, shown the prisoner to be guilty of any crime within the indictment, and if so, of what crime?

The first inquiry in such cases often is, does the evidence

show that the prisoner has caused the death of the deceased. In this case there is no controversy made upon this point.—The evidence shows that the deceased died by reason of a gunshot wound, and that this wound was inflicted by the prisoner. This is not disputed. There is no question that the prisoner has taken the life of a human being, and this is homicide.

Homicide is a general term, including several divisions, and may in some cases be committed without any violation of law. There is justifiable homicide, as when life is taken under the command, or by the permission of the law, for the advancement of public justice, and for the prevention of atrocious crimes—and excusable homicide, in self defence, or by misadventure. It is not contended that this case falls within either of these classes. There is further, felonious homicide. Within this division are the crimes of murder and manslaughter, and by the statute, before referred to, murder is divided into two degrees. Under this indictment the prisoner may be convicted of murder, in the first or second degree, or of manslaughter, according as the evidence shows him to be guilty of the one or the other.

The first question, then, is whether the prisoner is guilty of murder, or manslaughter. If of the former, another question arises—of which degree of murder does the evidence show him guilty?

Upon the first question—is the prisoner guilty of murder, or manslaughter? we must inquire what is murder in the contemplation of the law, and what manslaughter.

Murder may be defined to be, the voluntary killing of a person, under the peace of the state, with malice aforethought, either express or implied. The party who does the act must of course be sane; otherwise no crime is committed.

Manslaughter is the unlawful killing of another, without malice express or implied, and may be a voluntary killing upon sudden heat or passion, or involuntary but in the commission of an unlawful act. Manslaughter is, usually, when one kills another in a sudden passion, upon some provocation.—But there are other cases. In those cases where a party is doing an unlawful act, and death ensues in consequence of his negligence, but without any intent to do bodily harm, it is generally manslaughter. And there may be cases which amount to manslaughter, when the death is caused by gross negligence in doing a lawful act.

The great difference between murder and manslaughter is in the malice attending the killing. But this need not be express ill-will against the party killed.

“The malice necessary to constitute the crime murder is not confined to an intention to take away the life of the deceased, but includes an intent to do any unlawful act which may probably end in depriving the party of life.” It is said to be “not so properly spite and malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart.” Thus when an action unlawful in itself is done deliberately, and with intention of mischief, and death ensue, it will be murder, notwithstanding there was no design to kill the deceased; as where a party intending to poison one person, poisons another. So if one with intent to do a bodily injury to another, assault him in a manner clearly endangering his life, if death ensue malice will be presumed. And it is further laid down in the authorities that have been read, that “in order to rebut the evidence of malice it must appear that the provocation was recent, for in every case of homicide, however great the provocation may be, if there be sufficient time for passion to subside, and for reason to interpose, such homicide will be murder,—and that “as evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there is proof of *express malice* at the time the act is committed, the provocation will not reduce the offence from murder to manslaughter.”

These being the principles, the jury will apply the evidence to them, and settle the first question.

The evidence is that the prisoner had the day preceding attended a muster at Epping. There is evidence that he drank that day, but intoxication is no excuse for the commission of a crime. There is no evidence to show that there was any insanity such as will furnish an excuse.

It is not necessary for the court to recapitulate the evidence at large. It has been laid before the jury very distinctly, and particularly referred to by the counsel, so far as they have deemed it important so to do. It is not at all complicated, and must have been readily understood. The evidence of those who returned with the prisoner from the muster leaves him at about eight o'clock in the evening, near his house. The particulars of what transpired for the next hour are not

shown. About nine o'clock his wife goes to Mr. Gordon's to avoid him, and not long after he follows. His conduct there has been detailed. Mr. Gordon went for the officers of the police, and his father finally caused the prisoner to leave the house. There is the evidence of what took place on the arrival of the officers at his house—the conversation with him—the return of his wife, on their request, and her statements, and his declarations ending in the promise that he would treat her well, and there is also his declaration that he would not live with her after that night. She finally consented to remain, and they were left together about twelve o'clock. The next evidence comes from his son, who, hearing the report of the gun, came down, and asked his father what he had done; to which he replied, he had shot her. She was lying on the floor wounded. The prisoner was then partly dressed. To an inquiry, why he shot her, he answered, that she provoked him to it. It appears that he examined the wound, made preparations for his departure, and shortly before he went away, told the boy he might call the neighbors. You have further his detailed account of the matter when arrested.

It is to be considered, on his part, that there is no evidence that the gun was prepared by him for such a purpose, but there is evidence tending to show that it was not so, but was charged by the boy for his own use.

On the other hand there is his previous treatment, and threats, his conduct that evening at Gordon's, and his declarations when the police officers were present. The time that elapsed between the period when she fled to Gordon's and the final catastrophe, is also to be regarded.

It is not necessary that he should have intended, at the time, to kill her, in order to constitute the crime of murder.

You will consider all the evidence and settle whether there was malice, such as is required by the law to constitute murder—whether in fact there is any sufficient evidence to show that it was a killing in a sudden passion produced by provocation, or under other circumstances such as will reduce the case to manslaughter. If there was no malice, you will convict of manslaughter, but if you are satisfied there was what the law denominates malice, you are bound to find that the prisoner is guilty of murder—and then comes the other question as to the degree.

The statute of January 13, 1837, which has been read,

provides that "all murder hereafter committed by poison, starving, torture, or other deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, or burglary, may be murder of the first degree; and all other murder shall be of the second degree." This is the first time the court has been called on to give a construction to this statute, and there is a strong diversity of opinion, upon the bench, relating to it. The question is whether, where the testimony, in any case, shows clearly, beyond a doubt, that murder has been committed by poisoning, or in some other deliberate and premeditated manner, or in the attempt to perpetrate the other crimes mentioned in this clause of the statute, the jury are bound, by the statute, to find the party guilty of murder of the first degree; or whether they have a discretionary right to find a verdict of murder of the second degree, if they please, in all cases, however deliberate and aggravated the case may be, in order to save the offender from capital punishment. This depends upon the force of the term "*may*," in the first clause of the sentence. If, instead of that, the word "*shall*" had been used, as in the next clause, there would be no doubt that no discretionary authority was intended to be given, but that the statute was imperative upon the jury to find murder of the first degree, when the proof showed it to have been committed by poisoning, or in the other modes specially designated in that clause of the act.

In favor of the construction giving the jury a discretion to find in any case murder of the first or second degree, according to their pleasure, it has been reasoned that the word *may* imports no obligation, as the word *shall* does, but denotes permission, and that the use of that term in relation to murder of that character, while the term "*shall*" is used in the very next clause of the sentence in relation to the second degree of murder, indicates that the legislature intended to make a distinction, and to leave it optional with the jury how they will find in relation to the first class, while they made it obligatory upon them as to the second—that it is well known that great doubts have been expressed respecting the expediency of capital punishment; that this statute was passed after much public discussion had been had upon that subject, and that the phraseology must have been designed, in order to abolish that kind of punishment, in all cases except those of such an ag-

gravated character that a jury should believe that the punishment of death ought to be inflicted—that it is believed that this part of the statute was copied from the statute of another state, with the exception of substituting the term “*may*” instead of *shall*, which was there used, with the only intention of making this difference—and that if there is doubt about the construction, that ought to be adopted which is most in favor of life.

On the other hand, it has been urged that the term “*may*,” in the connexion in which it stands, has the same force and signification as if the word “*shall*” had been used—that such a use of the word is not uncommon in the statutes, a very marked instance of which is to be found in the third section of the statute relative to masters and apprentices, where it is enacted that the parents, &c., may complain to any justice of the peace, “and the justice, after having duly notified the parties, shall proceed to hear and determine such complaints, and if the complaint shall be supported, the court *may* render judgment that the said minor be discharged from the obligation and service of his said master, and the said master to pay costs of court, and all damage the said apprentice may, in the judgment of the court, have sustained from any cruelty, ill-usage, or neglect of his said master, or from any personal abuse of the master, or from others the said master may have countenanced in abusing said apprentice, and execution *may* be issued accordingly ; but if said complaint shall not be supported, the court *shall* award costs to the respondent” *—that there is no doubt, that in this clause the term “*may*” is *twice* used to denote an imperative duty, without any discretion—that to construe the clause in the statute of 1837, so as to give such a discretionary power to the jury, would introduce an entire new rule into judicial proceedings, there being no other instance in which the law confers upon the jury any discretion to find one verdict or another, according to their mere pleasure ; the rule in all other cases, civil and criminal, being, that the jury shall find their verdict according to the facts proved—that although the jury, before this statute, had, and now have, the right, on an indictment for murder, to find murder or manslaughter, this is not a right to find so at their pleasure, but according as the evidence proves the one or the other crime to have been committed, and so of other cases—

* 1 N. H. Laws, 176.

that such a discretion would make punishment unequal, as the question whether the offender should be convicted of murder of the first or second degree, would depend not upon the nature and aggravation of the offence, but upon the view of different juries as to the expediency of capital punishment—that if the legislature had intended to make such a great change in the principles of the law, and to bestow a discretion unknown to the laws in all other cases, it would have been done in some more direct and specific language, and not by the mere use of a word, which, in divers other instances, is used in the sense of “*shall*,” and implying not a permission or discretion, but an absolute duty; and that if it might be supposed that the individual who drew the act had an intention by the use of this term “*may*” to give a discretionary power to the jury, there is not sufficient evidence that the legislature gave to it any different signification and import, than is given to it in the act relative to masters and apprentices, and in divers other statutes; and furthermore, that if the word “*may*” is construed as denoting permission, and the precise grammatical form of the sentence is to give the construction, then the discretion which the jury must have, will be to find murder by poisoning, &c., to be murder of the first degree, or nothing; because upon such precise grammatical construction, the permission is merely to find all such murder to be of the first degree, without any right to find any killing of the description there mentioned to be murder of the second degree; for this statute alone constitutes the offence of murder in the second degree, and it does not make murder by poisoning, or in the other ways specially enumerated, murder of the second degree, or give the jury any right to find it, but it is “*all other*” murder, that is made by the statute murder of the second degree.

These are some of the arguments that have been suggested in favor of the different constructions of this statute, but we are all agreed, for the purpose of this trial, to instruct you, that if the offence proved in this case is shown by the evidence to be a murder within the description specified in the first clause of the statute, you are bound to convict the prisoner of murder of the first degree. Should it become necessary, he will have the benefit of an exception to this direction, and if, in the opinion of the Superior Court, it is incorrect, he will be entitled to a new trial. For this trial you

will take the true construction of the act to be, that in all the cases specified in the first clause of the statute there is no discretion, but the act constitutes them murder of the first degree.

Does this case come within that class? The deed was not done by poison, or starving, or torture, nor in the commission, or attempt to commit, any of the other crimes there mentioned. Was it a "deliberate and premeditated killing?"

In order to constitute a deliberate and premeditated murder, it must have been previously designed or planned, and it must have been meditated or reflected on, and thus carried into execution. There is no specific length of time in which it must have been contemplated, but it must have been a subject of consideration. If it was the result of a sudden outbreak, by reason of irritation, it cannot be considered a deliberate and premeditated act.

In settling this question, the jury will take into consideration all the previous circumstances. His promise to the officers, that he would treat her well if she staid—the time of night when it took place—and the fact that he would seem to have been in bed, as he stated, for he was but partly dressed when his son came down, are to be weighed. And the evidence to show that the gun was loaded by the boy, indicates that he had not probably premeditated taking her life in the way it was taken.

On the other hand, his declaration that he would not live with her—his general conduct that evening—and his previous conduct and threats are to be considered. These threats, however, are not conclusive evidence to show this to have been a deliberate and premeditated murder. They may have been uttered without an intention, at the time, to carry them into execution. If he intended it at the time, but the purpose was afterwards foregone, and the design wholly abandoned, and at a subsequent period he took her life from sudden impulse, occasioned by irritation, then those threats would not avail to make it a deliberate murder. The evidence of her taking his part when the police officer attempted to arrest him, and her visits to the prison when he was confined, may, perhaps, have some bearing to show that she did not suppose, at those times, that his threats indicated a deliberate purpose to murder her.

The jury will weigh the whole evidence, and, if he is

guilty of murder, find whether it was deliberate and premeditated, or upon some sudden impulse, without reflection. If guilty of murder, and you have reasonable doubts whether it was deliberate and premeditated, he is entitled to the benefit of those doubts, and in that case you will find murder of the second degree.

Your verdict will be in one of three ways;—that the prisoner is guilty of murder of the first degree,—or guilty of murder of the second degree,—or guilty of manslaughter—according as you may find the facts, upon the principles thus stated.

Adjourned.

Thursday, 9 o'clock, A. M.

The jury having been called, returned a verdict of “Guilty of murder in the second degree.”

Soon after the Clerk called upon the prisoner to stand up and hear the sentence of the Court---which he read as follows:

“Bradbury Ferguson, the Court having taken your offence into consideration, order that you be punished by *solitary* imprisonment for the term of *two years*---be confined to hard labor in the State prison during your natural life, and pay costs of prosecution,”

REPORT
OF THE
Trial
OF
GEORGE F. WILLEY.

George F. Willey of Nottingham, on the 18th of December, 1840, was examined at Nottingham, in the County of Rockingham, before Mr. Justice Tuttle, on a complaint for murdering Mr. David Glass at Nottingham, on the 9th of said December, and was ordered to stand committed.

At the February Term of the Court of Common Pleas for said County of Rockingham, the Grand Jury returned the following Indictment.

STATE OF NEW HAMPSHIRE.

ROCKINGHAM, SS.

At the Court of Common Pleas, holden at Portsmouth, in and for the county of Rockingham, on the third Tuesday of February in the year of our Lord one thousand eight hundred and forty-one—

The jurors for the State of New Hampshire, on their oath present, that George F. Willey of Nottingham, in said county of Rockingham, laborer, on the ninth day of December, in the year of our Lord one thousand eight hundred and forty, at Nottingham, aforesaid, in the county of Rockingham aforesaid, in and upon the body of one David Glass feloniously and wilfully did make an assault, and with a certain stick, which he the said George F. Willey, then and there in both his hands, had and held, in, upon and against the right side of the head of him the said David Glass, then and there feloniously and wilfully did strike, and did then and there, by the means and blow aforesaid, give to the said David Glass, in and upon the right side of the head of him the said David Glass, one mortal wound, fracture and contusion of the breadth of four inches, and of the depth of three inches, of which said mortal wound, fracture and contusion the said David Glass then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said George F. Willey, him the said David Glass then and there in manner and form aforesaid, feloniously, and wilfully, did kill and slay, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

CHARLES F. GOVE, *Att'y Gen.*

This is a true Bill—

NATHANIEL B. MARCH, *Foreman.*

On this indictment the prisoner was arraigned, and pleaded *Not Guilty*.

The Court assigned James Bell and James W. Emery, Esqrs., as counsel for the prisoner.

On Wednesday, of the second week of the term, the prisoner being put to the bar, retracted his former plea of *Not Guilty*, and pleaded *Nolo Contendere*.

Mr. Bell, of counsel for the prisoner, suggested to the Court that the case of the prisoner at the bar differed from common homicide. He was but a youth—short of eighteen years of age, and had not enjoyed the privileges of education. He could neither read or write. The act was done in the heat of passion, and from provocation. The instrument used was one which would not inevitably have produced death—was used without any intention of killing, and, indeed, the man Glass did not die for some days after the blow was given.—That affidavits would be furnished the Court, going to show these facts. He thought it a case for the consideration of the Court and for their mercy, and submitted the affidavits.

Upon inquiry from the Court, it appeared the Attorney-General had not examined the affidavits, and they were handed to him for examination.

The prisoner was then remanded to the jail.

On Thursday the prisoner was again put to the bar, and Mr. Emery, of the prisoner's counsel, read the following affidavits.

Affidavit of Joseph Langley. I, Joseph Langley, of Nottingham, depose that on the 9th day of December, A. D. 1840, I went to wood land of Joseph Bartlett, to assist George F. Willey in cutting wood, and at about ten o'clock in the forenoon, David Glass, of said Nottingham, came to us in the woods, and took his axe and cut down one maple tree, and cut it up into cord-wood lengths, and then turned round to said Willey, and said, "I want my pay for what I have done;" to which Willey answered, "I can't pay you, and I won't." Then said Glass stepped out from the limbs of the tree upon which he was at work, and said, "I want my pay, and will have it. I will take it out of your hide." Then Willey took up a stick, (which I did not particularly examine, but took to be about as large as a hoe-handle,) and went to Glass and struck him with it across the side of the

head. When said Willey took up said stick, and started to go towards Glass, he was perhaps about a rod from him ; and as said Willey started quick towards him, said Glass, before said Willey had fairly got to him, sat down on the ground, and then said Willey struck him as before-mentioned.

As the blow fell upon the right side of his head, said Glass threw out his left arm and saved himself from falling over, and then turned over upon his hands and knees and got up. He then went off perhaps two rods, and then turned and came back towards us, and, as he approached, said Willey retreated a short distance, and told him not to come upon the lot any more, but to keep off. Glass said nothing, but shook his head, and turned and went off, and I saw no more of him till he was found, nine days afterwards. I had never known or heard of any ill-will or animosity between said Willey and Glass before said quarrel. Said Willey will be eighteen years old next spring. He has had very little, if any, opportunity to attend school, and cannot read or write.

His
JOSEPH X LANGLEY.
mark.

Rockingham, ss. Feb. 23, 1841. Sworn to before me,
JAMES BELL, *Jus. Peace.*

Bradbury C. French's Affidavit. I, Bradbury C. French, of Nottingham, depose that I am the keeper of the Poor House and Farm of said Nottingham, and that prior to the 9th day of December last, David Glass was boarding at said house—that on that day he left the house between nine and ten o'clock in the forenoon, and was gone until the 17th of the same month.—That on the 15th of December, becoming alarmed at his continued absence, I began to make inquiry for him, and on the 17th, on my return from Nottingham Square, where I had been to see his guardian, I found George F. Willey at my house, and asked him to assist me in finding said Glass. I had before been informed by Joseph Langley that Willey had struck Glass, and that Glass had turned and gone away from them. I asked said Willey how he came to strike said Glass, and he answered, that “he struck him, but did not think to injure him—that being in a passion, he might have struck him harder than he was aware of.” I expressed my apprehension that said Glass was dead somewhere in the woods. Said Willey consented to go with me and others,

and search for him ; and he started to conduct us to the place where he was cutting wood with said Glass on the 9th of December ; but before entering the woods, we found the body of said Glass in a pasture adjoining said wood land. Said Glass, who was an intemperate man, had been in the habit of leaving said Poor House and returning to the same at his pleasure—being often absent for several days—and I did not, therefore, become alarmed until his absence had continued more than a week.

B. C. FRENCH.

I further depose, that I never knew or heard of any quarrel or misunderstanding between said Glass and Willey, before the 9th of December last.

B. C. FRENCH.

Rockingham, ss. Feb. 23, 1841. Sworn to before me,
JAMES BELL, *Jus. Peace.*

Samuel Neally's Affidavit. I, Samuel Neally, of Nottingham, depose, that on the 17th of December last, I went with Bradbury C. French, George F. Willey, and others, to search for David Glass—that we discovered his body within about 100 yards of the road, in a pasture adjoining the woodland of Joseph Bartlett, lying under a pine tree, and that said Bradbury left us with the body, while he went after the guardian of said Glass and the selectmen. The said George F. Willey then remained with us about twenty minutes, and then said he thought he would go home ;—that I called him back, and told him he had better not go—that he came back and said to me, “I struck him—I shall own the truth about it, let the case turn as it will,”—that prior to this, I never knew nor heard of any difficulty or quarrel between said Glass and Willey.

Said Glass was about 40 years old, and was under the guardianship of Ebenezer Butler, Esq. Said Willey is an ignorant young man, who has never had any advantages for obtaining any learning or education. I never knew nor heard of his being quarrelsome or malicious.

SAMUEL NEALLY.

Rockingham, ss. Feb. 23, 1841. Sworn to before me,
JAMES BELL, *Jus. Peace.*

Ebenezer Butler's Affidavit. I, Ebenezer Butler, depose, that I was appointed by the Probate Court, guardian of David Glass about the year 1835, on the ground that he was a spendthrift and a person of bad habits, and continued

his guardian to the time of his death. That on the 19th day of December last, after the body of said Glass had been found, I saw George F. Willey at the Alms House in Nottingham, and asked him how he came to strike said Glass, to which he answered, that David kept dunning him for his pay—that he told him that he had no money—that David then threatened him to take it out of his hide, and he then struck him—that he had no idea of killing him, but supposed that he struck him harder than he meant to do. I further depose, that from the clothing of said Glass, which was dry, notwithstanding the rain which fell on the 12th and 13th days of December, and other circumstances, it appeared probable that said Glass lived some days after he received the wound. After said 13th day of December, the weather became quite cold. I never knew or heard of any ill-will or quarrel between said Glass and Willey, before said 9th day of December.

EBENEZER BUTLER.

Rockingham, ss. Feb. 23, 1841. Sworn to before me,

JAMES BELL, *Jus. Peace.*

Nathaniel Bachelder's Affidavit. I, Nathaniel Bachelder, of Epping, physician, depose, that on the day when the body of David Glass was discovered, I made an examination of the wound on his head, and found a fracture of the skull above the right ear, but no depression of any part of the skull—that he appeared to have died from the consequences of concussion of the brain, and that he probably lived some days after he received said wound.—That I knew the parents of George F. Willey, who were uneducated and quarrelsome people, and that George F. Willey himself was ignorant and uneducated—that the cold and exposure to which said Glass was subjected were probably enough to have produced death, if his wound had been slighter—and that his life might probably have been saved by a seasonable surgical operation.

NATHANIEL BACHELDER.

Rockingham, ss. Feb. 24, 1841. Sworn to before me,

JAMES BELL, *Jus. Peace.*

Samuel French, Jr.'s Affidavit. I, Samuel French, Jr., depose, that I was present when Bradbury C. French, George F. Willey, and others, discovered the body of David Glass.—That said Willey accompanied us voluntarily in making said search. I have known said Willey since he was a child,

and never knew or considered him a quarrelsome or malicious young man.

SAMUEL FRENCH, Jr.

Rockingham, ss. Feb. 23, 1841. Sworn to before me,

JAMES BELL, *Jus. Peace.*

The Attorney-General here observed that he had no affidavits to offer.—That those read by the counsel for the prisoner embraced, in effect, the evidence as given before the Grand Jury.—That he had no doubt, as one or more of the Court resided in the immediate vicinity of the transaction, and without doubt knew the whole particulars attending it, that the Court would arrive at such opinion in the case, and give such sentence to the prisoner at the bar, as would be perfectly satisfactory to all parties, and would submit the case.

After some consultation of the Court, the clerk called upon the prisoner to stand up and receive the sentence of the Court—which he read as follows:

“George F. Willey,—the Court having taken your offence into consideration, order that you be punished by solitary imprisonment for the term of three months, and be confined to hard labor in the State-Prison for the term of seven years, and pay costs of prosecution.”

The prisoner was then ordered to be remanded to jail.