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OPENING SPEECH

OF

JOHN GRAHAM, Esq.,

TO THE JURY, ON THE PART OF THE DEFENCE, ON THE TRIAL OF

DANIEL E. SICKLES,

IN

THE CRIMINAL COURT OF THE DISTRICT OF COLUMBIA,

JUDGE THOMAS H. CRAWFORD, PRESIDING.

APRIL 9TH AND 11TH, 1859.

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MAY IT PLEASE THE COURT—

GENTLEMEN OF THE JURY:

THIS is to me a time for solemn thoughts, and I rise to address you laboring under a severe struggle of feeling. It is a beautiful sentiment, better expressed in the Latin, than in the translation, *amicos res opimæ pariunt; adversæ probant.* Prosperity is the parent of friends; bad fortune is the fire in which they are tried. Friendship is the most sacred of all artificial, as distinguished from our natural attachments. It stands next to those which by the hand of Nature have been interwoven with the objects which she herself creates. Upon the altar of this relation I cast my present offering. It carries with it the unction of a warm heart. May it prove to be an efficacious tribute in favor of my client! I have been the companion of his sunshine, and I am now called here to participate in the gloom of his present affliction.

Trouble is a mysterious visitor. It seems to be the unshunnable doom of man. It has been well said that, "Although affliction cometh not forth of the dust, neither doth trouble spring out of the ground: yet, man is born unto trouble, as the sparks fly upward." That same great influence which has impressed laws upon all the departments of creation—which has studded the heavens with their fires, and ordained the boundary line between the day and the night—that same great influence which stretches over the face of Nature verdure's green mantle, and again supplants it for the less pleasing dress of winter—that same great influence which has designated the time for the dropping of the leaves and the falling of the sparrows—is the will that guides, and the hand that holds the rod, with which, in this life, we are punished. As we pass from the proceedings in which we are here engaged, may we be permitted to repeat over their result (which I confidently anticipate), as a congratulation to this defendant for the severe ordeal through which he has passed: "Behold, happy is the man whom God correcteth: therefore despise not thou the chastening of the Almighty: for he maketh sore, and bindeth up: he woundeth, and his hands make whole. He shall deliver thee in six troubles: yea, in seven there shall no evil touch thee."

A few weeks since, the body of a human being was found in the throes of death in one of the streets of your city. It proved to be the body of a confirmed—an habitual adulterer. On a day too sacred to be profaned by worldly toil—on a day on which he was forbidden to moisten his brow with the sweat of honest labor—on a day on which he should have risen above the grossness of his nature, and though on no other day he had sent his

aspirations heavenward, he should have allowed them then to pass in that direction—we find him besieging with the most evil intentions that castle where, for their security and repose, the law had placed the wife and child of his neighbor. Had he observed the solemn precept, "Remember the Sabbath day, to keep it holy," he might at this moment have been one of the living. The injured husband and father rushes upon him in the moment of his guilt, and, under the influence of phrenzy, executes upon him a judgment which was as just as it was summary.

The issue which you are to decide here is, whether this act renders its author amenable to the laws of the land. In the decision of this issue, Gentlemen of the jury, you have a deep, a solemn interest. You are here to fix the price of the marriage bed. You are here to say in what estimation that sacred couch is held by an honest and an intelligent American jury. You are favored citizens. You live in the city which constitutes the seat of our federal government; a city consecrated to liberty above all others, but not to the liberty of the libertine; a city bearing the name of the illustrious Washington, the "Father of his Country," of whom it has been emphatically and truly said that he was "first in war, first in peace, and first in the hearts of his countrymen." You may feel a pity, in reviewing this occurrence, for the life which has been taken; you may regret the necessity which constrained that event; but, while you pity the dead, remember, also, that you should extend commiseration to the living. That life, taken away as it was, may prove to be your and my gain. You know not how soon the wife and daughter of some one of you would have been—nay, you know not but what she had already been—marked by the same eyes which doomed and destroyed the marriage relations of this defendant. You know not how soon the gardens of loveliness over which you now preside, had that life been spared, would have been called upon, by the deceased, to supply *their* flower, wherewith to gratify his wicked, yet insatiable appetite.

An interference with the marriage relation must strike every reflecting mind as the greatest wrong that can be committed upon a human being. It has been well said that affliction, shame, poverty, captivity, are preferable; and I do not know that I can express the sentiment more happily than in reciting the lines which the great dramatist has placed in the mouth of the Moor, over the supposed discovery of the inconstancy of his Desdemona:

> "Had it pleas'd Heaven
> To try me with affliction; had he rain'd
> All kinds of sores and shames on my bare head:
> Steeped me in poverty to the very lips;
> Given to captivity me and my utmost hopes;
> I should have found in some part of my soul
> A drop of patience; but, alas! to make me
> A fixed figure for the time of scorn
> To point his slow, unmoving finger at,
> Oh! Oh!
> Yet I could bear that too; well, very well.
> But there, where I have garnered up my heart;
> Where either I must live or bear no life;
> The fountain from the which my current runs,

> Or else dries up; to be discarded thence.
> Or keep it as a cistern, for foul toads
> To knot and gender in!—turn thy complexion there!
> Patience, thou young and rose-lipped cherubim;
> Aye, there look grim as hell."

You are here to decide whether the defender of the marriage bed is a murderer—whether he is to be put on the same footing with the first murderer, and is to be presented in his moral and legal aspects with the same hues of aggravation about him.

Gentlemen, the murderer is a most detestable character. Far be it from me to defend him before this or any other jury. Society cannot, it ought not to contain him. Calm, cold, and calculating, he saves his malice as the miser saves his treasure. His bosom is the vault in which he deposits it. Age possesses no claim upon his consideration—nor does sex interfere with him in the execution of his bloody purpose. In the very air he sees his weapon, and it marshals him "the way that he was going." He selects some object of innocence for his victim, and chooses some lonely spot for the perpetration of his horrid deed. In the drapery of the Night he wraps himself—and at that hour when

> "O'er the one half world
> Nature seems dead, and wicked dreams abuse
> The curtain'd sleeper,"

he steals forth to the accomplishment of his bloody design. Afraid of his own movements, he is compelled to address the very Earth itself in the language of supplication—and entreat it to

> "Hear not *his* steps, which way they walk, for fear
> The very stones prate of *his* whereabout."

If, between the act which has placed the defendant in his present position, and the act of a criminal like that, you can trace any similarity, it will be for you to institute and perfect the comparison; it is not in my power to do so.

There are some preliminary matters, Gentlemen of the Jury, to which I shall very briefly allude, before I proceed to the discharge of the important duty which has been cast upon me by the concurrence of my learned associates for the defence. There are some features of this trial which are to be borne in mind by you at this time.

In the first place, there was an extraordinary occurrence in the empannelling of the very body which is made up or composed of yourselves. You have heard the explanation of the learned prosecuting officer for the course he then pursued. The Court had no alternative but to administer the law; the objection was a matter entirely for the breast of the District Attorney; but you were called upon to witness the moving spectacle of the Son of misfortune being thrust from his rights, for no other reason than because he had the misfortune to be unfortunate. It does not speak strongly in favor of the intelligence of the law that it makes the possession of property to no *inconsiderable* amount, an indispensable qualification in the choice of those who

are drawn or selected for the discharge of jury duty. You will remember how soothingly his Honor upon the Bench expressed himself at the time he was forced to sustain objections which were founded in (*what he held to be*) this requirement of the law—for he evidently desired to avoid striking anguish into the bosoms of the unfortunate men who came within the principle of those objections. While such an exaction does not speak strongly in favor of the law, the odium of it is rather diminished by the reflection that it has about it the error of a century's age.

Another feature to be regarded, about this trial, is, the appearance of extra counsel on the part of the prosecution. We have been informed that they have not been assigned to the case by the act of the Government, and you must determine the question, although there may be a legal propriety in their appearance, under *some* circumstances, how far the exigencies of this case demand or justify it on this occasion.

Another feature of the case to be borne in mind by the jury is this: the extraordinary character of the opening of the learned counsel for the Government. It was an able, it was an eloquent production. It reflected credit upon the mind from which it emanated, for it was stamped with a high order of ability; but it will be for you, Gentlemen, to say, when you pass that opening in review before your minds, whether or not it was warranted by the humanity that should ever attach itself to his position. You will remember the extraordinary expressions of the "prisoner coming to this carnival of blood," of his being "a walking magazine," of his "adding mutilation to murder," of his "standing bravely over his victim," as though with dagger drawn ready to plunge it in his bosom. Gentlemen, you would have thought, from this opening, that the learned counsel for the Government was describing a case of the most deliberate homicide—and yet the case, he was describing, was the case of a man, who, while acting from a sense, and under the influence of a sense, of right, was nevertheless, no doubt, at that particular juncture, entirely bereft of his reason. At the time he alluded to the *magazine*, which he described as being in the possession of the defendant, did it occur to the learned counsel for the prosecution to describe also the weapons that were in the possession of the adulterer? For with his opera-glass and white handkerchief he was capable of carrying death just as certainly to the domicil of the defendant, as the weapons, with which this defendant was provided, were capable of carrying death to him. The sight of that opera-glass, and those other appliances with which the deceased was furnished, in the prosecution of his unhallowed purposes, were just as certain death to the happiness and hopes of the defendant, as though the pistol of that adulterer had been presented at his breast.

Another feature of this trial which I think it proper to present to your minds, Gentlemen of the Jury, is this; you will remember that the learned counsel for the Government, in questioning one of the witnesses, asked him to describe what *he saw* at the time of the occurrence, which led to the death of the unfortunate deceased. You will remember that the witness to whom that question was put, desired to spread before the court and jury all that he saw and heard upon that fatal occasion. The learned counsel for the

Government rose in his place and protested against the witness, stating what was not responsive to his question, and the gentleman made an admission, in the hearing of this jury, which seems to me, at all events, to be improvident, so far as the success of this prosecution is concerned. Knowing that some of the witnesses might testify to *a fact*, which would detract from the aggravated hue sought to be put upon the occurrence on the part of the prosecution, the learned counsel for the Government stated that he put the question, intending that the witness, in his answer, should discriminate between what he saw and what he heard. You will recollect, Gentlemen, that the honest Judge, upon the bench, stood out in the behalf of truth—that he refused to sanction the discrimination—and I can never forget the occurrence; no, not even to the latest hour or minute of my existence—you will recollect, Gentlemen, that not in a spirit of severe but rather of kind reproof, the learned judge said; "When a witness is put upon this stand, no matter how he is questioned, he is put here to tell the whole truth and nothing but the truth, and it is the duty of the Court to see that the witness is protected in stating all the knowledge which he may have gained upon the occasion in question."

Gentlemen of the Jury, I ask you this; why is it that this prosecution is thus technically managed? Is there anything behind, which, if it escaped, would satisfy this jury that this is an unhallowed prosecution? I do not mean by this to impeach the integrity of the authorities in any way; I use the word unhallowed rather in the sense that it ought not to succeed through the instrumentality of an intelligent jury. Is there anything in this prosecution which requires that the case should be tried in the way in which it has been tried; that from this jury all but property-holders should be excluded; that in the opening address of the learned counsel for the Government the occurrence should be presented under a hue which the facts do not impart to it; that strong extra counsel should be employed in order to sustain the prosecution; and that witnesses should be examined in a particular form so as to exclude from the ears of this jury, *that fact* which, when it becomes a part of this case, must incline the scale in favor of the defendant? It will be for you, under all the circumstances as I have presented them to you, to account for these extraordinary features in this prosecution.

In relation to your province, Gentlemen of the Jury, as I understand it, the Court has invested you with the largest powers. I have read several of the charges of the learned Judge upon the bench to juries, and I find that he is imbued with a spirit which has been only exemplified in an equal degree in one instance, to my knowledge, by any other jurist, and that is by the great Chancellor Kent. The greatest champion that juries ever had in this country was probably that great and now deceased jurist; and the same spirit which seems to have entered into the instructions and judgments of that learned jurist, with reference to the rights of juries, appears to influence the learned Judge upon the bench in relation to your province. As I understand the law of this Court, every fact is to be passed upon by the jury—not only the facts entering into the occurrence, which is charged as a crime, but the state of mind—the intention—the motives—that impalpable influence,

if there was such an influence—which set on the defendant to the commission of the act, for which he is now arraigned as a criminal before you. So far as the definition of *offences* is concerned in this case, resort is to be had to the common law of England, and the trial by jury, in this disirict, is to be according to the course of that same *common law*, except as modified by the genius of our institutions, or as changed by the Constitution and laws of the United States, or the law of the State of Maryland, as continued over this district by federal legislation. As to the crimes claimed to be involved in this proceeding, let me first ask your attention to the definition of *murder*, as given in 4th Blackstone's Commentaries, page 195, a book of the highest authority, and the law, as here laid down, is to control you in the discharge of your present duty. Blackstone, borrowing his definition from Coke, thus defines murder:

"When a person of sound memory and discretion unlawfully killeth any reasonable creature in "being and under the King's peace with malice aforethought, either express or implied."

We have no king, and therefore, to carry out this definition, *we* must substitute in place of "the King's peace" "the peace of the people of the United States."

I shall, in another branch of the case, consider the question, whether at the time of the death of the deceased, he was in the peace of the people of this great Government, whether the adulterer, when he goes forth upon his mission, does not cease to be in the peace of the community, and whether he is not making direct war upon those great fundamental principles upon which not only the institution of marriage itself rests, but upon which our social fabric is founded.

The definition of manslaughter is given on page 191 of the same book. It is there thus defined:

"The unlawful killing of another, without malice either express or implied, which may be either "voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act."

The difference between murder and manslaughter (as was stated by the learned counsel for the Government) is this; the one is supposed to be committed in cold blood as the result of premeditation, and the other is supposed to be committed in a state of heat resulting from passion, but resulting from passion which ought to be controlled, but is not controlled; for passion which cannot be controlled is not passion which places any man within the pale of criminal accountability.

In this connection let me also ask the attention of the Court and jury to Foster's Crown Law, page 290, which, although it is an old treatise, nevertheless, is one of the purest and most reliable oracles from which legal knowledge can be gained.

This author says, speaking of *manslaughter:*

"I now proceed to that species of felonious homicide, which we call manslaughter, which, as I "before observed, *the benignity of our law, as it standeth at present, imputeth to human infirm-* "*ity;* to infirmity which though in the eye of the law criminal, yet is considered as incident to "the frailty of the human frame."

I refer, also, to pages 256 and 257 of the same treatise, for a definition of Malice. This point is important, for the great question to be solved by the jury in this case is—what was the state of the defendant's mind at the time he slew the man who had contaminated the purity of his wife.

That is the cardinal question here. The counsel for the defence noticed on the first day, on which the witnesses for the Government gave their evidence, that some of the jurors took notes of the testimony given as to the *mode* or *circumstances* of the killing; but as we understand or look upon this case, it is perfectly immaterial how death was inflicted; whether it was the result of one shot or of thirty shots; whether the man who was killed stood up or lay down. The inquiry upon this part of the case, at least, is, what was the influence of the provocation *he* gave, upon the mind of the man who slew him; what was the condition of the mind of the defendant at the time he killed the deceased.

If the transaction was presided over by a mind perfectly self-possessed, *that* may constitute a different question, although, in some of the aspects in which I shall hereafter present this case, even that would not be conclusive in establishing that there was any criminality on the part of the defendant. But assuming, for the sake of the argument, that, under other circumstances, the act of slaying would be a crime, then the inquiry is—what was the condition of the mind of the defendant at the time of the perpetration of his act?

Serjeant Foster says that the term malice, in this instance, signifieth

"That the fact hath been attended with such circumstances as are the ordinary symptoms of a "wicked, depraved, malignant spirit."

Do you mean to tell me that the ordinary symptoms of a wicked, depraved, malignant spirit attend the act of the husband who slays the man who has polluted his wife? What distinction, then, do you draw between the case of a man who slays in order to commit a crime, and that of the man who slays in order to prevent the commission of a crime? Unless, Gentlemen of the Jury, you are prepared to find that the act of the husband who vindicates his marriage bed, by slaying the man who dares to defile it, is symptomatic of a "wicked, depraved and malignant spirit," there would seem to be an end of the case, upon this branch of it.

But to proceed with our author: After saying that malice, in reference to the crime of murder, is not to be understood in the restrained sense of "a "principle of malevolence to particulars," he proceeds:

"For the Law by the term malice, in this instance, meaneth that the fact hath been attended with "such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit."

"In the case of an appeal of death, which was anciently the ordinary method of prosecution, "the term malice is not, as I remember, made use of as descriptive of the offence of murder in con- "tradiction to simple felonious homicide. The precedents charge that the fact was done *nequiter* "(wantonly, craftily), *et in felonia* (feloniously), which fully taketh in the legal sense of the word "malice. The words *per malitiam* (by malice) and *malitiose* (maliciously) our oldest writers do "indeed frequently use in some other cases; and they constantly mean an action flowing from a "*wicked and corrupt motive*—a thing done *malo animo* (with a bad or depraved mind), *mala* "*conscientia* (a wicked heart or conscience), as they express themselves."

The same author further says:

"The legislature hath likewise frequently used the terms 'malice' and 'maliciously' in the same "general sense, as denoting a *wicked*, *perverse* and *incorrigible* disposition."

Again—on the same page:

"The *malus animus* (the evil or wicked mind) which is to be collected from all circumstances, "and of which, as I before said, the court, and not the jury, is to judge" [which was the law when this author wrote], "is what bringeth the offence within the denomination of willful, malicious mur- "der, whatever might be the immediate motive to it; whether it be done, as the old writers express "themselves, *ira* (in or from anger), *vel odio* (or hatred), *vel causâ lucri* (or for the sake of gain), "or from any other wicked or *mischievous* incentive."

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

Contemplating this proceeding, in reference to the charge of *murder*, you behold in these citations, Gentlemen of the Jury, the hideousness of the *peculiar*, the *animating* principle of that crime.

In order to constitute "malice," as that term is understood in reference to *murder*, you must find that the act, which is alleged to be *malicious*, was the result of a wicked, depraved, and malignant spirit; and if you can ascribe a spirit of that mind to the act of the husband who slays in defence of his marriage bed, then I have the honor to address gentlemen differently constituted from what I suppose you to be.

I must now pass on to another subject. Having given you the definitions of *murder* and of *manslaughter*, you are required to say, in the discharge of your duty ultimately, whether this case comes within either of those definitions—whether the act of the defendant, within either of those definitions, was or is evincive of a criminal heart. If it is a crime for a husband to defend his altar, his humble family altar, and if death is to be visited upon him for defending it, then the highest honor that can be conferred upon any man is to compel him to die such a death.

Now, three things are to be noticed: first, that human laws do not shield us in the enjoyment of all our rights; second, that a right created by divine law is perfect, though not recreated by human law; and, third, that to certain relations the divine law has attached responsibilities to execute which is not to commit a crime. The two first considerations are properly discussed together, and, by way of enforcing them upon your minds, we insist *that our legal system does not reach the case of every wrong that can befall us.* There are certain wrongs which we are not protected against, at all, by human laws, and therefore the only law which protects us against them is that which is traced in the human bosom by the finger of God—*the law of human nature; the law of human instinct.* When human laws do not protect us against injury, we appeal to our instincts; we are thrown upon the law of our instincts, and have a right to defend ourselves against those wrongs. This position will be perceived, upon examination, to be well founded. There is no law in this district which says you have a right to defend yourself against attack, except the law of nature. It would be folly to pass a statute to declare

that a man may defend himself against the assault of a highwayman; or if a statute were passed on a subject like that, it would be folly to say that, before the statute was passed, you had not the right of defence. Self-preservation is nature's great law, and it overrides all other laws. Two men are floating on a plank, and it is necessary that one should be drowned in order that the other may be saved. It is not murder in the person who, to save his own life, drowns the other, when two persons are *so* situated, because the law considers that all social regulations must yield to those great principles which are implanted in us, and are a part of us as we come from the hands of the great Creator.

Serjeant Foster, at page 273 of his Treatise, says:

"The right of self-defence in these cases (*alluding to the cases in which the right can be "availed of*), is founded in the law of nature, and is not nor can be superseded by any law of "society. For before civil societies were formed, one may conceive of such a state of things, "though it is difficult to fix the period when civil societies were formed, I say before societies were "formed for mutual defence and preservation, the right of self-defence resided in individuals: it "could not reside elsewhere. And since, in cases of necessity, individuals incorporated into society "cannot resort for protection to the law of the society, that law, with great propriety and strict "justice, considereth them *as still in that instance* under the protection of the law of nature."

What is the law of self-defence? Is it merely defending *yourself*, and allowing any person that comes along to slay your wife, or your child? Is that the law of self-defence—or is there not some relative duty cast upon you? Has the Creator made you so abominably selfish that you satisfy the demands of your nature when you defend yourselves, though you allow the partners of your bosoms or the offspring of your loins to be stricken down under your eyes? It is not so, as I shall presently show you; and that involves the consideration of the last of the propositions to which I have thus preliminarily directed your attention.

The authority cited proves that, to a certain extent, nature's law is our protection, and that social laws cannot supersede or divest us of that protection, and that as to all rights falling within the pale of nature's law, the great council chamber of Jehovah is the source from which the law is to come.

If, as you will shortly see, by numerous citations from Scripture, the adulterer is allowed to be slain by the law of God, and the right of a man to protect his wife against contamination is made a natural right, then, within the authority which I have read to you, it is not in the power of human laws to take away that right from those upon whom it is thus conferred. Do you mean to tell me that, when the great Being above said, "thou shalt not steal," it was not as high a crime to steal before, as it is after human legislation has said, "thou shalt not steal?" When the great Being above said, "thou shalt not kill," and "thou shalt not bear false witness against thy neighbor," those crimes were perfect. He himself pronounced those ordinances. Human laws may enforce them with additional sanctions, but do not impart to them additional solemnity. The crimes would be just as great and smell as rank in the nostrils of Heaven if human legislation should ignore the subject entirely, as if human legislatures had undertaken to embody all that is in the Decalogue in their own statutes. In this District no protection is provided against the

adulterer, unless you can protect yourself against him. There is no law which furnishes that protection. What is the inevitable result? Why, that you are thrown upon the principle *se et sua defendendo*—of defending yourself and your own. Not to be so abominably selfish as to defend yourself, and let your own be taken from you—*but to defend both yourself and your own.* Do you not wish to be as safe against the adulterer as against the housebreaker? Has society redeemed its compact with you when it protects you from the attacks of the housebreaker by night, but permits your house, when you have left it during the day to pursue your honest toil, to be polluted by the tread of the adulterer? One reason, then, we are bound to suppose, why society has not provided by positive legislation against the act of the adulterer, is that it considers that the natural right of a man to protect himself against that malefactor is as perfect under the Divine law as is his right to protect himself against any other violator of his natural rights Gentlemen, there is nothing in this doctrine revolutionary or subversive of the peace and good order of society. Where society has protected us, we are not thrown upon the law of self-defence, but where society has not protected us, we are thrown upon that law. *In this District* there is no law which protects you against the man who would rob you of the affections of your wives, unless it is engraven upon your hearts by the hand of the Great Being who made you.

You will see more plainly the importance of this, Gentlemen of the Jury, when I come to construct the argument which I design addressing to you, from the Scriptures, as to the heinousness of the offence of the adulterer, as it is stamped upon his act by the law of God.

We may assume, then—and I state it as a proposition—that whenever a right is given by the law of God, even though not expressly recognized by human law, and the violation of that right is denounced by the moral law as an offence of aggravated hue, to defend oneself against its violation is acting upon the principle of self-defence. The law says that no man shall enter your house at night to rob it, and that if any one does so, and you detect him in the fact, that you have a right to defend yourself and your own against him, even to the extent of taking his life. If human law can give you a right to take away the life of a man when he is committing an offence which it has made an offence, why have you not the same right in reference to the Divine law, when it has declared an offence to be equally heinous with the one created by human legislation? As will presently appear, *under the Divine law*, it is a great deal more aggravated an offence to contaminate the wife of your neighbor than to enter his house at night for the purpose of robbing it, and if human law can confer upon you the right to kill the burglar, the Divine law can impart to you the right to kill the adulterer. You will bear in mind that I am not insisting that a man has a right to kill even an adulterer, as the result of cold, deliberate thought. This is not such a case; for, unfortunately in this case, the deceased was caught, if not in the fact of adultery, *at least so near the fact*, as to leave not the least doubt of his guilt. The defence regard this as a very important point, and as I am about leaving it, I will state it to you again. We say this: that if society has not protected you in the possession of your wives, it is proof conclusive that society meant that

your right to their possession should remain as *at nature*—and that the right to protect the purity of your wives is *a natural right* which you can assert even to the extent of killing whoever seeks to deprive you of it, as much as you can kill for the purpose of protecting your own lives. We may assume, then, that wherever a right is given by the law of God, even though not expressly recognized by human law, and the violation of that right is denounced by the moral law as an offence of an aggravated hue, to defend oneself against its violation is an act based upon the principle of self-defence. As has been already seen, this is not a selfish principle; *it extends to the protection of your own as well as to the protection of yourselves.* If you can kill in defending yourself against an offence declared felony by human laws, and be blameless, why not when the Divine law makes an act against you the greatest conceivable offence? It would be an outrage upon all decency to compare a felony created by a human law with such an offence as adultery is made by the Bible. I shall show you, by abundant citations from that sacred book, that one of the most serious offences that can be committed against the Divine law is this crime of adultery. Human laws may enforce obedience to the Bible, by their own sanctions. They may create or multiply penalties—but do they, can they, increase or add to its moral obligation? *As well might they seek to repeal its commandments, as to lend them any force by reënacting them!*

It may be said that Mr. Sickles had a civil remedy, and could have brought an action for damages. Would this have staunched his wounds? Could the purity of his wife be paid for by a few paltry dollars? Could that course afford any adequate satisfaction for the injury inflicted upon him? If an individual comes into your house, and lies upon your bed, against your will, he commits a trespass, and you can repel him by force. If an individual comes into your house, and lies with your wife, and robs her, and *you*, of *that* which cannot be restored, and for which no recompense can be made, can you not repel this invasion by force? *Can your wives be used with impunity when your furniture cannot?* What furniture for your homes like a wife!

This brings me to the last of the three propositions advanced in this connection, and that is, that there are certain relations to which the Divine law attaches the greatest responsibilities, and which it invests with commensurate powers. Of these, the relations of parent and child—and husband and wife are the most hallowed—the most cherished. It may not be the right of a brother, probably, to slay in the defence of a sister, unless he should be present at the time an offence was attempted against her person—because the attachment which connects a brother with a sister is one of love—*they come from the same parents.* The relation, however, which exists between parent and child, and husband and wife, is not only one of love, but of protection. For such relations, the Divine law has created the duty of protection, and the right to kill in the discharge of that duty is a proper one, and cannot be questioned by a human tribunal—at least, provided the circumstances under which the killing takes place are such as not to denote that extreme malice of the heart against which social laws are designed to protect us.

It was this idea of inferiority on the part of the wife to the husband which

made the act of the wife, where she killed the husband, what the common law, in olden time, denominated *parva proditio*, petit treason. High treason, at common law, was rebellion against the sovereign, insubordination toward the Government—but petit treason was the insubordination of the wife to that yoke which her relations require her to wear, as it were, upon her neck. The rising of the wife against the husband was as much considered the rising of an inferior against a superior, as the rising of a subject against the sovereign; and the law, by way of characterizing the enormity of the act on her part, denominated it petit treason, in analogy to that offence which, when attempted against the Government, constituted high treason. The law, in this respect, is founded upon the Divine law, for the mandate of the Bible, to wives, is, "Love your husbands, obey them, submit yourselves unto them." The husband is the protector—the master of the wife. Her sex is supposed to render her unable to protect herself, and hence it is the duty of the strong arm of the man to defend himself and his wife against the wrongs which may be inflicted upon them, either with the connivance of the wife, in which case she is to be regarded as the slave of her own frailty, or as the result of violence on the part of another.

We know that it has been said, "Frailty, thy name is woman." With all our exalted conceptions of the perfection of female character, who is not compelled to acknowledge its extreme fragility? And it is because of this inability to resist herself and others, we find it written in the revealed Word of Heaven that *woman* is to be placed under the protection of *man*. *I hold it as a principle, that he who gains the affections of the wife in defiance of the authority of the husband, commits as great a crime against that husband, as if by force he had taken her person.* It is, therefore, the sacred duty of the husband to look to the affections of his wife, to control them, and, above all, to to see that they are not stolen from him by the insidious practices or machinations of the adulterer. He is the owner of them, and bound to secure them against the weakness of female nature. It is *upon* this principle and *upon* this obligation, the institution of marriage is created. Woman is the weaker vessel; man is the stronger vessel, and it is the duty of the man to make up for the shortcomings of the woman. In guarding the wife's honor, the husband guards his children. He owes it to them, to keep the stigma of her disgrace from them!

As a matter of mere legal knowledge, I would call the attention of the Court to the fact that since the statute of *circumspecte agatis*, passed in the 13th year of the reign of Edward I., the common law courts in England have not had, nor have they entertained, jurisdiction of *adultery*, as a distinct offence. Whatever may have been their jurisdiction before that, *over* adultery, as a separate offence, they have asserted no jurisdiction *since*. I have copied the provision of this statute upon my brief, which, as it has been extracted from 2 Bacon's Abridgment, 171, under the head of "Ecclesiastical Courts D.," I will read. The words *circumspecte agatis*, "use yourselves circumspectly," are, as it will be seen, fully explained by it. It proceeds:

"The King to his Judges sendeth greeting.—Use yourselves circumspectly in all matters concerning "the Bishop of Norwich and his Clergy, not punishing them if they hold a plea in Court Christian,

"of such things as be *merely spiritual*, that is, to wit: of penance enjoined by prelates for deadly "sin, as fornication, *adultery*, and such like, for the which sometimes corporeal penance, and some- "times pecuniary is enjoined, especially if a freeman be convict of such things. Also, if prelates do "punish for leaving the church-yard unclosed, etc.; item, if a parson demand of his parishoners "oblations, or tithes, due or accustomed, etc.; item, if a parson demand mortuaries, etc.; item, "if a prelate of a church, or patron, demand of a parson a pension due to him, etc., all such de- "mands are to be made in a spiritual court, and for laying violent hands on a clerk; and in cause "of defamation, it hath been granted already, that it shall be tried in the spiritual court, where "money is not demanded; *but a thing done for punishment of sin*, and likewise for breaking an "oath, in all cases afore rehearsed, *the spiritual judge shall have power to take knowledge "notwithstanding the king's prohibition.*"

Here is the declaration of the British Parliament that adultery is a deadly sin. At the time of the passage of this statute, adultery was an offence at the common law, and fell within the cognizance of the common law tribunals, but after the passage of this statute, it was transferred to the cognizance of the spiritual courts. By the common law of Maryland, which is the law of this District, adultery is not an offence; *for* the common law, which was in existence at the time of the creation of Maryland as a State, did not recognize it as such; and as we have no spiritual courts in this country, as in England, it needs the interposition of a statute to make adultery an offence punishable as such by the ordinary legal tribunals.

In this connection, permit me to refer to the case of Anderson *v.* The Commonwealth, 5 Randolph's Reports, page 627. This whole subject was discussed and considered in that case. A party had been convicted in the court below of enticing away for the purpose of prostitution and carnally knowing a female a little over sixteen years of age. There was a statute in Virginia making it a crime to inveigle away a female, *within the age of sixteen years*, from the possession of the person in whose custody she was. The *deflowering* was made a more serious offence. The General Court of Virginia reversed the conviction, holding that the statutory offence must be punished according to the statute, and that the female in question, being over the statutory age, was not within its protection, and that no offence was predicable, as at common law, adultery *by itself*, since the statute of *circumspecte agatis*, not being a common law offence. The opinion of the court will be found to be a well-considered one, the doctrine being held to be that the adultery must be "combined with circumstances, which, beyond the mere criminality of the "simple fact, were calculated to make it injurious to society." Instances of *what* the court meant were given, as, where the fact was committed in a street or highway—or as the result of a conspiracy, and the like—where the circumstances attending the fact "imported a common law misdemeanor." It was held in this case *that the statute in question occupied the whole ground, and was not cumulative.*

In The State *v.* Cooper, 16 Vermont Reports, 551, it was held by the Supreme Court of Vermont that adultery is not at common law a felony, or *crime*, to be punished in the common law courts. In this case, a party was convicted upon an indictment which charged him with breaking and *entering* a dwelling-house in the night time, with intent to commit *adultery*. By a statute of Vermont, it was burglary to enter a dwelling-house at night, with

intent to commit murder, etc., *or any other felony*. To sustain the conviction of the court below, the Appellate Court was called upon to hold that adultery was a felony at the common law. The conviction was reversed and judgment arrested, because adultery was held not to be a felony, nor ANY offence at common law, punishable by common law jurisdictions.

In reference to the statute, *circumspecte agatis*, we are told that "the Bis "hop of Norwich and his clergy," are only put for an example, and that it extended to all the bishops within the realm. Blackstone, in the 4th volume of his Commentaries, pages 64, 65, informs us that in 1650, during "The Com- "monwealth," adultery, in England, was a capital offence. The spiritual courts—*Curiæ Christianitatis* (as they were called)—acted *pro salute animæ, for the safety of the soul*, and punished what were called *spiritual* sins by penance, contrition and excommunication, or by a sum of money to the officers of the court, known as *commutation of penance*. (4 Blackstone's Commentaries, page 275.)

Wharton, in his Treatise on American Criminal Law, 4th edition, § 2639 to § 2647, refers to the statutes of four States, namely, Massachusetts, Pennsylvania, Virginia, and Ohio, upon the subject of adultery. These appear to be the *only* States of the Union which, by *express* legislation, have made it an offence cognizable by the ordinary courts of justice.

I come now, Gentlemen of the Jury, to the discussion of the other parts of this case, and I urge upon you all through this trial, to bear in mind that you are sitting here to pronounce the estimate of an American jury upon the value of a husband's honor. That is the great principle of your verdict, and as it is rendered in this particular, so will you strike terror into the heart of the adulterer, or embolden him in his course. If *for the prosecution*, in *that* verdict is contained your written commission to him. You send him out emboldened by it to repeat his crimes, telling him that if he is slain for his offence, the man who dares to take his life shall forfeit his own for the act. You strike the deepest blow at the root of morality which has ever been given to it, on this continent, by the action of an American jury.

It is a well settled legal principle, that every man's house is his castle—for the security and repose of himself and his family. The word "castle" is a term of the law. It does not signify that a man keeps his family within battlemented walls—but it is used as a figure of speech to denote that his residence, though it be a hut which can neither keep the rain nor sunshine from penetrating its roof, is nevertheless, for every moral and legal purpose, as much a fortress as if it were constructed for one. The thatched roof, the humblest hut that rears itself to the most limited height in the face of heaven, is as much a castle for the protection of a man's wife and family as though it were a castle in reality—and whoever enters it, even though it be by his invitation, in the guise of a friend, but in reality as a seducer, is a trespasser upon that home. That is the principle I want to strike home to your hearts upon this occasion. Under such circumstances you have the same right to eject him from that castle, that you would have had he entered against your will. It is purity of heart *only* which entitles him to embrace the privilege you have accorded to him.

One of the most aggravated features of *this* case is, that the deceased entered the abode of Mr. Sickles as his friend. We will show you by the testimony that they stood almost as close together as did those two human beings who were connected by a link which was born with them, and which rendered them indissoluble. The hearts of these two human beings had beaten almost against each other. If I may so speak, their hearts seemed to have almost alternated in their pulsations, at least so far as their social or personal acquaintance was concerned. If, therefore, when Mr. Sickles invited Mr. Key into his house, Mr. Key accepted the invitation for the purpose of accomplishing the downfall of his wife, he was as much a trespasser as though he had entered that house against the will of Mr. Sickles altogether. When a husband extends an invitation to his friend to visit his family circle, he in effect requests him to keep back all uncleanness. Which of you would tolerate the presence of a man whom you had invited to your fireside *as* a friend —believing him to be, relying upon him as a friend—but whom you found canvassing the charms of a wife or daughter, to excite the sensuality of his nature? The man that comes to your abode with an unclean heart, and looks with lustful eyes upon *yours*, is a trespasser—and you *can*, nay, you *ought* to drive him back with violence!

Another well-settled principle is, *that the person or body of the wife is*, in a measure, *the property of the husband.* If violated against her will, it is a felony. She can defend it. So can her husband. So can a stranger. Serjeant Foster, at page 274 of his Treatise on Crown Law, says:

"A woman in defence of her chastity may lawfully kill a person attempting to commit a rape "upon her. The injury *intended*, can never be repaired or forgotten. And nature, to render the "sex amiable, hath implanted in the female heart, a quick sense of honor, *the Pride of Virtue*, "which kindleth and inflameth at every such instance of brutal lust. *Here* the law of self-defence "plainly coincideth with the dictates of nature."

This is one of the instances in which, according to the author, nature and social duty coöperate.

If the wife is deflowered, with *her* consent, in the presence of her husband, he can act, even to the extent of killing, upon the principle of "*se et sua defendendo.*" I now refer to the case of The People *v.* Ryan.—2*d.* Wheeler's Criminal Cases, 47. This was an indictment for murder, found against the husband for killing the alleged adulterer of his wife. It was tried before a court of whom the late Recorder Riker was one—a judge not unknown to fame, and whose erudition and experience in the Criminal Law certainly entitle his judicial acts to the highest consideration. The facts were these: Ryan returned home from his labor, and found his children (one but a year old) crying on the floor, his wife having gone out and left them. He had suspected her before of improper intimacy with the deceased (Finley). He went to Finley's room, heard his wife's voice within, and knocked at the door. After some delay it was opened. He entered, and found two men there, but his wife had gone. He turned away, and while talking with a man below, saw his wife come down-stairs. She was a little intoxicated, and they went home together. About ten o'clock at night, Ryan again went to

Finley's door, and, looking through the keyhole, saw Finley's arms around his wife, she lying on the floor. He knocked. Finley opened the door, forced Ryan to come into the room, where they drank together. Finally, Ryan and his wife, accompanied by Finley, went home. An hour after they entered Ryan's apartments, the noise of heavy blows was heard, *which* proved to be Ryan killing Finley. Ryan endeavored to make his escape, but was arrested on the street; and on his arrest, he said to the watchman, "I "killed him, and I meant to kill him; he has deprived me of my wife, and "I have deprived him of his life. I am willing to suffer for it." Ryan, all through, showed a perfect consciousness of what he was about, and even deliberation in what he did; but the case is a striking instance of how far courts and juries will *condescend* to acts prompted by a violation of our most sacred rights. In submitting the case to the jury, the court remarked, that it was for them, under all the circumstances, to say whether "the crime charged "upon the prisoner was murder or manslaughter, or justifiable homicide; "and observed, if the jury were of opinion that the prisoner committed the "act while the deceased was in criminal intercourse with his wife, it would "not be murder, or even manslaughter, but would be justifiable homicide, "*se defendendo. Her consent would be of no avail to increase or extenuate* "*the crime, if in the husband's presence.* If, however, the jury should believe "there was a criminal connection between the deceased and the wife of the "prisoner, as there was no positive, although there was presumptive "evidence of it, it would be for them to decide, from the circumstances, "whether the homicide was committed after time for reflection had been "given or not."

The District Attorney, in Ryan's case, did not contend for contrary doctrines. The following is an extract from his opening address to the jury:

"If a man surprised another in the act of adultery with his wife, and killed him instantly on the "spot, the law pronounced such killing to be manslaughter; but if the stranger was attempting a "rape, and the wife cried out, and the husband entered and killed him, it was justifiable homicide, "*se defendendo; nor could the consent of the wife, if in the presence of the husband, alter the* "*offence from a rape;* but if the adulterous act had been committed, and the husband, after time "intervening sufficient for reflection, attacked and killed the adulterer out of revenge, the kill-"ing in such case is murder."

Ryan's case was tried before a Court of Oyer and Terminer at the city of New York, in September, 1823. It is law *there*, and no Christian court or jury can refuse to subscribe to its reasonableness or propriety.

There are seven questions, Gentlemen of the Jury, which, in the judgment of the counsel for the defence, it is deemed appropriate to present for consideration.

I. As to how far the Government is bound to make out a case against the defendant. What it must prove, of what the jury must be satisfied, and how satisfied, before a conviction of any offence can be rendered.

II. As to how far the old rule that malice is presumed from the fact of killing obtains at the present time in the administration of criminal justice, and how far such a presumption is controlled by the great fundamental *presumption* of the law that every one is supposed or deemed to be innocent until proved to be guilty.

III. As to how the law esteems adultery as a provocation, and how it regards it in connection with an act caused by it.

IV. The reason, or principle, or meaning of the old rule that homicide by a husband, on discovering his wife in the act of adultery, either by slaying the adulterer or adulteress, is manslaughter.

V. What was the *effect* of the rule which lowered or reduced such a killing to manslaughter— *to show* that it was equivalent or tantamount to an *acquittal.*

VI. How far the provocation furnished by the deceased to the defendant acted upon or affected the defendant's *mind*, in reference to exonerating him from all the legal consequences for, or by reason of the killing in question. *Whether* while the influence of the provocation remained, it did not render the defendant for the time being, *insane.* Whether it did not operate such a state of *mental unsoundness*, as to relieve the defendant's (alleged) act of and from all criminality—*supposing the act to have been immediately and directly prompted or occasioned by it.*

In other words, whether this case is one of pardonable or excusable *unsoundness of mind*, or of *wanton or ungovernable passion.* Whether the defendant, not being to blame for the provocation, the frenzy, or its results, *can be holden for a crime.*

VII. Whether, viewing the case as one of *ungovernable passion*—as one of *resentment produced by passion*—there was a sufficient time for the defendant's passion to cool, and for reason to get the better of the transport of passion, *and his subsequent acts were deliberate*, before the mortal wound was given to the deceased.

As to the first of these questions—if the Court please—as to how far the Government is bound to make out a case against the defendant, we attack almost throughout the theory of the prosecution. We say that the case must be made out by the prosecution, and that it must be made out by proof, and not by presumption. We say that the old rule of law, that the killing was presumptive evidence of malice, no longer belongs to the law, for it is, *upon facts*, and not *upon presumptions*, that a man is to be condemned for an offence involving his life or liberty. Presumptions are mere rules of evidence, and juries cannot convict upon presumptions unless they conscientiously believe that the facts embraced in them do actually exist. They cannot subject the deliberations or convictions of the jury, if the jury *believe* or *think* them to be unwarranted.

As I understand the argument of the learned counsel for the Government, it is this: that the law supposes from the very fact of killing that there was *malitia præcogitata* in the heart. If I were sitting as a juror, and all the evidence before me was that one man had *simply* slain another, I should infer that the slayer was insane: but the argument of the prosecution is that you must infer that the slayer was in the possession of reason from the fact of his killing. Nominally it may be law, but it is not the practice, and no prosecutor should ever be permitted to give a case of this kind to a jury on the mere proof of the fact of killing. If the rule exists at all, it exists in *name* and not in *reality.*

Upon this point, I ask the attention of the Court to the case of the People *v.* McCann, 2d Smith's (New York Court of Appeals) Reports, page 58. I might feel a delicacy in citing the decisions of my own State, as *advisory* to this Court, in reference to the legal questions involved in the present proceeding, were it not for the kind manner in which your Honor has already spoken of the decision of our Supreme Court in the case of Freeman *v.* the People, 4th Denio's Reports, p 9, stating it to be *one of the most reliable authorities upon the law of insanity your honor had met with.* Our Court of Appeals contains Judges of equal calibre with those who passed upon the case of Freeman, and I doubt not that one of *their* judgments will meet with the same regard at the hands of this court, as the *opinion* of the Supreme Court in that case.

We insist most strenuously that it is the duty of the prosecution, if they charge that Mr. Sickles, *in a spirit of wantonness*, excited by the provocation which Mr. Key had given him, slew Mr. Key, *to prove it.* If they have not proved it before the court and jury, their case must fall to the ground.

The cardinal question presented in McCann's case, was as to how far *insanity*, when relied upon as a defence, must be established, *to be* sustained—and under what rules the testimony, in support of it, should, or must, be put to the jury. The judgment of the court will be found to explode many of the old notions, which have been uniformly invoked to prejudice *such* a defence, in the estimation of juries, and is a *recent* instance of a court declining to bow to the errors, however ancient, of *old rules!* I read from the opinion of Bowen J., at page 62:

"It is a general rule, applicable to all criminal trials, that to warrant a conviction, *the evidence* "should satisfy the jury of the defendant's guilt *beyond a reasonable doubt*—and it has been held "that there is a distinction in this respect between civil and criminal cases. *This rule is based upon* "*the presumption of innocence*, which always exists in favor of every individual charged with the "commission of crime. It is also a rule well established by authority, that where, in a criminal "case, insanity is set up as a defence, the burden of proving the defence is with the defendant, as "the law presumes every man to be sane. But I apprehend that the same evidence will establish "the defence which would prove insanity in a civil case. The rule requiring the evidence to satisfy "the jury beyond a reasonable doubt is one *in favor of the individual on trial charged with* "*crime*, and is applicable only to the general conclusion, from the whole evidence, of guilty or not "guilty."

I read also from the opinion of Brown J., at page 68 of the same authority:

"It (speaking of *murder*) is thus defined by Sir Edward Coke (3 *Inst.*, 47): 'When a person of "sound memory and discrimination unlawfully killeth any reasonable creature in being, and under "the king's peace, with malice, aforethought, express, or implied.' It is to be remarked that every "member of this sentence is of the weightiest import in determining the constituents of the crime. "The killing must have been effected by a person of sound memory and discretion. It must have "been an unlawful killing; that which is deprived of life must have been a reasonable creature in "being, under the king's peace, and the killing must have proceeded from malice, expressly proved, "or such as the law will imply, which is not so properly spite or malevolence to the deceased as any "evil design in general; the dictate of 'a wicked, depraved, and malignant heart.' *Every one of* "*these things must have existed, in order to make out the crime, and they must be proved or* "*presumed upon the trial to have existed, or the prisoner is to be acquitted. They are pri-* "*marily a part of the case for the prosecution, to be established to the satisfaction of the jury* "*beyond any reasonable doubt.* The law presumes malice from the mere act of killing, because "the natural and probable consequences of any *deliberate* act, are presumed to have been intended

"by the author. But if the proof leaves it in doubt whether the act was intentional or accidental, if "the scales are so equally balanced that the jury cannot safely determine the question, shall not the "prisoner have the benefit of the doubt?"

After referring to the expressions of a number of eminent judges, upon insanity as a defence, Brown J., on page 70, proceeds:

"Whatever has fallen from these eminent men will doubtless be accepted with the most profound "respect; but what they have said would be entitled to greater weight upon the present occasion, "did it distinctly appear that their attention was directed to the circumstance that, notwithstand- "ing the legal presumption, *the sanity of the prisoner's mind is, under all the definitions of the "crime, to be made out affirmatively upon the trial as a part of the case for the prose- "cution.*"

It will be my duty, *presently*, to trace out the origin of the rule as to malice being presumed from the mere fact of killing. It was a rule favored in the time of special verdicts, *when* juries did not pass upon *the intention*, at all, and *when* judges for the purpose of enlarging the royal revenue—the "census regalis"—made crimes in every case, to multiply forfeitures to the Crown. We will trace out the rule, though we could stand before the jury this day, and demand the acquittal of our client. Enough is *out*, now, to show the motive of his act—and to pierce the heart that was not cut from the "unwedgeable, gnarled oak;" for in the agony of his mind, when the deed was done, and he was relapsing into his sanity, *in the midst of his grief*, he exclaimed: "He (referring to Key) has dishonored my house; he has "defiled my bed." It was the dominant sentiment of his bosom. Twelve Indians, upon whom the light of civilization had never broken, would repel with indignation the idea of convicting a man of a capital offence upon the testimony which has been placed before you by this prosecution.

The judgments of the courts below, in McCann's case, were unanimously reversed, because "at variance with sound reason, and the just and humane "principles of the common law." The law has some humanity about it. What, Gentlemen of the Jury, is its cardinal presumption? As you heard me tell the honorable judge upon the bench, *that every man is innocent until proved to be guilty*. Not so, says the counsel for the Government. The law presumes, because Mr. Sickles discharged the contents of his pistol into the body of Mr. Key, that he is guilty. What is the great corner-stone of evidence in criminal cases, if it is not the legal *concession* of the innocence of the accused, until the contrary is made manifest. And yet, here, this presumption is to be dethroned, and a party is to be taken to be guilty, because he has been put upon trial; and instead of the prosecution making out a case against him, he is to be compelled to establish *that* he is not amenable for the crime of which he has been accused. The utmost effect of the rule the Government reposes upon, is to prevent the prosecution (if I may so speak) from being non-suited. It is a rule of evidence, but it is not a rule which is to govern the jury in their verdict. The law supposes, from the killing, that certain facts exist; but are the jury to *find* that they exist, because of this mere presumption. What is the oath of a juror? It is that "you will true deliverance make "upon the evidence." "Not so," says the counsel for the Government, "but "upon the *presumptions* of the law. It is no matter whether the fact exists—

"the law presumes it to exist, and that is the *ground* on which the oaths of "the jury rest." All that can be contended for by the counsel for the Governis, that the Court cannot nonsuit or dismiss the prosecution for *resting* upon legal assumptions; but the jury are, nevertheless, to go behind these assumptions, and see *whether or not the facts are in accordance with them.* Their oaths are not redeemed unless they can look their Maker in the face, and, with their hands upon their hearts, say, that every fact included in the verdict they render is clearly proved by the testimony adduced before them!

As to the second of the questions I stated to the Court—as to how far the old rule, *that malice is presumed from the fact of killing*, obtains at the present day in the administration of the criminal justice of our country—I now proceed to the discussion of it.

Upon this point I desire to call the attention of the Court to Mawgridge's case, as reported in the 17th State Trials (Howell's ed.), page 57. This authority shows that this rule originated under circumstances which do not now exist. From the opinion of Chief Justice Holt, it appears that at the time England was overrun by the Danes, those who were "to the manor born" were, *of course*, opposed to the incursion of foreigners, and hence the Danes were constantly being murdered. In order to prevent these murders or assassinations, *wherever* a Dane was killed the alleged murderer had to be produced within a certain time, and if not produced, the vill was fined, and if not able to pay, the fine was levied upon the hundred. "Though this "law" (says Chief Justice Holt) "ceased upon the expulsion of the Danes, "yet William the Conqueror revived it for the security of his Normans, after "he had confirmed King Edward the Confessor's Laws." Before the statute of Marlebridge (52 H. 3), "if a man was found to be slain, it was always intended "—1. That he was a *Frenchman.* 2. That he was killed by an Englishman. "3. That the killing was murder. 4. If any one was apprehended to be the "murderer, he was to be tried by fire and water, which was extended beyond "reason and justice in favor of the Normans; but if an Englishman was killed "by misfortune, he that killed him was not in danger of death, because it "was not felony. 5. If the malefactor was not taken, then the country was "to be amerced." The statute of Marlebridge relieved the man-slayer of his ordeal trial, and the country of its amerciament, where a Frenchman was killed by misfortune. The fine which was put upon the vill or hundred, was called "murdrum," and afterwards came to signify or denote the *crime* itself "murder." It was *the presumption*, namely, where a person was found to be slain (in the absence of proof to the contrary), that the person killed was a Frenchman, that he was killed by an Englishman, and that the killing was murder, *upon which* the rule implying malice, from the *mere* fact of killing was originally founded, and from which it originally sprang.

It was a rule which multiplied offences; for the more numerous *they* were, the more *forfeitures* were multiplied, and the more the revenue of the Crown was increased. These forfeitures constitute the sixteenth branch of the king's ordinary revenue—the *census regalis*—as enumerated in 1st Blackstone's Commentaries, page 299 to page 302. The *mode* of obtaining money, according to that writer, was no more regarded than its *use* when obtained. Even

deodands, which were intended to be "an expiation for the souls of such "as were snatched away by sudden death," and should have been given to "Holy Church," were perverted from their original design, and granted "by "the king to particular subjects as a royal franchise."

In the State of New York, this rule is completely exploded; and if a district attorney in that State were to prove nothing beyond *the* killing, the Court would direct the jury to acquit the prisoner upon the spot. I read from the case of The People *v.* McCann, page 65—Opinion of Brown, J.:

"It certainly is true that sanity is the normal condition of the human mind, and in dealing with "acts, criminal or otherwise, there can be no presumption of insanity. But it is not true, I think, "upon the traverse of an indictment for murder, when the defence of insanity is interposed, and "the homicide admitted, that the issue is reversed and the burden shifted. *The burden is still the "same, and it still remains with the prosecution to show the existence of those requisites or "elements which constitute the crime; and of these, the intention or malus animus of the "prisoner is the principal.* The doctrine of the charge (*i. e.*, of the judge at the trial) proceeds "upon the idea that the homicide is, *per se*, criminal; that the mere destruction of human life by "the act of another is, without any other circumstance, murder, or some of the degrees of man-"slaughter. 'The fact of killing,' says the judge, 'is admitted; that the act was done by the pris-"oner, is not disputed; thus, the issue is really reversed from the usual one.' It is doubtless true, "that when the killing by the prisoner is established by proof, the law presumes malice, and a suffi-"cient understanding and will to do the act. The malicious purpose, the depravity of heart, the "sufficient understanding and will must, however, actually exist. They are each of them, as much of "the essence of the crime as the act of killing. The rule which presumes their existence is a rule "of evidence, and nothing else, and when the law presumes their existence, it recognizes and "demands their presence as essential to constitute the crime. *The jury must conscientiously "believe they exist, or else they cannot convict.* The killing of a human being by another is not, "necessarily, murder or manslaughter. It may be either excusable or justifiable. It may have been "effected under either of those conditions referred to by the elementary writers, in which the will "does not join with the act, and then it is not criminal."

It is no longer true, even when the defence of insanity is interposed to the presumptions of an indictment, *and the homicide is admitted*, that the issue is reversed, and the burden shifted to the defence, as is the doctrine of the counsel for the Government *here*. The burden is the same when such a defence is attempted, and it still remains for the prosecution to show the existence of the requisite elements to constitute the crime.

A malicious purpose and depravity of heart, are, in this case, as much of the essence of the crime, as the act of killing itself, and the jury must conscientiously believe they existed. Did the will join with the act, or was Mr. Sickles, at the time of this homicide, a mere creature of an impulse or instinct which he could not resist—carried forward like a mere machine to the consummation of this so-called tragedy? It may be tragical to shed human blood, but I shall always contend that it is no tragedy to take the life of an adulterer. His crime removes the heinous character of his punishment, and he dies as justly as those men who were executed yesterday within the limits of the State of Maryland, within a few miles of this court room. What was their offence? It was no higher than the offence of the deceased. They had shed human blood. He had overturned the divine institution of marriage, created and reared by the hand of the Almighty!

And here I desire to make this additional suggestion. I understand the rule to be that where the prosecution prove the declaration of a prisoner, that *that* declaration is to be taken as true, until, or unless they show, *by*

evidence, that it is false. Now, what is the evidence in this case on the part of the Government? It is, that Daniel E. Sickles declared that Key had defiled his bed, and that, under the influence of the frenzy consequent upon that fact, he had taken his life. Where is the testimony which refutes the truth of that declaration? Have the prosecution shown that Key did not pollute the wife of Daniel E. Sickles, or do they throw themselves upon the jury and concede that that was the fact? We might with safety put a speedy period to this investigation, *if such is the position of this case before the jury.* Our learned friend on the other side is very ingenious; but is Daniel E. Sickles to be fitted and cut into a conviction of murder? Is it by cutting out this part, or that part of the truth, or is it upon the morality of the case, we stand in this court, awaiting the action of the jury? How would you feel, if the law were to tie a handkerchief over your eyes, and close your ears, and compel you to render a verdict, *while your faculties or perceptions were not within your own control?*

The prosecution have started in the slough, and how are they going to get out? Though, in this aspect of the matter, we are not bound to show the adultery, we will put it before the jury in all its disgraceful and disgusting details. Not only will we show that Key was the friend of Mr. Sickles, but that, as such, he was the violator of a confidence the most sacred. The treachery of a friend is bad enough *alone*, but when the perfidy reaches the bosom companion of one's life, it becomes doubly damned. I believe in the maxim, *De mortuis nil nisi bonum*—"Speak not of the dead, unless you men-"tion them favorably." It is said—

> "The evil that men do lives after them,
> "The good is oft interred with their bones."

It is verified here, but *the evil Key has done* is not brought into this case *gratuitously* for the purpose of aspersing his memory. I would leave him where he slumbers, but he is before us *as a fact;* his conduct is here to be reviewed; and, while we respect the memory of the dead, we must not forget that we owe a sacred and important duty to the living.

This brings me, may it please the Court, to the *third* question proposed by me for consideration, and if at any time I become more tedious in the discussion of these questions than the Court desires, I will take it as nothing more than kindness if your Honor will so intimate. I have no pride to gratify here. If I can accomplish the deliverance of my friend, the measure of my gratification is not only full, but overruns; and if I am tedious to the jury at any point, they too should check me. This brings me, I say, to the third question, which involves the heinousness of the crime of adultery—as to how the law estimates adultery as a provocation, and how it regards it in connection with the act caused by it. In its consideration, I shall present it in two aspects: first, in reference to the character of the crime as declared by the Bible, for we build upon that as to its heinousness; and second as it is estimated by the common law.

The first branch of the inquiry, then, is as to the heinousness of the crime as declared by the Bible; and it ought to be some recommendation of the

defence, that it is able to build in part upon the Good Book. Most cases if tested by that standard, would hardly be able to pass through such an ordeal. The first citation I make from the Bible in reference to the heinousness of adultery, is Genesis, chapter ii. verses 23, 24:

When the Almighty caused a deep sleep to fall upon Adam, and took one of his ribs and from it made a woman, he brought her unto Adam:

"And Adam said, This is now bone of my bone and flesh of my flesh: she shall be called Woman, "because she was taken out of man.

"Therefore shall a man leave his father and his mother and shall cleave unto his wife, and they "shall be one flesh."

What was Mr. Key's offence? He parted this one flesh. He committed an act as much against the Bible itself as though he had divided the body of Mr. Sickles itself in twain. He could not have made a division which was more in the face of the Good Book than when he divided man and wife.

The Saviour, when in the coasts of Judea, used almost the same language when the Pharisees sought to tempt him on the subject of divorcement.

It is proper for me to say, that, in the preparation of this part of my brief, I have received some assistance from *one* not a counsel on the part of the defence; for, to prepare it, would require a greater familiarity with the Bible than is ordinarily possessed by others than those whose duty it is to preach it.

I cite from Matthew, chapter xix. verse 6, where the Saviour says:

"Wherefore they are no more twain but one flesh. What, therefore, God hath joined together "*let not man put asunder.*"

I next refer to Genesis, chapter xii. verses 18, 19: When Abraham went into Egypt on account of the famine, Sarai his wife passed as his sister. He feared death on her account. The princes of Pharaoh saw her and commended her to Pharaoh, and she was taken into his house. The Lord plagued Pharaoh and his house with *exceeding* great plagues.

Here was a direct visitation *for* the offence of adultery, because of Pharaoh taking Abraham's wife into his house.

"And Pharaoh called Abram, and said, What is this that thou hast done unto me? why didst "thou not tell me that she was thy wife?

"Why saidst thou, She is my sister? so I might have taken her to me to wife? *now, therefore, "behold thy wife, take her and go thy way.*"

The offence which drew down these plagues was committed *in ignorance*, on the part of Pharaoh. When the real character of the relation between Abraham and Sarai was discovered, the offence was atoned for.

So when Abraham sojourned in Gerar, Sarai passed as his sister, and Abimelech, the king, sent and took her. I refer now to Genesis, chapter xx. verses 3–7:

"But God came to Abimelech in a dream by night, and said to him, Behold, thou art but a "dead man, for the woman which thou hast taken; *for she is a man's wife.*

"But Abimelech had not come near her; and he said, Lord, wilt thou slay also a righteous "nation?

"Said he not unto me, She is my sister? and she, even she herself, said, He is my brother: In "the integrity of my heart, and innocency of my hands, have I done this.

"And God said unto him in a dream, Yea, I know that thou didst this in the integrity of thy "heart; for I also withheld thee from sinning against me: therefore suffered I thee not to touch "her.

"Now, therefore, restore the man his wife; for he is a prophet, and he shall pray for thee, and "thou shalt live: and if thou restore her not, *know thou that thou shalt surely die, thou, and all "that are thine.*"

This is to show you, Gentlemen of the Jury, that the very last man in reference to whose life the "soft gush of a Sabbath sunlight" should have been referred to, is the adulterer, for you have got to consider that on that day he was out ready to execute his infamous designs upon the partner of the bosom of the defendant. A more aggravated case than this could not possibly be presented.

I next refer to Exodus, chapter xx. verses 14 and 17. Here are found the ten commandments as delivered on Mount Sinai. The seventh is—"Thou shalt "not commit adultery;" and the tenth is—"Thou shalt not covet thy neigh- "bor's house, *thou shalt not covet thy neighbor's wife*, nor his man servant, "nor his maid servant, nor his ox, nor his ass, nor anything that is thy "neighbor's."

Again—to the 20th chapter of Leviticus, verse 10, *where the punishment for adultery is declared*:

"And the man that committeth adultery with another man's wife, even he that committeth adul- "tery with his neighbor's wife, *the adulterer and the adulteress shall surely be put to death.*"

Again—to the 22d chapter of Deuteronomy, verse 22:

"If a man be found lying with a woman married to an husband, *then they shall both of them die, "both the man that lay with the woman, and the woman;* so shalt thou put away evil from "Israel."

Moses died in the year 2553 of the world, and 1451 years before Christ He was succeeded by Joshua, who, on the Mount of Ebal, read to the people a copy of the law of Moses written on tables of stone, and it was reaffirmed to the congregation. I cite from Joshua, chapter 8, verses 30–35:

"Then Joshua built an altar unto the Lord God of Israel in Mount Ebal.

As Moses the servant of the Lord commanded the children of Israel, as it is written in the book of the law of Moses, an altar of whole stones, over which no man hath lifted up any iron; and they offered thereon burnt offerings unto the Lord, and sacrificed peace offerings.

And he wrote there upon the stones a copy of the law of Moses, which he wrote in the presence of the children of Israel.

And all Israel, and their elders, and officers, and their judges stood on this side the ark and on that side, before the priests the Levites which bare the ark of the covenant of the Lord, as well the stranger as he that was born among them: half of them over against Mount Gerizim; and half of them over against Mount Ebal; as Moses the servant of the Lord had commanded before, that they should bless the people of Israel.

And afterwards he read all the words of the law, the blessings and cursings, according to all that is written in the book of the law.

There was not a word of all that Moses commanded which Joshua read not before all the congregation of Israel, with the women and the little ones, and the strangers that were conversant among them."

The law of Moses then was continued by Joshua.

At this time, as the jury will remember, the Jews were under what is called

a *theocratic* government; that is, the Deity himself was in reality their king. It was a direct government from Heaven. This is the derivative sense of the term *theocratic* "God-ruling." This continued until between 1095 and 1065, *ante Christum*—before Christ. Saul was their first king. They asked for a king, and that was the end of the theocratic government.

I refer now to 2 Samuel, chapter 12, verse 10. When the Israelites besieged Rabbah, David tarried at Jerusalem. He there committed adultery with Bath Sheba, the wife of Uriah the Hittite. He directed Joab to place Uriah in the forefront of the hottest battle before Rabbah, and then retire from him, that he might be smitten and die. This was done, and Uriah was killed. Bath Sheba had a child, which was struck sick by the Lord, and died. *Nathan* was sent to David, and reproved him in the parable of the "rich man with many flocks and herds, and the poor man with his single ewe lamb," and a part of the reproof was this.

"Now therefore the sword shall never depart from thine house: because thou hast despised me, and hast taken the wife of Uriah the Hittite to be thy wife."

David repenting, Nathan said:

"The Lord also hath put away thy sin; thou shalt not die."

David wrote the fifty-first Psalm on this, containing the verse—

"The sacrifices of God are a broken spirit; a broken and a contrite heart, O God, thou wilt not despise."

I refer, also, to 2 Samuel, chapters 13 and 14. Amnon ravished Tamar.

"And it came to pass after this, that Absalom, the son of David, had a fair sister, whose name was Tamar; and Amnon, the son of David, loved her.

And Amnon was so vexed that he fell sick for his sister Tamar; for she was a virgin: and Amnon thought it hard for him to do anything to her.

But Amnon had a friend, whose name was Jonadab, the son of Shimeah, David's brother: and Jonadab was a very subtle man.

And he said unto him, why art thou, being the king's son, lean from day to day? wilt thou not tell me? And Amnon said unto him, I love Tamar, my brother Absalom's sister.

And Jonadab said unto him, lay thee down on thy bed, and make thyself sick: and when thy father cometh to see thee, say unto him, I pray thee, let my sister Tamar come and give me meat, and dress the meat in my sight, that I may see it and eat it at her hand.

So Amnon lay down, and made himself sick; and when the king was come to see him, Amnon said unto the king. I pray thee let Tamar my sister come and make me a couple of cakes in my sight, that I may eat at her hand.

Then David sent home to Tamar saying, go now to thy brother Amnon's house and dress him meat.

So Tamar went to her brother Amnon's house; and he was laid down. And she took flour, and kneaded it, and made cakes in his sight, and did bake the cakes.

And she took a pan and poured them out before him; but he refused to eat. And Amnon said, Have out all men from me: and they went out every man from him.

And Amnon said unto Tamar, Bring the meat into the chamber, that I may eat of thine hand. And Tamar took the cakes which she had made, and brought them into the chamber to Amnon her brother.

And when she had brought them unto him to eat, he took hold of her, and said unto her, Come, lie with me, my sister.

And she answered him, Nay, my brother, do not force me; for no such thing ought to be done in Israel: do not thou this folly.

And I, whither shall I cause my shame to go? and as for thee, thou shalt be as one of the fools in Israel. Now, therefore, I pray thee, speak unto the king; for he will not withhold me from thee.

Howbeit, he would not hearken unto her voice; but, being stronger than she, forced her, and lay with her.

Then Amnon hated her exceedingly; so that the hatred wherewith he hated her was greater than the love wherewith he had loved her; and Amnon said unto her, Arise, begone.

And she said unto him, there is no cause; this evil in sending me away is greater than the other that thou didst unto me. But he would not hearken unto her.

Then he called his servant that ministered unto him, and said, put now this woman out from me, and bolt the door after her.

And she had a garment of divers colors upon her; for with such robes were the king's daughters that were virgins apparelled. Then his servant brought her out, and bolted the door after her.

And Tamar put ashes on her head, and rent her garment of divers colors that was on her, and laid her hand on her head, and went on crying.

And Absalom her brother said unto her, hath Amnon thy brother been with thee? but hold now thy peace, my sister; he is thy brother; regard not this thing. So Tamar remained desolate in her brother Absalom's house.

But when King David heard of all these things, he was very wroth.

And Absalom spake unto his brother Amnon neither good nor bad; for Absalom hated Amnon, because he had forced his sister Tamar.

And it came to pass, after two full years, that Absalom had sheep-shearers in Baal-hazor, which is beside Ephraim; and Absalom invited all the king's sons.

And Absalom came to the king and said, Behold now, thy servant hath sheep-shearers; let the king, I beseech thee, and his servants, go with thy servant.

And the king said to Absalom, Nay, my son, let us not all now go, lest we be chargeable unto thee. And he pressed him; howbeit he would not go, but blessed him.

Then said Absalom, if not, I pray thee, let my brother Amnon go with us. And the king said unto him, Why should he go with thee?

But Absalom pressed him, that he let Amnon and all the king's sons go with him.

Now Absalom had commanded his servants saying, Mark ye now, when Amnon's heart is merry with wine; and when I say unto you, Smite Amnon, then kill him; fear not; have not I commanded you? be courageous and be valiant.

And the servants of Absalom did unto Amnon as Absalom had commanded. Then all the king's sons arose, and every man gat him up upon his mule and fled.

And it came to pass, while they were in the way, that tidings came to David, saying, Absalom hath slain all the king's sons, and there is not one of them left.

Then the king arose, and tare his garments, and lay on the earth, and all his servants stood by with their clothes rent.

And Jonadab, the son of Shimeah, David's brother, answered and said, let not my lord suppose that they have slain all the young men, the king's sons; for Amnon only is dead: for by the appointment of Absalom this hath been determined from the day that he forced his sister Tamar.

Now, therefore, let not my lord the king take the thing to his heart, to think that all the king's sons are dead; for Amnon only is dead.

But Absalom fled. And the young man that kept the watch lifted up his eyes and looked, and, behold, there came much people by the way of the hillside behind him.

And Jonadab said unto the King, behold, the king's sons come; as thy servant said, so it is.

And it came to pass, as soon as he had made an end of speaking, that, behold the king's sons came, and lifted up their voice, and wept, and the king also and all his servants wept very sore.

But Absalom fled, and went to Talmai, the son of Ammihud, king of Geshur. And David mourned for his son every day.

So Absalom fled and went to Geshur, and was there three years.

And the soul of King David longed to go forth unto Absalom: for he was comforted concerning Amnon, seeing he was dead."

Absalom returned to Jerusalem, where he dwelt two full years, and saw not his father's face. When the king sent for him, he came to him, "and "the king kissed Absalom."

You will perceive, Gentlemen of the Jury, that this killing took place two years after the offence which provoked it was committed, and the punishment which was inflicted for the killing *was*, that "the king kissed Absa-

"lom!" The fate of the seducer is here shadowed forth. There is no time which outlaws his offence! Talk of cooling time in reference to a man whose wife has been deflowered! Can any man cool over a provocation like that? A mere personal indignity is something you can cool over; but if Mr. Sickles is cool now, *he is more than human!*

I refer, also (but rather out of order), to Genesis, chapter xxxiv., verses 1, 2, 7, 25, 30 and 31:

"And Dinah the daughter of Leah, which she bare unto Jacob, went out to see the daughters of "the land.

"And when Shechem the son of Hamor the Hivite, prince of the country, saw her, he took her, and "lay with her, and defiled her.

"And the sons of Jacob came out of the field when they heard it; and the men were grieved, and "they were very wroth, because he had wrought folly in Israel in lying with Jacob's daughter; "which thing ought not to be done."

The sons of Jacob refused to betroth Dinah to Shechem, unless he was circumcised. Hamor and Shechem returned to the gate of their city, and communed with the men thereof; and they and all the males that went out of the city were circumcised.

"And it came to pass on the third day, when they were sore, that two of the sons of Jacob, "Simeon and Levi, Dinah's brethren, took each man his sword, and came upon the city boldly, and "slew all the males."

Hamor and Shechem were slain, and their city pillaged by the sons of Jacob. Jacob heard of it.

"And Jacob said to Simeon and Levi, Ye have troubled me, to make me stink among the inhabit- "ants of the land, amongst the Canaanites and the Perizzites; and I being few in number, they "shall gather themselves together against me, and slay me; and I shall be destroyed, I and my "house.

"*And they said, Should he deal with our sister as with a harlot?*"

I refer now to the prophecies of Ezekiel, chapter xviii., commencing at verse 5. This prophet flourished 588 years before the birth of the Saviour.

"But if a man be just, and do that which is lawful and right,

"And hath not eaten upon the mountains, neither hath lifted up his eyes to the idols of the "house of Israel, *neither hath defiled his neighbor's wife*, neither hath come near to a menstru- "ous woman.

"And hath not oppressed any, but hath restored to the debtor his pledge, hath spoiled none by "violence, hath given his bread to the hungry, and hath covered the naked with a garment.

"He *that* hath not given forth upon usury, neither hath taken any increase, *that* hath withdrawn "his hand from iniquity, hath executed true judgment between man and man,

"Hath walked in my statutes, and hath kept my judgments, to deal truly, *he is just, he shall* "*surely live*, saith the Lord GOD.

"If he beget a son *that is* a robber, a shedder of blood, and *that* doeth the like to *any* one of these "*things*,

"And that doeth not any of those *duties*, but even hath eaten upon the mountains, *and defiled* "*his neighbor's wife*,

"Hath oppressed the poor and needy, hath spoiled by violence, hath not restored the pledge, and "hath lifted up his eyes to the idols, hath committed abomination,

"Hath given forth upon usury, and hath taken increase: shall he then live? *he shall not live:* "he hath done all these abominations, he shall surely die, his blood shall be upon him."

My next reference is to the prophecies of Malachi, chapter iii., verse 5. This prophet flourished about 430 years before Christ.

"And I will come near to you to judgment; and *I will be a swift witness* against the sorcerers, "*and against the adulterers*, and against false swearers, and against those that oppress the hire- "ling in his wages, the widow and the fatherless, and that turn aside the stranger from his right, "and fear not me, saith the Lord of Hosts."

Under the New Testament dispensation, the precepts against adultery were affirmed by the Saviour. I refer to Matthew, chapter xix., verses 16–22.

"And, behold, one came and said unto him, Good Master, what good thing shall I do, that I may "have eternal life?"

"And he said unto him, Why callest thou me good? there is none good but one, that is, God: "but if thou wilt enter into life, keep the commandments.

"He saith unto him, Which? Jesus said, Thou shalt do no murder, Thou shalt not commit adult- "ery, Thou shalt not steal, Thou shalt not bear false witness.

"Honor thy father and thy mother: and, Thou shalt love thy neighbor as thyself.

"The young man saith unto him, All these things have I kept from my youth up: what lack I "yet?

"Jesus said unto him, If thou wilt be perfect, go and sell that thou hast, and give to the poor "and thou shalt have treasure in heaven: and come and follow me.

"But when the young man heard that saying, he went away sorrowful: for he had great pos- "sessions."

And so in Mark, chapter x., verses 17, 18 and 19:

"And when he was going forth into the way, there came one running, and kneeled to him, and "asked him, Good Master, what shall I do that I may inherit eternal life?

"And Jesus said unto him, Why callest thou me good? there is none good but one, that is God.

"Thou knowest the Commandments, *Do not commit adultery*, Do not kill, Do not steal, Do not "bear false witness, Defraud not, Honor thy father and mother."

To the same effect, is Luke, chapter 18, verses 18–20.
I refer, also, to Matthew, chapter v., verses 27, 28:

"Ye have heard that it was said by them of old time, that thou shalt not commit adultery:

"But I say unto you, that whosoever looketh on a woman to lust after her, hath committed "adultery with her already in his heart."

There the Saviour, in the memorable sermon on the Mount, declared that the lust of the heart was tantamount to the passion of the body. The man who lusteth for his neighbor's wife has committed a sin which clamors for the judgment of Heaven as much as if he had soiled her body. So that you observe the policy of the Bible is to arrest the crime in its bud. It is but a step between the intention and the deed, and therefore the divine law aims itself at the motive to the deed.

The Apostles urged the same injunctions. Paul, in his Epistle to the Romans, chapter xiii. verses 8 and 9, says:

"Owe no man anything, but to love one another: for he that loveth another hath fulfilled the "law.

"For this, thou shalt not commit adultery, Thou shalt not kill, Thou shalt not steal, Thou shalt "not bear false witness, Thou shalt not covet; and if there be any other commandment, it is briefly "comprehended in this saying, namely, 'Thou shalt love thy neighbor as thyself.'"

So, also, in the Epistle of James, chapter ii. verses 10, 11:

"For whosoever shall keep the whole law, and yet offend in one point, he is guilty of all.
"For he that said, Do not commit adultery, said also, Do not kill. Now, if thou commit no adul-
" tery, yet if thou kill, thou art become a transgressor of the law."

Now, the adulterer hateth his neighbor. Had Mr. Sickles any worse foe on the face of this earth than Philip Barton Key? If he had come to him and sunk his stiletto in his bosom he would have been merciful to him. He wraps himself, however, in the habiliments of friendship, and in that garb, supposing that he is masked, he commits the most frightful, and, at the same time, the most *sneaking* of all crimes.

These citations from the Bible prove that female purity in connection with the marriage relation is an object, in divine law, of the greatest concern; that the sanctity of the family altar must not be desecrated; that it is impiety to Heaven to violate it; and that it is piety to Heaven to defend it. If Daniel E. Sickles goes to the judgment bar of the next world with no other sin upon his head than the punishment he has put upon his wife's destroyer, he will go as well recommended as will any soul that passes from this sphere!

This brings me to the second branch of the *third* inquiry—the heinousness of adultery, *as a provocation* at the common law. The "jus gladii" resides somewhere. Is it with Omnipotence? Or is it confided to the hands of the injured husband? Though the law does not punish adultery as a crime, *does it not stay its vengeance, when invoked against the husband who turns his own avenger?*

We have seen it as it exists under the Bible. Is it not very strange that although adultery is twice forbidden in the ten commandments—although it is forbidden in terms, and again forbidden in the injunction "thou shalt not covet thy neighbor's wife"—although the Almighty thought it of sufficient importance to make it the subject of two out of the ten commandments—yet, that no human law has caught up the spirit of those commandments and made it a proportionate offence. What is the meaning of that? Do you suppose that society means the adulterer shall go unpunished? No. It throws you upon the law of your heart. There is the repertory of your instincts. Go by them, and you reflect the will of Heaven, and when you execute them, you execute its judgment. If this is not the reasoning of society, then society has not fulfilled its compact with Daniel E. Sickles. What was Daniel E. Sickles's agreement with society? It was that he would give up so much of his natural liberty as *they gave him back a consideration for*. Did he, when he joined society, place his wife beyond the protection of the law? Did he leave her at the mercy of *this* shameless adulterer? No, society knew that that thing would take care of itself. It left the adulterer where the will of God has left him—to be the victim of that judgment which is executed on him by Heaven through man as its instrument. If you are going to pronounce the verdict that there is no other protection to your homes than a sordid action for damages, growing out of the criminal conversation between a wife and the adulterer, then your wives live in a very perilous atmosphere.

If that is all the security over your homes, let the disgrace come, and let the coins of the adulterer soothe your wounded feelings. That is a doctrine

that does not prevail out of this District, and it ought not to prevail *here*, for the moral tone of this District, above all other sections of our country, should be a model, an exemplar to all the other parts of our confederacy.

Upon this branch of the inquiry, I refer, if the Court please, to the case of Manning, or Maddy (as it is sometimes called), in 1st Ventris' Reports, page 158, in 2d Keble Reports, page 829, and also in T. Raymond's Reports, page 212. The Court will notice that Manning's case was decided upon a special verdict; *the intention* was not put to the jury. It occurred in the reign of Charles II., nearly two hundred years ago. We defy the counsel for the Government to find a case in which a British jury ever refused to justify the homicide who *either* slew in the act of adultery, *or* when the act was so near being committed as to leave no doubt of the guilt of the adulterer. Where the jury render a special verdict, they do not pass upon *the intention*, which is the very essence of criminality. I have read the report of a case which was tried in this very court—the case of a brother who slew his sister's seducer—in which the learned judge told the jury that the *status* of the prisoner's mind was a matter entirely for them to determine; and under that charge, which was the law, and creditable to the humanity of the court, the jury set that brother free, within fifteen minutes after the case was committed to them. I do not cite the case of Manning as a *precedent*, but merely to show you that when the British courts were trying to make the "*census regalis*," or *royal revenues* as large as possible, they felt a kind of instinctive shame, even at the burning (with an almost cold iron), of the slayer of an adulterer in the hand!

The shortest of the three reports of Manning's case is that in T. Raymond's Reports, and it is as follows:

"John Manning was indicted in Surrey for murder, for the killing of a man, and upon not "guilty pleaded, the jury, at the assizes, found that the said Manning found the person killed "committing adultery with his wife in the very act, and slung a jointed stool at him, and with the "same killed him; and resolved by the whole court, that this was but manslaughter, and Manning "had his clergy at the bar, and was burned in the hand, *and the Court directed the executioner to "burn him gently, because there could not be greater provocation than this.*"—Hale, Ch. J., "Twisden, Rainsford and Morton, JJ."

All that Manning's act was made an offence for, *was* to forfeit his goods and chattels to the crown, and thus augment the *census regalis*. The splendor of royalty must be supported. It was not at all times of much consequence how it was supported, and you will find—for I intend to refer to it—that Serjeant Foster, in a part of his treatise, admits the readiness *judges* exhibited to turn everything they could into *a felony*, so as to make the forfeitures to the crown as large and as numerous as possible.

At the time Manning's case was disposed of, Lord Chief Justice Hale was the presiding judge of the court, and your Honor will remember that the rule by which he guided himself, as a judge, was that, "in the administration of "justice, I am *intrusted* for God, the king, and country;" *and the utmost Hale could make out of such an act as the slaying of an adulterer, was, that it was a nominal offence, requiring a slight burning in the hand, merely to conform to the law.*

In the opinion of Lord Hale, in Mawgridge's case—17th State Trials, page 79—it is said:

"When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, "or knock out his brains, this is *bare* manslaughter; *for jealousy is the highest rage of a man*, "*and adultery is the highest invasion of property.*"

This authority proves that the greatest provocation one man can give to another, according to the concession of human tribunals, is, *to seduce his wife.* It is the greatest violation of right that can occur. Lord Hale says, in allusion to the slaying of an adulterer:

"If a thief comes to rob another, it is lawful to kill him. [Mark the sarcasm.] *And if a man* "*comes to rob a man's posterity and his family*, yet, to kill him, is manslaughter. So is the "law, *though it may seem hard*, that the killing in the one case, should not be as justifiable as "the other."

Who does the adulterer rob? He puts a spurious issue into your family. He compels the offspring of your loins to mingle with bastards. He puts his bastards upon an equality with your lawful children, and *they come in* and share in the inheritance you leave behind you. Is not that enough to madden any man's brain who would reflect upon it for a single moment? The adulterer is worse than a thief or a burglar, says Lord Hale, "for he robs a "man's posterity and his family."

Think of the district attorney for the county of Washington coming into this court and hunting down petty criminals, and then going out of this court and compelling Heaven to turn its face from him in disgust over the enormity of his own crimes! The person to protect the home of Daniel E. Sickles the greatest malefactor that ever walked the face of the earth himself! Keeping the burglar out, that the adulterer might pass in, when the burglar could not compare, for a moment, with him in the aggravation and heinousness of his crime!

The Court is also referred to the case of Carnegie, same volume, page 79, in which the language used by Hale to depict the aggravations of adultery, is repeated substantially in the arguments of counsel. Also to the case of Chetwynd, State Trials, vol. xviii., page 306, where the doctrine that killing an adulterer, taken in the act, is *bare* manslaughter, is affirmed by the counsel for the prisoner. In Hawkins, vol. i., chapter xxxi., section 36, it is said:

"Neither can he be thought guilty of a greater crime (*i. e.*, manslaughter), who, finding a man in "bed with his wife, etc.,—in which case the killing the assailant hath been holden by some to be "justifiable. *But it is certain*, that it can amount to no more than manslaughter."

Having shown you, Gentlemen of the Jury, by the Bible, that there can be no higher crime than that of adultery, I *mean* to convince you that, by the concession of human tribunals, *it is the greatest provocation that can be given to a man;* and the question which will then present itself to your minds is, whether, when a man receives a provocation which excites in his mind a phrensy he cannot control, he is responsible for what he does under its influence.

I now refer to Foster's Crown Law, page 298, a short discourse upon the Act of James the First. At the accession of James the First, collisions between the Scotch and English were so frequent, and killings by means of concealed weapons so common, that it became necessary to pass a special statute for the purpose of restraining occurrences of that description. The words of the statute were:

"Every person and persons who shall stab or thrust any person or persons that hath not then "any weapon drawn, or that hath not then first stricken the party, which shall so stab or thrust, so "as the person or persons so stabbed or thrust shall die thereof within six months then next follow- "ing, although it cannot be proved that the same was done of malice aforethought; yet the party "so offending, and being thereof convicted by verdict, etc., shall be excluded from the benefit of "clergy, and suffer death as in case of willful murder."

Foster says that the case of an adulterer stabbed by the husband, in the act of adultery, was not within that statute—that it was manslaughter at *common law—for the provocation was greater than flesh and blood, in the first transport of passion, could bear.* That is what I want the jury to understand. It is folly to punish a man for what he cannot help doing. If you concede that the transport is such that he cannot control it, you cannot make him criminally responsible for what he does under its influence. To stab an adulterer was not to draw a weapon within the meaning of the statute of James the First, even though the adulterer had no weapon, because the statute was never meant for his protection. Although its language would embrace the act of a party who stabbed an adulterer who had no weapon drawn, yet the courts looked to the reason of the law, and held that the adulterer was beyond its protection, that it was no offence under it to draw a weapon and thrust an adulterer, even though he had no weapon drawn, for his crime made him the subject of attack, and placed him beyond the purview of the statute.

In 1st East's Pleas of the Crown, page 234,—and let me observe that it is all important to note the language of the various authorities in laying down the principle, that the provocation of adultery is too great for human nature to bear,—it is stated:

"*There is indeed one species of provocation*, which, though it do not amount to personal assault "upon the party himself, *is yet of so grievous a nature* as the law reasonably concludes cannot be "borne in the first transport of passion, *where the injury is irreparable and can never be com-* "*pensated.* This is where a man finds another in the act of adultery with his wife; in which case, "if he kill him in the first transport of passion, he is only guilty of manslaughter, *and that too of* "*the lowest degree*; and, therefore, the court directed the burning in the hand to be gently inflicted, "because there could not be a greater provocation."

It should be borne in mind, while I am citing these authorities, that the rule making it manslaughter to kill an adulterer in the act was a rule created by the court upon a special verdict, *and that no British jury ever condemned a husband for standing in defence of his wife.* I now refer *particularly* to the first volume of Howell's State Trials, pages 33, 34 and 35 of Emlyn's Preface to the 2d edition of the "State Trials," printed in the year 1730:

"This severity of our law, in inflicting capital punishments upon the lighter crimes of pilfering "and thieving, seems the more extraordinary when one considers the great indulgence shown to *one* "*of the first magnitude, and which is productive of much more mischievous consequences;* I "mean *adultery*, which, it is holden, does not by our law admit of any prosecution in a criminal

"way; *yet, whether we consider the guilt of the offender, or the mischief done to the injured* "*party, there is no comparison between the one and the other.* What proportion is there between "a private theft, perhaps of some trifle, which may soon be repaired, *and the invasion of our* "*neighbor's bed, irreparably robbing him of all the satisfaction and comfort of his family,* "*confounding relations, and imposing upon him the charge of maintaining a spurious* "*issue as his own?* The one is often done only to allay the violence of a pressing hunger, but "*the other always to gratify an irregular and ungoverned lust.* Nor can it with reason "be pretended, that the one is a crime of a public, the other of a private nature; if the public "be concerned in the preservation of the property of goods, *it cannot be less so in the pre-* "*servation of the more valuable rights which affect the peace and quiet of families.* Is "private stealing an offence against the community? The other is much more so, having a greater "tendency to promote frays and quarrels, public disturbances, and breaches of the peace, from "whence bloodshed and murders often ensue. What may be the reason why our laws make so "light of this enormous crime, whether it be the countenance it receives from great examples, and "the commonness of the fault, or some other reason, I will not take upon me to say; but most "certain it is that the laws of other nations had a different sense of it, and treated it in a severer "manner: by the Mosaic law, it was always punished with death; and long before that law, it was "esteemed 'an iniquity to be punished by the Judges.' By an old law of Romulus, the adulteress "was to be put to death—*Adulterii convictam vir et cognati uti volent necanto;* and though "afterward the civil law, *Lex Julia de Adulteriis*, punished it only (*per relegationem*) with "banishment, or (*per deportationem*) with transportation into some remote island; yet, the father "of the adulteress was permitted to kill both his daughter and the adulterer, and in some in-"stances the husband had the same power; and if he chanced to use that power in a case not "allowed, even then he was not to be punished with severity, but only to undergo a milder sort "of punishment; but, at length, when the empire became *Christian*, under the reign of Constan-"tine, adultery was made capital, *sacrilegos nuptiarum gladio puniri oportet*, and so it continued "to Justinian's time, and long after. Some are of the opinion that it was so even while the empire "was heathen, under the reign of Diocletian and Maximian, it being enumerated in one of their "laws among the capital crimes."

When "the empire became Christian, under the reign of Constantine," adultery was again made capital! That is, when it was established on the principles of Him who spake as never man spake, and who preached humility and meekness on earth, adultery was made a capital crime. When a community becomes Christian, it is Christian to punish adultery with death!

The atrociousness of adultery, as a provocation, is also recognized by our American legal writers. Wharton's Am. Cr. Law (4th edit.), sections 983, 984; Greenleaf on Evidence, volume iii. section 122.

This brings me to the fourth question in order, which was—as to the reason, or principle, or meaning of the old rule, that homicide committed by the husband on discovering his wife in adultery, either by slaying the adulterer or adulteress, is manslaughter. Not only can the husband slay the adulterer, but if the guilty parties be together, he can pick from them and slay either or both. Now, the question, if the Court please, is this: Does this rule, which made the killing of an adulterer manslaughter or a merely nominal offence, apply only to cases where the guilty parties are caught in the fact? If so, the husband will have to wait a very long time before he becomes vested with the rights which such a rule would give him. Such a thing may have happened, but if the husband never has his right to slay the adulterer until he catches him in coition with his wife, *in the natural course of things*, he will never have the right at all. It has been said—

"The wren goes to 't, and the small gilded fly
"Does lecher in *our* sight,

but that is almost the only instance of coition *usually* occurring *under the eye!*

Our proposition is this, that *to catch the adulterer in the fact* means to catch him so near the fact as to leave no doubt of his guilt. If you caught the adulterer turning out of the bed in which your wife was, the coition would not then be taking place, but would you not then be pardoned for killing him? If you caught him coming out of a room where she was, *in such a state as to indicate what he had been doing*, would you not then be pardoned if you killed him? You would have the same right as if you caught them in actual coition. The question is, not as to how you catch them, *but are the parties guilty, and are you satisfied and convinced of their guilt.* Whether the fact actually takes place before the eyes of the husband, or he becomes satisfied of it by irrefragable proof, is perfectly immaterial. It is the provocation that works on the human breast, *which* the law looks to, and the provocation is the same, let the knowledge of its existence be gained as it may. We say, therefore, that the rule, reducing the killing of the adulterer to manslaughter, *is figuratively expressed.* It is but saying that the man who kills another for adultery, if he does it *when the proof strikes home, under the passion then excited*, and which is uncontrollable, incurs no other than *this nominal criminality* at the common law. I cannot enforce this position better than by citing from the great Dramatist, from whom I quoted this morning, where he makes the caitiff Iago inflame the Moor against the supposed, but unreal infidelity of his wife. The Moor is made to demand proof of her guilt, and Iago is made to say:

"Would you, the supervisor, grossly gape on?
* * * * * * *
"It is impossible you should see this,
"Were they as prime as goats, as hot as monkeys,
"As salt as wolves in pride, and fools as gross
"As ignorance made drunk: but yet I say,
"If imputation and strong circumstances,
"Which lead directly to the door of truth,
"Will give you satisfaction, you may have it."

That is all that any husband can expect—*imputation and strong circumstances leading directly to the door of truth;* and if he is never invested with his right to kill until he has more than that, then it is denied him altogether!

Is not the man who discovers *some sign*, after the admission of guilt by his wife, *corroborating her statement*, as much the victim of passion, as though he had surprised the adulterer in his guilt? Does it make any difference how the *knowledge* is gained? Is the *spectacle* more exciting than the *belief?* It is when *suspicion* changes into *proof*, when the mind can no longer lay hold of or reason upon doubts, *that the tumult of the passions commences*, and while it rages, it is vain to try to assuage them.

By the law of England, it is treason to defile the queen consort or regnant, and also *the heiress apparent*, but not the queen dowager. The reason is, it puts a spurious heir upon the government, and the crown, in that way, might

pass into illegitimate hands. We have no government here transmitted by inheritance, unless it is the government of families; but is not the diadem of the family honor as dear and costly as any that ever graced a monarch's brow? Where is the man who does not contemplate the honor of his family as it flows from father to son with the same reverence and attachment with which he would contemplate the governmental crown as it passed from the head of the incumbent to his successors! You, all of you, know the loyalty of an Englishman to his government. Allegiance was never more strong than is that of the subject there to the sovereign. And if attachment like that can grow up between individuals and the government that grinds them down, how much stronger must be the attachment that grows up between the members of the same family! Let the same sanctity that attaches to the nation's queen attach to the queen of every family altar. Shall the *palace* be purer or securer than the *hut?* Shall one's lawful children mix or commune with the living monuments of his wife's inconstancy? Shall the offspring of another man divide with one's lawful children their patrimony? Shall every door be swung open to the adulterer? As thrones and crowns do not go with us by birthright, let the ægis of the law extend itself around every family castle. *Cuckold!* Who would live to have it written upon his back? What man *so made of flint*, that he could walk in the presence of his fellow men, and feel that some person was secretly smirking or smiling at him, because he knew, if *he* did not know, of his wife's inconstancy? What is the choice? The choice is for the injured husband, in the midst of his agony and despair, to lay violent hands upon his own life, and leave the course free to his wife's seducer, or to lay those violent hands on the life of him who has justly forfeited it. Remember that we were made in the image of the great Creator. Man was made erect, and to walk erect upon the face of the earth, and when the immortal soul was breathed into his nostrils, he was invested with dignity of character and with instincts to protect that dignity of character; and in the same way, in which his instincts tell him that his God lives, he is told to defend his dignity, even to the extent of his own or his neighbor's life.

This brings me, if the Court please, to the last consideration in connection with this subject, which constitutes the fifth question I proposed to the Court, viz.: what was the effect of the rule which lowered or reduced such a killing to manslaughter? I design showing that it was equivalent or tantamount to an acquittal, that the rule at common law, which made such an act manslaughter, was, in effect, *declaring that there was no offence*, or so light an offence *as not to be worthy of punishment.*

At the time the common law rule was first promulgated, they had what was called the *privilegium clericale*, or privilege of clergy, on praying which, a party convicted of a felony was entitled, on a mere burning in the hand, to be discharged from the severer penalties of the conviction. And here I cite from the case of the Earl of Warwick, 13th State Trials, pages 1014 to 1020, the opinion of Lord Ch. J. Treby. A husband, at common law, convicted of slaying a person who had committed adultery with his wife, was entitled to claim the benefit of clergy (as it was called), and on that, and a slight burning in the hand, he was discharged from the conviction. "The

"benefit of clergy was an ancient privilege, whereby a clerk [that was the "name by which clergymen were then known] charged with felony, was "dismissed from the temporal judge, and delivered in custody to his Ordinary, "before whom he was to purge himself, if he could, of the offence." It was supposed that the persons of clergymen were sacred. The privilege was originally confined to *men in holy orders*. That *was* by the old law. It was afterwards, by statute, extended "in favor to learning," to "lay-clerks," or laymen, who, by reason of their ability to read, were "in a possibility of "being made" priests. You will think it strange, Gentlemen of the Jury, that the law thought it less sin in a man, who could read, to commit a crime, than in one who could not read; but so it was under the old English law. As soon as the party, claiming this privilege, was convicted of felony, he was subject to three things—*first*, the loss of his liberty, being to continue a prisoner; *second*, the loss of his goods and chattels, *absolutely*, and of his capacity of purchasing more, and "of taking and retaining the issues and "profits of his freehold land to his own use;" *third*, the loss of his credit, so as not to be a witness, juror, etc. When he had made his purgation, he was restored to all these things, *except* the goods and chattels, which he had at the time of his conviction. They were forfeited, *absolutely*. *Purgation* was the convict clearing himself, before the Ordinary, of the crime "by his "own oath, and the oaths or verdict of an inquest of twelve clerks, as com- "purgators." The statute of 18th Elizabeth, c. vii., abolished this system of purgation, with its perjuries and abuses; and provided that after the allowance of clergy, and burning in the hand, the party should "forthwith "be enlarged and delivered out of prison" by the justices before whom such clergy should be granted, *unless* the judges might, for the further correction of the party, detain him in prison not to exceed one year. *Peers* had the benefit of the law, "without either clergy or burning." *Clerks in orders;* "upon clergy alone, without burning." A lay-clerk "not without both." This was the punishment which could have been inflicted under the rule, at common law, *which* declared that the slaying of an adulterer, caught in the act by the husband, should be deemed manslaughter. The mode of obtaining the allowance of clergy was, for a party, as soon as he was convicted of a felony, to suggest to the court that he was able to read. A book was then handed to him, and if he could read the *neck-verse* (as it was called), he was entitled to his clergy. The neck-verse was "a scrap of Latin," *miserere mei Deus*. (Foster's Crown Law, page 306.) The "ceremony of reading" was abolished by an act in the 5th of Anne. The neck-verse is *supposed* by some to have been *always* the beginning of the 51st Psalm (12th State Trials, page 631, note); but this is, certainly, not so.

The question then arises, *whether*, if under the old law, the offence, which *the killing of an adulterer caught in the act*, was declared to be, was tantamount to an acquittal or exoneration from all liability—*the rule* can be invoked by the prosecution to procure a conviction, for the purpose of insuring the infliction of the punishment which our Act of Congress prescribes for a conviction of manslaughter?

The counsel for the prosecution may say that taking the counsel for the

defence at *their* word, the common law rule convicts the defendant of manslaughter; *but* is it to be lost sight of, that *that manslaughter*, at the common law, *was scarcely punishable as an offence?* If by any subsequent statute manslaughter is made a capital offence—*can the counsel for the Government claim the benefit of the common law rule to get a conviction, and then fall back upon the statute for the punishment?* No. This Court is to construe the common law rule with reference to the law which existed at the time it was promulged; and if the conviction of felony, at that time, involved a merely nominal punishment, and there is no punishment now which answers to *that* which then prevailed, it is the duty of the Court to direct the absolute acquittal of the defendant. I refer the Court to 4th Blackstone's Commentaries, page 373, and to Foster's Crown Law, page 288. The Court will perceive that these authorities show that, at the common law, *the privilege of clergy, made a conviction of manslaughter merely nominally punishable.* Foster says:

"And if it deserveth the name of a deviation, it is far short of what is constantly practised at an "Admiralty-Sessions under the 28 H. 8., with regard to offences not ousted of clergy by particular "statutes, which had they been committed at land would have been entitled to clergy. *In these "cases the jury is constantly directed to acquit the prisoner; because the marine-law doth not "allow of clergy in any case.* And, therefore, in an indictment for murder on the high sea, if the "fact cometh out upon evidence to be no more than manslaughter, supposing it to have been com-"mitted at land, *the prisoner is constantly acquitted.*"

Blackstone is to the same effect. These citations establish *this:* that in the Maritime Courts, where the privilege of clergy was not, *as such*, known *at all, a conviction of felony*, in any case, *which would have been clergyable in the common law courts*, was regarded as tantamount to an acquittal; or that the jury were directed in *such* cases to acquit absolutely. Showing precisely, what I told the Court at an earlier stage of my remarks, the fact would prove to be—that when, upon *these* special verdicts, the courts had secured a forfeiture for the crown, they felt they had gone far enough, and that all, beyond *that*, was merely nominal, without reality or substance!

The fondness of the English judges to decide, *themselves*, the most important questions in a criminal prosecution, can be seen in the remarks of Ch. J. Raymond, in delivering the judgment of the Court of King's Bench, upon the special verdict in Oneby's case, 17th State Trials, page 49. The question of "malice" is there denied to be a question of fact, and *claimed* for the Court.

The conduct of the judges in regarding, *too much*, the effect of their judgments upon the *royal revenue*, is very pointedly reprobated by Foster at pages 263, 264 of his "Crown Law."

"I cannot help saying, that the rule of law I have been considering in this place, touching the "consequence of taking or not taking due precaution (*i. e.* in holding *blameless*, or *almost blame-"less* acts to amount to manslaughter), doth not seem to be sufficiently tempered with mercy. Man-"slaughter was formerly a capital offence, as I shall hereafter show. And even the forfeiture of "goods and chattels upon the foot of the present law, is an heavy stroke upon a man guilty, 'tis "true, of an heedless, incautious conduct, *but in other respects perfectly innocent.* And where "the rigour of the law bordereth upon injustice, mercy should, if possible, interpose in the adminis-"tration. *It is not the part of judges to be perpetually hunting after forfeitures when the "heart is free from guilt.* They are ministers appointed by the crown for the ends of publick

"justice; and should have written on their hearts the solemn engagement his majesty is under to "'Cause Law and Justice *in Mercy* to be executed in all his Judgements.'"

At the present time, however, it is the province of the jury to render *general verdicts. Lay intelligence* pronounces upon matters of fact. *Juries have a firmness, judges had not.* You, Gentlemen of the Jury, are to pass upon all the issues joined upon this indictment. I shall not amplify this point any more. *It appears* that even though, at the common law, for the purpose of enriching the crown, forfeitures were *made* for *it;* still, *in those courts* in which the privilege of clergy did not exist, offences which were clergyable at the common law, were considered grounds of absolute acquittal, and that in analogy to the privilege of clergy, the maritime courts directed acquittals in all cases in which that privilege could be claimed at the common law.

I come now to the sixth question I proposed to discuss. How far the provocation furnished by the deceased to the defendant acted upon or affected the defendant's mind in reference to exonerating him from all legal consequences for or by reason of the killing in question; whether, while the influence of the provocation remained, it did not render the defendant, for the time being, insane; whether it did not operate such a state of mental unsoundness as to relieve the defendant's alleged act of and from all criminality, supposing the act to have been immediately and directly prompted or occasioned by it? In other words, whether the case is one of pardonable or excusable unsoundness of mind, or of wanton or ungovernable passion; whether the defendant, not being to blame for the provocation, the frenzy, or its results, can be holden for a crime? This point is regarded as one of the most important items in this prosecution. We mean to say, not that Mr. Sickles labored under any insanity consequent upon an established, permanent mental disease, but that the condition of his mind, at the time of the commission of the act in question, was such, as to render him legally unaccountable, *as much so*, as if the state of his mind had been produced by a mental disease. In other words, the proposition we shall argue to this jury is this: it is no matter how a man becomes insane; *is he insane?* Whether it is a disease of the mind or body that produces his delirium, or whether it is a provocation coming suddenly upon him, is perfectly immaterial. If his mind is in the same condition from either cause, then the privilege of exoneration, in consequence of his conduct, attaches as completely in the one case as in the other. Disease, Gentlemen, is inexplicable in its visitations, and the ailments which affect the mind come upon it just as certainly and suddenly as do the ailments which strike at a man's physical structure. *Bodies*, apparently in full health, are suddenly stricken down. Why may not *minds* be as unexpectedly affected? The mind is as delicate as the body. A sudden transition from one extreme to another—as, for instance, a sudden transition from heat to cold, or cold to heat—will frequently destroy the equality of the body; and it is precisely the same with the mind. The reaction is just as strong; and when thus disturbed in its equilibrium, how disastrous the consequences become!

The state of the mind can never be gauged by definitions. In the time of Lord Hale, *the doctrine*, as to how far its state or condition excused from

criminal responsibility, was built upon a very narrow foundation. In the 1st Hale's Pleas of the Crown, page 30, he says:

"It is very difficult to define the indivisible line that divides perfect and partial insanity; but it "must rest upon circumstances duly to be weighed and considered, both by the judge and jury, *lest,* "*on the one side, there should be a kind of inhumanity towards the defects of human nature,* "*or, on the other side, too great an indulgence given to great crimes.*"

Although the term *insanity* is the same as *unsoundness of mind*, and considered as equivalent to it—in this case I prefer to use the latter terms. It is as difficult to define the causes that may throw the mind into a state of unsoundness, as it is to define the particular state of unsoundness into which it may thus be thrown. The jury are to carefully weigh its condition at the time of the commission of *an* act. *You* are not to be too savage on the one hand, nor too feeling upon the other. You are to avoid extremes either way. You are not to pardon the passion which has been unduly excited by an inadequate cause; nor are you to refuse indulgence to a passion which has been provoked by an adequate *one*, and which, when once aroused, defies all human restraint. We deny that this case presents an instance of ungovernable passion, as those words are *legally* understood. An ungovernable passion implies a passion disproportionate to the provocation; one, if not wantonly excited, at least, wantonly indulged—*such* as over-sensitiveness, severe retaliations for slight affronts, and the like.

The following instances of "inadequate provocation," are given by Lord Holt, in "Mawgridge's case," (17th State Trials, pages 66–69):

"Therefore, I am of opinion that if two are in company together, and one shall give the other "contumelious language (as suppose A and B), A that was so provoked draws his sword and makes "a pass at B, (B then having no weapon drawn) but misses him. Thereupon B draws his sword and "passes at A. And there being an interchange of passes between them, A kills B, I hold this to be "murder in A, for A's pass at B was malicious, and what B did afterward was lawful. But if A, "who had been so provoked, draws his sword, and then before he passes, B's sword is drawn; or A "bids him draw, and B thereupon drawing, there happen to be mutual passes; if A kills B this will "be but manslaughter, because it was sudden; and A's design was not so absolutely to destroy B, "but to combat with him, whereby he run the hazard of his own life at the same time.

* * * * * * *

"Secondly, As no words are a provocation, so no affronting gestures are sufficient, though never "so reproachful.

* * * * * * *

"Thirdly, If one man be trespassing upon another, breaking his hedges or the like, and the "owner, or his servant, shall upon sight thereof take up an hedge-stake, and knock him on the "head; that will be murder because it was a violent act beyond the proportion of the provocation.

* * * * * * *

"Fourthly, If a parent or master be provoked to a degree of passion by some miscarriage of the "child or servant, and the parent or master shall proceed to correct the child or servant with a "moderate weapon, and shall by chance give him an unlucky stroke, so as to kill him; that is but "a misadventure. But if the parent or master shall use an improper instrument in the correction, "then if he kills the child or the servant, it is murder.

* * * * * * *

"Fifthly, If a man upon a sudden disappointment by another shall resort violently to that other "man's house to expostulate with him, and with his sword shall endeavor to force an entrance, to "compel that other to perform his promise, or otherwise to comply with his desire; and the owner "shall set himself in opposition to him, and he shall pass at him, and kill the owner of the house, it "is murder."

In the same opinion, the cases of manslaughter are classified as follows:

"First, If one man upon angry words shall make an assault upon another, either by pulling him "by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword and "immediately run the other through, that is but manslaughter; for the peace is broken by the "person killed, and *with an indignity to him that received the assault.*

* * * * * * *

"Secondly, If a man's friend be assaulted by another, or engaged in a quarrel that comes to "blows, and he, in the vindication of his friend, shall on a sudden take up a mischievous instrument "and kill his friend's adversary, that is but manslaughter.

* * * * * * *

"Thirdly, If a man perceives another by force to be injuriously treated, pressed, and restrained "of his liberty, though the person abused doth not complain, or call for aid or assistance; and others "out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is "manslaughter.

* * * * * * *

"Fourthly, When a man is taken in adultery with another man's wife, if the husband shall stab "the adulterer, or knock out his brains, this is bare manslaughter."

In Chetwynd's case, 18th State Trials, page 290, is another instance of "insufficient cause" for killing. Chetwynd (a lad of about fifteen years of age) killed one Ricketts (who was about nineteen years of age), his schoolmate, for snatching away a piece of his cake against his consent. The cake was lying on a bureau, and the killing was effected by a stab given with a knife with which Chetwynd cut the cake. The jury rendered a special verdict, which the friends of Ricketts laid before Sir John Strange, who answered one of the questions propounded to him, by saying, "I am *strongly* "inclined to think this will be adjudged murder." Before the argument of the special verdict, the relations of the prisoner, "who were persons of some "figure in the world," applied to the king for a pardon. The lords justices in council referred the petition for a pardon to the attorney and solicitor general, and after their report was made, a pardon was granted. This case proves two things—*that* it is fortunate for a prisoner to have relatives "of some "figure" in the world—and *that* in England, at that time, at all events, when the application of a well settled *legal* rule to a particular case, was disrelished, the Crown stepped in and prevented the judges offering violence to their own feelings! This case occurred 17 George II., A.D., 1743, and shows the unreliability of the English rules; for when their rigor was not palatable, and the courts could not *extricate*, the king *did!*

In Foster's Crown Law, pages 290, 291, the subject of "insufficient provo-"cation" is thus alluded to:

"Words of reproach, how grievous soever, are not a provocation sufficient to free the party "killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive "of contempt or reproach, without an assault upon the person.

"This rule will, I conceive, govern every case where the party killing upon such provocation "maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or to do some "great bodily harm. But if he had given the other a box on the ear, or had struck him with "a stick or other weapon *not likely to kill, and had unluckily and against his intention* "killed, it had been but manslaughter.

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

From the citations I have just made, I think you will agree with me, Gen-

tlemen of the Jury, that the English law of homicide is hardly consistent, and that many of its principles would not do to carry out, under *our* mode of administering criminal justice. It may suit the *proprieties* of the bench to hold that killing an adulterer is as high a crime as killing one for filliping you upon the forehead; or that one who interferes in behalf of a friend or a *stranger*, and kills in the heat of passion, or on the spur of the moment, has an equal sanction and incurs no greater responsibility for his conduct *than the husband who defends the honor of his family;* but such rules would hardly do for an intelligent jury. We know enough of the action of juries to know that they have, at times, reversed the common law so far as to reduce the offence of killing to manslaughter, *for opprobrious words*, such as *would* and *did* stir up the sensitiveness of the person to whom they were addressed. Must adultery take rank, *as a provocation*, with words? To confound it with the other instances given of manslaughter, is to confound *extremes*. If filliping upon the forehead prevents an act rising to murder, the provocation of polluting a wife justifies and shields it altogether.

The American law, in reference to *homicide*, aims at two things: *first*, the punishment of the offence when perpetrated in cold blood—*sedato animo, malitia præ-cogitata; second*, when committed revengefully, while in a state of passion, but passion unduly excited or wantonly indulged. Homicide committed while in a frenzy—a transport of rage—is not a crime, when the provocation is sufficient to justify the mental condition. The cases punished by the law imply *either* the possession of perfect will *or* the loss of it through the wantonness of the frenzy, which is deemed to be indicative of vice. In either case, the homicide is revengeful. In the one case, it is cold-blooded revenge; in the other, it is passionate, hot-headed revenge. We can concede, on the part of the defence, that life taken in cold blood, or under the influence of excitement not proceeding upon an adequate provocation, is criminally taken. How does this affect Mr. Sickles? In murder, a party is in possession of his will; in manslaughter, he is not under the control of reason. That does not touch the question in this case, as to how the provocation Mr. Sickles received operated upon him. He did not act in cold blood. If he did, he is more or less than human. His provocation was adequate, proportioned to his frenzy; for the *law* concedes that it was past endurance. How hypocritical, then, would it be for the law to punish him, when it starts with admitting that he was not, and *could not be*, a free, *rational* agent!

It is important for you, Gentlemen of the Jury, to know some of the facts of which he was aware at the time of his collision with the deceased. He knew when he met Mr. Key, on the afternoon in question, that he was about his house for the purpose of making an assignation with his wife. He knew that he had hired a house but a few blocks from his mansion, where he met his wife. He knew that he had the aid of a park, and a club-house, and an opera-glass, which enabled him to see whether or not it was safe for him to approach his habitation. This thing was well considered by Key! He hired the house in a part of the city from which he *thought* no witnesses could come against him; in a part of the city populated chiefly by blacks, where, from his legal knowledge, he knew that facts seen by *them* were not

seen at all. All the weapons which, *as an adulterer*, he required, he had about him on the afternoon of this fatal occurrence. He wanted no Derringers to accomplish his end. And although there is no proof before you to show that he was not armed at that time, the evidence to be adduced on the part of the defence will be that he was a man who was in the habit of carrying arms. He was provided, no doubt, with all that was necessary to protect his life. At all events, he was furnished with all the means serviceable to him in the pursuit of his adulterous intentions—his white handkerchief, the signal of assignation—*the adulterer's flag*—and the other appliances of an adulterer's trade.

Mr. Sickles knew that Key was in the habit of carrying his opera-glass. He knew that he was in the habit of availing himself of the club-house and park, and that he had been frequently seen about there for the purpose of making an assignation with his wife. He had no knowledge that he was coming there that afternoon, and he saw him without any forewarning whatever. But he knew what the purpose was *that brought him there.* What, then, must have been the condition of his mind? Mr. Sickles did not invite him to that vicinity. The meeting was the result of accident, and when his eyes rested upon the destroyer of his happiness, he associated him at once with the facts he knew, and went forward, in the transport of his rage, *to* the consummation of the deadly scene. I state these facts that you may be able to appreciate the point I am discussing.

Is it possible that, under these circumstances, Mr. Sickles could have acted in cold blood? Was it possible for him to know what he did of the relations of Mr. Key and his wife, and *yet* look upon him, even though he saw him accidentally, and preserve his equanimity? If Mr. Sickles was *excited*, was it an instance of passion unduly excited? If he was in a state of *white heat*, was that too great a state of passion for a man to be in who saw before him the hardened, the unrelenting seducer of his wife? Mr. Key did not yield to temptation in an erring moment. It was not while any sudden fit was on him, he deflowered the wife of his friend! It was a deliberate and systematic crime from beginning to end.

Though he has passed from the scenes of the living, and though he may be entitled to be kindly remembered in other things, so far as he forms the subject-matter of this inquiry, his faults are to be exposed in their proper hues and with all their aggravations.

An important consideration as to the *status* of Mr. Sickles' mind, is this: Had he any hand in originating or augmenting his own passion? If he had been under the influence of liquor; if he had provoked Mr. Key, and had been provoked in return by him, the case might have stood differently. But he was as innocent of any participation in the cause of his state of mind, as is any one of the jury I have now the honor to address. The provocation originated with Mr. Key entirely. He desecrated a marriage vow. He compromised *his* friend, and, in a respect which *touched*, heavily touched, *that* friend's heart.

By nature, accountability is based upon the idea of rational agency. *Animus maleficia distinguit.* A certain amount of reason is requisite to

make a criminal act; for intention is the soul of crime. It must either be cool, deliberate, and sedate, or it must be passionate intention; and when the mind is in a state of frenzy, admitting of no motive, *as* was the condition of Mr. Sickles' mind at the time of the commission of *his* act, then human nature is divested of its immortal part, and comes forward in the execution of its purpose submissive to the impulses that set it on.

I beg to refer, at this point, to the information for the panel, in the case of Carnegie, 17th State Trials, pages 96, 97:

"And as to the law of Nature, one of the first principles seems to be, *that every action must be* "*construed and regulated from the intention of the actor.* Every action whatever, except in so far "as it is conjoined with the will and intention of the agent, differs in nothing from the act of *an* "*irrational creature;* yea, if we may so speak, as to call the operation or impulse of an inanimate "creature an action, *the actions of man separated from his intention and design as a rational* "*creature differ in nothing from the actions of brutes, or the impulse of things inanimate;* "and consequently that action, be it what it will, can neither be crime nor virtue; *it is a mere* "*impulse or motion, not properly subject to laws or rules.* But then, indeed, when it comes to "be conjoined with the intention, or which is the same thing, considered as the action of a rational "agent, there it comes to be subject to laws, *to be considered as criminal or virtuous;* or if it "appear to be accidental, so as to have depended upon no will nor deliberation of reason, then it "returns to be of the nature of the act of an irrational creature, or inanimate substance, and is "subjected to no penalty, nor yet capable of receiving a reward. The plain consequence of which "is, that it is the *animus* alone that determines the nature of the act; and if the *animus* or inten-"tion was criminal, then, by the law of nature, the action itself amounts to a crime. On the other "hand, if it be good and virtuous, the act is laudable by the law of nature, supposing even a bad "consequence should follow. But, in the third place, if the action truly arise from no intention or "principle governing that action, it is neither laudable nor punishable, it returns to be of the kind "already mentioned, the same with the like act of an irrational creature or the impulse of an "inanimate substance, moved by a cause intrinsic to itself. And the consequence of all this is, that "by the primary law of nature, the intention must make the crime; *and therefore if there appear* "*no intention to commit that particular fact which happens to be complained of, it is not a* "*crime, notwithstanding of a bad consequence; it is considered as a fatality.*"

In other words, this authority amounts to this: that in order to make out a crime, there must be will and intention in the mind, and that will and intention can only exist where the mind is in a perfectly undisturbed condition, or else where it is only (comparatively speaking) moderately excited by passion. Where the mind is utterly transported by frenzy and fury, it is impossible that will and intention can exist.

Every action is governed by an intrinsic cause. It is this which decides its character, and stamps it as good or bad. Where the animating principle originates with ourselves, it may be said, properly, that the act is ours. Where Nature itself takes the control, and supersedes all volition on our part —where it drives us on, and will not permit us to go back—is the fault ours? If the impulse, the pressure, the movement, is irresistible, uncontrollable, not to be withstood—is an involuntary submission, on our part, a crime? If we are so constituted, as that when acted upon by a given provocation, we have not the power to resist the commission of that to which the provocation impels us, does the involuntary commission of the act amount to a crime? It has been asked, can the Ethiopian change his skin, or can the leopard put aside his spots? Can a man change his nature? If we are so formed that the provocation of adultery with a wife is *one* we cannot withstand, upon what principle are we liable for consequences we were not able to avert? I deny

—I spurn the idea that the mind of Mr. Sickles was in a mere state of passion. You might as well say that it was cool, undisturbed, and that it preserved its equipoise. You might as well say that he was at heart a murderer, and proceeded in cold blood—as to say that at the time he met Mr. Key his mind was simply under the influence of passion. If he was a human being at all, from the moment his eyes fell upon the man who had wronged him; when he knew he was around his house to lay his train of pollution to it, he must have been transported. His will and his intention must have left him. He must have become the creature of his instincts—to which even brutes are true. He must have acted upon them, and surrendered himself, as he no doubt did, fully to them.

Our proposition comes to this—that if the provocation, given by the deceased, was of the aggravated character conceded by the law; and *as the consequence of it*, the defendant, for the time being, and while under its influence, was in the same state of mental unsoundness, *as* if the result of disease *would have excused his act or exonerated him from accountability*—he is equally unaccountable under the circumstances of this case. The law regards the condition of the defendant's mind, and the part the deceased had in occasioning it.

And here let me inquire—was the deceased, at the time of the commission of the act in question, in the peace of God and of this community? And, in the language of the indictment, for that is another way of propounding the inquiry, was Mr. Sickles moved and seduced by the instigation of the devil? That is the language of the indictment; and to convict the defendant under it you have to find that Satan set him on, and that he did not act under the ennobling instincts of his nature. What an atrocious verdict that would be to declare upon the oath of a juror, that when Philip Barton Key met his death he was in the peace of God and this community, when he was on a mission of adultery, and that Daniel E. Sickles, the injured, outraged husband, when he slew him under this provocation, yielding to instincts he could not resist, was tempted and set on by the devil. Yet that is the finding which the prosecution ask you to record against the defendant. This is no figurative language, for unless the devil set him on, he perpetrated no crime.

Was it the malicious, or the frenzied, maddened will of the defendant that caused the death of the deceased? I shall consider this; *first*, by taking a succinct view of what is called "mental unsoundness;" *second*, by suggesting the legal tests applied in such cases; *third*, by asking the jury to say how far the mind of Mr. Sickles must have been frenzied by the provocation he had received from the deceased; and how far its state or condition coincided with these tests, at the time of the killing.

First, Let me ask you to follow me in a brief review of what is called "mental unsoundness."

At one time, in order to make an act, committed while in a state of insanity or unsoundness of mind, excusable, where "its matter" would, *otherwise*, be capital, it was necessary that the party should be totally insane, that he should be entirely bereft of mind and reason. This was the law in the time of Hale as to treason and felony. I refer the Court to 1st Hale's Pleas

of the Crown, page 30. When *he* wrote, in order to make unsoundness of mind an excuse in law, *in such instances*, it was requisite that the insanity should consist, *either* of (what he called) "phrenesis" *or* "lunacy," *either* absolute and permanent insanity, *or* that which was "interpolated" and existed "by certain periods" "and vicissitudes." *Lunacy* was used to signify the influence of the moon on all diseases of the brain, being *absolute* while it lasted.

This error was first attacked by Lord Erskine on the celebrated trial of Hadfield, 27 State Trials, 1282. Hadfield was indicted for treason, in attempting the life of the king (George the Third), as he was about taking his seat in a box at the Theatre Royal, Drury Lane. Erskine was his counsel—Kenyon, a bright name in jurisprudence, then chief justice of the King's Bench, presided at the trial. Erskine, on that trial, succeeded in establishing the doctrine that an *emancipation* from legal accountability, also, attached to one "whose whole reasoning and corresponding conduct, though gov-"erned by the ordinary dictates of reason, proceed upon something which "has no foundation or existence." In other words, *the doctrine* of insanity from *delusion*—where the imagination is diseased and disordered—mistaking its own absurd creations for realities. While Erskine enlarged or extended the rule as to "mental unsoundness," as a *legal* excuse for human conduct, he also fell into error, in maintaining that *facts* awakened *resentments*, and that they could not be accepted in law, to make out the defence of insanity—that *morbid delusions*, and not *real circumstances*, must be the impelling motive to an act, to save or shield a party from its consequences—that the mind could be frenzied, *only* by imagining a state of facts, which, if believed, as imagined, would be sufficient to destroy the reason.

The modern, and *now* well-settled law of insanity was moulded after this, and carried the rule much farther than as stated by Hale, or modified by Erskine. It was ascertained that there was not only an insanity of the *intellect*, but an insanity of the *affections*, the *passions*, and this latter is the particular species of "mental unsoundness" to which I now invite the attention of the Court and jury. In this connection, I shall *first* read several extracts from Dean's Medical Jurisprudence, containing the results of the law, stated with simplicity and perspicuousness. On page 488, Mania is thus divided and defined:

"MANIA has two divisions:

"The first embraces INTELLECTUAL MANIA, both *General* and *Partial:*

"The second, MORAL MANIA, both *General* and *Partial.*

"This division or classification of the active forms of mania, will fail to be clearly understood "except by those who have accustomed themselves to look at the mind, in its sane state, as being "made up of intellectual and moral powers and faculties, and of clearly discriminating the differ-"ences between them. The distinct office of the *one*, is to originate and elaborate all the diversified "forms of thought; to perceive, conceive, imagine, remember, judge, associate, reason. That of the "*other*, is to produce every modified form of feeling, to give birth to emotions, passions, desires, "*everything that impels*, or in any degree feels.

"The relations in which these two departments stand to each other, are in the highest degree "interesting. The moral faculties, embracing as they do all the instincts, propensities, sentiments "and affective powers, are in themselves perfectly blind, and absolutely require the aid of the intel-"lect to enlighten, to guide and to enable them to work out their various purposes.

"On the other hand, the intellectual faculties derive all their motives to exertion from the moral "department, without the promptings of which, they probably never would exert themselves except "in the feeblest manner. *In the moral or affective department is lodged the immense magazine "of motives that exert their ceaseless and widely-diversified influence over all the stirring "activities of life.*"

That is, the departments of the mind are twofold: *first*, its intellectual department, which comprehends the ability to think, to judge, to reason; *second*, its affective and moral department, which is the residence of the passions. Whether the insanity is of the intellect, or of the passions, if the act committed is traceable to *its* influence, it is not an act which is the subject of visitation by the criminal law. And so, on page 492, speaking of general intellectual mania, this author says:

"As intellectual mania arises from the perverted action of the faculties that form ideas, and "moral mania from those that furnish feelings, emotions, motives and passions, we should naturally "expect to find the first more characterized by the *conversation*, and the last by the *conduct*, of "the individual. This, accordingly, will be found to be the fact, and it affords one of the best means "of discriminating between the two."

And so, on page 495, speaking of moral mania, this author says:

"Hitherto, the attention has only been directed to the exaltation and perverted action of those "faculties that constitute the intellectual part of man's nature. It is perfectly obvious, however, "that the *affective* or *moral* powers are equally as essential as the intellectual in constituting a com- "plete human mind. Nor can the organs of those faculties claim an exemption from disease; nor "the faculties themselves from perversion and derangement. Hence, another form of active mania, "which has been termed *moral mania.*

"This was never recognized as a distinct form of mental alienation until the time of Pinel. He "was the first to observe, about the commencement of the present century, that where there was no "lesion of the understanding, no delusion or hallucination of intellect, there might exist a kind of "instinctive or abstract fury, which could be referable only to the affective powers. It is now very "universally admitted by the most approved writers on mental alienation. It is defined to consist "in a morbid perversion of the natural feelings, affections, inclinations, temper, habits and moral "dispositions, without any notable lesion of the intellect or knowing and reasoning faculties, and "particularly without any maniacal hallucination.—*Guy's Principles of Forensic Medicine*, 306. "Moral mania, like intellectual, is divided into *general* and *partial.*"

Moral insanity, it seems from this, has, at this time, a perfectly well recognized existence. It is conceded that *that* magazine which holds the passions, the emotions of the human heart, can be as much inthralled by madness as can the intellect itself. It is *there* the adulterer's provocation strikes. It may not destroy the power to think or to reason, but it displaces the ability to resist the instincts of our nature. *Man* is only a moral agent, as he is able to exert his will. If it is maddened so that he cannot exert or resist it, how can it be said his moral agency still exists?

And so, on pages 496 and 497, speaking of general moral mania, this author says:

"A strict inquiry must be made in relation to his former habits, disposition and modes of feeling "and action. This will probably result in the discovery of one of two things. Either a marked "change will be found to have occurred, which will be likely to date from the period when he sus- "tained some reverse of fortune, or experienced the loss of some near and dear relative, or the "alteration will be found to have been gradual and imperceptible, consisting in an exaltation or "increase of peculiarities which were always natural or habitual. There is also another tolerably "extensive class of cases in which the change has been consequent upon some shock which the

"bodily constitution has undergone; and this has been either a disorder affecting the head, an "attack of paralysis, a fit of epilepsy, or some fever or inflammatory disorder.

"The change, however brought about, is always found in the temper, disposition, habits, and "moral qualities of the individual; and is uncomplicated with any delusion or other evidence of "derangement of the intellectual faculties. It is properly described by Hoffbauer as being '*a state* "'*in which the reason has lost its empire over the passions, and the actions by which they* "'*are manifested, to such a degree that the individual can neither repress the former nor* "'*abstain from the latter.* It does not follow that he may not be in possession of his senses, and "'even his usual intelligence; since, in order to resist the impulses of the passions, it is not suffi-"'cient that the reason should impart its counsels, *we must have the necessary power to obey* "'*them.* The maniac may judge correctly of his actions, without being in a condition to repress "'his passions, and to abstain from the acts of violence to which they impel him.'"

The mind is not perfect for the purposes of human accountability, unless it is possessed of the reason which *informs*, and of the ability which enables an individual to *obey* the will. If it is in that condition in which the reason or the will is dislodged, *then* one of its departments is completely gone, and that state of mental unsoundness is superinduced which, *whether it be the result of disease or provocation*, equally excuses from criminal responsibility.

And so, on page 500, speaking of partial moral mania, this author says:

"PARTIAL MORAL MANIA consists in the deranged or perverted action of one or a few of the "affective or moral powers and faculties. The effect of it is to place the individual under the "dominion of some one vice, *or ruling idea*, which exercises a sway, *perfectly tyrannical*, over "the entire man and his actions. *Every moral power or faculty is liable to be perverted or* "*deranged in its manifestations;* but those which are the most prominent, and the most fre-"quently exhibited in the affairs and conduct of life, are the most liable to deranged action."

If, without moral liberty, there can be no accountability for crime, what moral liberty is there on the part of a husband when he comes to deal with the adulterer of his wife? How can it be said, that at a juncture like that, when he is confronted with the man who has blasted his hopes and his prospects, and brought disgrace on his household, he enjoys enough of free agency to be subject to responsibility for crime?

The mysteriousness of the insane impulses which the human mind is capable of entertaining, can be discerned in that species of moral mania known as *homicidal*, which is thus spoken of by this author, on page 510:

"This, at the present day, is a subject of immense interest throughout the civilized world. Here, "in a most peculiar manner, and with most appalling results, is shown the amazing strength of "*insane impulse;* which, by a power and energy resistless as the fiat of God, impels the wretched "being to destroy life, without a motive to actuate, or an end to be attained, or object to be "accomplished. *Individuals in the full possession of their usual powers of intellect, whose* "*social and moral organization, to all appearance, remain unaffected, have imbrued their* "*hands in the blood of the innocent, frequently in that of their own wives and children,* "*simply because they felt that they must destroy.*"

And so, on pages 574, 575 and 576, speaking of the *legal consequences* of moral mania, this author says:

"Irresponsibility in moral mania rests on a different principle from that of intellectual. There "is here no delusion, no false assumption of fancies for facts. The intellectual faculties may remain "undisturbed in their operations, while the moral are exhibiting every variety of derangement. "This, it is true, seldom occurs; as extensive derangement of the moral powers is commonly ac-

"companied with some perversion of those of the intellect. Nevertheless, as the one set of facul-
"ties is independent of the other, there exists the possibility of their separate derangement.

"As the moral powers embrace the motives, impulses, and promptings to action, the derangement
"of one or more of them must seriously affect the volition upon which the act depends.

"*Actions are volitions carried to their extremest limits.* They take place when nothing is
"wanting to render the volition complete, and they are themselves its most perfect evidence.
"Without the proof they furnish, there is no accountability to human law; as man can be account-
"able to God only for the volitions he forms in his own mind, but leaves unexecuted. *The princi-*
"*ple of forming volitions, and of carrying them out into acts, must be fully possessed to ren-*
"*der a being accountable.* When therefore the first is necessarily rendered incomplete, or the
"last prevented by some insurmountable obstacle, all accountability is destroyed. It is in the first
"only that we witness the agency of moral mania. It is a disturbing element thrown into the very
"sources whence volitions are derived; and either contributes, in a large measure, to the for-
"mation of those that would otherwise remain unformed, or prevents the formation of others that
"would otherwise be formed. In either way, it disturbs the ordinary normal operations of mind,
"and thus absolves it from accountability.

"It is not easy to define in what respect this new element modifies the volition or the act. The
"inquiry in relation to the former, is unnecessary, except so far as it qualifies the latter. In regard
"to the manner or respect in which it modifies or affects the latter, so as to absolve from its conse-
"quences, there can never be expected an entire agreement among writers or thinkers, or even the
"decisions of judicial tribunals.

"I have supposed we might find in *irresistibility* a principle upon which all might agree. That
"whenever this quality should be found attached to an act, so far as to control it, the actor, in
"respect to such act, should be deemed irresponsible.

"*Without moral liberty there can be no responsibility for crime. In the normal, sane state*
"*of the faculties, this enters as an essential element. In the deranged state of the moral facul-*
"*ties, where the sources of impulse, motive, and feeling are perverted and deranged, this*
"*liberty is destroyed, and with it the accountability for actions.*

"*Irresistibility*, where it arises from deranged or perverted actions, should absolve from all
"accountability, because—

"1. *The act is unavoidable, and the actor, therefore, no more a subject of punishment,*
"*than a machine for going wrong when some part of its machinery is out of order. To ad-*
"*minister punishment under such circumstances, would shock all the moral sympathies*
"*of men.*

"2. One of the purposes of punishment could never be answered by it, viz., the reformation of
"the criminal. If the act be irresistible, the whole effect of punishment upon the individual must
"be lost.

"3. Another of the purposes of punishment would remain equally unanswered, viz., the salutary
"effect to be produced by it upon the minds of others. That effect, instead of being salutary, would
"be in a high degree injurious, as it would shock all moral sensibilities, and create a horror of
"the law itself, which could thus needlessly sacrifice life without answering any good end or
"purpose."

I have thus, Gentlemen of the Jury, endeavored to show from this book that *where* the mind is affected in *that* department, which contains the passions and emotions—*where* free agency is taken away—*where* the right of volition is denied to, or withdrawn from us, by the frenzy into which we are thrown—an act, which we commit, while so circumstanced, does not subject us to the visitation of the criminal law.

The Court here adjourned to Monday, April 11th.

On resuming, Mr. Graham proceeded as follows: I am fast approaching, Gentlemen of the Jury, the close of my present duty. If there were nothing else to warn me to a speedy termination of it, it would be my own exhaustion—for the severe labor, through which I passed on the first day of my address to you, has left me hardly able to perform what now remains. I feel, also, that I have already taxed too grievously the attention of the Court, and too heavily your patience, and I can only offer for it the apology of the deep interest I take in the welfare of my client.

Before proceeding with what remains of my address, permit me to rehearse to you some of the grounds I had advanced up to the hour of adjournment on Saturday. In the first place, I had submitted to you, that human laws did not reach the case of every wrong done to us. In the second place, that as to those wrongs entering into, or affecting radically and deeply the security or defence of ourselves and our natural rights, Society, by its omission to provide against them, *either* meant to turn us over to our instincts, as regulated by the law of Nature, *or else* by reason of its failure in that respect, we were entitled, *in all proper cases*, to stand upon the great law of Nature. In the third place, that as to certain relations—as, for instance, those of husband and wife, and parent and child—Nature had created duties of protection, which it was not only not criminal to discharge, but which we were bound to discharge. I had then passed to another subject, and in connection with it, had suggested; *first*, that an invitation, to a man's friend or neighbor, to partake of the hospitalities of his house, was upon the *implied* understanding, *that all lust or uncleanness in reference to his wife or daughter would be repressed, or banished from his bosom;* and that to come, in the guise of a friend, *when* at heart a foe, constituted an abuse of the license to enter; and that the offending party was in reality a trespasser; *secondly*, that whether the wife consented away her chastity or not, *as between the husband and the adulterer or ravisher*, the rights of the husband were the same; that, morally speaking, the wife was the property of the husband, and, as against him, *possessed no dominion over her person in favor of another.* I had then passed to the consideration of another subject, and in connection with it, had exhibited the offence of adultery in two aspects; *first*, as its heinousness was impressed upon it by the Bible; *secondly*, as it was presented at the common law. In reference to the Bible, I had argued that, in making adultery so high a crime, it was fair to presume our minds were formed with corresponding perceptions: that is, I had submitted to you that when the Almighty pourtrayed adultery as so heinous an offence, he supplied us with that capacity of mind which enabled us to look upon it in the same heinous light in which He himself had exhibited it. As I understand the law of Reason, it is this; that the Power, which creates a natural duty, gives us the ability to understand and

appreciate it. I had, in reference to the common law, shown that the sternest judges regarded adultery as a provocation too great for human nature to bear. As to the amount of excitement which resides in that provocation, it is not necessary for you to speculate, because it has been conceded by the flintiest-hearted judges that ever presided over the administration of criminal justice, that jealousy is the highest rage of man, and adultery the greatest provocation that can be given to him. I had, in the same connection, also considered the rule making *the slaying* by the husband of his wife's adulterer manslaughter at the common law. I had shown that *that* was a merely nominal, *because* a clergyable, offence, involving a slight burning in the hand. I had traced the origin of the rule, and shown that the augmentation of the "*census regalis*," or royal revenue was its principal object—that it was established in the time of *special verdicts*, when juries did not pass upon or dispose of the question of *intention*, and that in the maritime courts, where the *privilegium clericale* did not prevail, in analogy to it, juries were instructed *absolutely* to acquit in those cases in which the privilege obtained in the common law courts.

I had left off in the consideration of one of the gravest questions arising in this case, the question *as to whether there could be any criminality, when the mind was in a condition which exorcised from it all will or intention.* We understand the basis of all accountability, divine and human, to be the possession of that amount of reason which enables us to know the right way, and of that amount of will which enables us to select it; in other words, in the language of the criminal law, "intention is the essence—the soul of criminality." In the case of every crime, there is a *body* and *an animating principle*, precisely as in nature. Every crime is divided into two parts; first, the *corpus delicti*, as it is called—that is the body of the offence—and it is a mere dead, inanimate body, without that exciting principle which gives it life; secondly, the intention, or will, which enters into it. *It* has its *palpable* and *impalpable* feature—its overt act—and its requisite amount of legal malice. It is just as possible to separate the soul from the human body, and still preserve the vitality of the human body, as it is to separate the animating principle of crime, the will or intention, from the *corpus delicti*, or body of the offence, and, at the same time, insist upon criminal responsibility with reference to the mere commission of the overt act.

Although, in the present case, a human being was slain, nevertheless, we say the soul of that act, that which could turn it into a crime (if it could become a crime at all), was never infused into it; that there was not that will or intention on the part of the slayer, at the time of the perpetration of his act, which rendered him amenable to a criminal tribunal. The proposition I had submitted on this point was this: that whether the state of mind was produced by disease, or provocation, was perfectly immaterial; the inquiry for the jury was, *what was the state of mind*, and I submit to you that that is a proposition founded in sound reasoning. Is it material how a result is accomplished, so long as it is accomplished? There is one exception to this rule, and that is—*where a man takes into his mouth, voluntarily, that which steals away his brains*, the law says that he is responsible for every act com-

mitted under its influence; for its maxim is, "Nam omne crimen ebrietas, et incendit, et detegit;" *drunkenness both inflames and discovers the crime committed under its influence.* In this case, however, there is no such thing, for Mr. Sickles was not a party to the origin of the provocation, which acted upon him and induced him to the commission of his act. There might be something in favor of the prosecution, if that ground could be occupied by it, but he stood entirely clear of the conduct of this adulterer, was in no way privy to it, had never connived at it, and the first knowledge he gained of it, *was the moving cause to the commission of the act for which he is now arraigned before you.*

I had shown you, Gentlemen of the Jury, the construction, or tendency of the human mind, with reference *to mental unsoundness.* I had told you that it was divided into two departments: *one*, the intellectual, where the thoughts resided; and *the other*, the affective or moral department, where the passions resided. I had shown you that insanity might *either* take entire possession of the mind, that it might enthrall both its intellectual and affective departments; or that it might enthrall either of them, or involve a part of either of them; and that whenever mental unsoundness was set up, the inquiry for the jury was not whether the act was prompted by a mind generally unsound, but whether the particular influence which begat or produced the act alleged to be criminal, was such a one, as with reference to that particular act, did beget or produce mental unsoundness. It is perfectly immaterial, as the learned judge will tell you, whether the mind was totally insane or not; if it was unsound enough to cover the particular act, which was the offspring of that unsoundness, the law declares that no accountability shall attach to a party for its commission.

I had prepared an elaborate brief in this connection; but since the adjournment of the court, I have discovered that this subject has been considered in this Court, at least, to the same depth of research to which, in the hands of the counsel for the defence, in this case, it has been subjected; that it has been before the mind of the learned judge upon the bench, and that he has collected all the legal authorities bearing upon the subject, and advancing the true principles, by which this part of your duty, in this case is to be regulated and controlled. Before leaving the *first* division of this subject, as I had proposed to consider it, namely: *taking a succinct view of what is called mental unsoundness*, I beg to refer the Court to the 1st volume of Bennett and Heard's Leading Criminal Cases, pages 101, 102, 103 and 104, in a very learned note to the case of The Commonwealth *v.* Rogers. The subject of "irresistible impulse" is there very cogently discussed, and the existence of "Moral Mania"—the insanity of the passions—is enforced by strong original views, and strong citations. Some judges refuse to subscribe to such a species of mental unsoundness; but *this Court* has committed itself to its recognition in cases already tried before it. I wish to add further, *that* drunkenness excuses an act, where the drunkenness results from the contrivance of one's enemies. 1st Hale's Pleas of the Crown, page 32. This proves the great difference, for the purposes of accountability, between a state of mind produced by one's own act, and *that* brought about by the act

of another, and this latter category embraces the case of the present defendant.

As to the *second* division of this subject, as I had prepared to consider it—namely, *the tests applied by the law, in cases of alleged criminality, where mental unsoundness is interposed as a defence.*—I mean *now* to rely upon the law which the learned judge upon the bench has himself promulgated. The cases I *did* intend to discuss, under this branch of the subject, are Arnold's case, 16 State Trials, 695; Earl Ferrers' case, 19 State Trials, 886; Hadfield's Case, 27 State Trials, 1281; Regina *v.* Oxford, 9 Carrington and Payne, 525; Regina *v.* McNaughton, 10 Clark and Finnelly, 200; Commonwealth *v.* Rogers, 1 Bennett and Heard's Leading Criminal Cases, 87.

Your Honor will permit me to refer to your legal instructions to the jury, in the case of the United States *versus* John Day.

The legal views *there* held are precisely those arrived at by the counsel for the defence in the performance of this part of their duty. Day was charged with slaying his wife. The defence of insanity was set up, and the cause of that insanity was alleged to be the shame or mortification occasioned to the husband, by the birth of a child (whose father was one S.), some three months after the solemnization of the marriage union. It was insisted that the shame to which this fact subjected him, in the eyes and consideration of his fellow-men, so worked upon his mind as to craze or frenzy him, and that it was under the operation of frenzy, so produced, he perpetrated the act for which he was arraigned at the bar of *this* court. The instructions which his Honor upon the bench imparted to the jury, in that case, will illustrate to you, Gentlemen of the Jury, the idea entertained by the defence in this case, in reference to the principle now advanced to you. The first prayer of the prisoner's counsel, which was granted by the Court, was this:

"1st. If from the whole evidence aforesaid, the jury shall find that the deceased, Catharine Day, "was killed by the prisoner, at the time and in the manner set out in the indictment, yet, if they "shall further find that, *at the time of the killing her as aforesaid, the reason and mental* "*powers of the prisoner were so deficient that he had no will, no conscience or controlling* "*mental power: Or if, at the time aforesaid, through the overwhelming violence of mental* "*disease, his intellectual power was for the time obliterated; then, in either of such cases,* "*he is not in law guilty of murder.*

"Or if, from the evidence aforesaid, the jury shall further find that the prisoner was for a long "time before, and at the time of the killing of his wife as aforesaid, laboring under mental disease "attended with delusion, and that, in a paroxysm or outbreak of this disease of the mind, *his rea-* "*son and judgment were for a time overwhelmed and suspended, and, while they were thus* "*overwhelmed and suspended, he committed the act with which he is now charged,* he is not in "law guilty of murder.

"Or, and in other words, if from the evidence aforesaid, the jury shall find the prisoner committed "the act, but that at the time of committing the act he was under the influence of diseased mind, "and was really unconscious that he was committing a crime, he is not in law guilty of murder."

The third prayer of the prisoner's (Day's) counsel, which was also granted by the Court, was this:

"If, from the whole evidence aforesaid, the jury shall find that the deceased was married to the "prisoner on the 4th of June, 1850, and on the 18th of September, 1850, gave birth to a full-grown, "living child, *and thereupon and thereafter the mind of the prisoner was, became and con-* "*tinued diseased, and he falsely conceived that, in consequence of the said birth, he had lost*

"*character among his former associates and friends, and was no longer held in esteem*
"*among them; that such conception was an unwarranted and unsound delusion, which*
"*affected his intercourse with society, and that such delusion increased in intensity, until his*
"*mind became diseased thereby, and he thereafter was subject to great, causeless and violent*
"*paroxysms of rage, produced by such diseased state of his mind; and if they shall further*
"*find that in such paroxysm of causeless rage, his power of distinguishing whether he was*
"*committing a crime or not, was, by such paroxysm, for the time destroyed or superseded,*
"*and in such paroxysm, and while such power of distinguishing was destroyed or superseded,*
"he committed the act with which he stands charged, then he is not, in law, guilty of murder."

Shame, Gentlemen of the Jury, was one of the emotions which crowded Mr. Sickles' mind, and *but one;* for the human mind may well be likened to the cave which, in ancient mythology, was said to contain the winds. It is a most fearful depository of passions, and when they rise and engage in angry, though bloodless conflict with one another, each striving for the ascendency, it is for you to conceive, it is not for language to paint to you, the condition of the human bosom at that moment. In the case of Day, the learned judge instructed the jury, that if shame, which was only *one* of the emotions crowding Mr. Sickles' mind at the time of his act, was sufficient to produce a state of frenzy, which, *while it was on*, rendered the party who acted under its influence a mere machine in going forward to the consummation of the event before him—then it exonerated that party from all criminal responsibility. That is precisely the law we seek to enforce upon you, after a thorough and analytical examination of the legal authorities bearing upon the point. The jury, on the first trial of Day, disagreed, and his Honor, on the second trial, repeated the instructions given to the first jury, and the defendant was found guilty of manslaughter. The mortification of having a child born, prematurely, after marriage, is not to be compared for a single instant to having a wife deflowered. Hence a jury might very well say, that though the former excused the shedder of human blood from a capital conviction, it did not discharge him from all accountability. But when the law of God writes, on the heart of man, what it does in relation to adultery, and the sternest judges concede that human nature cannot be expected to withstand a provocation like that, there is a vast difference between an act attributable to such a cause, and one alleged to proceed entirely from mere emotions of shame or mortification. On the second trial of Day, the learned judge granted this additional prayer for instructions of the prisoner's counsel, namely:

"And if from the whole evidence aforesaid, the jury shall find that *from any predisposing*
"*cause, the prisoner's mind was impaired*, and there was a prolonged change in his character
"consequent upon the birth of the child on the 18th September (if they shall find such birth), *and*
"*he became sad, gloomy and unsociable, and without interest in things which he was formerly*
"*interested in; and under the influence of said causes, he became mentally incapable of*
"*governing himself in reference to his wife, and at the time of his committing said act was,*
"*by reason of said causes, unconscious that he was committing a crime as to her, he is not in*
"*law guilty of murder.*"

I refer, also, to the case of Jarboe, tried in this court. These cases are undoubted law, as can be demonstrated by the highest legal authorities. Jarboe was charged with murder in slaying the seducer of his sister. The deceased had entered into a promise of marriage with the sister, had violated

that promise, and nevertheless had polluted her person, and left her in that condition in which she should only have been after marriage. This brother, infuriated by the conduct of the deceased, after first asking him what he intended to do, and not getting a satisfactory answer from him, slew him upon the spot.

In that case, the District Attorney prayed for the following instruction to the jury, which was granted:

"'If the jury believe from the evidence, that the deceased had been engaged to be married to the "'sister of the prisoner, and if they also believe, from the evidence, that the deceased had criminal "'intercourse with the prisoner's said sister, and had refused to marry her, and that under these "'circumstances the prisoner asked of the deceased if he would marry his said sister, and the "'deceased replied "No," or that "he would see," or words to that effect, and that influenced by "'this provocation, he took the life of deceased, such provocation does not justify the act, and "'such killing is murder, if the jury are satisfied, from all the evidence in the case, that the evidence "'sustains the indictment.'

"Mr. Carlisle, for the defendant, objected to the instructions so asked for, and argued that the "prayer set forth only a part of the evidence, and excluded all consideration of the condition of "the prisoner's mind, and of the testimony in reference to the deceased having been armed when "he lost his life.

"Mr. Key, contra.

"By the Court:

"The prayer as it is presented is granted, except the words at the close—'*if the jury are satis-*" '*fied, from all the evidence in the case, that the evidence sustains the indictment.*'

"These words ask the Court to say that there ought to be a conviction on the whole evidence.

"They were not so intended, I am sure, but they are, as it appears to me, open to this con-"struction, and so construed would take from the jury *the decision of the facts, which I never* "*have done, and never will do.* All the Court say is, that the statement of facts makes a case of "murder, but whether these facts are proved or not, and if proved, what additional facts are also "established; *what was the state of the prisoner's mind as to capacity to decide upon the* "*criminality of the particular act in question (the homicide) at the moment it occurred, and* "*what was the condition of the parties respectively as to being armed or not at the same* "*moment, are open questions for the jury, as are any other questions that may arise upon* "*consideration of the evidence, the whole of which is to be taken into view by the jury.*"

Under this instruction, the jury lingered in the box but the short period of fifteen minutes, when they rendered a verdict in favor of the brother; holding, that acting on the provocation he had received, and under the excitement into which it had plunged him, he stood excused before this tribunal from the act charged upon him as a crime.

The citations from Day's and Jarboe's cases are made from a pamphlet containing a copy of the reports of those cases, as preserved, in his own handwriting, by the learned and indefatigable judge himself. Particularly in the latter case, you see, Gentlemen of the Jury, with what explicitness and fairness *your* province is marked out and guarded by the learned judge. He leaves the evidence to the jury. He is unwilling to say anything which could be tortured into an expression of opinion upon it; he tells them that they are to pass upon it, to draw their own inferences from it; and, as though it was the favorite feature of his instructions, he leaves to them *the state or condition of the mind of the party charged*, telling them to say whether or not it comes up to the standards he lays down. This heightens your duty, for whatever *moral* or *immoral* results may flow from this proceeding, they will be traced to the verdict *you* may pronounce!

Gentlemen of the Jury, I ask you this: if the brother who voluntarily

assumes to redress the wrongs of his sister, to the extent of killing, when the father of that sister, her divine, her human protector is in being, for where the parent exists, no peremptory duty is cast upon the brother to defend the sister, unless where violence is inflicted upon her in his presence (or in similar cases), and the same duty is cast upon the stranger who witnesses its infliction; if the brother who does *that*, stands excused by the verdict of a jury from the consequences of his act, because the provocation was too much for him, upon what principle can a difference be indulged or a distinction drawn as to a husband intervening to avenge an outrage upon his marriage relations? These are all the authorities to which it is necessary for me in the hearing of the Court to ask your attention upon this branch of the point I am engaged in considering.

As to the third division of this subject—how far the mind of the defendant coincided with *the* established legal tests of *mental unsoundness*, at the time of the killing in question—I shall occupy your attention but a few moments upon it. You can answer this as men—as husbands—as fathers—as brothers. We need no books here to tell you with what affections the human mind is endowed. It is a matter for your own common sense. Your own innate feelings will serve you better, in reference to this, than the citation of authorities, or any enlightenment of mine. *You* are qualified to respond to the question, as to what must have been the frenzy of Mr. Sickles, when he encountered the deceased under the circumstances leading to his death. There was no deliberation in the meeting. It was purely accidental. If he had thrown out a bait—if he had invited the deceased to that *vicinity*, in order that he might go forth from his mansion, *armed*, in the fearful manner painted by the learned counsel for the Government, and slay him, there would be a feature in this case which might appall us. *There is no such feature here.* Mr. Key was in the neighborhood of Mr. Sickles' mansion, following the bent of his own infamous and wicked inclinations. The very ferocity of the attack upon the deceased, as testified to on the part of the prosecution—the *murderous* character which they have tried to impart to it—proves conclusively the state of mind which actuated and prompted the defendant to his act. This is a speaking fact. He encountered the deceased without any expectation of doing so. He met him as casually, as though he had met the veriest stranger; and the ferociousness with which the witnesses for the prosecution represent him as assailing the deceased, is indicative of the impulses—the irresistible impulses, which drove him on, and to which it was impossible to oppose any resistance.

Reflect, again, for a moment, upon the fearful tenantry of the human breast. The emotions are there. The passions have their abode there. Shame, anger and grief claim it as their residence. How must *they* have been excited in this defendant, over the provocation they received? Could reason exert any sway over them? Amid such a tumult what voice could be heard? To what tones could the ear of the mind incline itself? Where was the free agency of the defendant, *then?* Where was his will? Where, his intention? Who will call such a condition passion? It is an exaggeration of the *feeling* —a misuse of the term!

If individuals can be thrown back upon their *instincts*, this is *that* case. The defendant was led on, involuntarily, unwittingly, by Nature. She accomplished the result—the crusade is against *her*. When the community punish adultery, let it forbid *private justice*, and not before. Till then, the guardianship of the family altar is committed to those who preside over it. *They* have an adequate sanction for its defence.

I now come to the *seventh* question proposed by me, for consideration, which was—whether, viewing the case as one of ungovernable passion, as one of resentment produced by passion, there had been a sufficient time for the defendant's passion to cool, and for reason to get the better of him before the mortal wound was given to the deceased.

Upon this point (which could be material, only, to reduce the conviction from a capital conviction, *when* we deny that the defendant is liable at all), I refer the Court, *particularly*, to Oneby's case, 17th State Trials, pages 50 and 51. I also refer to Rex *v.* Hayward, 6 Carrington & Payne, 157; Regina *v.* Fisher, 8 Carrington & Payne, 182; Regina *v.* Kelly, 2 Carrington & Kirwan, 814. These were cases in which either *premeditation* was perfectly plain, or in which reason was either not dethroned, or had time to resume her sway. The English law of *cooling time* was made upon special verdicts. It became a question of law upon facts specially found. *Here*, the jury render *general verdicts*—passing upon all the facts—and applying the legal instructions of the Court to them.

In the present case there could be no *cooling time*. There was none, and there could be none within the compass of a lifetime. As often as recollection recalled the wrongs of his wife, the defendant's excitement would blaze up in all its original fury.

Oneby's case contains some very just views on the subject of *slaying in hot blood*. A killing, according to it, which is caused by a party in a state of passion, depriving him of his reasoning faculties, amounts to manslaughter. If caused after reason has resumed its throne, it is murder. Where a cessation of passion is insisted upon, *it must appear*, either from the length of time that has elapsed from the provocation, or from the party falling into other discourse, diversion or occupation, *that such is the fact*. I ask the attention of the Court and jury to the following extracts from Lord Raymond's opinion, 17th State Trials, pages 50 and 51:

"But then it is objected, that the law has fixed no time, in which the passion must be supposed to "be cooled. It is very true, it has not, nor could it, *because passions in some persons are stronger*, "*and their judgments weaker than in others;* and by consequence it will require a longer time in "some for reason to get the better of their passions than in others; but that must depend upon the "facts, which show whether the person has deliberated or not; for acts of deliberation will make it "appear whether that violent transport of passion was cooled or no."

Again:

"At the meeting of all the judges before Lord Morley's trial by the peers, for the murder of one "Hastings, they all agreed, that if upon words two men grow to anger, and afterward they sup- "press that anger, *and then fall into other discourse, or have other diversions, for such a rea- "sonable space of time as in reasonable intendment their heat might be cooled*, and sometime "after they draw upon one another, and fight, and one of them is killed, this is murder; because "being attended with such circumstances, it is reasonably supposed to be a deliberate act, and a

"premeditated revenge upon the first quarrel. But the circumstances of such an act being matter "of fact, the jury are judges of them."

Again:

"From these cases it appears, that though the law of England is so far peculiarly favorable (I "use the word peculiarly, because I know no other law that makes such a distinction between mur- "der and manslaughter), as to permit the excess of anger and passion (which a man ought to keep "under and govern) in some instances to extenuate the greatest of private injuries, as the taking "away a man's life is; yet in those cases, it must be such a passion, as for the time deprives him of "his reasoning faculties; for if it appears that reason has resumed its office, if it appears he "reflects, deliberates and considers before he gives the fatal stroke, *which cannot be as long as* "*the fury of passion continues*, the law will no longer, under that pretext of passion, exempt him "from the punishment, which from the greatness of the injury and heinousness of the crime he "justly deserves, so as to lessen it from murder to manslaughter."

Oneby's case may have been correctly decided by the Court upon the facts specially found by the jury; but it is a matter of some doubt whether a jury would have convicted of murder, if *they* had pronounced a general verdict. He and the deceased (Gower) were in a room at a tavern, and had a dispute, beginning in opprobrious epithets, and leading on to throwing missiles at one another, and then the seizing of swords. Gower had actually drawn his sword. Friends interfered; they were restrained, and sat down together again. After an hour, Gower wanted a reconciliation, and tendered it. Oneby declined, and evinced such a manner as a man who had been drinking would be likely to exhibit. Afterward, their friends went out, and they remained in the room together, when a clashing of swords was heard. Gower was mortally stabbed, and acknowledged that it had been done in a manner fair among swordsmen. Oneby was stabbed in three places, but not mortally. The Court held this to be a case of murder. Supposing it to have been right, what it said in relation to "cooling time" would have prevented *this* defendant from being convicted of any higher offence than manslaughter, assuming him to have been in a state of passion at the time of his act. He had not, from the discovery of his wife's guilt, or from seeing the adulterer's flag floating outside of his mansion, fallen into any other discourse or diversion, or engaged in any occupation that could break or interfere with the current of his reflections. I discuss the present point rather to make my argument complete, than because I believe that the tests, by which the mitigating effects of *hot blood* are judged of or applied, can, in any aspect of it, become the hinge of the present case.

The time I have already occupied would forbid the examination of all the authorities I have just cited. To one more—the case of Regina *v.* Fisher—I feel impelled to refer. It was the case of a father who had slain another for committing the crime of sodomy with his son, a boy some 14 years of age—a *crime* so horrible as that the law says of it, "inter Christianos non nominandum," *not to be named among Christians*. The boy had yielded to the unhallowed lust of a man, and the father hearing of the crime, pursued the man for a whole night with a *menace*, and having found him, deliberately slew him. Would any jury say that any such sensitive feelings could rouse the father of this boy, as would attach themselves to a wife. It is human nature to love a *woman* with a tenderness which does not identify itself with any other pas-

sion. It is the most enthusiastic, most maddening passion, which environs her, and invests her with her claim to protection. The more *her* inconstancy is contemplated, the more it crazes.

Although the father deliberately slew the man who perpetrated the horrible crime upon his son, and although the judge charged the jury in effect that they must convict him of murder, *yet* the jury *only* convicted him of the crime of manslaughter. A parallel *may* be attempted to be drawn between that case and the present. They do not admit of it. *There*, the father, after spending the night in pursuing the offender, executed vengeance upon him. In *this* case, the deceased thrust himself against the defendant. He had just been waving his adulterous flag. He had scarcely furled it. He was haunting the defendant's mansion. In a moment the train exploded, and because the wronged husband summarily slew the adulterer, he is arraigned here as a criminal.

Mr. Sickles, unlike the father referred to, had no time, *between the provocation and its effect*, to manifest the usual indications of a frenzied mind. He had no time to call in witnesses to see the distraction under which he labored. He had no time to think—to reflect upon the enormity of *the exciting cause*. The proof of the adulterous intercourse with his wife, and the death of the adulterer, were almost produced in the same moment; and you, Gentlemen of the Jury, are left to conjecture the dreadful surge of feeling that preceded the event.

As one of his counsel, I maintain that the act of the defendant was committed while in a state of mind *such* as the circumstances would *naturally*, *necessarily* engender, *and the humanity of every man can understand the meaning and force of the remark!*

Begging you, Gentlemen of the Jury, to keep in view these considerations, namely: *that the defendant was in no way connected with, or responsible for, the conduct of the deceased; that he neither countenanced nor promoted it; that it was a direct invasion of his most sacred rights; that it involved, not merely the overthrow of his household, but the destruction of his own self-composure and happiness; and that he executed judgment upon the deceased while almost in the act of flaunting the adulterer's signal.*—I shall proceed to give you a brief narrative of the facts of this case, and then commit it to you, so far as my present duty is concerned. Who, let me ask, were the parties to this transaction? As I have said before, I shall speak no unkind word of Mr. Key. I shall place the facts before you, and leave them to speak to you. He was a man of mature years. He was a man about forty years of age, as I am informed. He had been a married man; and at the very time of his misconduct, he had the monuments of that sacred relation before him, *daily*, to warn him of the wickedness of his course. He himself had assumed the marriage vow, and knew the solemnity of it. He could tell himself what would have been his own feelings, if his own home had been dishonored; and he could very well have conceived how he would have acted, if he had discovered the author of that dishonor. He could appreciate the horror of a wife's disgrace!

His profession was such as should have imparted some gravity to his cha-

racter. There are some occupations which do not interfere with the frivolity of human nature; but if there is any profession in the world, short of the pulpit, which ought to communicate gravity to the human mind, it is the profession to which I belong. The very business of our profession is to study out the rights of other men, and to observe them; and therefore a lawyer, above all others, before every tribunal, whether it be erected in the arch of the heavens above, or upon the face of the earth, is entitled to the least charitable consideration, for such misdeeds as are wanton encroachments upon what belongs to his neighbor.

What, too, was his position? He was the prosecuting officer for this District. He was selected to conserve the cause of public morality and public decency. It was his business to see that your homes were protected against seducers and adulterers, and every other species of criminals. Yet he robed himself in the garb of hypocrisy, came into this court, and hunted down, with almost unparalleled success, the very worms that crawl upon the face of the earth, while full-grown men in crime, such as he himself was, were permitted to stalk about this community, not only unpunished, but not even admonished or reproved.

That was the character of this adulterer. Who was the woman with whom he committed the adultery? Young enough to have been his daughter. What her disposition may have been, I know not; but it is not too much to say that the frivolity which surrounds women of her age, environed her; that she was susceptible of flattery; that she was susceptible to the attentions of men, and looked upon them as so many offerings cast upon the shrine of her beauty. At her period of life the marriage vow had not impressed itself upon her mind with all its gravity. She did not comprehend fully the meaning of the terms by which she had surrendered herself, body and soul, to the ownership and control of her husband.

If there ever was a case in which a man, though tempted by a woman, should have imitated the example of Joseph, who left his garment in the hands of Potiphar's wife, this was *one*, above all others, in which the man, rising above the dominion of his passion, should have left behind him some proof which, by the mendacity of the woman, could have been perverted into evidence of his guilt.

Who was the husband in this case? He was a man, as I understand, some years younger than Mr. Key. He was accredited to your city, as a member of the councils of the nation. He came here from the great commercial metropolis of the continent—a city upon which every part of this Union looks with pride, and which, however objectionable some of its features may be, nevertheless will be conceded by every American heart to be the first city of our Union. He was here in the way of duty, and by way of showing Mr. Key, and you, his confidence in the protection which was guaranteed to him by the laws of the District, he brought within its precincts his wife and child. He threw them, with himself, upon *your* laws for protection.

What were the relations of Mr. Key and Mr. Sickles? We shall show you what they were. So far as Mr. Sickles was concerned, they were those of

sincere friendship; so far as Mr. Key was concerned, they were those of *professed* or *avowed* friendship. It has been said by the Psalmist:

"For it was not an enemy that reproached me; then I could have borne it; neither was it "he that hated me that did magnify himself against me; then would I have hid myself from "him.

"But it was thou, a man mine equal, my guide, my acquaintance.

"We took sweet counsel together, and walked unto the house of God in company."

The wrong of the stranger may be borne with patience, but the perfidy of a friend becomes intolerable. You will be shown, Gentlemen, that Mr. Sickles had interceded to have Mr. Key appointed to the very place which his private life disgraced: that all the influence he could wield, *to secure for him the elevated position of prosecutor at the bar of this Court*, was thrown into the scale for the purpose of enabling him to attain the object of his ambition. We will show you that Mr. Sickles had sent him private clients, and that on one occasion, when he was obliged, in consequence of a difficulty relative to the hiring of a house, to employ professional services, he retained Mr. Key as his counsel in opposition to the senior counsel for this prosecution (Mr. Carlisle); so that there were not only friendly, but professional relations between them, which it ought to sink any man to the lowest depths of disgrace *to think* of compromising.

Mr. Key *pretended* that he was in bad health. I say *pretended*, because, although he had not strength enough to encounter the sphere of duty which was assigned to him *here*, nevertheless, he had strength enough to carry out his designs in reference to the wife of his neighbor. Had he extended to this court the same energy which he exerted in the prosecution of his adultery, he would have been physically, as he was mentally, adequate to discharge every duty which devolved upon him.

He becomes a visitor at the house of Mr. Sickles. Their acquaintance, I believe, extends back some six years. Mr. Sickles is a man in public life. He is compelled to trust to the purity of his wife. He is compelled, sometimes for considerable periods, to be away from his family mansion, and to leave his wife under the guardianship of her own chastity. Mr. Key goes there in the character of a friend, and exhibits those attentions which gallantry is ordinarily supposed to prompt, and in that way laid the foundations upon which, as an adulterer, he sought to rear his destructive fabric!

We will show you, Gentlemen, that as early as the 26th of March, 1858, it was reported, so as to be heard by Mr. Sickles, that this Key was dishonoring him. Mr. Sickles sends for him. He stands upon his honor as a man. He denies the truth of the impeachment. He traces the author from one to another. He sends and passes notes, and when he is unable to discover the real author of the rumor, he represents it to be the work of calumny. He addresses a note to Mr. Sickles, speaking *of the ridiculous and disgusting calumny*. We will be able to show you that if the intimacy with Mrs. Sickles did not exist at the time of that note, it, at all events, commenced a few days afterwards. To show you how base he is—*when he is charged with dishonest conduct towards Mr. Sickles, he says this is the highest affront that can be*

offered to him, and that whoever asserts it must meet him upon the field of honor, at the very point of the pistol! He thus cuts off all communication, on the part of the world, with Mr. Sickles, thinking that his baseness would, thereby, go undetected; and that was the reason why, for a period of nearly a year—though he was, no doubt, almost daily in the practice of his treachery upon his friend—his friend, until the development came upon him, as I shall presently state, never harbored a thought of suspicion against him. We will show you, Gentlemen, that from this time until the 24th of February, 1859, his relations to Mr. Sickles appeared perfectly friendly, and that *Mr. Sickles* reposed every confidence in *him.*

On the 10th of February—and here you perceive the character of Mr. Key again, and it certainly does become very black—Mr. Key was one of a dinner party at the house of Mr. Sickles. This was a little more than two weeks before his death.

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On the Thursday before Mr. Key's death, Mr. Sickles had another dinner party at his house. Mr. Key was not invited to it. After dinner, his wife accompanies some friends who have been at the dinner to Willard's Hotel, for the purpose, as she says, of enjoying a hop there. Mr. Sickles goes there after her. When he enters the room, he finds Key sitting by her; but as soon as Key sees him, he abruptly leaves the wife. Nothing but his own sense of shame could have prompted him to it! On returning home, and opening his letters, Mr. Sickles finds an anonymous letter among them, which was the origin of the discovery of his wife's inconstancy, and will be produced in evidence before you.

The substance of that letter was, that his wife was in the habit of meeting Mr. Key at a house on 15th street, between K and L—that Key had hired the house for the express purpose, and had as much use of her person as he (her husband) had. The nature of Mr. Sickles would never have permitted him to trust to an anonymous letter, if framed in the ordinary manner. He is a man of elevated character, and would treat an anonymous communication with contempt. But there was a degree of circumstantiality about this letter; it went into details, located the house, and gave him such an inkling of facts as satisfied him there was something requiring investigation. He institutes one, and becomes satisfied of all but the identity of the person who visited the house. It turned out, on inquiry, that there was a house located where this was described as being, that Mr. Key had hired the house, and that he was in the habit of going there sometimes with, but oftener to meet, a female, who went in either before or after him. The only question, then, left for Mr. Sickles to solve was, whether the female who came to the house was his wife or some other person.

Now, Gentlemen, behold again the cunning of Mr. Key. In selecting a house it was necessary for him to get one in a secluded place, or, at all events, in a section of your city in which witnesses could not rise against him. If he hired one out of town, it might be too far from the home of Mrs. Sickles to enable her to meet him as often as he desired; and hence he goes to a part of your city which, as I understand, is chiefly populated by blacks, knowing

that what they saw or heard was not seen or heard by any one. That is all the strength there is in this prosecution. But for the disability which the law imposes upon that kind of testimony, the infamy of Mr. Key would be run before you in a stream which would disgust and sicken you. There is evidence enough, however, to get over this disability, and to prove him unmistakably and unquestionably the author of all this ruin and disgrace.

On the following day (Friday) Mr. Sickles commissioned Mr. Wooldridge, his friend, to inquire into the identity of the woman who accompanied Mr. Key to the house in question. We will show you the circumstances under which he commissioned him to do this. Mr. Wooldridge went to 15th street and arranged with the person occupying the house opposite the one rented by Key, for the use of a front room, on the next day, to enable him to watch and see, in case the woman came there on that day, who she was. While there on Friday, he understood that the woman had last been at the house on Thursday. Having made the arrangement for the use of the room on the next day, he returns and informs Mr. Sickles that the woman was last seen at the house on Thursday. On Saturday he goes to the house, and, from the room which he had engaged, he watches for from five to six hours, and, not discovering anything, returns to his boarding-house, and learns that Mr. McClusky, who, I understand, is an attendant at the Capitol, had been there for him with a note, and while there Mr. McClusky returned and delivered to him a note from Mr. Sickles telling him *to be exceedingly tender in the prosecution of his inquiries, for he has reason to believe that his wife is innocent, and that he wishes her to emerge from the suspicion she rested under, without the public becoming possessed of the imputation which the anonymous letter had cast upon her.* As soon as Mr. Wooldridge receives the note, he goes to the Capitol and there sees Mr. Sickles, and he is then under the necessity of disabusing his mind and disappointing the hope he had indulged as to the fidelity or constancy of his wife. As soon as he saw Mr. Sickles, he told him that while at the house opposite the house in question, on 15th street, on that Saturday, he had learned that it was on Wednesday, and not on Thursday, the woman had last been there. Of course Mr. Sickles, having by inquiry satisfied himself that his wife was not at the house on Thursday, when the day was shifted to the right one, lost all confidence in her innocence. He then became satisfied that it must be his wife. Mr. Wooldridge described the articles of dress which the woman who accompanied Mr. Key wore when she went to the house, and Mr. Sickles at once recognized the apparel of his wife. Conviction more and more fastens itself upon him, and he finds the hope he had indulged that she was pure, because she had not been to the house in question on the Thursday before, a fallacious and delusive one. He returns home; he questions his wife; he puts her guilt to her in such a way as that she thought she had been exposed, and, under its pressure, she acknowledged her dishonor and furnished him with a written confession of it. As soon as this confession is given to him, he sends for Mr. Wooldridge, by note, and directs him, if he receives it before ten o'clock that night, to come immediately to his house, or, at all events, to come early the following morning. Mr. Wooldridge was out when the note was sent, spending the evening on

some jovial occasion, some presentation or other, and did not return to his boarding-house till near midnight, and of course did not get the note in time to see Mr. Sickles that night. On the following morning, between ten and eleven o'clock, he went to the house of Mr. Sickles, and there he found him a perfectly frantic, frenzied man. Mr. Sickles comes in, throws down the written confession of his wife, tells him that the whole story has been acknowledged, and Mr. Wooldridge, with his own eyes, reads her guilt as it is embodied in her statement. We will be able to show you what the anguish and grief of Mr. Sickles were at that time. The day before he was unwilling to relinquish the idea that his wife was pure, but the proof thickened too strong against her, and he was compelled to abandon the hope of her innocence with reluctance. How must his anguish have been heightened when he discovered that her guilt was an undoubted fact!

We will be able to show you, by the testimony of Mr. Wooldridge, all that transpired at Mr. Sickles' house on that memorable Sabbath—that Mr. Sickles was in a most frantic state—that he was unable to fasten his mind upon any subject—that he seemed to be utterly destitute of reflection, and that there was nothing in his condition, beyond his indications of grief, to show the possession of that immortal part which distinguishes man from the brute creation. After Mr. Wooldridge had been at the house some time, Mr. Sickles proposed to send for Mr. Butterworth to take charge of his wife, and see that she was forwarded to her parents in the city of New York. That is how Mr. Butterworth came to be introduced into this matter. Mr. Butterworth was at the time at the house of Senator Gwin or some other well-known resident of this city, and as soon as he receives the word he hurries to the house of Mr. Sickles and there encounters him. If Mr. Sickles was not perfectly demented at the first knowledge of his shame, how must his frenzy have been heightened as he had to impart the knowledge of that shame to his friends, one by one, as they entered his mansion? Grief, when its cause is shame, becomes tolerable to a certain extent when we can keep our shame to ourselves. Is it not the tendency of human nature to bury such secrets in one's own bosom? There are griefs which we delight to impart to others. When the icy hand of death has closed in its sleep the eyes of a relative or friend, we delight in imparting our anguish to those who come with warm hearts and cordial hands to administer to us the balm of consolation. But when the cause of grief is Shame, Man hides his diminished head, for he feels that it is diminished by the disgrace which afflicts him. Gentlemen of the Jury, I ask you what must have been the anguish of Mr. Sickles at this time? He had not only the first knowledge of his wife's infidelity to contend with, but as his friends presented themselves, one by one, he was forced to tell them, as an explanation of his condition, of her dishonor and her downfall. The scene which took place while Mr. Butterworth was at his house will be described by Mr. Wooldridge.

Some considerable time before Mr. Butterworth came there, the colored servant man, on raising the shade of the front window of Mr. Sickles' library, saw Mr. Key, and remarked it to Mr. Wooldridge, who looked, and saw him come through the gate of the Park and cross the street, in which Mr. Sickles'

house was, and go up past the President's mansion. Key, no doubt, was perfectly desperate on this occasion. He had not seen Mrs. Sickles since Thursday. He had not been able to get signals to, or from, her. All communications had been cut off. He had hired his house for nothing. Days had gone by since he had rifled the casket of his friend's affections. Like all libertines, he was "eager for the fray" of his passions. He was carried headlong by them, and was shamelessly, "in the soft gush of the Sabbath sunlight," watching the castle of his neighbor. You can account for Key's conduct on that memorable Sabbath in no other way.

It was between twelve and one o'clock in the day, when Mr. Butterworth first came to Mr. Sickles' house. After he had been there some time, passing through the harrowing scene that was enacted on his first meeting *with his wronged and injured friend*, he left, saying that he was going to Willard's Hotel. When he had been gone about ten minutes, Mr. Wooldridge looked at his watch, and it was twenty-five minutes to two o'clock. Almost immediately after this, as he (Wooldridge) sat at the front library window, he saw Key passing the house on the opposite side of the street, going toward Pennsylvania Avenue. He was with a lady and gentleman, walking on the outside of them, next the curb-stone. As he passed, he took out a white pocket-handkerchief, and waved it towards Mr. Sickles' house, looking, at the same time, towards the upper part of the house. When he got to the Avenue, he shook hands with the gentleman, and entered the Park, and the trees hid him from Mr. Wooldridge's view. The gentleman and the lady went down the Avenue, on the outside of the Park. Mr. Butterworth returned in a few moments, and as he entered, Mr. Wooldridge told him what he had seen—that Key had just passed—"You did not tell Mr. Sickles," said Mr. Butterworth. "No," said Mr. Wooldridge, "I could not find it in my heart to do "so." They were resolved to keep it from Mr. Sickles if they could, that Key was prowling on the outside of his mansion, with dishonorable intentions toward him.

Instantly Mr. Sickles came down-stairs. I do not fill up the interval between Mr. Wooldridge's coming there on that day, and this point, with a minute statement of what Mr. Sickles said or did. It would occupy too much time. At this point he rushed down-stairs in a perfect frenzy. He had seen Key pass with the lady and gentleman, and wave his handkerchief. We have understood that the prosecution mean to try to show that the handkerchief was waved at a dog, which, at that moment, happened to cross Key's path. He must have imagined sometimes that he saw dogs, for, on some occasions, we will prove, he waved it, when there was no other object in view but Mrs. Sickles or her house to wave it at. It was, however, his signal for an assignation. Mr. Sickles, *now*, knew that his wife had been dishonored by this man; and, also, the meaning of the wave of the handkerchief. He was frenzied. We will show you that so close and compact were the occurrences at this time that the inmates of the house did not know, until they heard that Key had been shot, that Mr. Sickles was outside of the house.

Mr. Butterworth left the house again. Mr. Wooldridge saw him go down the steps of the stoop. He was alone. Mr. Sickles was not with him. Mr.

Wooldridge went to the drawing-room, and got the stereoscope that was there—brought it to the front library window, and as he was arranging it on the window-sill, he saw persons running to the further corner of the Park. He did not dream that Mr. Sickles was outside of the house, until a colored girl came to the house and announced that Key had met his death. Reflect, Gentlemen, for an instant upon the condition of Mr. Sickles' mind at this juncture.

The night before his wife had acknowledged her guilt; he had passed the night without sleep; he had sighed and sobbed it away; as his friends came in he was compelled to unbosom to them the story of his wife's dishonor; *to crown all*, he saw the adulterer, his flag floating, as it were, for the purpose of inviting or enticing his wife from her home. It is for you to say, from these facts, what must have been the condition of his mind at the time he went into the scene that resulted in the death of his wrong-doer.

After specifying a few other facts, I have done. Why was Mr. Key constantly in the vicinity of Mr. Sickles' house? We will show you that he lived in another part of your city, a very considerable distance from it. Yet he was in the habit of riding by it on horseback, at all hours, and of showing himself off, in every way he could, to the greatest advantage. In his intercourse with Mrs. Sickles, too, he resorted to and practised all the blandishments, which adulterers study and cultivate, to reach the target they have set before them. How did he make his assignations? If he encountered her in the President's mansion, he made *them* there. If in the mansion of some senator, he made *them* there. He tainted, *with his vile appointments*, the atmosphere, which your wives and daughters—the virtuous females of this district—were obliged to breathe. The very air about was laden with them. He followed his object wherever she went. She could hardly get more than a hundred feet from her house, before he was, unexpectedly, by her side. If she walked, he was on foot. If she was riding in a carriage, it was stopped, and he got in, and rode with her for two or three hours; and the directions to the driver were, *that it must be driven through the back streets.* He became a subject of kitchen comment. He was called by the servants "Disgrace." That was the name bestowed upon him by the kitchen department of Mr. Sickles' house. The District Attorney of the County of Washington had become a by-word and a reproach in the kitchen of one of the houses in the district; and as often as he entered the house, or was seen approaching it, the remark was made, "here comes Disgrace." . . . Even the servants in the house felt the pressure of his infamous intentions to the defendant's wife.

We will show you, Gentlemen, that between the 25th of January and the 25th of February last, Mrs. Sickles and the deceased were seen to enter the house on 15th street from six to eight times—sometimes by the front door, and sometimes by the rear door, reached through an alley way in the rear. We will show you that, on one occasion, about two weeks before his death, they were seen walking together on 16th street, in the rear of this house, when, owing to the mud, the walking was not fit for females—at least in that section of your city. We will show you that on or about the 16th of

February last, the deceased was spoken to on 15th street, between L and M. while walking with Mrs. Sickles, and that he was whirling a night-key in his hand at the time. That they were plainly intending to enter this house, and were watching for a chance to enter it unobserved. That they concealed themselves some time behind a house on the corner of 15th street and M. That they were then followed to the corner of L street, through L to 16th street, through 16th street to K, through K to 15th street, and then to M. That the walking was very muddy, and that the streets were crowded with persons looking at them; for, while they thought they were unobserved, they were the "observed of all observers." We will show you that on or about the 23d of February last, they were at the drug-store together, corner of Vermont Avenue and K street, and that they left there together, and disappeared so as to leave no doubt that they entered the house in question. This was between three and five o'clock in the afternoon. We will show you that the shawl the deceased wore on that afternoon was found in this house, after his death, and identified. We will show you that he was continually haunting La Fayette Square, opposite Mr. Sickles' house, *which* he watched, and *at which* he was in the habit of shaking his handkerchief. That on the Sunday week before he was shot, he was in the square, doing this very thing. We will show you that some three weeks before his death, Mrs. Sickles was seen to enter the President's mansion, and that he followed her there. That she came out, and entered a house near the Banker's (Corcoran's), and that he followed her there. This seems to have been the course of his life. She could go nowhere that he did not follow her. No house was safe against him. *It was his whole business.* We will show you that on the Thursday before his death, he was seen walking with Mrs. Sickles and her little daughter, near the cabinet-maker's (Green's), on Pennsylvania Avenue, and that he was reading a letter *evidently* to her, so that the people in the street could and did see him. This letter, no doubt, was similar to the one sent to Mr. Sickles (though not opened by him till late that night), apprising the deceased of the danger he stood in from the discovery of his relations to Mr. Sickles. We will show you that not many days before the shooting, while Mrs. Sickles was standing on the stoop of her husband's house with her little daughter, this adulterer waved his signal at her—proving that the waving of the handkerchief, in which he indulged so much in that neighborhood, was meant for her. We will show you that he went to market with her; and that, on one occasion, when the family marketing was selected, *much to the amazement of the butcher*, who could not appreciate the reason of such familiarity, Mrs. Sickles handed her *portemonnaie* to him, and directed him to pay the amount of the butcher's score. So that wherever Mrs. Sickles went, and whatever duty she was engaged in, whether it was the merely social duty of calling on her friends, or the domestic duty of providing for her family, Mr. Key was her constant gallant; he was about her and around her, and paid her those attentions which, had her husband been disengaged, it was his duty and his right only to have bestowed upon her.

We will show you by the testimony of the defendant's coachman to

what an extent the intimacy between the deceased and Mrs. Sickles was carried. . . . . I forbear invading the details here.

We will show you that the deceased, like most men who are engaged in his practices, was in the habit of carrying deadly weapons; and that, when admonished by a friend that his attentions to Mrs. Sickles had been noticed, and that he had better be careful, he replied, *that he was ready for any contingency.*

In this case, the effort is evidently being made by the prosecution, to induce you to turn the defendant over to Executive clemency. It has been, in effect, said to you: "Render your verdict of *Guilty* here, and Mr. Sickles "can apply at the proper door for the interposition of Executive clemency." In answer to this, I intreat you not to divest yourselves of your rights as jurors. You never before occupied a position surrounded with the honor which now environs you. You may never occupy such a position again. It is the honor of a lifetime. You were never before called upon to declare so solemn or important a verdict, as attaches to the decision of the issues which are here presented for your determination.

The feelings which should prompt the Executive to annul *your* verdict, are the feelings which should warn you against, and turn you from its rendition. If the Executive could interfere at all, it could be only upon the ground that the defendant, at the time of the commission of this act, was the instrument in the hands of his God, for the purpose of executing, in a summary way, the judgment of his Maker. That is the very question which you are to pass upon here. Was the defendant an involuntary instrument in the hands of some controlling and directing power, for the purpose of putting an effectual termination to the adulterous career of the deceased?

Whenever a question, *appealing to similar feelings of morality*, has been put to other juries, they have not sought to evade the responsibility of answering it. They were proud of the glory of being permitted to do so, and fearlessly and promptly have they given it a response. *Less* than the imitation of their example, on your part, would be a violation of your duty—do I go too far when I say, *a disregard of your oaths?* Mercy is your attribute, as much as it is that of the Executive. It should temper all your deliberations.

I propose here calling your attention to a few, out of a number of cases, in which juries have refused to sanction the principle upon which this prosecution builds.

The first is related by Lord Erskine, in his celebrated opening for the defence, on the trial of Hadfield. It was the case of a woman who was tried in Essex for the murder of a Mr. Errington. He had seduced her, lived with her, and then turned her off for another woman, whom he had married, or (as Erskine said), "taken her under his protection." She went deliberately to his house, and shot her wrong-doer. She was goaded to her act by a sense of injury; and after her acquittal, she became absolutely insane. She was not insane *when* acquitted; and Lord Erskine rather mourned over her acquittal, *taking place as it did*, for it conflicted with his favorite idea of insanity from delusion, a view of which you have already had. He advo-

cated the principle that *real* wrongs produced violent resentments; *imaginary* ones, insanity. The jury, in the case of this unfortunate woman, read from, and practised upon, the Book of Human Nature. They spurned all fine-drawn theories, looked to the impulses of the human heart, and held, that with such a provocation as she had, *desperation* did not exhibit itself in a criminal form. This was the voice of an English jury.

To come to our own country. In the neighborhood of twenty years ago, if I remember right, a father was tried and acquitted in the city of Philadelphia, on the charge of murdering his own daughter. He was a confectioner there. His daughter had married against his will, and the shock to his paternal feelings was such that he took her life. He acted upon *real* facts, which would hardly tally with Lord Erskine's doctrine of *delusion*; and yet, a Pennsylvania jury, considering the workings of the provocation upon the parental heart, refused to consign him to punishment.

In the year 1843, Singleton Mercer was tried in the State of New Jersey, on a charge of murder, in killing a young man who had forcibly deflowered his sister. He had been some forty hours under the influence of the feeling, which prompted him to take the life of the deceased. The deceased and a friend, in a close carriage, got on board the ferry-boat to cross from Philadelphia into the State of New Jersey. As the boat was just nearing the New Jersey shore, the friend of the deceased, who had left him alone in the carriage, hearing several pistol reports in its direction, went to the carriage to see what it meant. When he arrived there, he found the deceased in a dying state. Mercer was arrested on the boat; did not deny the deed, and manifested a perfect resignation to his fate. He was tried in a State *which prides itself upon the severity of its justice*, and yet, an honest jury acquitted him of all criminality. They sympathized with the condition of his breast; allowed for the fury into which a mortified and outraged brother would be thrown, under the circumstances, and refused to stamp his act with censure. The same spirit pervaded the whole public mind of the State, and the manifestations *of delight, of joy*, on the rendition of the verdict (were it not that we know they were so) might be taken, from the accounts in the public journals, to be too extravagant for belief. How much stronger would this brother's case have been, had he caught the deceased in his guilt; and yet not so strong as the defendant's, *then*—for to *his* relation not only *love*, but duty attached itself. The former brooded over *the exciting cause*. The latter did not, for *it* was *first* exploded in the very act, into the commission of which, it precipitated him.

The case of the husband in Virginia cannot be unknown to you. The adulterer was found shot in his bed. The husband, accompanied by a brother and a friend, went to the apartment of the adulterer quite early in the morning. What took place there, no human testimony outside of it could supply; but certain it was, the adulterer was shot and died. The Mayor of Richmond committed the husband, and those that accompanied him, *on a charge of murder*. There is in that State *what* is called an Examining Court, being a tribunal between the committing magistrate and the court of *trial*. Its office appears to be to decide, from its own investigation of a matter,

whether *any* criminality is sufficiently made out against an accused party to warrant his being held to answer at the court of *trial*. This case came before *that* court, and, if I am correctly informed, it did not "send on" the proceeding to the court of *trial*, but discharged the accused from further prosecution. This case occurred in the city of Richmond, in the year 1846, and is another proof that the vindication of marital honor can hardly be perverted into *an offence*. I have perused the argument of one of the counsel for the defence (Mr. Lyons), and it is an eloquent exposition of the awful magnitude of an interference with the marriage relation.

In the year 1844, Amelia Norman was tried in the Court of General Sessions, at the city of New York, on a charge of assault and battery with intent to kill. It appeared from the testimony, that she had been seduced by the prosecutor under circumstances of great cruelty; and that after serving him in the capacity of *mistress*, until he was sated with her charms, she was finally abandoned by him. She tried to persuade him to do something for her. Her health had been much impaired during her association with him, and she requested *a little*, to stand between *her* and *want*. He remained obdurate. She became frantic; furnished herself with a dirk knife, went to his hotel, in the *great* thoroughfare of our city, saw him in the broad daylight in the act of entering it, once more besought his aid, was repulsed by him, and, in her agony, stabbed him, and well-nigh deprived him of his life. She was taken into custody on the spot. Her situation and her wrongs came to the knowledge of a distinguished authoress, whose sympathies were enlisted for her. This lady took her under her protection, ministered to her during her imprisonment, and employed counsel to defend her. That counsel was my own brother, who *now* is among the dead. When he ascertained the circumstances of the case, he returned his fee, and refused to serve under any other employment than that growing out of his compassion for an injured woman. Her trial came around; it lasted several days, and resulted in her acquittal. So great was the public interest in her, that on the night the verdict was rendered, the courthouse was besieged by thousands of our citizens, and when the result was announced, the welkin rang with the plaudits of an excited populace!

The case of Jarboe, to which I have already referred, and with which you *must* be familiar, is another, and a fresher instance of a jury refusing to stigmatize, as criminal, *obedience to the instincts of our natures*.

Gentlemen of the Jury, how instructively do these cases come home to you. The rejected mistress—the contemned father—the disgraced brother—have been received into the merciful keeping of discerning juries. In matters of natural right, the intelligence of the whole world is in unison. What an English jury commenced, American juries have not refused to imitate or extend. Shall it stop with the records of the past? Or shall the husband, whose hopes have been broken, like the tender flowers (as it were), upon their stocks, be placed behind the same shield which has protected other defenders of our dearest rights? Even in your own district has been planted the seed, of whose growth we seek to reap the harvest. The honor of initiating in this locality the doctrine of natural justice, under proper qualifications,

has not been reserved for you. It has already taken root here. You can follow the example which has been set you. You can apply it to a new wrong. You can announce that a husband's feelings, and a husband's happiness, must not be made light of. My client, it is true, has not aimed at being a public champion; but his doom cannot be fixed without affecting, more or less, by the precedent you establish, the great moral interests of society.

Will you or not give in your adherence to the examples which have been rehearsed to you? You have your own immediate citizens, and the citizens of other States, where justice is not sold, and where it cannot be bought, putting the redemption of a juror's oath upon the principles which, in one aspect of it, constitute the pillar of this defence. Will you renounce your allegiance to those principles? Will you refuse to yield yourselves to them? Or will you rather follow in the wake of such precedents, and render that judgment which will accord with perfect justice, and, at the same time, be consistent with the adulterer's offence.

Gentlemen of the Jury, shall the abominable doctrine go forth from this Court that pecuniary compensation is the only mode of stanching the bleeding wounds of a husband? What is the effect of that doctrine? It tells every man that if he will pay the price which a jury may set upon his seduction or his adultery, he can enter any house he pleases and rifle it of its purest contents. Is that to be the doctrine of your District? Are we to have a mere list of rates, or a mere tariff of charges. Is the lower house of infamy to fix one, and the higher house of infamy to fix another? Shall an American jury say to the seducer or adulterer what he shall pay for his crimes. The very moment you act upon that principle you tell every libertine he may enter any house in your District, if he is only ready to foot the bill which shall be presented by an American jury, and stand clear of all human or divine accountability. In God's name repudiate that principle from your verdict. You sit, where it is your inestimable privilege to sit, under the immediate protection of that fire which burns upon the great Altar at which all the other torches of our government are lighted. You are here, at the seat of our Federal Government. You are overshadowed by the illustrious name of Washington. Let its recollection inspire you with fitting and becoming thoughts—and be reluctant—be loath to incorporate into your verdict a principle, which—if it is the one upon which you act—will have a more demoralizing public effect than any other that could be sustained by an intelligent jury!