AMERICAN CITIZEN.

"Let us have Faith that Right makes Might; and in that Faith let us, to the end, dare to do our duty as we understand it"--A. LINCOLN.

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TRIAL OF JOHN B. ADLINGTON,

FOR THE MURDER OF

Sidney B. Cunningham

COMMONWEALTH vs. J. B. ADLINGTON, } Indicted for Homicide.

THURSDAY, March 21, 1867.

(CONTINUED.)

Lewis Z. Mitchel, for Commonwealth. I am sorry, very sorry, to be called upon to say anything, after the very eloquent remarks which have been made before this jury. He was glad the responsibility did not rest upon him to decide the case. His duty was to advocate the vindication of the laws of the Commonwealth. Kingdoms, nations and dynasties had been swept from the face of the earth, but God's word remained intact: "Whoso sheddeth man's blood, by man shall his blood be shed." This was ringing in our ears, at this day. "Thy brother's blood cryeth from the ground unto me," and "I will require it at your hands." The seals of justice were held blindly, and no outside sympathy could move the beam. Stern facts must be weighed. If it were not so, you might tear down the walls of the temples of justice, abolish your courts; break down the barriers which protect life, and let the as a sin's knife riot in murder. Mr. Mitchell, spoke very eloquently in his opening. He then remarked upon circumstantial evidence. He said the defence would have us believe that it must be proved that the knife must be seen to enter the side; must be seen to be turned in the wound; must be seen withdrawn; before we could be called upon to convict. You may see the lightning strike the oak and shiver it, but unless you can see the streak all the way from the cloud to the oak—trace it down the tree to the root, you are not to conclude that the lightning shivered the tree.—Two men were stricken down, and as well remarked by the counsel for the defendant by the same hand. They were cruelly, cowardly, dastardly murdered.—Shame on the cowardly men who were there, and participated in it. It was a cowardly act. Who did it? You, gentlemen, are the conservators of the law. Every man in the Commonwealth, when he retires to rest at night, depends upon the verdict of jurors, for the security of his life. He referred to the attacks upon the witnesses by one of the defendant's counsel. They take the ground in the first place, that it was John Oliver, Calvin Weller and Sidney Oliver, who perpetrated the killing; and next, that if it was defendant who struck the blow, it was done in defence of John Oliver.—Our theory is that two men were killed at the house of John Oliver, on the 24th of December; that they were killed with a knife, and that it was defendant who done it. His opinion was that Cunningham was killed at the time he drew the chair to strike Oliver; but his opinion went for nothing. He believed that Teeple received his death wound when fighting with Oliver and Shaffer. They were killed. Who did it? It was done with a knife, there is no doubt about that. It was done in that room, and they died of the wounds there and then received. It was done with a double-edged knife. Science proved this. The doctor proved it. Who had the knife?—Can you have any doubt that defendant had such a knife in September? It was described by several witnesses, that defendant had such a knife. The blacksmith proved that he made such knives—had them in his shop window—defendant was seen coming out of the shop with a knife, and it was a little rusty.—Is not this a link in the chain of circumstances? He carried it in his breast and in his boot. Had he the knife on the night of the murder? Here we call in human testimony. Calvin Weller says he saw the knife in defendant's hand on that night in the door of the room; he described it—blade five or six inches long: double-edged; side of the blade toward him; inch and one-quarter broad in the blade. But the defendant's counsel say don't believe him, he is swearing the rope from around his own neck. Now, we prove that Sidney Oliver saw it in the hand of the defendant on that night. He spoke of the meeting of the defendant and Oliver and others, in the evening when a combination was formed—when Oliver told Adlington not to bring his knife, and he told him he had not done so,—when Oliver told Weller to put stones in his pocket, and Sidney Oliver to take a tumbler, and Ambrose to take a poker, and himself a revolver to be used as a knuckler. This is the reason, why young Oliver would be more likely to see the knife.—He was in the secret of the ring; he knew of the combination.

Adjourned till 2 p. m.

AFTERNOON SESSION.

Court met pursuant to adjournment.—The prisoner was brought into Court by the Sheriff. The jury were called over and answered to their names.

L. Z. Mitchell, for Commonwealth resumed.—Had the Defendant the knife? Did Calvin Weller see it? Did John L. Jones see it? Did Sidney Oliver see it? Did Mrs. Adlington say, when the witness leaned over the bannisters and cried out, "John, John, don't shoot." "Is it my John?" was it the knife or a pistol which he had in his breast? It is said, that when one commits a crime "he is moved and instigated by the devil," who is the father of liars. May it not be that after the defendant had struck the blow, he ran to the kitchen; thrust Miss Campbell aside and demand the knives;—"Damn it, where are the knives?"—was his exclamation—that he intended to have it to say I had no knife, you can not lay the murder to my charge. Did he say, "I must hide this knife?" Was he talking to himself? Was his conscience smiting him when he uttered these words? Was he saying to himself, "thou can'st not shake thy gory locks at me?" Sidney Oliver told the Defendant, before the pool of blood was dry upon the floor, that he would have to swear that he had a knife that evening. Did the defendant use the knife? We have proved that he had a knife before this time, and at this time. He then went on to show that he was in a position to use it. They were stabbed with a knife. In the early part of the evening he was told not to bring his knife. This connects him with the knife. It seemed to him that the evidence of Mrs. Wilson was unfavorable to the defendant, and that it was probable Adlington got the knife when he went to see the children. When Mrs Adlington cried out "Don't, John, for God sake John, don't let him!"—Don't let him do what? This sentence has never been finished. It was at this time the fatal blow was struck at Cunningham. It was when Oliver was prostrate on the floor, Adlington was beside Cunningham—then it was that the blow was struck. Mr. Mitchell descanted at length upon the evidence. John Jones was a peace maker; was one of whom it is said blessed are the peace makers."—Adlington calls his attention to another part of the room, and then rushes to the fight between Teeple and Oliver, knife's him, and raises the chair and strikes—as he says—Oliver by mistake. He comes to Teeple, when he is prostrate and bleeding, and grinds his head beneath his heel. Not once, nor twice, nor thrice, but repeated it until he was forced back. Did he use the knife? If he did not, who did use it? He spoke at great length on this branch of the case; and then went on to show that it was used deliberately, premeditatedly. He was neither struck nor insulted. It was used if at all deliberately. He would be followed by his colleague. He wanted the jury to feel for the defendant's wife and children, but he wished the jury to know that there were other tears shed and to be shed in this case. The mothers and sisters of Teeple and Cunningham would nevermore be hold their sons and brothers; the arm had gone down in blood. Mr. Mitchel closed with a very eloquent appeal on behalf of the bereaved relatives of deceased, and of the outraged majesty of the law; and humbly invoked the jury to give the prisoner a safe deliverance if innocent.

Mr. M'Junkin closed for the Commonwealth. He said he thought he should have done his duty, by simply saying he concurred fully with the able argument of his colleague; but there was a duty devolving upon him which he must perform, whether he could wish to avoid it or not. There were two men struck down in the enemies their youth, in the vigor of their manhood. The defendant has sat here throughout the horrid details of this bloody tragedy, and his cold blue eye has never quailed nor moistened. His features were as cold and hard as his murderous heart. I believe he has the mark of a cold blooded murderer written upon his brow. He was known to carry a knife—a horrid butcher knife—in his bosom and in his boot; and none but a man who was written all over with murder, would be in the habit of carrying a knife thus in a peaceable community. Mr. McJunkin went on to examine the evidence and comment upon it; but as it was much in the same vein as that of his colleague, we shall not pursue him through this part of the case. If an assassin were in that room seeking an opportunity to stab, when would he have done it? Why, when the chair was drawn by Cunningham to strike Oliver—when his eyes were hidden from him by the chair. Then it was that he struck the fatal blow. He then crouched in the corner, until opportunity offered to stab Teeple. He was not sure that he had struck Teeple to the death; he followed him up, and raised a chair to give him the finishing blow; but by mistake, struck Oliver. Still he followed him up with his murderous intent, and stamped him when lying helpless upon the floor. It had been said that the defendant had been a soldier. So far as he upheld the honor of his country's flag I honor him; but when he used the assassins knife, he condemned him. He did not know but he may have been the pet of the regiment; but he did not believe he ever had the spirit of a true soldier; a good soldier would never strike a fallen foe. A brave soldier would never strike a man behind his back. Whose fault, he asked, was it that the disturbance commenced? They had apologized to Oliver; had mingled in the dance; were sitting quietly before the fire. There had been talk between two of the Portersville boys; and there can be little doubt something insulting was said about New Castle, which the quick ear of Cunningham caught, and the fight instantly commenced. A great deal had been said about the wife and children; but he apprehended the Court would tell the jury, with that matter they had nothing to do. It was not their fault if the defendant had placed them in this position. He had no tears or him. If he had tears to shed, it would be for the widowed mother of the murdered man. If justice and the law say this man is guilty, it will be your duty to find him so; and then you will find the degree of homicide. He descanted upon the weapon used; the manner it was used; the place (the left side) where the knife penetrated; all went to show premeditation. It was not accident. It was not done in a passion. It was deliberate, wilful, premeditated murder. He did not slash about as a man in anger and sudden passion would have done. He was not in imminent peril of his life; and, therefore, it could not have been done in self-defence. The character of the wounds precludes the idea that it was done in self defence, or for the purpose of protecting John Oliver. The wounds were all on the left side—within an inch of the same spot, on both the murdered men. They were made secretly, and with due deliberation. The defendant has given himself the reputation of a fighting man. This must be taken as his reputation, when the fact is considered that he had not offered a single witness to support his character for peace. Butler county and the whole country was open to him, yet he has not produced a single witness. He closed by saying that the jury, if they believed the evidence, would have to find him guilty of murder in the first degree, in manner and form as he stands indicted.

CHARGE OF THE COURT.

GENTLEMEN OF THE JURY:—We have now arrived at the point when it becomes the duty of the Court to submit this case, to which you have given such painful attention during the last eleven days to the evidence, to you for your determination and your verdict according to law and the evidence which has been laid before you.

To all concerned this case is of importance. To the prisoner it is most certainly one of vast importance, for his life hangs on the issue. To society, it is of great importance, because the welfare of a community depends on the faithful and careful administration of justice, and the punishment of offenders when crime is found to have been committed. And, gentlemen, it is of no less importance to you who are acting in the discharge of a duty which you have solemnly sworn to perform according to the evidence, and for the manner in which you shall discharge that duty in view of your accountability to your own consciences and to God.

I have observed the patience which you bestowed to this long trial, and the attention you have given to the able and eloquent arguments of the counsel of the parties who have addressed you, and I am satisfied that you feel the importance of the case and the considerations I have suggested, and that you will endeavor to do your whole duty.

This case presents facts of a somewhat peculiar character. In the midst of hilarity and scenes of pleasure, two disgraceful and horrible homicides are committed in the same hotel, within a brief space of time. Two young men, in the full enjoyment of health are stricken down with a deadly weapon, and "hurried hence to the bar of God to answer for the deeds done in the body." This gives us another instance to add to our belief that crimes of the higher character are on the increase; and an utter disregard of human life seems to pervade the community in which we live.

You have before you a man in middle life—with a fond and affectionate wife who clings to him in the hour of his trial; who are blessed in their union with six young children dependent upon their father for their support and education—suddenly brought to the bar of justice to answer an accusation of the commission of one of the highest crimes known to the catalogue of offences. The defendant, John B. Adlington is indicted, and before you for trial, for the murder of one of these two men—Sidney B. Cunningham; and is charged with having taken his life on the night of the 24th of December last, in the hotel of John Oliver, situate in the borough of Portersville, in this county, by means of wounds inflicted with a knife upon his left side, which produced death. And the Surgeon who made the examination of the wounds within a short time from their infliction, testifies that "upon removing the clothing of the deceased, he found *one* on the left side of the body just inside *anterior superior spinous process of the illium;*" that the bowels of deceased protruded from the wound about as large as his fist; that the wound was about one and a half inches in breadth; that the bowel *was not cut;* that he replaced the bowel, and then found another cut higher up, on the same side about the same width, and apparently made with the same knife. It was between the seventh and eigth ribs, counting the number from above. He further says it corresponded with the other wound in size; that it was four and a half inches in an upward and inward direction—penetrating the left lung. That he then found the man in a dying condition, with acculi hemorrhage in the chist; that he believed his death was caused by hemorrhage of the lung from the upper wound; that this upper wound, from its character, would necessarily be fatal; that the knife cut through the coat, vest and shirt of the deceased; that the wounds were exactly alike in their extremities, and would indicate that the knife had been a double edged one. The nature of the instrument used, gentlemen, is greatly to be deduced from the wound itself; and it is said in cuts or stabs, the wound will agree with instrument used, particularly if inflicted by a dagger or a knife.

1st. Then, gentlemen, it becomes our duty to instruct you upon the law as applicable to this case—to present to you for your consideration, such *positions* as arise upon the evidence adduced; and it is your duty to apply the law, as you may receive it from the Court, to the proof before you as you have heard it from the mouths of the witnesses who may have testified as well for the defendant as for the Commonwealth, and to make up your verdict as you may be warranted therefrom, in view of the responsibility you have assumed as jurors.

The indictment contains two counts in which the defendant is charged with murder, and if the evidence warrants, he may be found guilty of murder of the first, or of the second degree, or of manslaughter, on this indictment.

Murder, at common law, is the unlawful killing of any reasonable creature in being, in the peace of the Commonwealth with malice aforethought, either express or implied. This definition is adopted in Pennsylvania; and our Legislature, by an act of 22d April, 1794, provided punishment for the offence—declaring and defining what shall be considered murder in the first and second degrees—and under this act our courts had so well defined the offence, and it has been so well settled among the profession, as to induce the codifiers of our criminal law, in 1860, to retain it unchanged, and the Legislature to re-enact it without any modification whatever.—I will now read it to you:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly."

It will be observed that all murder *perpetrated* in the attempt to commit the offence of *arson, rape robbery*, or *burglary*, wherein life is taken intentionally or otherwise, in the commission of either of these offences, is murder in the first degree; and the Commonwealth is not bound to show on the trial that it was the *intention* to take life; because, while in the commission of either of these felonies the act makes the taking of life murder in the first degree.

It is not contended in this case that the offence, for which the prisoner is put upon his trial to answer, comes within the provisions of this clause of the act.

The other clause of this portion of the act declares that when life is taken by means of poison, or when the party is found lying in wait—or the offence is committed by any other kind of wilful, deliberate and premeditated killing, it is also murder in the first degree. Under this clause the mixing and preparing the poisonous cup for another, requires deliberation; or, lying in wait—which is to lie in ambush, to be secreted, in order to fall by surprise on the enemy—requires deliberation and design. "And by any other kind of wilful, deliberate and premeditated killing," requires reflection and thought; and, in all these last described in this clause, the *intention* is the essence of the crime; and, whenever that intention is murderous, the killing is murder in the first degree. And then all other kinds of murder not included in the foregoing clause, which I have explained, will be deemed murder in the second degree; and includes all cases of deliberate homicides, where the intention is not to take life; and instances are given us by our law writers. To illustrate: as, where a workman throws timber from a house in a street of a populous city where he knows many persons are passing and repassing; or, the shooting at a fowl with an intent to steal it and killing an individual; or, where death takes place in a riotous affray where there was no *intention to kill;* or, if a pregnant woman be killed in an attempt to produce an abortion, although no intention to take life—it is murder in the second degree.

The question for your inquiry will be,—if satisfied of the fact that the defendant committed the act,—was the killing deliberate and premeditated with intent to take life, or was it merely to do bodily harm? Whenever the deliberate intention is to take life, and death ensue, it is murder in the first degree; whenever it is to do bodily harm or other mischief, without the intention to take life, and death ensues, it is murder in the second degree.

The law, in the case of unlawful killing, presumes malice; and *express malice* is where one kills another with a sedate and deliberate mind, or formed design; and this formed design may be discovered by the evidence of surrounding circumstances connected with the defendant, which may show to the jury his inward thoughts and his intentions; or, by his threats and declarations, or menaces toward the deceased; or, by his lying in wait for the deceased; or, by any preconcerted plan to do him bodily harm.

Malice is implied by law from any deliberate criminal act committed by one person against another, however sudden; and, in a legal sense, any act done wilfully and purposely to the prejudice and of another which is *unlawful*, is, as against that person, malicious. Thus, where a person kills another suddenly without any, or any considerable, provocation, the law implies malice; for it supposes no person—unless of a wicked heart—would be guilty of such an act upon very slight, or no perceptible cause; and I may remark, as a general rule, all homicides are presumed to be malicious, and will be so treated by the law until the contrary appears—or, until the surrounding circumstances, at the time of the commission of the act alleged, show something of extenuation, excuse or justification. Malice, however, can seldom be directly proved—and therefore the evidence—being circumstantial, *as facts* which go to afford an inference of *its* existence,—is admissible. And our Supreme Court has said in a case, in giving construction to our Act of Assembly:

"Our State adopts the common law definition of murder, and it is distinguishable into two degrees; defining the first degree *specially*, by certain enumerated cases; and *generally*, by the words "other kind of wilful, deliberate and premeditated killing." A careful study of our jurisprudence on this subject, clearly reveals the fact that such terms as a *deliberate* purpose, or a deliberate and premeditated intent to kill, are sometimes substituted for the words of the statute; yet our reported jurisprudence is very uniform in holding that the *true criterion* of the first degree is the intent to take life—the deliberation and premeditation required by the statute are not on the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill—and not upon the intent after it has been formed. An intent actually formed, even for a moment before it is carried into act, is enough."

And his Honor, Judge Thompson, in the case of the Commonwealth vs. Kelly, 1st. Grant, 491, in delivering the opinion of the Court, declares what is the proper construction of our act, and gives instructions to the Judges below in charging juries in reference thereto:

"By the act of 1794, (and now by act of 1860,) murder by means of poison, or by lying in wait, or any other wilful, deliberate and premeditated killing, is murder in the first degree. When the crime was not committed in the attempt to perpetrate either of the felonies mentioned in the act in which a specific intent is not an element, the Legislative will is most carefully expressed to limit the capital offence to cases where it is the result of a wilful, deliberate, wicked purpose. Poisoning and lying in wait are enumerated, and "any other wilful and deliberate killing," is placed along side as equally heinous, because equally the result of the wicked settled purpose, and to be followed by precisely the same punishment.

The collocation of those varieties in which the crime may occur, serves to show that all belong to the same species—that they sprung from the same root—which is *will, deliberate purpose.* It must here be remembered that this disposition of mind, leading its victim into murder, all aware of its wicked pursuit and intent upon the result, is the distinguishing trait between murder in the first and second degree. It is a positive element, and its presence must be proved, according to law, beyond the possibility of a reasonable doubt. If it be not proved, there is no capital offence. It is essential to its grade as is killing itself, and cannot be supplied by any other ingredient. If it be not proved, and the killing be with malice, but upon a sudden quarrel, or on great provocation, it is by the act of Assembly deemed to be murder in the second degree. If not found to be long to the first class, it is presumed to belong to the second; and this should be carefully presented to the juror's mind in all such trials; and he should conscientously act upon it, regardless of anything but duty."

Then, gentlemen of the jury, your inquiry would naturally be what length of time does the law declare necessary for deliberation? In addition to what has already been said, Judge Lewis, in his Criminal Law, gives us the spirit of the authorities on that point. He says: "If the defendant has time to think and intend to kill for a month as well as an hour, or a day, it is deliberate, wilful, and premeditated killing—constituting murder in the first degree. To kill a person wilfully is the same as killing him on purpose—it must be deliberate—but the law fixes no time to deliberate to constitute murder. It is not required that he shall ponder over the crime for any period of time. To deliberate is to reflect with a view to make a choice; and if it appears that the party did reflect, though but for a minute before he acted, it is unquestionably a sufficient deliberation within the act of Assembly. To premeditate, is to think of the matter beforehand. It is to conceive of a thing before it is executed. The word "premeditation" would seem to imply something more than deliberation, and may mean that the party had not only deliberated, but had framed in his mind the plan of destruction. No time is too short for a wicked man to form in his mind a scheme to murder, and to contrive the manner of accomplishing it."

Then, gentlemen, under the statute, when it appears from the whole evidence, that the crime was, at the moment, deliberately or intendedly executed, the killing is murder. It is sufficient if the circumstances of *wilfulness* and *deliberation* are proved, though they arose and were generated at the period of the transaction. If intention to kill existed, and if the jury are satisfied beyound all possible doubt, that defendant did the act, and that the weapon used was sufficient to produce death in the manner it was used by the prisoner, and the act was deliberately premeditated, then it is murder in the first degree; for the law in the absence of circumstances and evidence that the blow was struck with intent to do great bodily harm, will presume an intent to kill from the use of a deadly weapon. And if a deadly weapon be used by the defendant, the *provocation* must be very great to reduce the grade of crime from murder to manslaughter. * * * This, then, gentlemen, brings us to enquire whether the evidence establishes in your minds that there was provocation. The law declares that although in homicide there may be provocation of such character as to rebut the legal inference of malace, yet provocation has its defined legal limits. No breach of a man's word; no mere trespass on his lands or goods; no insults by words, however offensive they may be, will free a party killing from the guilt of murder. This rule holds good when a party, killing upon provocation, makes use of a deadly weapon, or otherwise manifests an intention to kill. Malicious destruction of property is likely, and as well calculated to provoke, as any thing that can be done by one man to his neighbor—yet the law, by wisely judging that too great latitude should not be given to the taking away of human life, refuses to extend to the provocation I have mentioned, particularly when the party killing use a deadly weapon. No *provocation* whatever, can render homicide justifiable, or even excusable. The best it can do is to reduce it to manslaughter. An unintentional trivial assault along a street or densely populated town or city, or in a lawfully assembled gathering of people crowded together, as by a jostle—nor, as has been said, a trespass against his property, (not his dwelling house,) is sufficient provocation to warrant the owner in using a deadly weapon in its defence; and if he do, and with it kill the trespasser, it will be murder; and this though the killing were actually necessary to prevent the trespass. And it will be no answer to express malice, and when provocation has been received, and when a party, at the time, or afterwards, uses expressions indicating an intention to be revenged, using such language as satisfies a jury that he had formed a design, and afterwards carrying his designs into execution, he will be guilty of murder.—

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Manslaughter is the unlawful killing of another without malice aforethought, either express or implied. It may be committed voluntarily upon a sudden heat, or quarrel, or fight—or it may be involuntary, but while in the commission of some unlawful act—(or contrary to law,) below the degree of felony.

A homicide having been duly proved, to extenuate it from murder to manslaughter, the evidence must prove both provocation and passion to exist. *Provocation* alone will not reduce the offence. Nor will *passion* without provocation.—And this provocation must be such as the law will deem sufficient to put a man in such a state of *temper* as to prevent due deliberation. As I have already said, no mere words of insult or contumely, or epithets used, nor tresspasses to lands or goods, are sufficient. But an assault or battery upon the person, or blows, are deemed sufficient to excite the passions to such an extent as deprive the mind, for the moment, of the power of deliberation. Was there evidence in this case of any provocation, given by the deceased to the defendant? If you are satisfied he gave the fatal blow; if so, what was it? When and where was it given and received? If there was, did it produce passion? If so, to what extent; and was the defendant smarting under the provocation at the time?—Was it so recent and so strong that he might be considered as not being, at the moment, master of his own understanding? If so, then the offence would be manslaughter.

But, gentlemen, if you shall find there was provocation sufficient to produce passion, and it actually existed in consequence of it—yet, if, after the provocation, there had been sufficient time for the blood to cool, and for his passion to resume its place, before the fatal blows were struck, the offence would be murder.

The law has not fixed limits within which cooling time may be said to take place. Every case, of course, must depend on its own circumstances; but the time in which an ordinary man, in like circumstances would have cooled, may be said to be a reasonable time. And as to the fact of whether there has been a resuming of the control of reason, it is said if the prisoner displayed thought, contrivance and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, such exercise of contrivance and design demonstrates rather the presence of judgment and reason, than violent and ungovernable passion. Or if, between the provocation and the *stroke given*, the prisoner fell into another discourse, not connected with the immediate object of his passion; that it is believed by the juay his attention was called off from the provocation—or, if he should pursue his business in the usual way for a reasonable length of time, any subsequent killing of his adversary—especially when a weapon of any kind, the use of which will produce death, is used, it is murder. And to which we may add that, when a man is assailed, and is secure in his separation from further personal aggression, he has no right to return armed to the scene of conflict, or *hunt* up his assailant and engage in a new combat with him. If he do so and slay him, he is guilty of *murder or of manslaughter*, according to the circumstances under which the homicide is committed.

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One of the defendant's counsel, in his argument, read to the Court and to the jury some authorities in reference thereto, and contended the facts in the case protected the defendant under the principle of self-defence.

Homicide in self defence.—As a general rule the danger to a party must be actual. In cases of personal conflict, in order to prove such defence available, it must appear that the party killing had retreated, either as far as he could by reason of some wall, or other impediment to his retreat; or, far as the sudden attack or fierceness of the assault would permit him. If it appear, however, that the conflict was in any way premeditated by the defendant, the defence can no longer be used. And, as I have said, it must be proven the assault on him was perilous in the extreme. There may be cases where the assault may have been so fierce as not to allow time to retreat a step without manifest danger of his life, or other enormous bodily harm; and then, in his defence, if there be no other way bf *saving* his own life, he may kill his assailant instantly. An attack, provoked or renewed by the defendant, will be no defence. Therefore, if he will provoke an attack, the law will not shild him under the plea of necessity, should he kill. An instance is given, as, "where in the course of a quarrel, the prisoner was menaced by the deceased whose strength was greater than his own, with a brickbat, and could have escaped by flight, but not choosing to do so, turned round and mortally wounded his assailant with a dagger which he had concealed on his person; it was held manslaughter."

The necessity ceases to exist when the defendant, though originally in iminent danger, escapes,—arms himself with a dangerous weapon—returns and slays his antagonist. The plea of self defence rests on the natural right every man has to protect his own life against the unlawful attack upon it by another. If, however, when he is secure from danger by going away or retreating from his assailant, if he voluntarily return and renew the combat, it could not be pretended he is acting in defence of his own life against inevitable destruction.

And, gentlemen, this right of protection, with the same limitations as those I gave just now, extends to master and servant to parent and child, husband and wife—and, in defence of each other respectively, are excused by reason of the relation each stands to the other; and the law humanely treats the act as if in defence of the party himself. But the principles I have just explained do not extend to persons not standing in the same relation. It is true that, where an attempt is made to burn your house, or to break into your house burglariously, you, or any of your family—or even a lodger in your house—may lawfully kill the assailant for the preventing the mischief intended. In such case the party killed was engaged in the commission of the crime of arson or burglary, which are among the highest grade of offences, next to murder; and, therefore, he may be resisted even unto death.

If two men fall out and quarrel, and a third person (who had not any quarrel) interfere in revenge of his friend, and strike the other man, of which stroke he died; this would be manslaughter, because it happened of a sudden manner in revenge of his friend. But it must be intended that the two men who fell out must be fighting together at the time he struck the fatal blow—for, if words had only passed between them it would have been murder; for there must be open affray or a striving; being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter if the man is killed by the person so meddling—where a third party interferes from hot blood alone and kills one of the combatants, this is manslaughter. If, however, in anticipation of a difficulty, and with malice in his heart, he deliberately formed the design in case there should be an affray between combatants engaged there to interfere, and take the life of one of the combatants—whether he did it secretly with a knife, or openly with some other deadly weapon (he himself not being attacked by any one)—and he there with the weapon, took life, it would be murder in the fiast degree. If, however, his intention was not to take life, but to do bodily harm, it would be murder in the second degree.

The following technical points were submitted by Mr. Thompson, counsel, for defendant, and the Court requested to instruct the jury:

1st. That the time and place of the homicide are material averments, and must be proved as laid in the indictment.

2d. The day on which the deceased died of the alleged mortal wound, must be averred and proved as averred.

To the first and second points we answer: Time and place must be attached to every material averment. But place is sufficiently described if laid in the county, without specifying the particular spot where the offence was committed. The time of committing the offence may be laid on any day previous to the finding of bill, and where time does not enter into the nature or essence of the offence (as in this case) and proof of the facts of the blow struck and death ensue anterior to the finding of the bill, within a year before that period, it is sufficient.

3d. That if the jury find that the said Sidney B. Cunningham received the mortal wound on the 24th day of December, A. D. 1866, but did not die that day, but that he languished; and, languishing, died on the 25th day of the same month; the defendant cannot be convicted under this indictment.

4th. That the phrase laid in the indictment "*instantly did die,*" means that there was no perceptible or appreciable intervention of time, between the time the wound was inflicted and the death it caused—that death followed the stroke that produced it instantly—at the same instant—without the lapse of time.

5th. That if the deceased lived an hour, or about one hour, after he receiv-