Report of the trial of Leavitt Alley : indicted for the murder of Abijah Ellis, in the Supreme judicial court of Massachusetts / reported by Franklin Fiske Heard.

BOSTON HERALD.

SATURDAY MORNING, APRIL 1.

NOT DEAD YET!

What Dame Rumor Said this Morning of Leavitt Alley and His "Dying Confession"—What Alley Says about It.

A rumor which gained an extensive circulation this forenoon was, that Leavitt Alley, who was tried some time since for the murder of Abijah Ellis, was in a dying condition at his home, 28 Emerald street, and that in anticipation of "passing over the river," he had made a confession of the murder. The rumor in some of its details was quite descriptive as to how the butchery was accomplished, but upon investigation as to the source of the report nothing could be obtained by a HERALD reporter, who, after arduous labor, paid a visit to the residence of Mr. Alley. The family of Mr. Alley, a short time previous to the call, had been made acquainted with the report, and received the interviewer with the greatest affability and cordiality. Mr. Alley was found to be in about as good health as any man could enjoy, except that he was suffering with a slight cold. Upon being interrogated upon his supposed confession, he said he was not aware of having any to make; and so far as the murder charged to him was concerned, "he was as innocent of the crime as when he was born." He deeply deprecated the continual attempts of suspicious and unfeeling people to persecute him and his family by circulating reports against his character, and hoped yet to live long enough to see the public satisfied of their mistake in suspecting him of being a murderer. He appeared as cool and collected as when he stood his trial two years ago, and upon the suggestion of his wife, who was present during the conversation and quite agitated, he expressed the hope that when he should die that a HERALD reporter would be by his bedside, and give authentically to the world an answer as to whether or not he had a confession. He said he was about to take a walk in the afternoon, and expressed the supposition that the rumor above referred to grew out of the fact of his taking the precaution to cure his cold by staying at home for a few days; and also spoke of a desire to learn who the persons were that started the rumor, for whom, he intimated, he would make it warm. He thought it terrible that he was to be hounded as he has been, but did not care so much for himself as for his wife and six children, the latter who were now starting into the world for themselves, and who were suffering badly from the stigma placed upon him by the public, although twelve intelligent men had honorably acquitted him of the charge of murder. The interview closed by Mr. Alley reiterating his innocence of causing the death of Ellis.

REPORT

OF THE

TRIAL OF LEAVITT ALLEY,

INDICTED FOR THE MURDER OF

ABIJAH ELLIS,

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

REPORTED BY

FRANKLIN FISKE HEARD.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1875.

Cambridge:
Press of John Wilson and Son.

PREFACE.

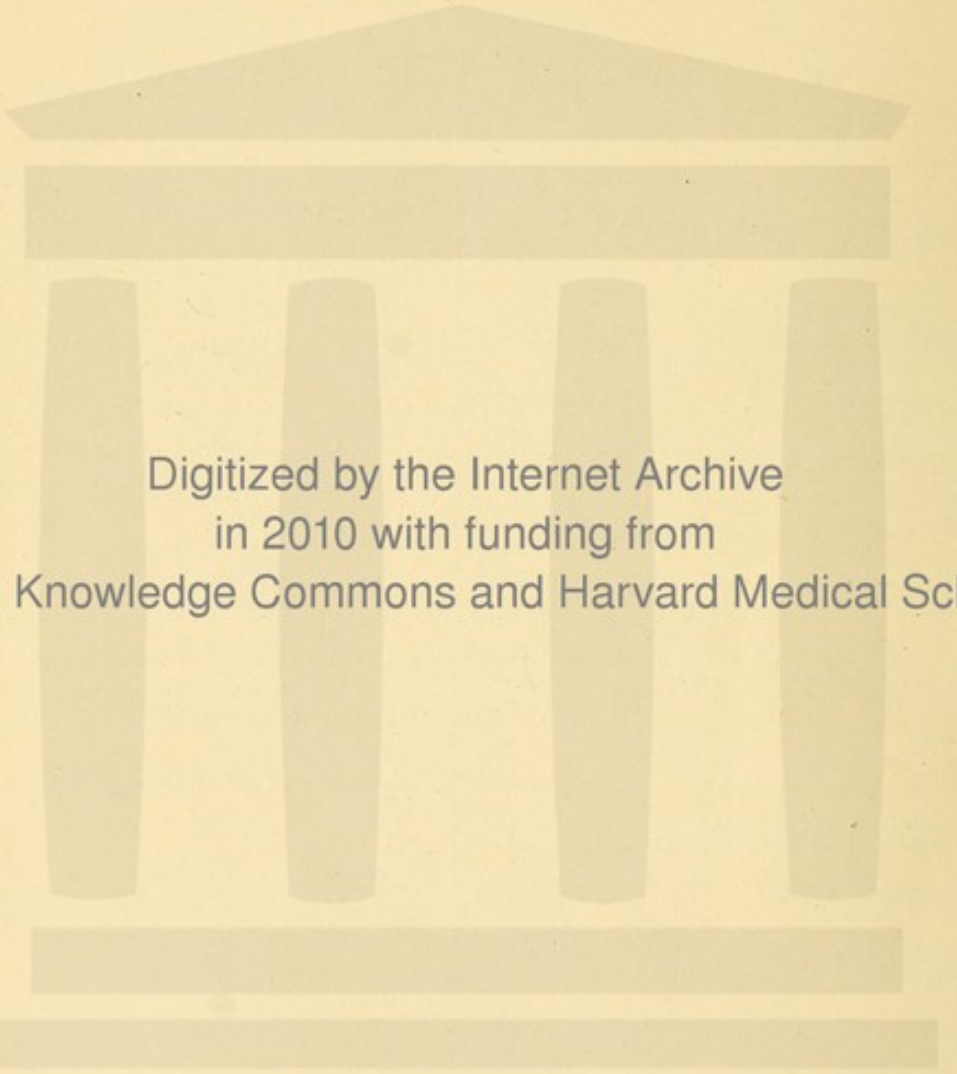
The argument of the Attorney General is printed precisely as it was published in the newspapers of the day.[1] Owing to pressing official engagements, he has not had an opportunity to revise it, and he is in no wise responsible for it in the form in which it appears in the following pages. It is but justice to him to say that, at the time of its delivery, it was regarded as a masterly effort, and one of the ablest ever made in behalf of the Government in a capital case in Massachusetts.

The Reporter has added in the Appendix notes on such points of law as were suggested by the text.

[1] This statement also applies to the opening of the case for the Government by the learned and efficient District Attorney, Mr. May.

Boston, April, 1875.

INDEX TO CASES CITED.



DAYS OF THE TRIAL.

TRIAL OF LEAVITT ALLEY

FOR THE

MURDER OF ABIJAH ELLIS,

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PRESENT:

Hon. JOHN WELLS,
Hon. MARCUS MORTON, } *Justices.*

Counsel for the Commonwealth.

Hon. CHARLES R. TRAIN, *Attorney-General.*
JOHN W. MAY, Esq., *District Attorney.*

Counsel for the Prisoner.

GUSTAVUS A. SOMERBY, Esq.
LEWIS S. DABNEY, Esq.

THE Grand Jury for the County of Suffolk returned into the Superior Court begun and holden at the City of Boston within and for the County of Suffolk for the Transaction of Criminal Business, on the first Monday of December, A.D. 1872, to wit, on the 9th day of December, the following indictment: —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, TO WIT: At the Superior Court, begun and holden at the City of Boston within and for the County of Suffolk for the Transaction of Criminal Business, on the first Monday of December, in the year of our Lord one thousand eight hundred and seventy-two:

The jurors for the Commonwealth of Massachusetts, on their oath present that Leavitt Alley, of Boston aforesaid,

on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, at Boston aforesaid, with force and arms, in and upon one Abijah Ellis, in the peace of the Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that he, the said Leavitt Alley, with a certain axe, him the said Abijah Ellis, in and upon the head of him the said Abijah Ellis, then and there feloniously, wilfully, and of his malice aforethought did strike and beat, giving unto him the said Abijah Ellis, then and there with the axe aforesaid, by the striking and beating aforesaid, in manner aforesaid, in and upon the head of him the said Abijah Ellis, divers mortal wounds and bruises, of which said mortal wounds and bruises the said Abijah Ellis then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said Leavitt Alley him the said Abijah Ellis, in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought did kill and murder; against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, on their oath aforesaid, do further present that the said Leavitt Alley, at Boston aforesaid, in the county aforesaid, on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, with force and arms in and upon the said Abijah Ellis, in the peace of the Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said Leavitt Alley then and there with a certain club him the said Abijah Ellis, in and upon the head of him the said Abijah Ellis, then and there feloniously, wilfully, and of his malice aforethought did strike and beat, giving unto him the said Abijah Ellis, then and there with the club aforesaid, by the striking and beating aforesaid, in manner aforesaid, in and upon the head of him the said Abijah Ellis, divers mortal wounds and bruises, of which said mortal wounds and bruises he the said Abijah Ellis then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said Leavitt Alley him the said Abijah Ellis, in manner and form aforesaid, then and there feloniously, wil-

fully, and of his malice aforethought did kill and murder; against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, on their oath aforesaid, do further present that the said Leavitt Alley, at Boston aforesaid, in the county aforesaid, on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, with force and arms in and upon the said Abijah Ellis, in the peace of the Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that he the said Leavitt Alley both his said Leavitt Alley's hands about the neck and throat of him the said Abijah Ellis then and there feloniously, wilfully, and of his malice aforethought did put, fix, and fasten; and that he the said Leavitt Alley, with both his hands so as aforesaid, put, fixed, and fastened about the neck and throat of him the said Abijah Ellis, him the said Abijah Ellis then and there feloniously, wilfully, and of his malice aforethought did choke and strangle; of which said choking and strangling the said Abijah Ellis then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said Leavitt Alley the said Abijah Ellis then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder; against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, on their oath aforesaid, do further present that the said Leavitt Alley, at Boston aforesaid, on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-two, in and upon the said Abijah Ellis, in the peace of the Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and him the said Abijah Ellis in some way and manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, wilfully, and of his malice aforethought deprive of life; so that he the said Abijah Ellis then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said Leavitt Alley him the said

Abijah Ellis, in the manner and by the means aforesaid, to the jurors unknown, then and there feloniously, wilfully, and of his malice aforethought did kill and murder; against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill. ARTEMUS R. HOLDEN,
Foreman of the Grand Jury.

HORACE R. CHENEY,
Assistant District Attorney.

This indictment was transmitted to the Supreme Judicial Court in the County of Suffolk, and filed in the clerk's office, on the thirteenth day of December, A.D. 1872.

On the eleventh day of January, A.D. 1873, the prisoner was arraigned before *Morton, J.*; and Gustavus A. Somerby and Lewis S. Dabney, Esquires, were assigned as counsel for the prisoner.

FIRST DAY. — *Monday, 3d February*, A.D. 1873.

Monday, the third day of February, A.D. 1873, was subsequently set down for the trial. On that day a jury was empanelled. Their names were, —

BENSON C. HAZELTON, *Foreman.*
SAMUEL ASHMAN.
HENRY EWALL, Junior.
WILLIAM B. FENNER.
FREDERICK FOLSOM.
JOHN H. HUMPHREY.
THOMAS KING.
BENJAMIN F. MAHAN.
GEORGE MORSE.
CHARLES F. MORGAN.
NATHANIEL M. NASON.
IRA A. NAY.

After the indictment had been read to the jury, the Attorney-General moved the court to order a view by the jury of

the stable situated on Hunneman Street, in Boston, where the alleged murder is said to have been committed. Mr. Somerby moved that a view should also be ordered of the dwelling-house of the prisoner, situated on Metropolitan Place.

Whether or not the view should be made before the case was opened to the jury by the prosecution was left for the decision of the Court. And it was decided that the view should be made before the opening of the case, and that the dwelling-house, stable, and stand of the prisoner should be viewed.

Mr. May, District Attorney, opened the case for the prosecution. Addressing the jury, he said: You have been selected and empanelled to discharge one of the most important duties that can fall to the lot of man. You are to speak in judgment, and upon your verdict depends the life of a fellow-being. I know, gentlemen, that every man of sensibility would be glad to escape such a responsibility. Speaking for myself, I should rejoice if another were occupying the seat which my official duty commands me to fill. Doubtless the learned gentlemen who appear for the prosecution, the honored members of this highest court of this Commonwealth, as well as you, would be glad, if possible, to escape such a duty. But the organization of society is such, sanctioned and approved by the experience of centuries, that it falls to us to discharge this duty, an unpleasant duty, but a duty; and the true test of a man's moral standard, the real test of his manhood, is the manner in which he performs, not a grateful and pleasant thing, because any man can perform that, but the manner in which he stands up and performs that duty which he would gladly have avoided, but which the organization of society throws upon him. Gentlemen, while you would gladly escape this duty, I beg you, as far as possible, to dismiss from your minds all consideration of whatever you may have heard for or against the unhappy man who stands charged. Whatever you may have heard with reference to the victim of this terrible tragedy, whatever feelings may be calculated in the least to swerve you from that steady and calm judgment, which now, if ever, you are called upon to exercise, both as regards the prisoner, who, if innocent, you are to acquit, and as regards this people in this

Commonwealth whose security is pressing upon you. If it were possible for you to throw aside your past life and to forget that you had any connections, any relations with the people of this great metropolis; if it were possible for you to have come here as from some foreign land, now for the first time to hear what every word of which would be new to you, — you would be in the best possible position to consider well and faithfully, and to decide aright. You are men like ourselves. It is no use for me to ask you to have no mercy, because you are human, but allow me to say to you that that sympathy is likely to cloud the judgment so far as it forms the atmosphere around the heart. It obstructs the clearness of the view, and I say again, that the more absolutely you can confine yourself to a true consideration of the facts which shall be presented to you, without any reference to the casual incidents, the more perfectly you will be able to perform your duties. This, gentlemen, in common language is called a prosecution. Speaking for myself, that is not the proper term. This is an investigation. The Commonwealth is as passionless as the mouldering remains of this unhappy victim of this tragedy. It has no revenges to gratify, it has no ambition to satiate, it has no desire whatever to accomplish, but that it may ascertain, in the interest as well of the prisoner at the bar, whose innocence it has as much interest to establish as you have, and in the interest of every innocent man, woman, and child living and breathing in the peace of this Commonwealth, who is guilty of the crime of which the prisoner is charged. There is no prosecution. If the prisoner at the bar is guilty, and is shown to you to be not guilty, no one in this whole Commonwealth is interested in having any different judgment, who is under the protection of the law as you are. With an entire absence of feeling, with no desire, — speaking for myself, and I know I can speak for my distinguished associates, — with no anxiety whatever, save that we shall be able to enable you, under the guidance and direction of the learned court, to determine who was the murderer. If we fail of our duty in presenting you that which will enable you to come to an intelligent determination upon this question, the responsibility is ours.

I shall not enter into any discussion of the law. If there is

any occasion for discussion, it will arise at a later stage in this trial. I wish merely to read to you and offer a word or two upon the statutes which define the penalty of the crime of which the prisoner stands charged. He then read the statutes relating to murder, and said: According to the view which the Commonwealth takes of this case, it is not important for me to enter into any discussion of the distinction of the degrees of murder; for whether it be murder with malice, or whether it be murder committed in an attempt to commit crime upon the person with imprisonment for life, or whether it be murder committed with extreme atrocity and cruelty, it seems to us that the circumstances are such that the case is within either or all.

I propose now to narrate to you, as well as I may, some of the facts which the Commonwealth expects to lay before you. He first detailed the facts touching the finding of the body of Mr. Ellis in Charles River, near the gas-works in Cambridge, on the 6th of November, and the mutilated condition of the remains. Of course there was great excitement, and everybody was anxious to ascertain who had committed this terrible deed. A thorough examination was made, but nothing was found at that time to furnish a clew, until in one of the barrels was discovered a piece of brown paper with the name of "P. Schouller, No. 1049 Washington Street." Naturally the clew tended toward Mr. Schouller, and investigation proved that Mr. Alley had been in the habit of removing shavings from Mr. Schouller's billiard manufactory to his stable on Hunneman Street. Following the clew to Mr. Alley's stable, it was found a dry manure heap had been recently disturbed. An examination of some boards behind the manure heap disclosed the fact that there were hundreds of spots of blood upon them, varying from little spots to those of much larger size. The government would show that these spots were blood as certain as science can demonstrate.

It would be shown that on the Monday night previous three barrels of shavings were taken from Mr. Schouller's to Alley's stable, and that in one of these barrels was found the lifeless head of Mr. Ellis. It would be shown that on Tuesday night one of these barrels was emptied by Mr. Alley and locked up

by him. Mr. Alley took the key home in his pocket, and as near as can be ascertained, even by the prisoner's own statement, he arrived at his stable a few minutes before five o'clock the next morning, and found every thing in its usual condition. At quarter past six o'clock Mr. Alley was called upon by a man who wanted him to do a job. Soon after, Mr. Alley's son and a Mr. Tibbetts, employed by Mr. Alley, arrived at the stable; about twenty minutes before seven an express wagon large enough to contain four barrels was hitched to an old black horse always driven by Mr. Alley, and he started for Washington Street; as he was about starting, the man who had engaged him to do a job at eleven o'clock jumped upon the wagon and turned up one of the barrels which was then lying on the bilge. Mr. Alley said to him: "If you want to ride with me, come forward." The man started to do so, but just then the horse started, and in the effort to save himself the man caught hold of another barrel, and on lifting it found that there was something in it. Mr. Alley then drove to his house on Metropolitan Place, and next to his stand near Risteen's stable, where he left two empty barrels. At half-past seven o'clock, a party driving along the Mill-dam met, about two hundred feet from the sluiceway, an express wagon with an old black horse so grievously afflicted with the horse disease as to attract attention. The driver of the wagon he did not notice particularly, but the view he had of him in no wise differs from the description of the prisoner. In the wagon the party noticed two barrels lying side by side, covered up with a piece of green carpet. Subsequently this man, at the stable of Alley, overhauled a lot of bagging and other materials, and identified the piece of green carpet which he had seen covering the barrels in Alley's wagon. On the day the man met Alley on the Mill-dam, he was proceeding in the direction of Parker Street, and when about to turn up that street, he looked around and saw Alley with an empty team going in the direction of Boston. The barrels were nowhere to be seen, and the government would claim that the barrels were thrown into the sluiceway by Leavitt Alley, and that they afterward floated up to Cambridge, where they were found.

As to the mode and manner in which Abijah Ellis came to

his death there was no absolute certainty, but that it was by violence there could be no doubt. Mr. Ellis lodged at No. 151 East Dover Street. The last time he was seen or heard was about five o'clock on Tuesday morning (election day). About twelve o'clock he was known to have inquired for Mr. Alley, and the jury would be satisfied that Mr. Alley had agreed to meet Mr. Ellis at two o'clock and to pay him some money. Mr. Ellis took his meals at No. 3 Smith Avenue, near Hammond Park. He was last seen alive about seven o'clock that evening, when he left that place. Mr. Alley left his house at about the same hour, and his course would naturally be the same as Mr. Ellis's, who was returning to his lodgings. How they met and what transpired was known only to Abijah Ellis and to God. Within two hours after Mr. Ellis took his supper he was dead, and in all human probability his corpse was hacked to pieces and placed in the barrels where they were found. According to Mr. Alley's statement, he locked his stable about seven o'clock that night, and unlocked it about five o'clock the next morning. The government would show the jury that on the night of election, between seven and nine o'clock, an altercation took place in that stable, and that sounds of a human voice were heard, and a noise as if barrels were being rolled. The next morning it would appear that Alley's son said to him: "Father, how came that blood on your shirt-bosom?" He replied, "It came from the nostrils of a horse." Upon an examination of his clothing shortly after by the chief of police there was no blood upon the shirt, and Alley denied having changed it. From medical testimony we intend to show that the man was killed, in all human probability, by blows from an axe, and by blows struck from behind. On his head are four distinct blows, either of which would have hurried a man into eternity. When Mr. Alley was asked if he hadn't bought an axe recently, he said he had not, but we shall prove to you that on the 31st day of October, in the forenoon of that day, he did purchase and pay for a new and a peculiar axe, and the axe was seen in Alley's stable but a day or two before the murder occurred.

We shall prove to you, gentlemen, that if Mr. Alley was not at the sluiceway on the morning of Wednesday, you will find

the most remarkable of coincidences: that a gentleman like him was there; and when you add that fact that the horse which he drove was the old black horse that Alley usually drove, it becomes stronger; when you add that this old black horse was grievously sick with the horse distemper, as was Alley's at the time; and when you add that there is no difference between the wagon, his wagon, and the wagon in which the man was seen, it grows stronger and stronger; and when we find that there were two barrels in that wagon, one larger than the other, and covered with a cloth identified as Alley's; and when you add the fact that these two barrels were thrown from that wagon in question into the sluiceway and the wagon returned empty, — I apprehend that you have a combination of circumstances which will bring you to the irresistible conclusion that he and no other was the man. In closing, he again urged the jury to give a candid and dispassionate attention to the facts that would be presented.

Having concluded his opening, and requested that the witnesses for the defence be excluded till after they had testified, he proceeded to a direct examination of the witnesses for the prosecution.

Stephen McFaden *was first called, and sworn.* Reside in Cambridge, and am employed at the gas-works, where I have worked for twelve years; was there on the sixth of November; remember seeing a barrel floating up the river; went out after it, and, approaching, saw a human hand stretching out of it; towed it to the shore, and, calling assistance, landed it; it was about three o'clock when I first saw the barrel; when I got ashore, called the police-officers, and put it in their charge; took out no part of the contents till the officers arrived; one of them tipped the barrel up a little, enough to see what it contained, and then it was covered with grass.

Cross-examined. Can tell the barrel by the broken stave and nails, but in no other way; don't know who took the things out; saw a pencil, some nails, and a watch, but don't know as they were taken out of the barrel.

William Goldspring *was next called, and sworn.* Am em-

ployed at the Cambridge gas-works; about quarter before four o'clock on the afternoon in question my boss sent me after a barrel that was floating down the stream, which I did; didn't see the contents of the other barrel; brought in the barrel and shoved it ashore, and two other men took possession of it. He then identified the smaller barrel as the one which he secured.

Cross-examined. I put the barrel ashore; know it was a new barrel, and that is the only way I identify it.

JOHN S. MILLIKEN *sworn.* Am a police-officer in Cambridge; about half-past four on the day after election, McFaden called Officer Child and me; went with him, and coming to the barrel tipped it up so that we could see what was in it; left Officer Child in charge and went on to my beat; didn't see but one barrel.

MOSES M. CHILD *sworn.* Am a police-officer in Cambridge; on the sixth day of November was called to the gas-works about half-past three; found the barrel on shore, and tipped it up so far that I could see the contents, which I deemed required the attendance of a coroner, and one was summoned; the contents had not been disturbed; no examination was made till after the coroner arrived; was by it all the time, and nothing was taken away; Coroner Wellington arrived about five o'clock; was present when the second barrel was brought ashore; one was a flour and the other a packing barrel; don't know that I could identify the barrels; they are certainly similar; helped lift the second barrel ashore; did not open it, and nothing was taken from it till after the coroner arrived.

Cross-examined. Was five or six rods from the first barrel when it was taken from the water; the contents were not disturbed except by me.

WILLIAM HAZLITT *sworn.* Worked at the gas-works when the barrels containing the remains were brought ashore; assisted McFaden in landing one; put it upon the bank and covered it with surf grass; nothing of any kind was taken away before the police-officers arrived.

Cross-examined. I identify the barrels by the broken staves and nails.

PETER SCHOULLER *sworn.* Do business at 1049 Washington Street, and make billiard and bagatelle tables; receive goods from New York wrapped in paper similar to this [speak-

ing of the paper found among the shavings in one of the barrels], and oftentimes throw the paper down among the shavings; Alley has taken them away since March last; no one else has had more than a small basketful; Alley took away three barrelfuls the day before election; I know it was Monday, because I always swept them up Saturday; I don't know as I could identify the barrels; I only know that one is larger than the other; saw Alley the day after election, about eight or nine o'clock in the morning; he came upstairs where I was; saw him nowhere else; saw one of those barrels at my place about six o'clock on Monday evening; Alley took it away; the shavings [examining those in the barrel] are like mine.

Cross-examined. I don't know any thing more about the large barrel than I did at Cambridge; cannot swear that it was ever in my shop; couldn't swear that the paper was ever in my shop; children used to take away shavings; about a month before Alley took a load out upon the dump; saw two barrels at Cambridge, one large and one small one; said then that the one was not so large as the one I saw in my shop, and a little blacker; when I was at Cambridge I was shown some shavings and a piece of moulding; said I hadn't used any such moulding for more than a year; say the same now; they showed me a piece of wood that I am sure was never shovelled up with my shavings; when anybody came after shavings would let them take any barrel that happened to be there; they might have taken one of Alley's barrels.

Redirect examination. Alley took more shavings than Mr. Kimball; have mouldings similar to the piece found in my shop, but haven't used any for a year.

Mishelle Schouller *sworn.* Am son of the last witness, and am in business with my father, 1049 Washington Street, and build billiard and bagatelle tables; use pine, chestnut, and walnut in our work; our shavings since March have been mostly taken away by Alley for horse-bedding, as I understood; the day before election a colored man carried away two barrels for Mr. Kimball; he had not taken away any before that I know of; last saw Alley in my shop on the Thursday after the election; saw him on Wednesday about eight o'clock in the morning; gave him directions to go down town to get some

tools for one of the workmen; saw him again at noon time when he came back with the tools; am not acquainted with Mr. Ellis; we use mouldings like these [examining those found in the barrel]; couldn't say the shavings were ours; [examining the paper] have received parcels in paper like this; pay cash on delivery; the last time was October 18, and I paid $31, C. O. D., as marked on this paper; August 30 I paid on another parcel the same amount.

Cross-examined. Our shavings are similar to those produced in any billiard-table manufactory; Alley usually took them away; used to pay him for dumping them; saw the shavings in Cambridge, and said that a piece of billiard-pocket found in them could not have come from my shop recently.

SECOND DAY. — *Tuesday, 4th February.*

JOHN TIBBETTS was the first witness called. I came from Springfield, N. H., and knew Alley before coming to Boston; since last August I have lived with Alley and drove team for him; Alley had four horses, one black one and three red ones; on the 5th of November the horses were troubled with the horse disease; on entering the stable on the left is a place for grain and three stalls [the witness was then shown a plan of the stable and described the stalls]; didn't remember of seeing either of the barrels in the court-room, although he might have done so; on Tuesday, November 5th, went to Mr. Schouller's and got three barrels of shavings; one of these was a large barrel and the other two were flour barrels; took the barrels, put them in the wagon, and carried them to Alley's stables; they were filled with shavings; the large barrel Alley and I emptied into the stall where he kept his horse and into the stall where I kept mine; the smaller one we emptied under the other horse; I then fed the horses and did a little work about the stable, and then we all, Alley, his son, and I, went up to the house; don't remember who locked up the stable; there was an old express wagon very much dilapidated, painted dark

red, then there was the wagon that I drove, a large red one, with Oliver Briggs's name on it, then there was another large red wagon that Alley drove, having Mr. Schouller's name on it, and there was also one small one; besides these there was a carryall belonging to Mr. Kelley; all were there when I left; went into the house then, and after eating supper and talking a little while, I went up to bed; think Alley did go out that evening, for his son told him that he had left a stove down at the stand, which Alley said he would go down and get; he left the house a little before eight, I should think; in the morning I went to the stable about six o'clock, and found Alley and a gentleman named Mr. Baker; Alley was leading out his black horse, which was not in a very bad condition, not very poor and not as fat as might be; Curtis Alley was with me; Alley usually goes down first, and feeds the horses; all the wagons were there, and in Alley's were two barrels lying lengthwise of the wagon and covered with an old horse-blanket, I think; couldn't tell whether they were alike or not; don't know what time Alley left, for I was not there; took a horse to the blacksmith's shop, and when I returned there was no one there, so I harnessed up my horse and drove to the stand; I found Austin there, but Alley was not present; then drove to Mr. Leach's coal wharf and afterwards got a load of wood; did not go near the stand again during the morning; there was a heap of manure about two feet high in the stable; noticed nothing particular on the boards back of the manure till the Saturday morning after the murder, when I examined them with a detective; saw blood on them; Wednesday morning, as Alley was leading out his horse, Austin asked him how the blood came to be on his shirt; that caused me to look up, and saw that his shirt-bosom was covered with blood; in answer to his son's question Alley said it was from one of the horses; didn't notice blood on any of the horses; on Thursday evening the subject of finding the body in Charles River and the murder came up, as we were sitting in Alley's house; he said, I believe, that we had better make a memoranda of what we had done and where we were on Wednesday, for they had found shavings and manure in the barrels, a piece of billiard pocket, and a paper

marked "Peter Schouller," and it might go hard with us; the blanket here is the one which covered the barrels as they were in Alley's wagon; on Wednesday morning I didn't notice the condition of the heap; I have worked for Alley since August last; the Saturday before the election Austin asked Alley if he could pay me some money; he replied that he could not, for he had that day paid $50 on his house; the memoranda which I made I gave to the chief of police; Alley had an axe in the stable, which I saw there a few days before the election; it was a light, new axe, and painted red, I should say; haven't seen it since that day, when we used it in mending the harness; on the Friday after the election I looked for it [an axe that was here presented him he thought he had never seen]; on Thursday it rained, and none of the teams went out in the morning; have seen Mr. Ellis and Alley together several times; don't know that they had any business with each other except a matter of house rent; Mr. Ellis was never at the stable or at the house that I know of; he has been at the stand a number of times; didn't notice whether the barrels in Alley's wagon on Wednesday were headed up; didn't see Alley again till evening; never to my knowledge did I see any other new axe, but have seen an old one, which Alley said some one had stolen.

Cross-examined. I left the stable on Tuesday evening about seven o'clock; the youngest daughter, Anna, used to keep an account of our work; Tuesday evening I don't recollect that we gave in our work; went from the house to the stable on Wednesday morning; the two places are about seven minutes' walk apart; when I got there I cleaned my horse and help run out the wagons, and then led the lame horse to the blacksmith shop, which is about half a mile from the stable; when I got back there was no one there; soon went to the stand; couldn't swear as to the time when I got to the stand; Alley, Curtis, and I all had keys to the stable; Mr. Kelley used to have a key, and don't know that it was given up.

Redirect examination. Heard nothing said in Alley's hearing about fixing the time of his being in the house on Tuesday.

Ellen Kelley *sworn.* Reside at No. 6 Spring Court; my house is about thirty feet from Alley's stable; on election

night I went through the alley-way at the back of the stable on my way to Bartlett's bakery; it was about seven o'clock; heard voices in the stable, but nothing that I could distinguish; when I came back I heard some one say, "God d—n you;" there was a light in the stable till ten o'clock; about eight o'clock I went after a pail of water; heard voices in the stable, and heard a noise as if some one was rolling barrels.

Cross-examined. This was the election day; don't know what they were voting for, because women don't trouble themselves about such things; heard this noise of rolling barrels, but didn't take much notice of it; on Friday night a man — I don't know who he was, only know he was eating peanuts — came to the door and asked me questions about the barn; he soon returned with an officer; and then another man came, and I told them all that I have said to you; the officer told me to say nothing about it to any one; never told anybody that I heard no noise in the stable.

W. W. Wellington *sworn.* Am a physician in Cambridge, a coroner, and held an inquest on the remains of Mr. Ellis; on Thursday, November 7th, the jury was summoned, and held subsequent meetings on the 8th, 9th, 10th, 11th, and 19th; first saw the barrels on the afternoon of the 6th, and found the trunk of a human body; didn't see the smaller barrel at first, but it was afterwards brought into the shed; took the contents of the pockets into my own possession, and the other articles were left in the custody of the officers; found a bunch of keys, some coppers, and a piece of scrip, I believe; the clothing upon the remains consisted of a dark suit; this hat resembles the hat we found in the barrel; the pantaloons we cut corresponding to the limbs of the man; this clothing has a general appearance to that taken from the body; the clothing was left in the hands of the police, and came to the inquest from them; Mr. Child, a police-officer, had them in charge when I was called, and I think I left them in his charge when I went away; the barrels, shavings, papers, and pieces of boards were afterwards given to the Boston police-officers; the clothing, taken off under my direction, was left with Mr. Child.

Cross-examined. Did not find the watch myself, but a man

brought it to me, saying he had found it where the body had been lying; the watch had stopped at eleven o'clock; when I was called there were a hundred persons, I should judge, gathered about the remains; the trunk was lying upon the ground; never knew Mr. Ellis, and never saw him that I am aware of; gave the watch to Mr. J. Q. A. Brackett, the executor.

WILLIAM S. JACKSON *sworn*. Am a surveyor in the employ of the city; prepared this plan of Hunneman and adjacent streets; also this plan of Alley's stable.

FRANKLIN A. RAMSELL *sworn*. Reside at Park Street, Highlands, and drive a team for myself; on election day I got up about six o'clock, and after feeding my horse and getting my breakfast started for Boston, going over the Mill-dam road; started at eight o'clock; when I got across the Mill-dam road and had passed the sluice-way, I met a wagon containing two barrels; as I turned into Parker Street the same team passed me again, but without the barrels; and when I looked back I could not see them on the road; didn't notice the wagon particularly, but my attention was directed to the appearance of the horse, that he was very sick with the prevailing distemper; couldn't swear to the man; the barrels were lying upon the bilge, mostly covered with an old carpet; one of the barrels was new and the other old; didn't notice the size; was called to the stable of Alley and saw a carpet very much resembling the carpet that I saw on the barrels; I selected it from a number of pieces, distinguishing it by its colors, which were black and green; an officer was present when I found it; it was on Saturday forenoon about ten o'clock; saw a wagon and a horse at the stable, but could not say that I had ever seen them before; the horse was poor, black, and very sick with the horse disease, and resembled the one I met on the Mill-dam; when speaking before the coroner's jury at Cambridge, I stated that the large barrel was not fully covered, I meant the old barrel; the new one was so nearly covered that I could see nothing but the head. [*The District Attorney* — "When you were in my office, did you not say that the bell you heard was the Brookline bell?" *Witness* — "I said that I supposed it was the Brookline bell."] I have been in Alley's stable twice; when I took up the cloth I said I thought it was the same that covered

the barrel; when I met the wagon I was about 200 feet this side of the sluice-way, and about 1000 feet to Parker Street, and I turned into that street just as the wagon I had met passed me again; I was walking my horse.

Cross-examined. It is about a mile and a quarter from my house to the point where I met the team; my horse walked almost all the way; the water runs out of the sluice after it has turned on the flats.

W. S. Richards *sworn.* Live at the Highlands in Newton; am acquainted with Alley; saw him on Charles Street, between Beacon and Boylston Streets, on the morning after the election, some time after seven o'clock; he was driving a dark bay horse, I thought; he was not going very fast; I was walking to my stable in Ashburton Place; didn't see him again that week to my knowledge; don't recollect what I did on that day; saw Mr. Baxter on Bedford Street, and went to the market with him; think I didn't go to the market with him again that week; on the morning of election day, between seven and eight o'clock, I was between Chandler Street and Bedford Street; one of my horses was sick, and I didn't use him on Monday and Tuesday, but on Wednesday I drove him from the stable down to Bedford Street.

Captain Charles W. Baxter *sworn.* Have resided in Boston for the last twenty years; am acquainted with Mr. Richards; saw him several times on election day, and on the next day I met him about ten o'clock; he took me in his carriage, and we rode to several places down town; didn't ride with him on any other day of that week.

Cross-examined. Have ridden with Mr. Richards a number of times before.

John W. Perry *sworn.* Am a police-officer in Boston; on the Saturday after the election I found some black walnut and white wood shavings on the Mill-dam bridge; noticed that the railing was marked as though something heavy had been slipped over; the marks were about three feet apart; on Wednesday, about half-past two o'clock, my attention was called to two barrels floating up the stream; the tide was coming in and the wind was blowing pretty strong from the south-east; they were about fifty rods from the bridge.

Cross-examined. Can swear that the shavings produced here are the same that I picked up; the wind had blown them under the projecting end of a board; the barrels were above the sluice-way; first told of having seen them on Wednesday evening; spoke of it to the officers of the Third Station; it must be nearly a mile from the bridge to the gas-works; may be more or less; am not sure.

ALBERT M. GARDNER *sworn.* Am a dealer in hardware on Washington Street; am acquainted with Alley; he came into my shop and purchased an axe; it happened to be the last one of the kind I had, and there was a little defect in it; that was on the evening of October first; when he came in he said that some one had stolen his old axe; the axe in court is not the one I sold Alley [witness here read the entry of the sale as made on the books]; this entry was made at the time of the sale.

BARNEY MCDONALD *sworn.* Live in Brookline; ring the town bell in the Unitarian church; have rung it since April last; rang it on the 6th of November last at seven o'clock; always ring it at that hour the year round; no other bells in the town are rung in the morning, except on special occasions, it may be.

THOMAS S. PETTINGALL *sworn.* Ring the bell on the Baptist church in Brookline; it is not rung regularly in the morning; hasn't been rung on any morning except on Sundays since last July.

JOHN SARGENT *sworn.* Am police-officer in Brookline; the Unitarian church bell is rung in the morning; no other bell is rung at that time.

JOHN BLAISDELL *sworn.* Am sexton of the Sears Church in Longwood; there is no morning bell rung in Longwood.

EDWIN R. CATE *sworn.* Am sexton of the Lawrence Church in Longwood; there is no morning bell rung in Longwood.

W. W. PHELPS *sworn.* Am sexton of the St. Paul's Church; my bell was not rung any morning in November, except on Sunday.

JAMES M. BAKER *sworn.* Reside near Northampton Street, Boston; am acquainted with Alley; was at Alley's house

about six o'clock on the morning of the sixth of November; from his house I went to the stable, getting there ten or fifteen minutes afterwards; found Alley there cleaning his horse; told him a man wanted his furniture moved; Alley's son and teamster were there; Alley harnessed his horse and attached him to the furniture wagon; there were four barrels in it, and there might have been some old carpeting in it; as Alley was driving out of the yard I got on behind; the barrels were lying upon the bilge; placed one upon the head and sat upon it, and the horse starting suddenly I took hold of the chime of one of the forward barrels to save myself; couldn't say that there was any thing in it; it was, perhaps, a little heavy; didn't notice any thing peculiar in their appearance; Alley told me to come forward, and, I believe, said there was nothing the matter with the barrels; we then rode out Washington Street and met a man, Daniel Mahan, to whom Alley paid fifty dollars; don't know whether it was all the money he had or not; I then went to my house, getting home at a quarter before seven; Alley was driving a dark-colored horse.

Cross-examined. When I went to my house I left Alley with Mr. Mahan and another man; Alley and I had a drink before we met Mahan.

Milton A. Chandler *sworn.* Am partner of Mr. Gardner, hardware dealer; remember that on the 31st of October Alley purchased an axe at my store.

Mary E. Tuck *sworn.* Have known Abijah Ellis for about nine years; he has boarded near Harrison Avenue, on Dover Street; he has got his meals at my house, No. 6 Smith Avenue; saw him last at my house between seven and eight on the evening of the fifth of November; he ate bread and milk for supper, as he usually did; it is only a short distance from my house to Hammond Park; Mr. Ellis had considerable money with him on election day, for his pocket-book was very full; saw the money sticking out of the ends of it; his tenants used to pay me sometimes, when, calling often at the house, they found that Mr. Ellis was out; he had two houses on Dover Street, three in South Boston, and two in Metropolitan Place; knew that he received $250 a month; first missed Mr. Ellis

on Wednesday forenoon, and sent a boy to inquire after him; saw his remains at the undertaker's; they were Abijah Ellis's; saw them on the Sunday night before they were carried to his friends; he was fifty-five years old; he collected rents on Saturday night or on Monday morning, except from his monthly tenants.

Cross-examined. He began to take his meals with me about three months before the election; have seen money paid to him in his Dover Street house by Mrs. Davidson, a South Boston tenant; have seen her pay him at several times, the last time about three years ago; haven't seen any money paid to him for nearly three years; never saw Alley pay him any thing; gave Mr. Ellis a two-dollar bill on Tuesday, and saw his pocket-book full of money.

Marion L. Westcott *sworn.* On the fifth of November I was living at No. 6 Smith Avenue, in the same house with Miss Tuck; am a tenant of Mr. Ellis; think Mr. Ellis carried a great deal of money; have seen him with $300.

Cross-examined. Mr. Ellis told me he had $300; don't know except from what he told me; have seen him have money, but never counted it or saw it counted.

Joseph Blanchard *sworn.* Reside at Sherburne; was acquainted with Mr. Ellis, and saw him on election day at a house 819 Washington Street about eleven o'clock; he had a large roll of bills, so large as to fill up his hand; am of no relation to either of the parties in this case.

Horace R. Quigley *sworn.* Reside at 44 Windsor Street; was well acquainted with Mr. Ellis; he used to carry his money in a pocket-book; about three weeks before his disappearance saw him count $100 which he took from this pocket-book.

Daniel Mahan *sworn.* Reside in Roxbury; am acquainted with Alley; met him on the morning after election day at the corner of Washington and Hunneman Streets; he paid me $50, two twenties and one ten; it was a note I had against him for a horse; another note was to be due in a few days, and he said he would pay me on Saturday.

Cross-examined. The money was paid on the sidewalk, and afterwards Alley went down Washington Street.

JOHN F. KELLEY *sworn.* Kept a carriage at Alley's stable, and had a key to the building.

GEORGE A. DURHAM *sworn.* Live in Chelsea, and am clerk in a store on Northampton Street; on the morning of November 6 I saw an entry upon the books in favor of Mr. Ellis; it was shortly after eight o'clock.

HERBEL S. WILTON *sworn.* Am in the employ of the last witness; am acquainted with Alley, and on November 6 I received $50 from him; it was about eight o'clock; the money was on a note that was not due for some time; the face of the note was for some $200.

Cross-examined. Alley had paid some on the note before; he paid $50 on the 4th of October.

JOHN R. MASON *sworn.* Am employed in the office of Morse, Stone, & Greenough; Alley paid me $51 on account of Clark & Leatherbee. [The witness here identified the prisoner as the man who paid the money.]

Cross-examined. Alley told me on the 15th of October that he would pay me some money on the 5th of November; think when he paid me he took $50 in a roll from his pants' pocket, and the other dollar from his pocket-book.

GEORGE R. MCINTOSH *sworn.* Saw Alley on the morning of the 6th, about half-past six; he paid Mr. Mahan $50.

Cross-examined. Mr. Mahan, Alley, the man that invented the horse-car punch, and I, went into a saloon after Alley had paid the money; remained there about a quarter of an hour, I should think; Alley was driving a black horse attached to an express wagon.

EMORY N. JONES *sworn.* Known Ellis for several years; saw him last alive about eight days previous to his death; know that he has been in the habit of carrying money; have done work for him, for which he has paid me; paid me in money taken from a book resembling a diary, and which he carried in his vest pocket; he always had more or less money in his possession; was never paid by check, and don't know that he had a bank account.

Cross-examined. Six or eight days before his death, he paid me a small sum of money; he hadn't paid me for eight or ten months before that time; have often thought of the fact that he carried a great deal of money.

SAMUEL J. ROSS *sworn.* Am a member of the bar; have had business with Mr. Ellis and Alley; know Mr. Ellis had considerable property, but don't know how much; the day before the election I saw him count $500, and he had more than that; he was about purchasing a house, and was to pay $1000 down upon it. [*The District Attorney* here read a document containing the agreement between Alley and Mr. Ellis in relation to the house occupied by Alley. Alley was to pay $50 a month for one year, then $400 afterwards, the property to be deeded in consideration of a mortgage of $3000.]

Cross-examined. Didn't count the $500, but saw Mr. Ellis; he told me it was that amount; he had more money with him carried rolled up in another pocket; Alley had no money on Tuesday.

Mr. DURHAM *recalled.* We had a note from Alley that came due about election day; saw him on the morning of Tuesday the 5th, and asked him if he was going to pay the note; he said he could not, for he had no money.

JOHN M. DIXON *sworn.* Saw Mr. Ellis and another man together on November fifth, between the hours of nine and ten, talking; both seemed excited, and as I left, the man with Mr. Ellis said, "God damn you."

Cross-examined. Didn't tell Mr. Dabney, one of the counsel for defence, when he called upon me that Alley was not the man I saw with Mr. Ellis; can't swear that he was taller or shorter, whether his coat was buttoned up or not, whether he had on dark or light clothes, whether he had on a Panama hat or a beaver, or no hat at all; can't swear that the prisoner is the man I saw.

THIRD DAY. — *Wednesday, 5th February.*

WARREN GOWING *sworn.* Mr. Abijah Ellis was his uncle [a photograph of the deceased was shown witness and identified]; witness knew that Mr. Ellis was in the habit of carrying large sums of money in a calfskin wallet on the inside of his vest; never knew Mr. Ellis to keep a bank account.

Cross-examined. Last saw Mr. Ellis on the 23d or 24th of October, when he came to my place; never had any business transactions with Mr. Ellis.

GEORGE B. QUIGLEY. Reside at No. 34 Windsor Street; knew Abijah Ellis, and identified his remains at Cambridge; Mr. Ellis, after collecting his rents, used to come to my office and straighten out his bills; the last time Ellis was in my office he had between $200 and $300; this was about ten days before the death of Ellis.

Cross-examined. The last time I saw Mr. Ellis have money with him was some eight or ten days before the tragedy.

Captain EDWARD H. SAVAGE *sworn.* Am Chief of Police in Boston; it became my duty to investigate the murder of Mr. Ellis; the matter of the death of Mr. Ellis first came to my knowledge on Thursday morning, November 7; it was a rainy day; that night officers Skelton, Dearborn, myself, and Alley went to the stable; between twelve and one o'clock that night, in company with officers Skelton and Dearborn, went to Alley's house, and witness had a conversation with Alley. Told Alley we had come to see if he could give us any information about the death of a man found in Cambridge. Alley said, "Yes, he had heard of it." I told Alley that I understood that he (Alley) had been in the habit of carrying shavings from Mr. Schouller's. Alley said he had been in the habit of getting shavings from Mr. Schouller's, and taking them to his stable and using them for bedding. Alley thought the last time he got shavings was on Monday or Tuesday previous, and said he carried the barrels back. I asked who had keys to the stable. Alley replied that he, his son, and teamster had keys. Asked him if he knew of any teams being taken out. Alley said no; but that morning he found his stable open and one of his horses loose. He was sure this was on Thursday morning, though asked by me if it was not on Wednesday. Witness was quite sure that Alley said the horse was loose and out of the stable.

Asked Alley what time he put up his team on Tuesday night. He said at the usual time, and that he locked the stable himself. Asked him to give recollections of what transpired on Tuesday night. Alley said he went home from his stable to his

house, and took supper with his family, which included his son and teamster; at supper his son said a stove had been left out at the stand, and ought to be looked after, as it was going to rain; Alley said he was going to look after it, and left his house about half-past seven o'clock to do so; he went down and took care of the stove, and then went back to the house. Asked him what time he got back to his house. Alley replied about nine o'clock. Asked him how he fixed the time. Alley said that when he got back to the house, some one of the family said it was five minutes of nine. Asked him if he spoke to any one going or coming. Alley said he didn't think he did. Asked him what transpired at night. Alley said his wife was taken sick in the night, and he was called up twice, the last time at four o'clock; at five o'clock he went down to the stable; after awhile his teamsters came, and he (Alley) harnessed up his team, and went to the house and had his breakfast; then he went to his stand, and took a package to Court Square; said he went through Washington, Castle, Harrison Avenue, Chauncy, and Devonshire Streets, to Court Square; afterwards said he didn't go to Court Square, but went to Haymarket Square; from here he went to Mr. Morse's office, and paid some money; after doing his business, he went back the same route he came. I asked him if he had ever had any trouble with his stable before. Alley said he had; that he had lost some grain and other things, besides an axe, which had been missing some time. Asked him if he had an axe. Alley said no. Asked him what kind of an axe he had lost. Alley replied that it was an old one. It might have been one o'clock in the morning when I and officers Dearborn and Skelton went with Alley to the stable. Alley said he hadn't got any lantern, but had some candles there, and lighted some after we arrived. Made no discovery at the stable, as our light was very poor. Found one or two old barrels, four horses, a lot of manure, and shavings. On the left side of the stable was a little parting, where Alley kept his grain. Beyond that was three horses, and beyond them, still further on the left, was a pile of manure some two or three feet high, and six or eight feet through. Some of the manure was strewn about the floor. Nothing peculiar was

discovered that night, and, after making what examination they could, the Chief and officers left the stable. Alley unlocked the stable when we went, and locked it when we left.

At the Chief's request, Alley said he would come down to the Chief's office in the morning. The Chief directed the lieutenant in charge of Station Five to place an officer at Alley's stable and at his house, which was done. Officers Skelton and Dearborn were with the Chief at Alley's house and stable, but one of them went for a light. There was a padlock on the stable. On Friday morning Alley came to the Chief's office, as he agreed, reaching there at nine o'clock. After being there a time, Alley went away with officer Skelton, and returned an hour or two later. Immediately after he returned the Chief asked him if he had been out to Cambridge. Alley said he had, and that he saw the body of Mr. Ellis and the barrels. Alley said he had had the larger barrel in his stable, but was not positive about the other. Alley remained at the Chief's office until half-past four in the afternoon, and in the mean time the officers were engaged in investigating the case.

While at the City Hall, the Chief, in the presence of officers Skelton, Dearborn, and possibly officers Ham and Wood, had a conversation with Alley, in which he repeated substantially the same story as narrated above. In response to an inquiry by the Chief, what made Alley so long in going from his house to his stand, the latter replied that he walked slow because he was lame. Alley said that the last time he saw Ellis was on Saturday before election, and made some small payments on account of his house; that he then agreed to meet Ellis on Tuesday (election day), and pay him some money, but that he didn't see him on that day. On a second conversation about the barrels, Alley said he took back four barrels on Wednesday morning, two of which were left in the alleyway near his stand. Alley said he was at work as usual that day. About half-past four o'clock, Friday, Alley started to Station Five, in company with an officer. The Chief next saw him at Station Five the same day, but had no particular conversation, until just before he was locked up. Just before this occurred, the Chief told Alley that the circumstances were such that he would have to be locked up.

On searching Alley, he was found to have on two shirts. On the sleeve of the undershirt the Chief thought he discovered blood, and in Alley's drawers were distinct marks of blood; the drawers and undershirt were given to Captain Small; the outside shirt was examined with sufficient care to ascertain that there was no blood upon it; it was a cotton shirt, and was but little soiled; the remainder of the clothing was examined, but there were no further indications of blood. The Chief then ordered Captain Small to lock Alley in a cell alone, and place a man at his door, which was done. Mr. Savage saw Alley again the next morning about eight o'clock, and asked him about a hatchet it had been said he borrowed of a man named Peter. Alley said he had not borrowed such a hatchet. The Chief said, "Mr. Alley, that hatchet may be in your house; will you go with us, and make a search?" Alley said he would; and, after arriving at his house, the back-yard was searched; here an old axe was found. [An old axe was then shown the Chief, who said if it wasn't the one he found, it looked very much like it.]

The Chief went into Alley's house, and found officer Dearborn in the second story with Alley, looking over some papers in the desk of the latter. [Some papers were shown to the Chief, and he thought they were the same he saw in Alley's house. They consisted of receipts signed by Ellis, and an agreement between Alley and Ellis.] As Alley and Dearborn were standing at the desk, the Chief walked down to the foot of the bed; on a chair was a pair of pants and a vest; picked up the pants, and there was an appearance of blood on the legs. On the corner of the bed was a coat. The Chief said, "Alley, whose clothes are these?" Alley said, "They are mine." The Chief said, "Did you have these clothes on the day of the murder?" Alley replied, "I did." "When did you change them?" said the Chief. Alley hesitated at first, but finally said, "I changed them Friday morning."

The undershirt was then shown the Chief, who said it looked like the one taken from Alley, but that a piece of the arm was missing, on which was a spot of blood. The pants, drawers, and coat were also exhibited, and the Chief believed them to be the same he found, as above described. There was a spot

of blood on the leg of the pants, and it was cut out by Dr. Hayes at the station-house. After finding the clothes in Alley's house, the Chief gave them to officer Dearborn. A search of the house was made afterward, but nothing particular was found. Subsequently Mr. Dearborn took Alley to the station-house, and the Chief, with Mr. Skelton and Wood, went to the stable. On arriving there, we found it in charge of an officer. This was about nine o'clock on the morning of Saturday. After waiting a few minutes for Dr. Foye, we proceeded to make an examination. On the back part of the manure-heap was found what appeared to be spatters of blood, and blood was also upon the boards around the heap. [The Chief was then shown several pieces of board, and thought they were the same taken by him from the stable, comprising the stall near the manure and a partition-wall.]

At the time the boards were taken the spatters of blood upon them appeared more distinct than now. Took a fork and pitched over the heap of manure. Found some shavings near the bottom, on which there were spatters of blood. Up to this time, to his knowledge, no person had disturbed the manure. There was a depression, which looked as if some substance had lain there. There were no indications that the manure-heap had been disturbed. The manure was warm, and, beside the shavings, there were found some shreds of wool, near the bottom of the pile. Every part of the barn was thoroughly searched for a new axe, but none could be found. Noticed Mr. Ramsdell there, overhauling some clothes, and inspecting the horses and wagons. After the search was concluded, the Chief went to Station Five, and Dr. Hayes was sent for. Mr. Tibbetts was taken into custody, and Alley's son was sent for. Mr. Richards was sent for, and came, and there was a general investigation. After this, in presence of the officers, the Chief told Alley he wanted to have a little more talk with him. The Chief said, "You are not obliged to say any thing, but I have been making a search with the hope to prove you innocent; but the story told by others don't agree with yours, and I would like to go over the story again with you, and tell you some of the strong points against you." The Chief said to Alley, "You told me you had paid out $50, but I find you paid

out much more." Alley said, "I always have a little money with me." The Chief said, "What would you say if one of your acquaintances should say he saw you on Charles Street Wednesday morning?" Alley said, "I have not been on Charles Street for a long time." The Chief said, "What would you say if a man would testify that he met you on the Mill-dam, on Wednesday morning, with some barrels in your wagon, and afterwards saw you without them?" Alley said, "I was not on the Mill-dam." The Chief said, "Mr. Alley, what would you say if one of your own workmen would testify that you had a new axe, painted red, in your barn on the Monday before the murder, and that it was used to drive a rivet?" Alley said, "I remember it; but it was the same axe you found in the yard." The Chief said, "Mr. Alley, what would you say if a witness should testify that blood was seen on your shirt-bosom?" Alley replied, "It came from a horse." The Chief said, "Mr. Alley, what would you say if chemists, who have examined the clothing you had on, should say there was a large amount of human blood upon them?" Alley replied, "I have accounted for that before."

This was substantially the interview had with Alley, and the Chief then told him that the circumstances against him were so strong that he must be locked up. I have not seen Alley from that day until I saw him to-day in the court-house. In response to an inquiry about the purchase of an axe, Alley denied having bought one. Am quite positive that Alley said he had paid out but fifty dollars.

Cross-examined. Wouldn't give the jury to understand that I meant to give the exact words of the conversations which passed between Alley and myself; the conversations narrated were in the presence of officers; didn't take particular notice of the clothes worn by Alley when he went with us from his house to the barn; when we first saw Alley, didn't tell him we had come to charge him with murder, or that we suspected him of murder; Mr. Dearborn has had charge of the case, and the other officers have worked in connection with him; shouldn't judge the clothes that Alley had on were the same that I have seen in the court-room to-day; after Friday morning, I considered Alley in custody; after the con-

versation had with Alley on Friday, I made up my mind it would be improper to discharge him until further investigation ; don't think any suggestion was made to Alley about counsel, nor any thing said to him about consulting friends as to what was best for him to do ; the object of putting the specific questions to Alley was for the purpose of seeing if his first statement was true ; after finding blood on Alley's clothes and at the stable, I didn't question him again, as my suspicions were quite strong that he was the murderer.

Charles L Skelton *sworn*. Am a member of the police force of Boston ; went with Alley to Cambridge on the 8th of November, and saw the remains of Mr. Ellis in the old armory. Alley said that he was sure that the remains were those of Mr. Ellis, and was positive about it ; went to police-office, in Cambridge, and saw some barrels ; Alley said he had had the larger one at his stable, but the smaller one he was not positive about ; took some shavings out of the barrel, and Alley said they were like some he had in his barn ; on returning, about twelve o'clock that noon, Mr. Skelton left Alley in charge of the Chief of Police ; on Thursday night, the Chief, Mr. Dearborn, and witness, went to Alley's house, and rang the bell ; Alley came to the door, and asked us into the parlor ; the Chief asked if he had a stable on Hunneman Street ; Alley replied that he had ; the Chief asked him what was kept in the barn ; Alley replied horses, harnesses, and wagons ; the Chief asked if there were any barrels in the barn ; Alley replied that there were some, or had been some there ; the Chief asked if there was an axe in the barn, to which Alley replied that there had been one there, but it had been stolen by some one four or five weeks previous.

Mr. Skelton then detailed the circumstances attending the visit of Alley and the officers to the stable on that night, it being in substance the same as narrated by Chief Savage. Mr. Skelton also described the visit made to Alley's house, the finding of the old axe in the back-yard, the searching of the drawer in Alley's desk, and the finding of the clothing, his testimony corroborating that of the Chief.

The purpose of the cross-examination of Mr. Skelton was to test his recollection of the exact language used in conversations

between him and Alley, at Cambridge, but nothing material was developed. Alley didn't deny ever having the larger barrel in his possession. Without any hesitation, Alley said that he was sure that the large barrel came out of his stable.

ALBION P. DEARBORN *sworn*. Am a member of the Boston police. He detailed the visit to Alley's house on the night of Thursday, November 7, and the search made in the stable, the story being in no essential particular different from that narrated by the Chief of Police. When Alley returned from Cambridge on Friday, Mr. Dearborn asked him if he knew Mr. Ellis, and Alley replied that he knew him well, and had bought a house of him. Alley said the cask he had seen at Cambridge was one of the three which he had carried shavings in on Monday or Tuesday; he thought it was on Monday night. In response to an inquiry how he knew it was the cask, Alley said he was quite positive about it, as he had handled it for about three months. When asked what he did on Tuesday night, Alley said that he left his stable as usual, and went home to supper; after supper he went down to his stand to put in a stove which his son said had been left out; Alley said he put the stove in the alleyway, and then went into Risteen's store, but almost immediately turned around and came out; he didn't think he met anybody in the store, and on leaving, he went directly home, going up Washington Street.

Mr. Dearborn then spoke of the conversation had with Mr. Alley as to what transpired on Tuesday night and Wednesday morning, and the recital of the story by Mr. Dearborn did not vary from that given by the Chief. Alley stated to Mr. Dearborn that he reached his stable about five o'clock Wednesday morning, and that no person had been to the stable before him.

Mr. Dearborn went with Alley to Hardy's office in Charlestown Street, where Alley said he got a bundle. Some person in the counting-room thought it was about nine o'clock on Wednesday morning when Alley got the bundle, which he took under his arm to Court Square. From there Mr. Dearborn and Ham went with Alley to Station Five. That evening, in Captain Small's office, Alley said when he came out of his stable on Wednesday morning he had four empty barrels with

him, and that he carried two to Schouller's place, and left two in a passage-way.

At Station Five, Alley was asked if he had an axe in the stable; Alley said he never had an axe since the boys stole his old one three or four weeks ago. Alley said he saw Mr. Ellis on Saturday, and paid him $21.50; that he was to meet him or see him at his stand on Tuesday, at twelve o'clock, and pay him the balance. Alley was asked if he met Ellis at that time, and he said he did not. The reason that he gave for not meeting Ellis was because he was away loading furniture. Alley was asked if he was in the habit of having much money. He said he sometimes had from $50 to $100. He said he had been saving up money that week to pay a protested note held by Mr. Durham. The note was for $50, and Alley thought he paid him on Tuesday. Alley said he had no doubt that the barrel or cask he saw at Cambridge was the one that was in his stable on Tuesday, as he saw it there. Alley was then searched. Mr. Wood took the shirt off, and asked Alley if it was the one he wore on Wednesday morning. Alley said it was, and that he had worn it several days. We then took off Alley's undershirt, and on a crease on the right sleeve was a discoloration which looked like blood. The undershirt lay on the table with other things, and Dr. Foye and Dr. Hayes were cutting out pieces of the clothing [an undershirt was shown witness, and he thought the piece cut out would correspond with that he saw taken out by Dr. Foye and Dr. Hayes]. On Saturday morning, the Chief, witness, Mr. Wood, and Mr. Ham went to Alley's house, and in his back-yard found an old axe; the one in the court-room looks like it. The axe was delivered to Captain Small. Before it was delivered, Mr. Wood cut a notch in it. Mr. Dearborn saw Mr. Wood cut one notch in the handle. The Chief asked Alley if he didn't use a new axe in his barn on Monday morning. Alley at first said he didn't. The Chief then asked him if he didn't remember using an axe with Tibbetts to head a rivet in a pair of hames. Alley replied: "I had forgotten that. Yes, I did use an axe, but it was the one you found in my back-yard." Mr. Dearborn then described the papers he found in Alley's desk. The Chief said to Alley, "Are these your clothes?" [Witness saw a vest

and pants on a chair at the foot of the bed, and a coat on the bed.] Alley hesitated at first, but finally said, "They are." The Chief asked Alley when he took the clothes off. Alley said, "When I came to your office on Friday." The Chief asked him if they were the clothes he wore on Friday morning. Alley said they were, and that he had worn them a long while. After going to Station Five with Alley, Mr. Dearborn, the Chief, Dr. Foye, Mr. Wood, and Mr. Ham went to Alley's stable and overturned the manure heap. Some shavings and a piece of billiard cloth were found, which were taken to Captain Small, at Station Five. Mr. Dearborn then described the pieces of stall, plank, &c., taken from Alley's stable, and thought they were the same as those now in the court-room. The witness saw spots of blood on the side of the stable, and officer Ham and I counted them and made two hundred and sixty-one spots.

After we got back to Station Five, the Chief asked Alley if he was on Charles Street on Wednesday morning; Alley said he was not; the Chief asked him if he was in Charles Street any morning that week; Alley replied that he was not, and didn't remember when he had been on Charles Street. To an inquiry as to what Alley would say if an acquaintance should say he saw him (Alley) on Charles Street Wednesday morning, Alley replied that the man must be mistaken; Alley accounted for the blood on his clothing by saying that he must have got it from the nostrils of his horses; Alley was asked if he had bought an axe since he lost the old one, or recently; and replied that he had not; the Chief then sat down and reviewed with Alley the statements made by him, and asked him if he murdered Ellis in his (Alley's) stable, cut him up, and packed him in barrels and threw him into Charles River; Alley replied, "No, Sir, I did not." After Alley had been complained of in the Municipal Court, Mr. Dearborn went for counsel at Alley's request; at Station Five, Alley said he locked his stable on Tuesday night, and found it locked on Wednesday morning; on Friday night, at Station Five, Mr. Wood asked Alley if he had told his help to make any memorandum of what they had done on Tuesday; Alley replied that he had not.

Cross-examined. Have taken more interest in this case than in ordinary cases; can't say I have taken a *great* interest in it; have not left any thing undone that I know of in looking up the case; have not written my story down, but tried to keep in memory what was said as nearly as I could; will swear that I have not talked over with the Chief what he said in his interviews with Alley; don't pretend to give exact words of conversations; haven't talked with the witnesses about their testimony; didn't try to make Mr. Wilson change his testimony in relation to the time Alley reached Durham's store on Wednesday morning; the complaint against Alley was made in the Municipal Court on the 11th of November; he was first locked up in Station Five on Friday night; from Friday morning to Saturday night didn't tell Alley he could communicate with counsel or with his family; never told Mr. Risteen I wanted him to say that it was before eight o'clock on Tuesday evening that Alley was in his store, nor never tried to get Risteen to change the time.

Redirect examination. Did not know that Alley had a right to counsel before he was committed, nor did I ever prevent his seeing counsel or friends.

Officer JAMES R. WOOD *sworn.* He stated that the first conversation he ever had with Alley was at the Fifth Police Station, on Friday evening, November 8; asked Alley where the white shirt was that his son saw the blood on; Alley said the one he had on he had worn since Sunday, and that he was sure of it. [A white shirt was shown witness, which was not the one he alluded to. He thought the one in the court-room was brought from Alley's house.] Alley was asked about some blood on his vest and pants; it is unnecessary to give his explanation.

The remaining portion of Mr. Wood's testimony was the same as given by other witnesses, and the events which occurred at Alley's house and stable, together with the conversations had at the various points previously described, were narrated by the witness without variation from the testimony of the other officers.

Cross-examination. Have omitted some conversation had about a coat and a billy found in Alley's barn; took them to

Fifth Police Station, and asked Alley if it was his coat; Alley said it was not; then took Alley out of his cell, and he looked at the coat again and said it was his; as to the billy, Alley said it was not his, nor had he ever had one; the billy was found on Saturday between ten and eleven o'clock [the billy was produced in court, and witness said it differed from those ordinarily used by officers, inasmuch as it was larger]; the billy was found on a barrel underneath a coat, lying on the head of a barrel; the barrel set about half-way in the stable on the right hand side as you enter; can't say that any person saw me take the billy from a barrel; at the time I found it Alley had been in custody since Friday morning; didn't ask Alley at the station-house what he had the billy in his pocket for; officer Dearborn or Ham heard the conversation witness had with Alley; Alley did not say he had never seen a billy before, but said he had never seen *that* billy before; Mr. Dearborn was in the barn when I found the coat and billy.

Albion P. Dearborn *recalled*. Testified that he did not hear a conversation about the coat and billy between officer Wood and Alley at Station Five.

On cross-examination, Mr. Dearborn said he knew Mr. Wood had a conversation with Alley at Station Five, and was also in Alley's barn when Mr. Wood found the billy, but didn't see him take the billy from the barrel.

John F. Ham, *sworn*. Am a police-officer. On Friday afternoon, November 8, Alley wanted to go to No. 36 Court Square to see about a bundle which he had left there to be sent to Haverhill. On arriving there, Alley asked the clerk if he remembered of his (Alley's) leaving a bundle there? The clerk said he did not, but Alley insisted that he did. Officer Dearborn, Alley, and witness then went to Hardy's store, where Alley said he got a load of blinds or sashes on Wednesday morning. When we got there, Alley asked the clerk if he remembered of his (Alley's) coming and getting a load of blinds on Wednesday morning. The clerk replied by referring to the books; remembered that Alley was at the store about nine o'clock in the morning. Alley then said that he left his horse in Haymarket Square and took a bundle and

carried to the Haverhill express in Court Square, and afterward went and paid Mr. Morse, a lawyer, some money.

After this the witness, officer Dearborn, and Alley drove to about No. 1059 Washington Street, where Mr. Dearborn got out. On the way up Washington Street witness had a conversation with Alley about the barrels; the large barrel Alley said was his; came from his stable; but he couldn't tell whether or not he had ever seen the small one before. Witness asked him how he accounted for the barrels and manure getting out of his stable and into the Charles River. Alley replied that he couldn't account for it. This inquiry was repeated several times, and each time Alley replied that he couldn't account for the barrel. At Station Five, in the presence of the Chief, officer Wood, and witness, a conversation was had with Alley about the axe. Alley said that the axe he had in his barn was stolen by boys who had broken into his stable, and had bothered him a great deal. Mr. Ham also related conversations had with Alley at his house and other places, all of which were narrated by other witnesses, and described the condition of the barn, and the finding of blood spatters upon the wall. Mr. Ham went out to the sluiceway upon the Mill-dam, and saw marks upon the railing; also saw officer Perry pick up some shavings which were over the side of the bridge. Witness also found some shavings on the sill of the bridge [shavings produced and identified]. Alley's explanation of the blood upon his clothing was that it came from a horse. Alley's first statement was that the blood was due to another cause; was with Mr. Wood when he found the billy and coat in Alley's barn; saw Alley when he took off his outside shirt at the Fifth Police Station. The white cotton shirt in the court-room was shown witness, who thought it was the one he saw Alley take off, but wouldn't swear it was the one.

Cross-examined. During the intermission did not talk with officer Wood about the billy; had a conversation with officers Wood, Dearborn, and Skelton in the corridor outside the court-room about the case, but nothing was said about the billy. The only thing I remember being said was, that officer Wood

told Dearborn that a member of the bar had said that he (Dearborn) made a good appearance on the stand; don't know, when we started from City Hall to go to Hardy's store in Haymarket Square, that Alley was told that if he could show that he was in Hardy's store at nine o'clock on Wednesday morning he (Alley) might go home; won't swear but what Mr. Dearborn might have told him so, but if he did I don't remember it.

Captain CYRUS SMALL *sworn*. Testified to having in his possession the underclothing taken from Alley [clothes identified]. The planks, &c., taken from Alley's barn had been in custody of witness, together with other things.

No cross-examination.

JOHN W. SAVAGE *sworn*. Live on Hereford Street, nearly opposite the old hotel on the Mill-dam, and am a teamster. On Wednesday, November 6, some time between twelve and two o'clock in the afternoon, saw two barrels floating in Charles River in the direction of Cambridge. My attention was first called to the matter the next morning when I heard of the finding of the remains in the barrels. The tide in the river runs at the rate of three or four miles an hour.

Cross-examined. At the time I saw the barrels I think the wind was blowing from the north-east; think it is about two miles from Hereford Street to the gas-works in Cambridge.

WILLIAM HAZLETON was recalled, and testified that he cut the clothes found on the remains taken out of the barrels at the gas-works in Cambridge, and that he delivered them to officers Shackford and Child. The witness identified the boots, hat, stockings, shirt, vest, pants, and coat in the court-room as those taken from the remains.

Officer LEONARD SHACKFORD, of Cambridge, testified to receiving the clothing from Mr. Hazleton.

Captain TIMOTHY AMES, of Cambridge, stated that he kept the clothing at the station-house until it was delivered to the coroner.

Officer SKELTON was recalled, and testified that he received the clothing from Captain Ames, of Cambridge, and brought them to Boston to use during the trial.

CHARLES F. COULLARD *sworn.* Am in the employ of Joseph Nickerson & Co., and know Leavitt Alley. A paper was shown witness, which he said was a receipt given Alley for a month's rent. The receipt was given to Alley on the 4th of November, and was for $15 due for stable rent. The rent was due on the 1st of November.

JOHN S. HODGDON *sworn.* I saw Abijah Ellis at ten o'clock on Tuesday morning at my stand at No. 1068 Washington Street.

Mr. May then stated to the Court that the prosecution proposed to show that Ellis was inquiring for Alley on that day.

Mr. Somerby objected.

The Attorney-General cited authorities to show that the evidence was admissible. The Government proposed to show that at a certain hour on Tuesday (election day) Ellis went to Mr. Hodgdon's stand and inquired for Alley; and that this was a circumstance connected with the transaction, and came under the rule laid down in the authorities cited.

Mr. Somerby contended that the evidence was not admissible, on the ground that it was an act of no consequence in itself. He could not see how the disappearance of Ellis had any thing to do with the fact that he was inquiring for Alley on Tuesday.

The Court were of opinion that the matter was not free from doubt, and reserved a decision until the next day.

FOURTH DAY.— *Thursday, 6th February.*

On the question reserved, the Court decided that it was competent for the prosecution to show that on the morning of Tuesday (election day) Ellis inquired for Alley. This evidence was held to be admissible as a fact, and not as a declaration.

ROBERT B. GILMORE *sworn.* Reside on Park Street, Brookline, and not over fifty feet from Mr. Ramsell; have lived

there two and a half years. The depot bell rings at five minutes before eight in the morning; don't know whether or not the bell in the Unitarian Church rings; frequently hear bells ringing in Roxbury.

This testimony was admitted under objection, and there was no cross-examination.

JOHN S. HODGDON was then recalled, and testified that his stand was at No. 1068 Washington Street. On election morning Mr. Ellis came to my stand; he came from the direction of the Franklin School-house, and had a ballot in his hand. When he left my stand he went in the direction of Alley's stand. Ellis asked me if I had seen Alley that morning, and said he was waiting for him. This was about half-past eight o'clock. I had not seen Alley that morning. The next morning I was at my stand about half-past seven o'clock.

JOSEPH A. WILLARD *sworn*. Am clerk of the Superior Court. I keep a record of the weather and the direction of the wind. Between five and six o'clock on Wednesday, November 6, the wind was southerly, and the sky was cloudy. At one o'clock in the afternoon it commenced sprinkling, and at six o'clock it rained, with the wind south-east. The next morning it was rainy, with the wind south-east; and at ten o'clock in the forenoon it was raining, with the wind north-east. It continued to rain all day, and was windy.

On cross-examination Mr. Willard said that the wind was not north-east on Wednesday.

The Attorney-General then offered a copy of the "Old Farmer's Almanac" to show the state of the tide on the 7th of November, in Charles River, at the Mill-dam, where the barrels were alleged to have been put in.

Mr. Somerby objected to its admission, on the ground that, although it might be substantially accurate as showing the state of the tide generally in Boston, it would not show the state of the tide in Charles River at that point so many miles distant from the harbor, and would probably tend to mislead.

But the Court ruled that, for the purpose of showing what the state of the tide was, the almanac was competent evidence, subject to the right of the prisoner to show how far the time of the tide stated in the almanac was modified or controlled by

the distance from the harbor to that particular point on Charles River.

The almanac was then admitted in evidence.

Dr. JOHN W. FOYE *sworn.* Testified that on the morning of the 9th of November he went to Alley's stable and found Chief Savage and several officers there; Alley was not there; witness saw blood-stains upon the side of a stall, and on boards forming part of the side of a building [boards shown and identified]; the boards appear now very much the same as when first saw them, only they had a fresher appearance then than now; the blood spots appeared to be recent when I first saw them, but I couldn't tell with certainty; have been in practice fourteen years; have been a coroner, and have made some four or five hundred autopsies; have been called upon in court to examine blood-stains perhaps twenty times.

To *Mr. Somerby.* Have been called upon to examine blood many times, but do not think I have had any experience in determining whether blood was recent or not.

The Court deemed the witness qualified to testify as an expert.

Direct examination continued. The blood I saw in Alley's stable appeared to be fresh; saw blood on some shavings and on the side of the stable; I saw, perhaps, twenty spots of blood; examined the manure heap; top of the heap was fresh for two or three inches, while the remainder of the pile was hard, and looked as if it had been there several weeks; soon after blood is exposed it coagulates or hardens; if blood was poured out on the manure heap it would remain on the surface, and would not stain to any depth, and would coagulate almost immediately; there are various figures given of blood in the human system, and the largest number of medical gentlemen agree that the amount of blood in a person equals about one-eighth of the weight of such person, or a pint of blood to a pound; if a body was allowed to remain recumbent the bleeding would equal about one-fourth of the weight; if suspended, about one-half or five-eighths would be poured out.

The witness then described the coagulation of blood. On the morning of Saturday he took some twenty spots of blood from clothing which was alleged to be Alley's, and also

took blood from boards; on the left leg of the pants was a large spot of blood, and the pants looked as if they had been washed.

Blood was also found on the coat and vest, and the clothing was given to Dr. Hayes, who made a microscopic examination of the same [clothing produced and identified by witness]; spots of blood were removed from the inside of the left leg of the pants, the neck of the undershirt, the inner lining of the left side of the vest; a button-hole in the vest had been torn out; found blood on the drawers, there being quite a large stain of blood on one of the knees [witness identified clothing brought from Cambridge, and said to be Alley's].

Cross-examined. Am not a chemist, a tailor, or have I had experience in washing clothing; it is an easy thing to tell blood; won't swear that these spots are blood; to the best of my opinion they are; saw pieces of clothing removed and given to Dr. Hayes; it was about noon on Saturday, November 9, at Police Station Number Five [witness described in detail the pieces cut from the clothing]; all the pieces were cut out either by myself or Dr. Hayes; so far as I know the blood was the same on the several parts of the clothing; the stains on the part of the clothing which appeared to be washed were not as marked as the others, but appeared to be rusty; for twelve hours after death blood would continue to coagulate; out of the body blood commences to coagulate immediately, if the drop is thick enough; if the blood is very thin it would dry at once; a drop of blood as large and as thick as a wafer would dry at once; if it was as large and as thick as two wafers it would coagulate; the length of time of a blood-stain can be easily determined; after blood had dried, don't know of any rule which determines how long it has been upon any place; if a blood-stain retained sufficient moisture to be easily removed without leaving any or no stain upon the substance beneath, should say it was recent; will swear that I removed spots of blood from the boards in Alley's stable; first saw the clothing described on Saturday, November 9; as far as I could judge and see, should say the stains on the clothing were all made at the same time; in looking at the clothing to-day can't say whether the stains were all made at the same time, but in

my opinion they were; it would be impossible to tell with a certainty how long the spots of blood had been on the clothing, and don't know of any way of determining that fact with certainty; though the spots in the barn were all made at the same time, as they presented the same hue; if a man should be cut up twelve hours after death the blood would spatter; blood never coagulates or becomes solidified in the larger vessels of the human body; don't believe the blood would ever coagulate in the vessels so that it would not spatter; blood would always remain in a state of fluidity until the body dried up.

Dr. S. Dana Hayes *sworn*. Am State Assayer, and have given considerable attention to physiological chemistry; have examined many stains supposed to be blood; on the 9th of November went to Fifth Police Station and examined clothing and boards; cut out pieces of clothing and carried them to my laboratory, where I examined them. I cut out quite a number of pieces of clothing; examined a white shirt, but found no blood upon it; examined a pair of pants, and found stain near the right knee; inside of the left knee, in front of the trowsers, and on the back part were spatters of blood; examined vest, which was stained inside in front vest pieces; the buttonholes were torn out; examined undershirt, and this was stained on the right sleeve; examined drawers, and found stain on knee; examined other clothing and boots, but found no positive stains of blood upon them; cut out pieces of undershirt in an odd shape so that I might be able to identify it [shirt identified].

On the sleeve of the undershirt I found blood which was human blood, which I compared with the blood of a horse; I compared this blood with the blood of Mr. Ellis, and found no difference in the blood on the undershirt and on Mr. Ellis's drawers, but do not mean to say they are identical; science does not say positively it is human blood, but can show that it is not the blood of a horse; there are certain animals whose blood resembles human blood, but horse's blood is very different; the blood on the right knee of the drawers was rather of a doubtful stain, as it contained a large proportion of what is known as the white portion of the blood, or corpuscles, rather

than the red corpuscles; the stain on the knee of the drawers was the least distinct of all; the blood on the right knee of the pants was pure blood.

It was not horse's blood, but was human blood; there was a large stain on the knee which looked as if it might have been washed; the stain on the knee corresponded with that on the knee of the pants; on the inside of the vest there was a good deal of blood apparently undisturbed; examined the blood on the planks and boards, and all the blood found there, as well as on the clothing, was the same as the blood said to be that of the murdered victim.

On the lining of the coat was a clot of blood which was not horse blood, but was human blood; examined a piece of barrel stave, and compared the blood found upon it with that found on clothing and boards, and found it the same; on the 13th of January I divided the specimens I had saved with Dr. Chase; remember seeing spots of blood on the wood, and the Chief of Police handed me a piece of flesh which he said he had taken from the wood.

I reside in Longwood, and know where Park Street is; am familiar with localities; Dr. Hedge's church is a little south of west from Park Street; hear the Brookline bells when I am getting up at seven o'clock in the morning; hear no bells in Roxbury unless the wind is south-east.

Cross-examined. Took the specimens on the 9th of November, and carried them home the same night, and have made my examination at intervals since until this time; blood is determined by chemical analysis and microscopic examination; there are certain types of blood that are positive; no other substance can be mistaken for blood in the chemical analysis; chemical examination determines its composition, the microscope the mechanical structure.

I rely on both tests to prove whether it be blood, and then on the microscope for what kind of blood it is. The corpuscles in a horse are much smaller than in a human body; blood is composed of red and white corpuscles; neither of these in itself is blood, but taken together they form blood; authorities give the diameter of a corpuscle at one forty-sixth thousandth part of an inch; the diameter of corpuscles in a horse is about one-

third less than that of a human person; these sacs are flexible to a certain extent; corpuscles are of different shapes and forms, and to bring them into their original shapes an artificial serum might be supplied in place of that which has evaporated; the corpuscles are very easily destroyed, and don't think they will bear distending beyond their natural condition without bursting them; I prepare all the blood I work upon so as to bring it into its normal condition, and then by comparing them under the microscope the differences are very distinct, — as distinguishable as pease and corn; the differences in human blood are hardly perceptible; and in all my examination of horse's blood I have found very little difference.

Dr. Horace Chase *sworn*. Am a member of the medical faculty, and have been in practice eight years; have had considerable experience in analyzing blood, and within the last seven years have examined four or five hundred specimens; received specimens of clothing from Dr. Hayes; the stains upon them I compared with horse's blood, taken at the same time; there was a difference in the size of the corpuscles; the stains on the chips and the clothing were the same; judging from his experience, he should say the blood on the clothing and chips was human blood; the specimens given me by Dr. Hayes were received on the 30th and 31st of January; examine specimens of human blood almost every day.

Dr. Hayes was recalled, and said that, instead of saying that the diameter of a horse's corpuscle was forty-six thousandths to an inch, he should have said forty-six hundredths.

Dr. John Hildreth *sworn*. Reside in Cambridge. Made the autopsy on the body of Mr. Ellis; began the autopsy on Friday at ten A.M., some forty-eight hours after they were said to have been taken from the river; the head was severed from the body; the legs were completely severed from the trunk midway between the hip and knee; the skin was normal in color and presented a black and blue appearance around the lacerations; over the cheek-bone on the left side of the face was an abrasion of about an inch; on the head were four wounds, a technical description of which were given by the doctor. On removing the scalp were found several stella fractures, and the brain was filled with blood. The large veins of the body were

almost completely emptied of blood. The wound on the left side of the head was to show that in all probability the blow was given from behind. This wound was about three inches in length, extending through to the bone. The nature of the wound was not such as to indicate that the wound was made by some sharp instrument. It would be difficult to say as to whether the wounds were made with a round or an angular instrument, but in all probability they were made by an angular instrument.

The skull of Mr. Ellis was then produced by Dr. Hildreth. Dr. Hildreth pointed out to the jury the nature of the wounds upon the scalp; the hat of the murdered man was shown Dr. Hildreth, who said that a cut in it corresponded with one in the back part of Ellis's skull. The skull was thicker than the average of men's skulls at his time of life; and in order to produce the fractures made, the blows must have been quite severe; it would be very hard to draw an inference which of the blows was given first; as far as appearances went there was nothing to show that there was any great interval between the time that the blows must have been given; there was no other indication of death except by violence; in all probability the head and legs of the murdered man were severed soon after death, but it is difficult to fix the time exactly within five or six hours.

The stomach of Ellis I delivered to Dr. Fitch of Boston; the inside of the stomach presented a peculiar appearance, which I was not familiar with; it contained about one ounce of whitish yellow liquid; I think it might compare with bread and milk; authorities say that it takes bread and milk two or three hours to digest; the wound in the back part of the head was probably made from behind, as witness could not see how it could have been made by a person standing in front of the one who was struck; the wound on the back part of the head must have produced insensibility.

Cross-examined. There was evidence of more than one blow being given on the skull; don't think it possible that the fracture could have been made by falling; think the injuries were inflicted about the same time; can't imagine such injuries by a man's falling out of a window; the blow must have been given

from behind in order to produce the wound on the back of the skull; there is no mark of an instrument coming in contact with the skull; if the man was struck with a hoe the skull would probably have been fractured; common white bread in the stomach would assimilate in two or three hours; milk will probably pass out of the stomach in about an hour; the amount of gastric juice in the stomach would have something to do with the digestion of bread and milk; the stomach presented a moth-eaten appearance in the white part; it showed to me that they were *post mortem* changes occurring after death; I had read of such things, but never saw a stomach in that condition before; all stomachs contain liquids, but they are not as white as that I saw in Mr. Ellis's stomach.

Lewis L. Bryant *sworn.* I received a human stomach from Dr. Hildreth the Saturday following the autopsy, and carried it to Dr. Fitz on Tremont Street in Boston.

Daniel C. Murray *sworn.* Reside in Brookline; had occasion to come to Boston every morning; in November last observed a barrel in the river on the Mill-dam about 300 feet from the street on the Cambridge side; it was on the 8th of November, and about eight o'clock in the morning; it was at the sluiceway where I saw the barrel.

Cross-examined. It could not have been more than ten minutes past eight o'clock when I saw the barrel.

Dr. Reginald H. Fitz *sworn.* Am a physician, in practice at 293 Tremont Street; am curator at the Massachusetts General Hospital, and have made many autopsies; received a stomach from Mr. Bryant; the moth-eaten appearance of the stomach resulted from a superficial loss of parts of it through acetic acid; the appearance of the stomach indicated that death took place during digestion, and within three hours after food was taken.

Witness was then shown the skull, and said that from the appearance of the wounds they were probably caused by some blunt instrument; no fair inference could be drawn as to the exact length of the instrument making the wounds. In case such a cut, as to apparent length, was made by a straight instrument, the skull must have given way; with a curved instrument a superficial wound might have been made; milk will

digest in about an hour, and ordinary wheat bread in about three hours and a quarter.

No cross-examination.

Dr. CHASE *recalled.* Said he had had some experience in autopsies. Had heard Dr. Hildreth's testimony. From the appearance of the wounds in the skull it would appear that the blow was given from behind and passed forward. From the manner in which the skull is cracked I could not draw any inference from the relative time when the blows were given; the blows that preceded the fracture were the cause of death.

No cross-examination.

CATHERINE A. MCKEEVER *sworn.* On election day last resided at No. 151 Dover Street; knew Mr. Abijah Ellis, and last saw him before five o'clock on that morning; Mr. Ellis roomed in the house.

CATHERINE MCKEEVER *sworn.* Am the mother of the preceding witness. Mr. Ellis had a room over my kitchen; last knew of his being in the house between four and five o'clock on Tuesday morning.

CHARLES L. SKELTON *recalled.* He testified that he brought some of Mr. Ellis's clothing from Cambridge and delivered it to Dr. Foye.

HENRY COLES *sworn.* Am sergeant of the signal service; at seven o'clock on Wednesday morning, the 7th of November, the wind was south-west, blowing at the rate of three miles an hour; at eight, from the south, four miles; at two P.M., from the south, five miles.

At this stage of the proceedings, the Attorney-General informed the Court that, with the exception of calling Henry M. Wightman to prove a map of the city of Boston and the recalling of a witness at the request of a juror, the case for the Government was closed.

ALBERT M. GARDNER recalled at the request of a juror. Question by the juror: Will you describe the axe? It was a chopping-axe of the ordinary size, neither very heavy nor very light. There was a slight imperfection in the handle. My impression is, it was of a dark blue or green color. We have both kinds in our store. I do not wish to swear to the color.

I think that it would weigh four pounds or four pounds and a half. Some axes weigh five pounds and a half.

Cross-examined. I will not swear positively that the axe was not red. I only swear to the imperfection in the handle.

Judge WELLS then asked the counsel for the prisoner if they were ready to open the case for the defence.

Mr. Dabney requested that, before opening the case, the witnesses for the government should be excluded from the court-room; and this was done by order of the Court.

Mr. Dabney then opened the case for the defence, and spoke substantially as follows: —

May it please your Honors, and you Mr. Foreman and Gentlemen of the Jury: —

On the afternoon of the sixth day of November last, in Charles River, at Cambridge, were discovered floating certain barrels, containing the mangled parts of a human body. They were discovered first and brought to land by the workmen at the gas-works at Cambridge, who were terrified and appalled by the discovery of what they immediately knew to be the evidence of an awful crime. The alarm was given; the police were notified; the coroner was summoned; the story spread. The gentlemen who were in search of items for the daily papers heard of it; the papers the next morning carried the dreadful news into the bosom of every family in the vicinity, and it was flashed over the wires to neighboring cities and became the talk of men, not only in Boston and Cambridge, but in New York, Philadelphia, San Francisco, and of people all over the country. From that time, gentlemen, every person connected with the police force of the City of Boston has been interested and diligently searching for evidence to ascertain who might be the perpetrator of the act. In the days immediately following the discovery, not only the police were on the alert, but the gentlemen, to whom I have before alluded, connected with the daily papers, caught at every saying, seized eagerly upon each new fact as it was discovered and passed from mouth to mouth, and dressed up what they heard for the public prints. After two days of inquiry and investigation Leavitt Alley, this man who is now here on trial before you,

was charged with having committed the murder, and from that time forward, every thing that could be brought to bear against him was published and talked about by everybody who took any interest in the current news of the day; and so it went, until another and wider-spread calamity at the end of the week diverted public attention. I say, gentlemen, that the workmen at the gas-works were shocked at the discovery that they made. It was evident that a crime had been committed. It was evident that a man had been murdered, and that an awful method of concealment had been resorted to. The remains of the victim had been dismembered, packed in barrels, and thrown into the river. During all this time, when, as I have said, every thing bearing against this unhappy man before you, was seized upon, published, talked about and discussed, when everybody was reading and saying how wicked he was, and what a dreadful crime he had committed, during all this time, there was no man who stood up and told the story of Leavitt Alley's innocence of this fearful charge. The prisoner's mouth was sealed except in answer to the strict examinations and cross-examinations that were intended to draw out his guilt. Nobody told his story. No investigation was made to prove his innocence; and, if any facts tending in that direction were discovered, they were not disclosed. And now, for the first time, has the opportunity come to disclose these facts; to assert and prove Leavitt Alley's innocence; to lay before you, gentlemen, first, and then before the public through these gentlemen here on my left, who with such industry and fidelity prepare daily for the papers their careful reports of this trial, the other side of this story. Now, for the first time, will the defence and explanation of this man be given to you and to the world. And upon me, at this moment, devolves the duty of stating these facts and the explanation, which we give and expect to prove by the witnesses to be produced before you.

But, gentlemen, before I pass to the statement of what we expect to prove, I think it will be better for the comprehension and understanding of all of us, if I pause to discuss the principles of law, which we claim should guide you in your inquiry, and in the light of which all the facts which are proven here before you are to be tried. And, first, what is the issue in this

case? what are the questions upon which you are called to pass? The learned gentleman, the District Attorney, who so ably opened this case for the Commonwealth, took occasion to say to you in his opening that this, in common language, was called a prosecution; but that, in fact, it was no such thing; that it was not, so far as the Government are concerned, a prosecution, but an investigation, an attempt to discover the man who killed Abijah Ellis. Now, gentlemen, I tell you it is no such thing. It is not, within the meaning which the District Attorney tried to give it, an investigation. It is a prosecution. Things had better be called by their right names. You are not empanelled to pass upon the question of who killed Abijah Ellis, nor is the evidence directed to the solution of that question. The issue which we try before you, the question which you are sworn to pass upon is, Did Leavitt Alley, the prisoner at the bar, kill and murder Abijah Ellis? My friend, the District Attorney, seeks to prove to you that he did, and this is neither more nor less than to prosecute. But, further, if it were an investigation to ascertain who killed Abijah Ellis, the proper way to conduct it would be to lay before you, for your consideration, all the facts which bear upon that question. All the facts, however, within the knowledge of the Government have not thus been laid before you. As they leave it, you are left to believe that, so far as they know, the last that was seen or known of Mr. Ellis alive, he was departing from his boarding-house in Smith Avenue to go in the direction of his rooms on Dover Street, passing through the neighborhood where the prisoner's house and stable were situated. But, gentlemen, I expect to call before you here upon this stand, as witnesses, more than one person to whom this unfortunate Mr. Abijah Ellis was well known, and who saw this Mr. Abijah Ellis, alive and well, at a time subsequent to the time when any witness saw him who has yet testified here before you, when he had passed in the direction of Dover Street beyond every place where the prisoner was that night, and was walking rapidly still further away from the places to which the prisoner went that night. And I propose, further, to prove by these same witnesses, that this fact, that they had thus seen Abijah Ellis, and the place and time at which they saw him, was made

known immediately afterwards to those detective officers who have testified here against the prisoner and procured the evidence for the Government. The reason, of course, why these facts have not been proved on the other side is that they are utterly inconsistent with the theory of the prosecution.

But, gentlemen, I was going to speak to you about the law. Homicide, the killing of a human being, embraces a number of crimes of various degrees, subjected to various punishments, the highest of which known to the law is murder. Murder, Mr. Foreman and gentlemen, is committed when a human being in the exercise of his right mind, in the full possession of his reason and faculties, unlawfully kills another human being with malice aforethought. That definition of murder was enacted by a statute passed in England, as long ago as the time of Henry VIII.; and the crime, as thus defined, has been ever since known to the law as murder, and is so known to the law as we practise it in our courts to-day. By that statute of Henry VIII. unlawful homicide was divided into two classes, — unlawful homicide committed with malice aforethought, either express or implied; and unlawful homicide committed without malice, which became manslaughter, and is manslaughter to-day. The distinction lies in the presence or absence of malice. Malice may be either express or implied. Express malice consists in actual ill-will, in a formed and deliberate design to take the life of another, or to do him some grievous bodily harm. It is proved by evidence of lying in wait, or of threats, or of old quarrels, grudges, and violence. The law, however, will, in the absence of proof of express malice, imply it from acts which show a reckless disregard of human life, a mind fatally bent on mischief, or an enemy of mankind in general. That is to say, where one kills another unlawfully, although it may not appear that the killer had any particular ill-will, or cause for particular ill-will, towards the person killed; yet, if the death resulted from an act which could not have been committed by a person having a reasonable regard for the safety of human life, the law presumes that there must have been ill-will or malice towards the person killed; otherwise the act resulting in death would not have been committed. Take, for instance, such acts as shooting a gun or riding a

vicious horse into a crowd of people. No one with proper regard for human life would do such a thing, unless actuated by a design to kill some one in the crowd. Some one is killed. It turns out, however, that the person thus killed is a stranger to the one killing. No matter, the law says, he must have had a design to kill him, or he wouldn't have done such an act as to fire a gun into a crowd. So, too, where a chimney-sweeper pulled a boy out of a chimney by a rope tied to his legs, and the boy came out dead. The judges held that an intent to kill the boy or do him great harm, in other words, malice, would be implied by the law from so reckless an act as pulling the child out of a chimney by a rope tied to his legs. So, too, malice may be implied from the deliberate use of a deadly weapon. Out of regard, however, for the infirmity of human nature, it is held, that malice is not to be implied from the use of a deadly weapon, when there has been great provocation, and it has been used in the heat of blood, being at hand and not sought after. Bearing in mind, then, gentlemen, as I have explained to you, that unlawful homicide is not murder unless committed with malice aforethought, but when committed without malice aforethought is manslaughter; and that malice does not necessarily mean particular ill-will, but may be that, or a general reckless disregard for the safety of human life, — we will pass to a consideration of the statute which was read to you by the District Attorney in his opening. That statute enacts this: that all murder, as it was defined under the statute of Henry VIII., shall be murder in the second degree, and shall be punished by imprisonment for life, unless it is proved to be murder in the first degree. That is the result of one of its provisions; but the statute, also, defines the proof that shall be necessary to establish that any murder is murder in the first degree; and the circumstances which the statute says must be proved to establish murder in the first degree are divided into three classes. And the first class of murder in the first degree is murder committed with deliberately premeditated malice aforethought. This is a blow aimed by the legislature at the common-law doctrine of implied malice. Murder, says the statute, shall not be punished with death, unless the malice is express. When it is only implied by law the punishment shall

be imprisonment for life. Deliberately premeditated malice aforethought means an intent deliberately conceived and nourished in the mind. It means a thing done on purpose, as we say in common speech. It cannot be implied, and you cannot infer, because a man gets into a passion, either with or without provocation, and uses a deadly weapon, this deliberately premeditated malice of the statute. To be murder in the first degree, under this division of the statute, there must be a killing done on purpose, without provocation and unlawful. The next division of murder, defined in the statute as murder in the first degree, is murder committed in the commission of, or attempt to, commit any crime punishable with death or imprisonment for life. On that head I shall not trouble you, for it cannot possibly, so far as I can see, have any application in this case. The third and last division of murder, made by the statute murder in the first degree, is murder committed with extreme atrocity or cruelty, and the meaning of that enactment I conceive to be this: the atrocity and cruelty necessary to constitute murder in the first degree must be extraordinary as compared with other and more usual methods of committing murder. Of course there is a certain degree of cruelty in every murder; but that is not the cruelty which the statute means. It means that extreme atrocity and cruelty which is extraordinary, for example: burning or flaying, or breaking on a wheel; something which inflicts extreme torture before the victim dies. This the statute says shall make murder in the first degree. And I pray you, gentlemen, to notice one other thing. This extreme atrocity or cruelty is to precede the death. Any thing that is done after the death won't determine, in any way, the degree of the murder. Thus, if the killing of Abijah Ellis was not murder in the first degree, by reason of unusual and extreme atrocity or cruelty in the manner or mode of its commission before he died, it will not become murder in the first degree, because, after he was dead he was cut to pieces, packed in barrels, and thrown into the water.

Now, gentlemen, I have said to you that this is a prosecution and not an investigation, and that the issue with which you and I and all of us are to deal is not, Who killed Mr.

Abijah Ellis? We have nothing to do with that question. We trust and hope, as cordially and sincerely as the gentlemen on the other side and the public, that the guilty man who did that thing may be discovered and brought to light, tried, convicted, and punished. He ought to be discovered and punished, and we have no power and no desire to shield him, or to stand between him and his just punishment. But, gentlemen, again I repeat that the issue here is not, Who killed Abijah Ellis? but, Did Leavitt Alley, the prisoner at the bar, do it? and this issue is to be determined by a consideration of the evidence introduced, and under the guidance of the rules of law.

There are two kinds of evidence resorted to and approved by law for the proof or establishment of any fact. The first kind is direct evidence. An act is said to be proved by direct evidence when it is established by the testimony of persons who, being present, themselves witnessed the act to which they testify. And it is immaterial whether such persons were present for the express purpose of witnessing the act to which they testify, as is the case with the signing of wills and deeds, or happened to be present for some other purpose, or for no purpose. The evidence is direct if the fact to be established is proved by the evidence of persons whose knowledge is obtained by the use of their own senses. Thus where a homicide is proved by witnesses who swear that they saw one man strike another on the head with a club, so that he died, it is proved by direct evidence. Experience, however, has established two things. The first is, that if only direct evidence is to be admitted as proof, then many of the most atrocious crimes must always go unpunished. Crime is always, if possible, secret, and seeks solitude. The second thing shown by experience is, that events usually proceed in accordance with certain known and fixed principles, and that there is a certain harmony and regularity about all things; that similar effects are commonly produced by similar causes, and that therefore, if certain facts can be proved to exist, it is safe to infer that certain other facts which invariably accompany them exist also. Thus, if a man is found lying dead with a hole in his forehead and a bullet in his brain, it is safe to infer that his death was caused by the discharge of a weapon loaded with that bullet and pointed at his

head. For the purpose, therefore, of proving any given fact, the law allows other facts to be proved from the existence of which experience has shown that the main fact to be proved may with safety be inferred. A fact thus inferred from the proved existence of other facts is said to be proved by circumstantial evidence. And this kind of evidence is frequently more satisfactory, conclusive, and convincing than direct evidence. A case, which is usually cited in illustration of this, is a case where the charge was murder with a pistol. At the trial there was much evidence that the prisoner was in the neighborhood of the place where the deceased was killed, and at the time when he was killed ; but no direct evidence that he had a pistol or fired one. One of the witnesses stated that the pistol must have been discharged very near to the deceased, as part of the wadding was found in the wound. Upon inquiry he produced the wadding, which was unrolled and found to be a portion of a printed ballad, and the rest of the ballad was found in the prisoner's pocket.

But circumstantial evidence is also very dangerous, and the danger arises from two sources : from hasty and unwarranted deductions and inferences, and from making inferences from facts themselves insufficiently proved. Many a man has been convicted upon circumstantial evidence and hanged, whose innocence has been clearly established when it had become too late. For these reasons the law guards evidence of this kind with jealous care, watches it with close scrutiny, and has laid down for the guidance of juries in dealing with it a number of rules, very strict, and always very carefully observed.

The first of these rules, to which I shall call your attention, gentlemen, is, that it is essential that all the facts from which the conclusion is to be drawn should be fully established. Every single fact or circumstance which is essential to the conclusion must be established in the same manner and to the same extent as if the whole issue rested on the proof of such individual and essential circumstance. And the statement of this rule suggests the inquiry, What extent of proof does the law require ? How thoroughly must these facts be proved from which the inference is to be drawn. They must be proved, Mr. Foreman and gentlemen, beyond a reasonable doubt. This is the rule in

all criminal cases. If there is a reasonable doubt, the accused must be acquitted. The prosecution must prove to you beyond a reasonable doubt every fact from which they ask you to draw an inference. And the prisoner must be acquitted if the Government fails to satisfy you beyond a reasonable doubt of every fact essential to the conclusion which they ask you to draw. But he must also be acquitted if there is a reasonable doubt that his guilt is a reasonable conclusion from all the facts established. What then is a reasonable doubt? It is somewhat difficult to give a satisfactory definition of a reasonable doubt, although the meaning of the phrase is tolerably well understood and established. A short definition of it is, a doubt for which you can give a reason. This definition, unsatisfactory as it is, is as good as many longer ones that have been attempted. The best of all that I ever heard is this: proof beyond a reasonable doubt is proof which guides the mind, satisfies the conscience, and directs and convinces the understanding and judgment of him who is to act upon it. It is not the absence of all doubt, for all things are doubted. Some men have been found to doubt their own existence. But it is that sort of proof which produces the conviction of a moral certainty, which makes you so sure of any fact that you are content to act upon the fact, as a fact, in a matter involving the life or liberty of a human being, and in which all you do is done under the obligation and responsibility of a most solemn oath. To take an illustration from the case at bar: you are probably convinced to a moral certainty that the lifeless portions of a human body were found floating in barrels on the Charles River at Cambridge; and, if the guilt of the prisoner were established by proof of that fact, you would not hesitate to find him guilty. But, on the other hand, suppose that to reach the conclusion of the prisoner's guilt — which the Government will ask you to draw — it shall be essential to establish as a fact that the witness Ramsell left his house at seven o'clock in the morning, and met the man whom he has described to you driving a wagon on Beacon Street, shortly after seven o'clock, or at some time before eight o'clock. Has it been established beyond a reasonable doubt, as I have explained it to you, that it was seven o'clock and not eight when Ramsell started from

home that morning? Ramsell himself swears it was eight o'clock; that he took it at the time to be eight o'clock; that he knew the time by a bell which rings every morning. The swarm of witnesses that the District Attorney thereupon called to prove that some bells in Brookline ring at seven o'clock made me think it pinched the government case to have Ramsell's start fixed at eight o'clock instead of seven. But the Attorney only succeeded in proving that bells were rung within hearing of Ramsell's house at seven as well as at eight o'clock in the morning. What of it? Shall we believe it was the one bell rather than the other that Ramsell heard, because the District Attorney says so. In some parts of the day a man might easily make a mistake of an hour, but at a season of the year when it isn't light much before seven o'clock, a laboring man, who has the time he eats his breakfast and the time he has to get to his work to guide him, is not very likely to call seven o'clock in the morning eight.

The second rule which the law lays down for your guidance in the matter of circumstantial evidence is, that it is essential that all the facts from which the conclusion is to be drawn shall be consistent with each other, and with the hypothesis to be maintained. What is the hypothesis in support of which the Government have offered their evidence? It is that Abijah Ellis was killed in the prisoner's stable, on Hunneman Street, early in the evening of Tuesday, election day. At what time they pretend to say it was done, I don't know; but I do know that they have called before you here as a witness, and, by calling her, they ask you to believe what she swears, one Mrs. Kelly, and, according to her story, if you can believe it, it must have been shortly after seven o'clock. The further theory of the prosecution seems to be, that Ellis was cut to pieces and packed in the barrels at Alley's stable during the night, and that the barrels were, on Wednesday morning, taken over to Beacon Street in a wagon driven by Leavitt Alley, and by him thrown into the Charles River. Now, gentlemen, the rule that I have last stated to you prevents the conclusion that the prisoner at the bar is guilty, if any fact is proved to you which is inconsistent with this hypothesis, or inconsistent with the other facts from which it is sought to draw this conclusion of guilt.

And it makes no difference, in testing a fact or a conclusion by this rule, whether the inconsistent fact is proved by the prosecution or by the defence. Suppose, for instance, that we could establish to your reasonable satisfaction that the prisoner at the bar went to New York on the Saturday before election day, and remained there until after the barrels containing the body were found. That would be an instance of a fact proved wholly inconsistent with the hypothesis to be established. You see it would. And if this fact were proved, you could not possibly reach the conclusion that the prisoner is guilty, even if you were satisfied that Ellis was killed and cut to pieces in the stable on Hunneman Street. This is an instance of a fact inconsistent with the hypothesis. But the rule also prevents you from drawing any inferences from any fact which is inconsistent with other facts, or with any other fact, in the case proved to your satisfaction. Let me illustrate what is meant by this. We propose to offer evidence, and I think we shall satisfy you, that the prisoner's clothes were, before Mr. Ellis was killed, drenched and saturated with the blood of a horse. The Government have undertaken to prove that the blood on his clothes was human blood. What is their proof? Why, they call before you as witnesses two or three gentlemen who profess to be experts; in other words, to have made a special study of blood. They tell us that floating in the blood are certain little particles, which they call corpuscles, of a size so small that it takes over four thousand of the average size found in the blood of a horse, put side by side, to measure an inch; and something less than four thousand of the average size found in the blood of man to fill, side by side, the same space. These, mark you, are average sizes. The largest horse corpuscles and the smallest human corpuscles are more nearly the same size. The method by which they claim to distinguish between human and horse blood is by measuring these corpuscles under a magnifying-glass. Pretty fine spinning, gentlemen, this measuring of things of which it takes four thousand to make an inch! But they labor under a further difficulty. All the blood that they had to work with was, they tell us, dried before they got it. When the blood dries, the corpuscles shrivel and shrink. Before these gentlemen can measure them, they have to be

soaked and swollen again. If the liquid used to soak them with is too light, they don't swell to their original size; if it is too heavy, they become larger. We are dealing all the time with thousandths of an inch. If you soak dry human blood in too light a liquid, you may not swell the corpuscles so as to make them any bigger than horse corpuscles. You might then mistake human for horse blood. If you use too heavy a liquid for soaking horse blood, you might swell the corpuscles big enough to measure as much as the corpuscles of human blood. How do we know that this has not been done with the blood on the prisoner's clothes? How do we know that exactly the right liquid was used? We only have the oaths of these experts that such is their opinion. All men are liable to mistakes, even if honest; and shall a man be hanged on the difference of a portion of a thousandth of an inch, with such opportunities for mistakes? Now, if we satisfy you that this blood is horse blood, that fact is inconsistent with its being human blood, and the latter must be rejected. Take another illustration. The witness Ramsell swore that he noticed particularly the carpet which covered the barrels in the wagon he met on the Mill-dam, and would know it again anywhere. My learned friend, the District Attorney, was at great pains to prove by his witness Tibbetts that this carpet here on the floor is the one which the prisoner had in his wagon when he drove away from his stable on that Wednesday morning, when, they would like to have you believe, he drove over on to the Mill-dam with the barrels containing the body of Ellis, and threw them into the river. But Ramsell swears positively that this carpet is not the carpet which he saw in the wagon he met, and does not at all resemble it. These facts are wholly inconsistent with the position that the prisoner drove the wagon which Ramsell met on the Mill-dam. One more illustration, and I pass to the next rule. Ramsell says it was about half-past eight when he met this wagon on the Mill-dam. But the witness Scott Richards swears he met the prisoner, and he thinks it was that Wednesday morning, between seven and eight o'clock, on Charles Street, between Beacon and Boylston Streets, driving the other way; that is, driving away from Beacon Street, and towards Boylston Street. This fact, if

you believe it, is inconsistent with his being the driver of the wagon that Ramsell met, and you will be obliged to conclude that the prisoner could not have been the driver of the wagon described by Ramsell.

The third rule applied to circumstantial evidence is, that the circumstances from which the conclusion is sought must be of a conclusive nature and tendency. It is not enough that they make the conclusion probable, or even more probable than not. Thus, if it were admitted that Ellis was killed and packed in Alley's stable, it does not necessarily follow that Alley killed him. The killing and packing might well have been done in that stable by some one else; and unless it is proved that Alley was there, or even might have been there at the time when it was done, the mere fact that the crime was committed in that stable, insufficiently locked and fastened, as we shall prove it to have been, is wholly insufficient for the conclusion that it was committed by Alley. As the Government leave it, however, there is no proof that Alley was at the stable after Tibbetts locked it that Tuesday night; no proof that Ellis was there; and no proof that Alley and Ellis were together that evening at all.

The fourth and last rule to which I shall call your attention is of the utmost importance, and it has been stated by a former Chief Justice of this Court so much better than I can hope to state it that I propose now, with the permission of the Court, to read it to you as he has stated it, instead of stating it myself.

[Wells, J. What do you read from, Mr. Dabney?]

From the charge of Chief Justice Shaw to the jury, may it please your Honor, in Commonwealth *v.* Webster, 5 Cushing, 319: "It is not sufficient that they" [the circumstances from which it is sought to draw the conclusion of guilt] "create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hy-

pothesis." This rule, gentlemen, makes it necessary for my friends on the other side to make it morally certain that the prisoner is not innocent. If they fail to do so, you must acquit him. But as to some circumstances, my friends seem to be themselves in doubt, and not to assert any thing. Take the case of the barrels. The District Attorney, in his opening, said he was going to prove the barrels were put into the river from the Mill-dam, at about half-past seven o'clock on Wednesday morning. I presume he expected to prove that by his witness Ramsell. Whether he has succeeded or not is for you to judge. But what next? Why, they have called one man to swear he saw some barrels in the river, at that point, at eight o'clock in the morning of that day; another man to swear that he saw barrels in the river, at about the same place on the same day, shortly after noon; and a third, who actually swears to seeing barrels in the same place at half-past two in the afternoon of the same day. What are we to infer from all this, I ask the learned gentleman? Are we to infer that the barrels containing the body of Ellis, after being thrown into the river, floated and waited patiently about the spot where they were thrown in from half-past seven in the morning until half-past two in the afternoon, so as to give a chance to as many witnesses as possible to look at them, and come here and tell about it, and that they then dashed off up the river against the wind at a rate of speed which brought them a distance of three or four miles to the gas-works in about half an hour? I wish he would call a witness who saw them going. Our young friends at the college up there would do well to take one of those barrels for a model for their boats! But if all these witnesses saw different barrels, what does the evidence prove? It proves that barrels swarmed in Charles River on the sixth day of November last. But what of it if they did? The District Attorney told us, too, that Ellis ate bread and milk for his supper, and to be careful to remember it. Then he proved it, and proved, further, that it was eaten after six o'clock. Then he called one doctor to swear it takes just about three hours to digest bread and milk, and another one to show that the condition of Mr. Ellis's stomach proved he had digested his supper before he was killed. If this is all true, we may infer that Ellis was alive

until after nine o'clock; and, in that case, I should like to have somebody tell me what becomes of Mrs. Kelly's story. But I think I can satisfy you that, if Ellis was alive till after nine o'clock, Alley couldn't have killed him.

Gentlemen, crimes, particularly crimes of a grave character, are rarely committed without a motive. Unless some motive is proved to your satisfaction it will be pretty safe to assume that the prisoner is innocent of the charge against him. It is suggested by the prosecution, as I understand it, that money was the motive. They say Alley owed Ellis some money. What if he did? This man at the bar is no pauper. I am going to prove that he had money enough to pay all he ever owed Ellis six times over; that he was lending money at this very time. But suppose he owed him money and couldn't pay it, how did he gain any thing by killing him? The debt arose from the sale of a house. Let's see how that transaction was. Alley was paying Ellis money for the house at intervals. According to the agreement between them when he had paid a certain sum, Ellis was to give him a deed. If he failed in his payments before paying enough for a deed, he was to forfeit all he had paid. On the first of November it is said Alley was some twenty or thirty dollars in arrears. But he had no deed yet, and has none now. How could it profit him in this state of affairs to kill Ellis? There is here no motive. But we have had some attempts to show that Ellis carried money on his person. Gentlemen, when you have heard the character that his neighbors give that man over there in the prisoner's dock, and the story of his life, there will be no need to argue to you that Leavitt Alley never committed murder for the money he could plunder from the body of his victim.

Leavitt Alley was born in Eaton, New Hampshire, in the year 1816. His father is dead, but his mother is still living in New Hampshire. He was brought up in Eaton, where he received a good New England common-school education. He married in 1842, and has a family of three daughters and three sons, who will all testify before you here upon this stand. One of his daughters is married; but she and her husband, who will also be a witness and is a good honest fellow, live with her father. Alley lived in New Hampshire till 1869, earning

his living by farming and in the winter logging. He has been an unfortunate man in many ways. His barn burned up once, and when he rebuilt it a tornado came and blew it down. His foot was injured very badly by an accident while logging. But in spite of all this he has maintained himself and his family by hard, honest work, — honest work, gentlemen, with his hands. In 1869 he moved to Boston, where he first worked as a carpenter, and then bought out the express business he was pursuing last November. We shall prove by many of his old neighbors from New Hampshire who have known him from boyhood, that he was always a quiet, inoffensive, hard-working, honest man, never quarrelsome, never engaged in any fights, but always particularly quiet and peaceable.

On the evening of Tuesday, the fifth of November, Alley went home after putting up his horses at his stable. He got home shortly before seven o'clock, had his supper ; and then his daughter, who kept his accounts, got out her books, and he gave off to her his day's work. While they were at supper his son spoke of a stove which ought to have been delivered, but had been forgotten and left uncovered at the stand. Alley said he would go down and cover it up. When he got through his accounts he started to go down to attend to the stove. This was about half-past seven o'clock. We shall not rest our proof of all this on the members of his family alone. He walked down to his stand, a distance of more than a mile, — and he is lame, you know, — covered up the stove and then went into Risteen's store. His son, who was employed there, saw him and talked with him. Risteen saw him, and also another clerk of Risteen's. They will testify to seeing him, and also to the time, which was eight o'clock or a little later. When he came out of Risteen's he met a man by the name of Armstrong, with whom he went and took a drink shortly after eight o'clock, and then walked home, reaching his house a few minutes before a quarter to nine. The Government will ask you to believe that during this hour that he was away from home he had time to go to Risteen's and back, meet Ellis, take him to his stable, kill him and chop him up. During the night his wife was sick, and he had to get up twice and call one of his daughters to attend to her.

The next morning Alley went to his stable about five o'clock, as was his custom, to feed and groom his horses. About half-past six he harnessed up and started from his stable with Baker in his wagon. At the corner of Washington Street they met Mahan, to whom Alley paid some money, and they all went into a saloon and took a drink. While they were in the saloon his wagon, which, according to the theory of the prosecution, then had those dreadful barrels in it, was left standing on Washington Street alone, with no one to guard it. Alley then drove to Metropolitan Place; again left his wagon with the dreadful barrels in it standing on Washington Street, alone, unguarded, and out of his sight; went up the place to his house, it was then about seven o'clock; had his breakfast, and looked over his accounts. After this, he drove away, went to Durham's on Northampton Street, paid some money, and then drove to his stand, where he was seen by several persons about eight o'clock. All this we prove by many credible and independent witnesses. The business of an expressman leads him to see many persons, and Alley saw many that Wednesday morning. When they read in the papers that Leavitt Alley was charged with this murder, they remembered seeing him that Wednesday morning. From his stand Alley drove to Haymarket Square, where he left his wagon standing while he walked over to a lawyer's office in Court Square and paid some money. Returning to his wagon, which had been loaded while he was gone to Court Square, he drove with his load to Berkeley Street. We have a witness who met him driving his load up Harrison Avenue about a quarter-past nine. The rest of the day he was about his usual business.

As to the blood-stains we shall prove that one of Alley's horses was sick, and he got a horse-doctor to come and bleed him. He bled him in the stall, which stood where the blood-stains of which we have heard so much were found, and the blood spurted all over the side of the stall and of the building. During the operation the horse got away and went over to the other side of the stable near the door, and bled all over Alley's coat, which he had taken off, and which was lying on the floor. We shall prove that on this same occasion Alley's waistcoat and trowsers, the very same on which this blood was found that

the experts have experimented with, were smeared all over with the blood of this horse. Why didn't they find some horse's blood on these clothes? After Alley was arrested, and the story of the blood discovered in his stable was published in the papers, this horse-doctor, reading about it and remembering this operation there, had the curiosity to go to the stable to see if there were any new blood-stains made there since he bled the horse. He found just those that he remembered were where he bled the horse, and no others.

I must, gentlemen, make a few observations to you concerning the character of part of the evidence introduced for the prosecution: I mean the admissions of the prisoner testified to by the police. I confess when I reflect on the position in which Alley was placed, torn from his home, separated from his family and friends, without the assistance of counsel, examined and cross-examined, plied with hundreds of questions by the most skilful detectives, I am only surprised that they were able to obtain so little from a man under such circumstances, though wholly innocent, which they can state here as admissions. The danger is that when witnesses testify to statements and conversations, they do not and cannot state the exact language used and the whole of it. They only state what they understood at the time. Now, you know how frequently, in conversations, things said are wholly misunderstood and misapprehended. The speaker says a thing, intending by inflection, gesture, or word, to convey one meaning. The hearer loses a word, a gesture, or an inflection, and understands just the reverse of what is intended. But that is not all. When detectives cross-examine a man in whom they hope to have discovered a criminal, all which they understand him to say, that fits their theory, they seize on. Any thing that does not quite fit they turn over and over in their minds, until, unconsciously perhaps, they come to remember it in a way which does fit. Any thing he says which is inconsistent with their theory makes little impression on them, and they forget it. The result is, that, even when the witnesses are perfectly honest, it is next to impossible to get at what was really said and the whole that was said.

Mr. Skelton swears that, when the two barrels in which

Ellis's body had been found were pointed out to Alley at Cambridge, he said he could identify the larger one as having recently been in his stable. I don't believe he said it. Guilty or innocent, he wouldn't have said so. If guilty he certainly wouldn't, and, if he said it, saying so is the best possible proof of his innocence. They say he denied having an axe. They misunderstood him. He said he had an old axe, which was stolen from the stable three weeks before. And we shall prove that was the truth. Any one could get into that stable by pulling out a hasp or pulling open a shutter. He did buy a new one, and that was stolen from the stable, just as the old one had been, shortly before the time of this occurrence. It has been carefully proved that, before his arrest, he told Tibbetts and his son to remember carefully what they had been doing. Of course he did. On the evening before his arrest, an account was read aloud in the family of the prisoner from a newspaper describing the finding of a body packed in barrels with shavings, which had been ascertained to come from Schouller's, and stating that a teamster named Alley was discovered to have been in the habit of taking shavings from Schouller's to bed his horses. Naturally he thought suspicion might be directed to him or some one in his employ, and he told them to make a note and remember where they were and what they did, not on Tuesday alone, but on Monday and Wednesday also.

Gentlemen, I omitted to state to you that, when Alley drove to his stand on Wednesday morning, he carried from his stable four barrels in his wagon, all empty. Two of them he carried up into Schouller's shop. The other two he carried into the archway and left them there. If the police had looked for them there, they would have found them. When he started from his stand for Haymarket Square, we shall prove there was nothing in his wagon but a table, which he took from Schouller's. This table he delivered at a place on Washington Street on his way to Haymarket Square.

These things, Mr. Foreman and gentlemen, are what we expect to prove to you. I have prepared no studied conclusion or exhortation to close my address to you. I think it will be your pleasant duty, after hearing the evidence which we shall

offer, to render your verdict of not guilty, which will restore Leavitt Alley rejoicing to a happy family and friends, and the news of which will carry joy to the heart of his aged mother at her home among the hills of New Hampshire.

Albert M. Gardner was recalled at the request of a juror, and made the following answers to questions asked by the juror: It was an ordinary chopping-axe that I sold Alley; it was neither a very light nor very heavy one; it had a long handle, in which there was a slight imperfection; the handle might have been red, but thought it was dark blue or green; it was the last axe I had in the store, and weighed from four to four and a half pounds; am not willing to swear that the handle was painted red.

Daniel Mahan was recalled, and, in answer to a question by Mr. Somerby, said that when Alley paid him the money, he did not notice any blood on his shirt-bosom.

To the Attorney-General. I did not observe the clothing Alley had on.

At this point Mr. Somerby requested an adjournment, stating that, if time was allowed him to consult with his witnesses, he might be able so to arrange the evidence for the defence as to save considerable time.

The Court granted the request, and adjourned until the next day.

FIFTH DAY. — *Friday, 7th February.*

George M. McIntosh *recalled.* Stated that when he saw Alley on Hunneman Street, Wednesday morning, his vest and coat were open; witness saw no blood on Alley's shirt.

To the Attorney-General. Did not notice his clothing particularly.

EVIDENCE FOR THE DEFENCE.

Elias Towle *sworn.* Have resided in Freedom, N. H., fifty years; have been in trade most of the time; have known Alley

for forty years; he lived four miles from me; Alley's general reputation for honesty, and as an inoffensive and peaceable man, was good; am treasurer of the savings-bank in Freedom; have been selectman, town clerk, representative to the legislature, county commissioner, and postmaster; in October last, I discounted a note of six hundred and fifty dollars, payable to Leavitt Alley; it was brought by John Q. Alley, and is in the bank now; the note was made by two men named Drew, and was indorsed by Leavitt Alley.

Mr. Dabney. Do you know any thing of the pecuniary condition of the Drews?

The Attorney-General. I object.

Mr. Somerby. I propose to show the worth of the note, and that, at the time of the accusation against Leavitt Alley, his brother John owed him a debt. He offered the testimony to show the pecuniary condition of the defendant.

The Attorney-General. It don't appear that Alley had any credit.

The Court ruled that the question was irrelevant.

The defence proposed to show the value of the note, and the liability of the makers, but the Court excluded it.

Mr. Somerby took an exception.

NICHOLAS BLAISDELL *sworn.* Had lived in Madison, N. H., nearly all his life; was admitted to the bar in Massachusetts in 1863, to the bar of the Supreme Court of Washington in 1864, and in New York in 1869; have always known Leavitt Alley; his reputation for honesty, and as a quiet and inoffensive man, is very good; in September, made some conveyances for Alley, and other parties in New Hampshire; Alley had a farm deeded to him at that time, worth $1400 or $1500; at that time there was some money paid Alley; I counted $100 myself; saw money in Alley's pocket-book, and think there was $400 or $500 in it; made four notes, of $100 each, payable yearly to Alley, and I delivered the notes to Alley; the notes were secured by a mortgage on a farm; a note of $650, by the Drew boys, was made on the 25th of September, the same day as the other transactions; a day or two after, I wrote a note for John Q. Alley for $440, in favor of Leavitt Alley.

No cross-examination.

THOMAS COLLIGAN *sworn*. Reside in Boston Highlands; have lived there since 1828, and am a carpenter; am sexton of Dr. Putnam's church, and the locality about there is often called Norfolk House Hill; on the morning of November 6, I rang the bell on Dr. Putnam's church at eight o'clock; it is rung at that time every day.

WALTER HARMON *sworn*. Have lived in Boston thirty-three years; am a merchant, doing business on State Street; formerly lived in Madison, N. H.; knew Leavitt Alley when he and I were boys; have not known him since I came to Boston; in New Hampshire, Alley's reputation for honesty, and as a quiet, inoffensive man, was good.

To the Attorney-General. I am fifty-four years of age.

MARK T. BLAISDELL *sworn*. Was born and have always lived in Madison, N. H.; am a farmer; have represented my town in the Legislature; have always known Alley, and his reputation as an honest, peaceable, quiet, and inoffensive man is very good.

FREDERICK E. BRADBURY *sworn*. Live at Effingham Falls, N. H.; have not held any office there; have known Alley twenty-two years; Alley's reputation for honesty, &c., is very good.

To the Attorney-General. Since Alley came to Boston, four years ago, I don't know any thing about him.

JOSIAH THURSTON *sworn*. Reside in Freedom, N. H.; am president of the savings-bank in that town; know Alley, and his reputation for honesty, and as a quiet, peaceful, and inoffensive man, is very good.

JOSEPH E. SHACKFORD *sworn*. Live in Eaton, N. H.; am a farmer; I lived about one hundred rods from Alley, whom I have known twenty-five years; his reputation for honesty, &c., was good; on the 24th or 25th of September, I counted four hundred dollars, which Alley had in his possession; Alley also had a note for six hundred and fifty dollars, signed by John and Amos Drew; there were some other notes of demand.

Q. What was Alley's pecuniary standing?

The Attorney-General. I object.

The Court. We have already excluded this question.

Mr. Somerby. Do the Court rule that we cannot show

that Alley's credit was good, and that he could borrow money to any amount ?

The Court. We so rule.

Mr. Somerby. Then I desire to save the exception.

The Court. We have already saved it.

AMOS E. DREW *sworn.* Now live in East Boston, but formerly lived in Eaton, N. H. ; am now a horse-car conductor ; always lived next neighbor to Alley in New Hampshire ; in September last, myself and brother gave Alley a note for six hundred and fifty dollars, in payment for land bought of Alley in Eaton, N. H. ; we did not pay any money down ; there was no mortgage on the land ; the note made by my brother and myself is good.

To the Attorney-General. I have no family ; my compensation is two dollars per day ; the note is not secured by mortgage.

NATHANIEL G. PALMER *sworn.* Live in Eaton Centre, in New Hampshire ; have not held office ; have known Leavitt Alley for twenty years ; Alley's reputation for honesty, and as a quiet and inoffensive man, is good.

To the Attorney-General. I am a trader.

WILLIAM F. BROOKS *sworn.* Reside in East Boston ; formerly lived in Freedom ; have known Leavitt Alley ever since I was a boy ; Alley's reputation has always been good.

JOHN SMART *sworn.* Reside in Freedom, N. H. ; am a farmer ; Leavitt Alley married my sister twenty-one years ago ; Alley was then a farmer, and his reputation was good ; witness, of his own knowledge, didn't know what property he had in September last.

RUFUS H. BURBANK *sworn.* Reside in Boston, but formerly lived in Epping, N. H. ; am connected with the Metropolitan Railroad ; have known Alley fourteen or fifteen years, and his reputation is good.

JOHN CARR LEAVITT *sworn.* Live in Boston, but came from Epping, N. H. ; have been a member of the Legislature from Epping, and have been town collector ; have known Alley for twenty years, and his reputation is good.

JOHN Q. ALLEY *sworn.* Live in Eaton, N. H., and am a brother of Leavitt Alley ; am a farmer ; I live on the old place,

and my mother lives with me; in October last, I got a note from Leavitt Alley, signed by the Drew brothers; I received the note on the 27th; I borrowed the note of my brother, carried it to the Freedom Bank, got it discounted, and paid debts which I owed; have paid my brother some money on the note since his arrest; my brother had a part of the farm we sold and got the notes for, and he had money besides; saw one man pay him fifty dollars, and he had a roll of bills in his pocket; he received the four hundred and fifty dollars for the farm on the 25th of September, and took a mortgage; on the 5th of November last, I had not paid any of the money I owed my brother.

To the Attorney-General. The transaction to which I have referred was on the 27th of September; the $650 note which I borrowed of my brother was due on the 1st of April, 1873; the note was given for thirty acres of land in Eaton; on the 27th of September, my brother loaned me that note, and I gave him mine in return, but gave no other security; I owed my brother a note of $160, made in 1869; this note was included in the one I gave my brother for $440; the last note is secured by mortgage on my personal property; I own 300 acres of land, and, after borrowing the $650 of my brother, there was no mortgage on my farm; since my brother's arrest, I have given a mortgage to his son, Daniel L. Alley, to secure the note of $650; three or four weeks before the 25th of September, I saw my brother paid $50.

Redirect Examination. I indorsed the Drew note; my brother never demanded payment of the note of $160 which I gave him in 1869.

Albert Watson *sworn.* Live in Boston, and am a grocer and dealer in real estate; my store is at 788 and 790 Tremont Street; my store was at 141 Shawmut Avenue; have known Alley since 1869, and have lent him money; his reputation for honesty and as an inoffensive man is good.

Mr. Dabney. What was Alley's pecuniary standing three months before November 5?

The Court. We rule that the question is incompetent.

Mr. Somerby. I wish to save the exception.

Jacob Manson *sworn.* I live in Effingham, N. H. Have

known Alley from boyhood; his general reputation for honesty and as a peaceful and inoffensive man is good.

ALDEN SNELL *sworn.* Am a dry-goods dealer in Boston; have known Leavitt Alley from twelve to fourteen years, and his reputation for honesty, &c., is good.

JOTHAM HARMON *sworn.* Reside in Madison, N. H.; have known Alley for thirty-five years, and his reputation for honesty, &c., is good.

ELIZABETH L. PORTER *sworn.* Live at No. 17 Dover Place, Boston; am acquainted with Abijah Ellis, and have known him five or six years; he came to board with me on the 3d of January, 1868, and remained until the latter part of September, 1871; he afterwards came back and boarded with me till the latter part of June last; the rear of my house is near the house where Ellis last roomed; the last I saw of Mr. Ellis was between seven and eight o'clock on the evening of election day; I saw him opposite the old Franklin School-house; my attention was called to him by my daughter; he was walking very fast, and was going in the direction of East Dover Street; it could not have been far from half-past seven o'clock when I saw Mr. Ellis; my attention was called to the circumstance by some gentlemen who called at my house after the tragedy.

To the Attorney-General. On the 5th of November I had fourteen persons in the house; my husband has been South nearly eight years; Mr. Ellis has never roomed in my house; my daughter who called my attention to Mr. Ellis is eleven years of age; I was going to the corner of Washington and Garland Streets at the time; there were a very few persons on the street, and Mr. Ellis was on the same side that I was; I did not speak to Mr. Ellis because I did not want to be interrupted, and he did not speak to me; I left my house a little after seven, but don't know what time I got back; heard of the murder before the people came to my house to ask me about it on Thursday or Friday; have seen Mr. Dabney, Mr. Somerby, and Mr. Way once, and talked to them about it; the night I saw Mr. Ellis was not a light one; I passed within three feet of Mr. Ellis, and close enough to recognize him; when Ellis went from my house to Mrs. Tuck's to board he

said he was going into the country; never had any difficulty with him.

LIZZIE FRANCES PORTER *sworn.* Eleven years of age, and daughter of the above witness; she corroborated her mother's testimony.

To the Attorney-General. Mr. Dabney has been to our house twice, and I have talked with him; nobody told me that I had known Mr. Ellis about four years: haven't heard anybody say that Mr. Ellis boarded with my mother for four years; the reason I know it was the night of election day is because when I went to school that day I saw men giving out bills [ballots meant]; the reason I know it was between seven and eight o'clock when I saw Mr. Ellis was because my mother goes out at that time every night; it was a pleasant, dark night; nobody has told me what to say about the weather.

ARTHUR W. FORBES *sworn.* Have lived in Boston about three years, and am a surveyor; know where Metropolitan Place is, and Mr. Risteen's store, also; have measured the distance between the two places; it is about one mile; the distance between Alley's stable on Hunneman Street to Risteen's store is a mile and one-seventeenth.

LEONORA O'TOOLE *sworn.* Am the eldest daughter of Alley, and since July last have lived with my folks in Metropolitan Place; on election night was at home until about half-past seven o'clock, when I went out to see my cousin [witness gave a description of her father's house]; there is no door leading into the backyard except the one from the kitchen; before I went out that evening I had not seen my father; just before I went out the door bell rang, and I saw my sister Anna's music teacher come in; the way I fix the time is because Mr. Smith, the music teacher, usually comes about half-past seven o'clock; I went to my cousin's, at No. 39 Dearborn Street; I remained there perhaps three-quarters of an hour; at quarter-past eight o'clock I said I must go home, but my cousin urged me to stay, and I remained a few minutes longer; in going home I walked very fast till I got to Washington Street; I met my husband two or three doors from Metropolitan Place; I had not seen him for two or three weeks before; as I passed the corner of Lang's bakery I looked at the clock,

and it was twenty minutes past eight; when I got home found my sister Addie in the sitting-room and my mother and Anna in the kitchen; my father came into the house right behind me; he spoke to Mr. O'Toole first; I went to bed a little past nine o'clock; left my father, mother, and Anna in the kitchen.

About a quarter to one o'clock on Wednesday morning my father called me up as my mother was sick; I went downstairs and applied camphor to my mother's temple; my father was in bed at the time; next saw my father at seven o'clock that morning; he came from out-doors into the kitchen, washed himself, and then ate his breakfast; after eating his breakfast he went out; don't know whether he had his wagon at the house when he was eating breakfast; my brother Daniel came in when my father was eating breakfast.

To the Attorney-General. Think I first heard of the disappearance of Mr. Ellis on Thursday night; I read it in the papers; it was in the sitting-room, and my husband and brother Daniel were present; the piece was read aloud; it was after we had taken tea; we take tea about six o'clock; when I read the paper my father was downstairs; had not seen a morning paper; the matter was talked over by us; the substance of what I read was about the finding of the remains of Mr. Ellis in barrels in Charles River; my father knew about it, and it was talked over in his presence; all I remember was something about Schouller's teamsters removing some shavings; knew that my father did teaming for Schouller; can't remember that father talked about the matter; my father did not go out again that night; he went to bed in a few minutes after the conversation; think mother went to bed soon after; can't remember who was in the room after father and mother went to bed; can't say whether my husband was present or not at the time of the conversation; I felt much interest in the matter when I heard father's name was mentioned; don't remember that we conversed that evening about any thing else except the article in the paper; did not see my father Thursday night after he went to bed; heard the bell ring about eleven o'clock and knew that somebody came to the house; did not know who came until the next morning; I was out on Tuesday; remember that my father was at home to dinner on that day; he

came about half-past twelve o'clock. [Some considerable time was then spent by the Attorney-General in testing the recollection of the witness as to what she did on that day, and the events which transpired.]

On Friday morning, before father went down to the office of the Chief of Police, we did not have any conversation about what time I came in on Tuesday night; on Friday morning talked with my mother about the whereabouts of my father on Tuesday night; Saturday morning the officers came to the house with father and then we all talked it over; have not talked particularly with my husband about the matter of time when we reached home on Tuesday night; have told Mr. Dabney what time I came by the bake-shop on Tuesday night; don't think Mr. O'Toole was present at the conversation; have talked with Mr. Somerby this week; it was not last night, but might have been had the night previous; have no doubt it was on Wednesday night; was not at Somerby's office last night; on Wednesday night my two sisters, three brothers, and husband were at Somerby's office, and the matter was all talked over; will swear it was quarter-past one o'clock when I passed the bake-shop on Tuesday night; didn't notice any thing peculiar about my father when he came in on Tuesday night; did not notice his clothing.

Redirect Examination. The basement door was always left unlocked.

ARTHUR W. FORBES *recalled.* Stated that the distance from Metropolitan Place to Risteen's store was one hundred and forty feet over three-quarters of a mile; and the distance from Alley's stable to his house was one hundred and sixty-three feet over a quarter of a mile; the whole distance from Risteen's store to Alley's stable was five thousand five hundred and eighty feet; the distance from the sluiceway on the Mill-dam to the Cambridge gas-works was fifteen thousand eight hundred feet, or within a few feet of three miles.

FRANK J. SMITH *sworn.* I live at No. 48 East Chester Park; gave music lessons to Abby and Fanny Alley; went to Alley's house at half-past seven o'clock on Tuesday evening, November 5; was there about five minutes and returned home; went to Alley's to see if they wanted to resume music lessons.

To the Attorney-General. I ceased giving lessons to the Misses Alley on the 23d of October; the reason that I know that I went to Alley's at half-past seven o'clock on the evening of November 5, was because I always went there at that hour; I went there that evening with the expectation of giving lessons; don't remember what I did the rest of the night; couldn't say what I did that day or the day before; my attention was first called to the fact that I was at Alley's house on the 5th of November by reading the newspapers; my attention was also called to it by Miss Anna Alley; she asked me if I remembered what time it was, and I told her I did; the conversation about time was at Alley's house; Mrs. O'Toole was not present when it occurred; the first person I saw when I went to Alley's was Mrs. O'Toole; I think I told her I was undecided as to the time I called on the evening of November 5; the conversation with her took place in the parlor; in the conversation with Mrs. O'Toole I was undecided as to the night; afterward had a conversation with Anna, and since that have had conversation with Mr. Dabney, and at Mr. Somerby's office last night; Mr. Way and the two Misses Alley were there.

To Mr. Somerby. I was not in your office on Thursday night more than three or four minutes.

Mrs. Mary E. Taylor *sworn.* I live in Preston Place; in November last lived in Dearborn Street; Mrs. O'Toole is my own cousin; on the evening of election day she came to my house about quarter before eight o'clock; she remained over half an hour, and it was between quarter and half-past eight o'clock when she went home.

To the Attorney-General. It is a little more than half a mile from my house in Dearborn Street to Metropolitan Place; don't know where I was on Monday night, or any night prior to Tuesday night within a week; first heard of the discovery of Mr. Ellis's remains on Saturday; was informed about it by a friend; I went down to Alley's Sunday evening; the mother and all the children and Mr. O'Toole were there; we talked over the visit of Mrs. O'Toole to my house on Tuesday evening; in my conversation with Alley's family I remembered the day and time Mrs. O'Toole was at my house; have talked

with Mr. Dabney and Mr. Way about the matter; haven't read the newspapers during the trial, but have heard them read.

BURLEY M. TAYLOR *sworn.* I am the husband of the last witness. He corroborated her testimony in relation to the visit of Mrs. O'Toole at his house on the evening of November 5.

The cross-examination consisted mainly in testing his recollection; but his evidence was not materially affected.

LAWRENCE J. O'TOOLE *sworn.* I live at No. 5 Metropolitan Place; am a mason by trade; on the afternoon of the 5th of November, I left Keene, N. H., and arrived at the Fitchburg depot in this city a little after seven o'clock; walked up Washington Street and went into Risteen's store; then to my house, arriving there a little past eight o'clock; had my supper and went out with Lewis Day to a saloon and had a glass of ale; as I came out of the saloon I met my wife coming from the direction of Roxbury; I was then about three rods from Metropolitan Place; my wife and I went into the house by the door leading into the dining-room; before I had seated myself Alley came into the house; don't know what time it was when I came back with my wife, but it was just half-past eight o'clock when I went out; I talked a little while with Alley, and then went to bed about nine o'clock; heard the nine o'clock bells ring after I went to bed; some time in the night Alley came to my door and called my wife, who got up and was gone about an hour; did not see Alley again until Thursday.

To the Attorney-General. It was Mr. Dudley's saloon that I went in; it is the fourth building from the corner of Metropolitan Place; I left Mr. Day in the saloon; when I came out I intended to go and meet my wife; first heard of the discovery of the remains of Mr. Ellis on Thursday; read it in the newspapers that night; didn't read the paper aloud nor hear it read.

OTIS P. DAY *sworn.* I am a conductor on the Metropolitan Horse Railroad. [He corroborated the statements of Mr. O'Toole.] Before going on to the railroad I was employed as a teamster by Alley; saw O'Toole at eight o'clock on Tuesday evening, November 5; it was half-past eight o'clock when Mr. O'Toole and I went into Dudley's saloon.

To the Attorney-General. Can't say when I first knew of the murder; I saw it in the paper, but can't say whether it was on Wednesday or Thursday night; heard it talked about at Alley's either on Wednesday or Thursday, but took no part in the conversation myself; don't think I was asked about what time I got home on Tuesday night; this is the first time I have ever told my story.

JOHN P. LANG *sworn.* I live in Metropolitan Place; am a baker; my store is at the corner of Washington Street and Metropolitan Place; opened my store from half-past five to six o'clock in the morning during November, and closed it about nine o'clock in the evening; have a clock in my store near the door, and I consider it a very good time-keeper.

Miss ANNA L. ALLEY *sworn.* Am a daughter of Leavitt Alley, and live at No. 5 Metropolitan Place; on election day saw my father in the evening at half-past six o'clock; he came into the house from up the street; I was in the kitchen with my mother when he came in; he washed him, combed his hair, and then went into the dining-room and had supper; after supper I took down the work that had been done the Saturday before; then Monday and Tuesday's work; I was occupied about half an hour in doing this; while I was taking down the work I heard the front-door bell ring; went to the door and found Mr. Smith, the music teacher; he stepped inside, and I had about five minutes' conversation with him, and he then went home; then I went downstairs into the dining-room; while I was taking down the work Curtis spoke of a stove that had been left out at the stand and needed to be covered up; between half-past seven and quarter of eight father left the house, going out of the lower front-door; Tibbetts, Curtis, mother, and I remained in the dining-room a little while after father went out, and then I went down into the kitchen; Mr. O'Toole came about eight o'clock, and, after remaining in the house a few minutes, went out with Mr. Day; he returned with his wife a few minutes after; my father came into the house within a minute after Mr. and Mrs. O'Toole; Mr. and Mrs. O'Toole went to bed first, and then father and mother went; I heard father and mother in their room.

I went to bed about quarter-past eleven o'clock, and some

time in the night heard my father call my sister Abbie; the next morning about quarter-past seven o'clock I saw my father eating breakfast in the dining-room; the reason I know what time it was, is because I looked at the clock when I came downstairs; should think it was about twenty-five minutes past seven o'clock when he left the house; so far as I know my father did not go out of the house after coming in about nine o'clock.

To the Attorney-General. I was reading after the folks went to bed on Tuesday evening; I know that when Mr. Smith called it was half-past seven o'clock, and father went out after that; when I went to the door after Mr. Smith rang the bell, I looked at the clock, and it was half-past seven o'clock; I expected Mr. Smith that night to give lessons; after breakfast Wednesday morning, think I saw my father at noon time; then at supper; on Thursday night I first heard of the finding of Mr. Ellis's remains; it was read from a newspaper in the presence of nearly all our family; saw my father the next morning after breakfast; nothing was said by him about going to see the Chief of Police, but mother spoke to him about it.

First recollect of having a conversation Friday morning with mother about what occurred on Tuesday evening; don't remember that we had a conversation about it on Friday night; don't remember of having talked since with anybody about what occurred; don't remember of sending for Mr. Smith to come and see me; he didn't come and see me; don't remember of going to see Mr. Smith; I believe Mr. and Mrs. Taylor came to our house on Sunday evening, and the visit of Mrs. O'Toole to Mrs. Taylor on the Tuesday evening previous was talked of, and the fact that Mr. Smith came on Tuesday evening was also spoken of.

Redirect. Am sixteen years of age, and never was in Court before.

SIXTH DAY. — *Saturday, 8th February.*

By consent of the defence, Professor Henry Mitchell of the Coast Survey was called, and testified that on Tuesday morning, the 5th of November, by prediction, it was low water at one minute before nine o'clock at the dry dock in Charlestown; there is about five minutes' difference between the tide at the dry dock and at the sluiceway on the Mill-dam; the difference between the tide at the dry dock and the gas-works in Cambridge would be about half an hour; it was high water at the dry dock at eleven minutes past three; I would allow about twenty minutes between the dry dock and the Cambridge gas-works.

Cross-examination. Should think that if a south-west wind was blowing up Charles River at a less rate than ten miles an hour, it would not have any effect on the tide; if the wind was blowing up the river it would have the most effect on the tide; it is about two miles from the sluiceway to the gas-works; the tide is the most rapid at the Brookline bridge; the average rapidity of the tide just above this point is just about half a mile an hour; if an object was placed in the river at the sluiceway on an ordinary tide the least possible time it could reach the gas-works would be four hours and twenty-four minutes, according to my observation; it would be within the range of possibility for a barrel on a strong tide to float to the gas-works from the sluiceway in three hours.

To the Attorney-General. A barrel thrown into the water at the sluiceway an hour and a half before low tide, and half or nearly submerged, would probably float around among the flats in the basin and remain until the flood tide lifted it.

Arthur W. Forbes was recalled, and testified that the distance from Metropolitan Place through Washington Street, down Washington to Pleasant, from Pleasant to Charles, from Charles to Beacon, down Beacon to the sluiceway, was three and one-sixteenth miles, less twenty feet. From Metropolitan Place to Washington Street, from Washington to Northampton Street, from Northampton to Columbus Avenue, from Columbus Avenue to Madison Place, from Madison Street to Pleasant Street, through Charles Street to Beacon, and down Beacon

Street to the sluiceway, was three and one-eighth miles, less fifty feet. From Washington Street to Northampton, through Northampton to Columbus Avenue, through Columbus Avenue to Berkeley Street, through Berkeley Street to Beacon, and down Beacon Street to the sluiceway, was fifteen feet over two and five-eighth miles.

JOHN GEORGE WILKINS *sworn.* Am a veterinary surgeon; have seen Leavitt Alley twice; the first time I saw him he called at my house in Dorchester last September; he wanted me to go and see a sick horse; it was in the morning he called; I went to Alley's Stable in Hunneman Street about one hour after; Alley did not go with me, but I found him at the stable when I arrived; I found a horse sick and lying down in the second stall; made an examination, and found the horse had a severe cold; I first bled the horse, and then gave him some physic, the horse was loose at the time; I bled him in the jugular vein and also in both legs between the shoulder and the knees; the horse walked around the stable bleeding; he first went into the third stall and lay down; I got him up and he then walked up to the manure heap and lay down upon it; a stream of blood was flowing from his legs and also the jugular vein; he bled while over the manure heap about twenty minutes; I bled the horse on the left side of his legs; he ate some loose hay on the top of the stable, standing at the time near the side of the barn; the horse spattered blood on the side of the barn and the stall; I was spattered with blood and so was Alley; Alley got some blood on his pants, coat, vest, and shirt. I had my hand on the jugular vein of the horse at the time, and Alley had hold of the other side; the horse then walked up to the barn door and spattered blood upon a coat which was lying there; Alley was standing up till I ordered some poultices on the horse's knees, and Alley stooped down and did it; saw blood upon the post near the stall, and also saw the horse get blood upon the shavings in the third stall; while I was there Alley took up the bloody shavings and threw them into the manure heap; after I heard of the arrest of Alley I went to the barn again out of curiosity; found a post near the third stall had been removed; noticed blood upon the

side of the barn; there were no new spots, and it looked like the same I saw at the time the horse was bled.

Cross-examined. I bled the forelegs of the horse by cutting the centre artery with a lance; think the horse bled a pint from each foreleg; don't know how many arteries there are in a horse's leg; did not bandage the horse's neck when I bled him in the jugular vein; I backed the horse out of the stall when I bled him; he was headed toward the side of the building by the door, — I guess two feet from the door; the horse bled until within fifteen minutes before I left, when I pinned the wounds; did not get my pay for the job, nor did I charge it, and have no way of fixing the day when I went to the stable; don't remember of bleeding any other horse that day; I know it was not in August when I bled Alley's horse, because I went down in Maine about a fortnight after; have been to the stable since the murder; once, I went alone and the second time with my father; the door was locked when I got there; but I pulled out the staple and padlock and went in; went there again this morning; found Mr. Way there; the door was locked and some man whom I did not know unlocked the door and we went in; two or three weeks ago went to Mr. Somerby's office and talked over with him and Mr. Way about bleeding the horse in September; have told my story to Mr. Somerville and Mr. Way three times; after a horse is bled, if a horse was standing the blood would spurt from the neck from a half an hour to an hour; if a horse lay down the blood would flow in a steady stream; the horse bled about six quarts; there are about eighty pounds of blood in a horse or about forty quarts; this depends on the size of a horse; the pile of manure was about five feet high and two feet through; the horse lay down on the back of the manure heap with his head toward the wall; when the horse got up he crossed to the end of the stable; I got blood all over my shirt and pants; I did not have on a coat; Alley got blood on his vest, shirt, and pants; while feeling for a pin Alley rubbed the blood into his vest; don't know to whom the coat belonged that lay near the door and upon which the horse got some blood; it was a pretty bloody operation for both Alley and myself; before we got through bleeding the horse a shaver came in and went and got

some pins; I bled a horse day before yesterday at the South Boston horse-car stables; I bled him with a phlegm in the jugular vein; a man assisted me; I got bloody, but the man didn't.

Dr. CHARLES T. JACKSON *sworn*. Have lived in Boston forty years, and am an analytical and consulting chemist and State assayer for the Commonwealth; have taken a regular medical degree at Harvard College; have frequently had occasion to examine blood in reference to trials; it is not a difficult thing to ascertain whether stains are blood; the drying up of blood depends on the weather; I think it would dry entirely in twenty-four or thirty-six hours; there is no way to tell how long blood has been in a place after it has dried; if blood was scraped off with a knife after it had dried there would be no way of telling how long it had been on any place it was found; blood is a liquid, the fluid part of which is yellow, containing febrine and red corpuscles; some seventy-nine per cent of blood is water; corpuscles are circular disks having a central point, and are the same in all mammalia; if corpuscles were thrown on a board the serum would sink into the wood and is absorbed, leaving the corpuscles shrunk up in all manners of shape; when warm and fresh the corpuscles of a man are much larger than those of a horse; there are different-sized corpuscles in man in the same blood, varying from $\frac{1}{320000}$ to $\frac{1}{375000}$; there are also in the blood colorless globules which are very irregular; assuming that dry human blood was brought to me the corpuscles can be swelled out again, but there is no method known to science which can determine whether the corpuscles after being swelled are of their original size; I know of no means, and none are recorded in scientific authorities, of determining the difference between the dried blood of man and that of mammalia; this is settled by the highest authorities; the measurements of Dumas and Prevot are used all over the continent of Europe. In the best authority of England, a work by William A. Guy, it is stated that there is no means of knowing the difference between the corpuscles of the different mammalia.

The citation of authorities by the witness was objected to by the Attorney-General, and assented to by the defence.

Cross-examined. The last time I made a personal examination of blood in reference to the size of corpuscles was within two years; have never made an examination of the blood of different mammalia with reference to their relative size. A corpuscle can best be compared to a biscuit, — the disks being rounded up, and the highest in the middle; the highest authorities known maintain this. In their normal condition I know that corpuscles are not depressed in the centre. Lehmann is a high authority on this question. There is a difference of a third in the size of a particle of human blood and horse's blood. If you took particles of human and horse's blood, dry, by putting those two into an artificial serum, it is altogether an uncertain experiment to bring them back to their normal shape. Don't believe that with a powerful microscope a man could tell when a dry corpuscle was brought back into its original shape, and in my opinion they could never be restored with any certainty. In one drop of blood a single corpuscle might possibly be restored to its original shape, but it is hardly within the range of probabilities; it requires the most powerful microscope to even distinguish corpuscles. The blood of reptiles and birds is contained in elliptical or oval-shaped vessels, and are much easier examined than the corpuscles of mammalia; never have examined the blood of birds or reptiles, but in my opinion if it once became dry it would be impossible to restore the vessels to their original condition; if a globule of blood was magnified eight hundred times it would be about as large as the point of a sharp pencil; if the blood of two different mammalia was taken in a fresh shape under certain conditions, and then placed under a magnifying glass, I think a different size in the globules might be observed, but it would be a very difficult and delicate task to observe the difference; it would be very slight, however; dog's blood would be the same size as man's blood, and sheep's blood the same as horse's. I know that Dumas was engaged on his work thirty years ago, for I was one of his pupils in Paris.

James F. Babcock *sworn.* Reside in Boston; am an analytical chemist and professor of chemistry in the Massachusetts College of Pharmacy; studied at the Lawrence Scientific School, Cambridge, under Professor Horsford; have

frequently been called upon to examine blood and stains; have examined stains perhaps a dozen times and blood many times; it is a delicate matter to determine blood, but by a proper method it is an easy thing to recognize it; blood chemically consists of a clear fluid called serum, fibrine, blood-corpuscles, and various salts. The time of the drying up of blood would vary according to circumstances; blood spattered upon blood in ordinary weather would dry in a day; in a building blood would dry up in twenty-four or thirty-six hours; after blood has once dried up it is impossible to tell how long it had been there; if blood was scraped from a surface with a knife you could not tell how long it had been there. Take warm blood and the only way to measure the disks is by a micrometer; the differences in the size of mammalian corpuscles vary within certain limits; the corpuscles of the same animal are not all of the same size, though perhaps ninety per cent are; the average size of the human corpuscle is $\frac{1}{3200}$ of an inch in diameter; the extremes are from $\frac{1}{2000}$ of an inch to $\frac{1}{4000}$ of an inch; the blood coagulates and becomes solid soon after being drawn; the corpuscles previously floating in the fluid contract, the edges shrink together, the mineral salts crystallizing; the shape of the corpuscles when dry, before scraping off or after, cannot be told; they shrink up like a sponge; from my experience you cannot tell whether it is human or horse blood; the average size of a human corpuscle is a little larger than a horse's; a human corpuscle is about $\frac{1}{20000}$ of an inch larger than a horse's; after blood is dried it would be impossible to perfectly restore the corpuscles to their normal condition; I don't know of any authority which tells the way to distinguish between the dried blood of man and that of mammalia; there is no standard of measure to tell the difference between the dried blood of man and that of the mammalia; authorities on this point are not doubtful, but are all unanimous.

[Witness produced a copy of Guy's "Forensic Medicine," and read therefrom a passage in support of his statement, as follows: "When it is borne in mind that in most instances we have to examine a blood solution obtained from dried blood, made to approximate to the average density of blood by the addition of syrup, glycerine, or a saline solution; that the size

of the globules is materially affected by the density of the medium in which they float; and that in the blood itself the diameter of one globule may be twice as great as that of another,— it is not to be expected that the most skilful and practised person should be able to distinguish human blood from that of other mammals."]

Among the best authorities on this subject are Lehmann's "Physiological Chemistry," Watt's "Dictionary of Chemistry," Taylor's "Medical Jurisprudence," Pelouze and Fremy's "Chemistry," vol. vi.

Cross-examined. The size of corpuscles in human blood varies within certain limits; taking the average at $\frac{1}{3200}$, they would vary from $\frac{1}{2000}$ to $\frac{1}{4000}$; the difference between the comparative size of corpuscles in human blood and those of horses is about one-third; have examined human blood with reference to the relative size; the best illustration of the shape of a corpuscle would be a coin; in so speaking, I do not mean its exact shape, because no object is quite like a corpuscle; the shape of a corpuscle is slightly concave toward the centre; I have seen a particle of human blood magnified from a diameter of fifty to five hundred. [Witness then drew the size of a corpuscle as it appeared to him under a diameter of four hundred to five hundred.] Had seen a photograph of the blood of an animal under fifteen hundred diameters.

James F. Babcock *recalled. Redirect examination.* There is no certainty in pointing out on paper the size of an object as it appears under a microscope. It should be measured by the micrometer or drawn by the camera lucida.

Recross-examination. Lehmann, in his work, says that the moist blood of different mammalia can be distinguished, but the statement is qualified.

Professor Babcock then read other passages in the work at the request of Mr. Somerby, and claimed that it substantiated his statements. The experiments made by Schmidt were by drying fresh blood in thin layers on a glass plate.

George B. Harriman *sworn.* Live in Boston; am a dentist

and professor of microscopic anatomy in the Boston Dental College; my experience leads me to examine the tissues of the human body; blood consists of fluid in which float red and white corpuscles; its other substances perhaps chemistry alone can decide; blood drawn from a body will coagulate; the corpuscles in a human body will vary from $\frac{1}{2000}$ of an inch to $\frac{1}{3800}$; four hundred diameters is as small as corpuscles can be examined, but can be compared to five thousand or ten thousand diameters; I have a microscope which will magnify ten thousand diameters, and don't know of another instrument of that size in this country; have examined sheep's, cats', dogs', and horses' blood with this microscope; the corpuscles in a horse's blood will vary; the moment blood is exposed to the air it coagulates and dries up, and the corpuscles shrink and assume such a shape that it would be impossible to determine whether it was human blood or horses' blood; in a dried condition the corpuscles in human blood and horses' blood resemble each other; it would be impossible to tell the difference between the corpuscles of human and horses' blood, in a dry state, by a chemical test; have made this a specialty, and the highest authorities agree with my statement; microscopes vary, as the lenses are different, and in determining the size of corpuscles it is a matter of judgment.

Cross-examination. Have been a dentist sixteen or seventeen years ago; was educated at the New Hampshire Literary and Biblical Institute; I then studied dentistry with Dr. Clough eight or nine years, and was in company with him; entered the Boston Dental School five years ago, and graduated there; attended nine months lectures there, and made a specialty of the examination of the tissues in the human body; the size of the corpuscles of a frog would be from $\frac{1}{1500}$ to $\frac{1}{2500}$ of an inch in diameter, or about twice as large as human corpuscles; this could be determined by a microscopic examination; with my microscope I have compared human blood and that of sheep, horses, and cats; there is no particular difference between the blood of these I have enumerated; have made such an examination since the great fire; I know white corpuscles are the largest by comparison with my microscope; out of a

hundred corpuscles I don't think from ninety to ninety-five would be of the same size; the same would hold true of man or horse; upon the authority of Dr. Beal the difference between dry human blood and that of mammalia cannot be distinguished; don't think that science could determine the difference between a fresh drop of human blood and horse's blood.

EMMANUEL SAMUELS *sworn.* Live in Quincy, and my business is preparing microscopic specimens; have been engaged in that work twenty years, and think that there is hardly a medical man in the United States but what has some of my specimens; without mechanical arrangements microscopes are not alike; I have never seen two people who saw an object the same through a microscope; don't remember of ever having examined horses' blood, but have that of other animals; have had no experience in examining blood.

No cross-examination.

FREDERICK A. RISTEEN *sworn.* I am a grocer at No. 1051 Washington Street; Alley's stand is nearly opposite my store; have known Alley about three years; on election day, November 5th, saw Alley from eight to ten minutes past eight P.M.; he was in my store, and I think he had a conversation there; I was making up my cash at the time, and the reason I can fix the time is because I always make up my cash about eight o'clock; don't know how long Alley remained in the store; remember hearing Alley making some remark about election, which enables me to recollect that he was in my store on election night; Alley's reputation for honesty is good, and I never heard any thing against him as a quiet or peaceable man.

The cross-examination consisted mainly in testing the memory of the witness. Mr. Risteen said he never told anybody that Alley was not in his store that night.

Q. Was there any conversation between the Chief and you in reference to the search for an axe?

A. Yes, sir. I did tell the Chief I would let him know about a search in my store about an axe; I did not fix the time when I would let him know about it; I did let him know by written communication within two days; I had no reason whatever in the delay.

To Mr. Dabney. I did not object to having my store searched; the Chief thought it might be advisable to search the store; I objected only on the ground that a public examination might be unpleasant. The matter ended by an understanding that I was to search the store, and if I found any thing I was to let the Chief know. I made a thorough search of the store, and communicated with the Chief in relation to it.

WILBUR R. ALLEY *sworn.* I am a son of the prisoner. He testified to seeing his father in Risteen's store on the evening of November 5; it was between eight o'clock and a quarter past when my father came into the store; he came in by the front-door and walked to the rear of the store; he remained some ten or fifteen minutes; he and Howard Richardson had some talk about election; next saw my father on Thursday.

Cross-examined. Saw my father at the stand on Thursday; don't remember of his being in the store that day; Thursday was a rainy day; there was very little business going on Tuesday night; the Mr. Richardson referred to is Risteen's head clerk.

HORACE J. MARDEN *sworn.* I live in Quincy, and work on church organs at Ryder's, No. 1059 Washington Street; this is about fifty feet from Alley's stand; between half-past nine and ten o'clock Wednesday morning saw Alley at the corner of Beach Street and Harrison Avenue; Alley had his large express wagon and was going up Harrison Avenue with a load; I am quite certain about him, as I was to meet Mr. Ryder at the Lowell depot at ten o'clock, and I was going to the depot at the time.

GEORGE H. RYDER *sworn.* I am an organ-builder at No. 1057 Washington Street; have known Alley about two years since last November; I would trust him with any amount of money, and his character as a quiet and peaceable man is good; on Wednesday, November 6, I went to Lowell in the ten o'clock train, and was met a few minutes before the train started from the Lowell depot by Mr. Marden.

No cross-examination.

LYMAN W. HAPGOOD *sworn.* I live at No. 82 Dover Street, and am employed by Mr. Ryder; have known Leavitt Alley over a year; from ten minutes before eight o'clock to eight

o'clock Wednesday morning Alley came into the shop; I was the only one in the shop when he came; Alley came to inquire when an organ would be ready to be moved, and he remained but a short time.

Cross-examined. My time of going to the shop is at seven o'clock in the morning; as a matter of memory I recollect that I went to the shop at seven o'clock Wednesday morning; my attention was first called by Mr. Alby to the fact that Alley was in the shop Wednesday morning; the time Alley was there is a matter of judgment.

Charles Edward Joyce *sworn.* I live in Somerville, and am engaged in the iron business at Nos. 41 and 43 Fulton Street, Boston; between eight and nine o'clock on the morning of November 5, it must have been after quarter-past eight, I delivered to Alley a load of iron to be carried by him to a blacksmith's shop on Harrison Avenue.

The Attorney-General could not see the materiality of the evidence, and was at a loss how to cross-examine the witness.

The Court thought that the Attorney-General was entitled to know what it was intended to connect by this witness. As his testimony now stood it was clearly immaterial.

Mr. Dabney. We have no objection to stating what the bearing of Mr. Joyce's testimony is. One of the government witnesses has stated that on the morning of Tuesday, November 5, he saw Alley and Ellis talking together about half-past eight o'clock on Washington Street, near Clinton Place. We propose to show that at half-past eight o'clock on that morning Alley got a load of iron from Mr. Joyce's store.

Mrs. Sarah G. Weeman *sworn.* I live in Charlestown; in November last two men came to my house and got a stove to take to my sister, Mrs. Wood, at No. 1 Metropolitan Place, Boston; it was about noon on Tuesday, November 5, when the men came for the stove.

Mrs. Harriet M. Wood *sworn.* I live at No. 1 Metropolitan Place. On the 6th of November, a young man, with Alley's son, brought a stove to my house between twelve and one o'clock. I had been expecting the stove several days. I paid the express, and made a minute of it on a book, so that I am sure the stove came on the 6th of November.

ANDREW H. PEDRICK, Jr., *sworn.* Am in the employ of Mr. Augustus Hardy, dealer in doors, sashes, and blinds, on Haymarket Street; as near as I can remember, Alley came to the store between half-past eight and quarter of nine o'clock, and got a load of windows to take to Cordis Street; he remained in the office only a few minutes, and then went out, but returned soon after with Mr. Pedrick, one of the partners in the concern; of my own knowledge I did not see or know how Alley came or went from the store; should think Alley was in the office about five minutes, but he remained around the store, as I heard his voice.

Cross-examination. First saw Alley, to know him, day before yesterday; Alley was brought to our store by two detectives, and I identified him as the man who was at the store on the morning of the 6th of November; told the officers then that I couldn't fix the time exactly when Alley came to the store; have no definite means of forming an opinion as to the time Alley was at the store.

To a Juror. I can't say what time I got to the counting-room that morning; I generally get there about eight o'clock.

HOWARD D. RICHARDSON *sworn.* Am in the employ of Mr. Risteen; saw Alley in the store about eight o'clock on the evening of Tuesday, November 5; next saw Alley on Friday morning; on Tuesday evening had a conversation with Alley about election; Alley told me if the Democrats couldn't put up a better man than Horace Greeley, he wouldn't vote at all; this was in response to a question as to how Alley voted; I remember that when I got back to the store that evening it was about half-past seven o'clock.

Cross-examined. Think Alley's son, Wilbur, on Thursday morning, first asked me if I recollected the fact that his father was in the store Tuesday night; have talked with Mr. Way and Mr. Somerby once about the matter.

JAMES J. TOBEY *sworn.* I live at West Roxbury, and am a hardware dealer at No. 1081 Washington Street; have known Alley since he bought out Day's stand; between half-past one and half-past two o'clock on Wednesday, November 6, Alley came into my store, and I paid a bill due him.

GEORGE W. PEDRICK *sworn.* Am a member of the firm of

Augustus Hardy & Co., Nos. 7 and 8 Charlestown Street; on the 6th of November last, we delivered a lot of windows to Leavitt Alley to be taken to Cordis Street; I think it was about nine o'clock in the morning when Alley came, but I can't fix the time exactly; Alley's wagon stood in front of the door; as the windows were not ready, Alley said he would go to Court Square; he went away and returned again; should think it took an hour to get the windows ready, and I helped load them in the wagon; Alley was not there when it was done; it was the first load of goods that had been delivered that day.

At this stage of the trial, the Court adjourned till Monday morning.

The Court instructed the sheriff to make the jury as comfortable as possible during the Sabbath, and to permit them to ride out or walk in company with officers if they desired.

SEVENTH DAY. — *Monday, 10th February.*

John Batterman *sworn.* Am a blacksmith, at Nos. 471 and 473 Harrison Avenue; there is an entrance to my place from Washington Street, and on the south side of Dover Street; have known Alley for four or five years. [Paper shown witness, which he said was in the handwriting of his son, and was an order for the delivery of a lot of steel.]

Mr. Dabney asked the witness if Alley delivered the steel on the order on the morning of the 5th of November.

The Attorney-General objected, on the ground that it failed to connect the witness with the order.

Witness continued: I gave the order to Mr. Alley, and was at my shop when the goods were delivered, and helped take them from the wagon; should think they were delivered between nine and ten o'clock in the forenoon; the day was Tuesday, election day.

Arthur W. Forbes *recalled.* He said he desired to correct his testimony relative to the distance between Metropolitan

Place and Risteen's store. The correct distance was 4,780 feet, instead of 4,180, as he previously stated. The distance from Risteen's store, through Waltham, Dartmouth, and Beacon Streets to the sluiceway is 9,940 feet. From Risteen's store, through Washington, Dover, Berkeley, and Beacon Streets, to the sluiceway is 10,007 feet. From Risteen's store to the house of Engine No. 3 is 247 feet; and from Risteen's store to a point opposite the Warwick House is 267 feet.

JOHN HAM *sworn*. I live in Garland Street, and have been employed by Alley in driving team; was last employed by Alley in September; Alley usually fed the horses; I had a key to the stable; the barn had a common door, fastened by a padlock and staple; when I went there I usually pulled the staple out, and did not use a key; I worked for Alley on the 8th of November; there was a horse bled in the stable in September.

The Attorney-General. Were you there when the horse was bled?

Witness. I was not; but I know that a horse was bled.

To the Attorney-General. Don't remember what I did on the 8th of November; it was a fair day.

WILLIAM PATTERSON *sworn*. I live on Northampton Street, and am a carpenter; about quarter before twelve o'clock on Wednesday, November 6, I saw Alley at his stand talking with a gentleman I did not know.

The Attorney-General. I don't know what the evidence is for, and, if it becomes material at any time, I should like an opportunity to cross-examine.

Mr. Somerby. All we propose to show is that Alley was at his stand that day.

The Court. Call the next witness.

GEORGE MAXWELL *sworn*. Am a clerk in Rozenfield's grocery store at No. 1113 Washington Street; between twelve and two o'clock on Wednesday, November 6, Alley came in and collected a bill.

To the Attorney-General. The bill was for $1.50, and was for expressage done the day previous; it is a mere matter of judgment as to time.

DANIEL S. ALLEY *sworn*. Am the eldest son of Leavitt

Alley ; am a teamster, and have been in the employ of Grover & Baker two and a half years ; on the night of election day I returned home at eleven o'clock, and found my sisters, Abbie and Anna, in the sitting-room ; I asked them what they were up for, and then went to bed ; I did not see my father that night ; saw him the next morning at twenty minutes past seven o'clock ; I looked at my watch when I came downstairs, as I was late ; father remained in the house about ten minutes after I came downstairs, and went out-doors when I did ; my father's team was standing at Lang's Bakery ; next saw my father in the dining-room on Thursday night ; on Tuesday afternoon, about two o'clock, I saw my father at his stand and lent him $135. My father had but one suit of working-clothes, which he had worn five or six months ; next saw him at Station Five on Saturday night.

To the Attorney-General. The $135 has not been repaid ; first knew of the murder of Mr. Ellis on Thursday night ; I sleep and live at home ; my brother Curtis lives with me.

Willis H. Sanborn *sworn.* I live in South Boston, and am a driver for W. H. Abbott & Co.'s Express, at 1176 Washington Street ; have driven for Abbott & Co. about six months ; have known Alley about the same time ; in August last, I drove a team for him about one week, and also the day after election ; on this day I went to Alley's stand between seven and half-past seven o'clock in the morning to commence work ; didn't find Alley there when I arrived, but saw his son Curtis ; Alley came down Washington Street to the stand about eight o'clock ; Alley saw me ; there were no other persons there except Alley, Curtis, and myself ; Alley came to the stand with a large, red express wagon and a black horse ; the horse was in very good condition ; I had seen the team before ; should think the wagon would weigh 1,800 or 1,900 pounds ; don't recollect whether Alley had any barrels in his wagon, but thought he had ; I remained at the stand from ten to fifteen minutes ; I looked in Alley's wagon because I had occasion to see if every thing was all right ; that was the team I was hired to drive, and did drive it all day ; when I looked into the wagon there was nothing in it but some pieces of carpet ; I then went to Mr. Babson's, in Harrison Avenue, with Curtis, and got a load of wood ;

there were three of us engaged in loading, and it took three-quarters of an hour.

Mr. Dabney asked the witness how long it would take to drive the horse and wagon from Metropolitan Place to the sluiceway and back.

The Attorney-General objected, and the Court ruled the question incompetent.

The witness, in answer to a question by Mr. Dabney, said that the horse was not as fast as some, but was of average speed.

Cross-examination. Have been in South Boston three years; have said that I did not recollect seeing Alley at his stand until nearly twelve o'clock on Wednesday, November 6; have said so to Mr. Dabney, Mr. Skelton, and Mr. Dearborn several times; don't know how many times I have told the story; have never said I did not see Alley before I loaded the wood; Mr. Dabney was the first man who came to see me; have told Curtis Alley I did not recollect his father's sending me for the wood; have talked with Mr. Somerby and Mr. Dabney, but have never talked with Mr. May.

To Mr. Somerby. Was summoned by the Government, and saw Mr. May one morning last week, and had conversation with him in this court-house.

Mr. Somerby desired to show the conversation between the witness and Mr. May, but the Court declined to admit it.

Mr. Somerby requested leave to present reasons why the conversation had an important bearing on the case, but the Court declined to hear him.

A consultation was then had by the Judges, at the conclusion of which Judge Wells said that, on the face of the proposition, a conversation between the witness and the government officer seemed incompetent, but in view of the testimony given by the witness there was an aspect which appeared as if the question might have some bearing.

Mr. Somerby said he was willing to withdraw the question, provided the Attorney-General would consent not to insinuate in his closing argument that the counsel for the defence had been talking with the Government witnesses. It was to meet that argument of the Attorney-General, when he (Mr. Somerby)

would have no opportunity to reply, that he desired to show that the witness had first been examined by Mr. May.

Witness continued: The first person I told the story about seeing Leavitt Alley on Wednesday was to Mr. May, who examined me on the subject; Mr. Skelton came for me and introduced me to Mr. May; the conversation took place in the court-house; before this I had a conversation with Mr. Dearborn and Mr. Skelton at my stand; haven't said I had conversation with Mr. May, Mr. Dearborn, and Mr. Skelton, before I talked with Mr. May.

The Attorney-General. You can stand down.

JOHN M. BATTERMAN *sworn.* Am a son of John Batterman, doing business at Nos. 471 and 473 Harrison Avenue; have known Leavitt Alley since July, 1871, and he has been employed by the firm, and previously by my father; I wrote this order [order shown to witness] on Tuesday morning, November 5, and gave it to Leavitt Alley about eight o'clock.

The counsel for the prisoner attempted to show that Alley went for the iron mentioned in the order, but the Attorney-General objected to the question.

The counsel then asked similar questions to accomplish the same object, but all these were objected to by the Attorney-General, who said he was willing to admit that Alley went for the iron.

Mr. Somerby. That is all we wish for.

Cross-examined. The first time, after the 6th of November, that my attention was called to the time I delivered the order to Mr. Alley, was since the trial commenced, and since Mr. Joyce testified, I think; the reason I think it was about eight o'clock when I delivered the order to Alley, was from the fact that I had come from my father's house, on my way from Hyde Park, where I live; the delivery of the order to Alley was the first business done in the morning, and I remember the fact, because we wanted the iron very much.

Mr. Dabney then proposed to read the order referred to, to the jury, but the Court ruled it to be incompetent.

GEORGE W. CARPENTER *sworn.* I reside in Somerville, and am in the stove business, at No. 13 Union Street, Boston; have been in business there five years; on the 5th of November I

delivered a stove to Leavitt Alley about nine o'clock in the morning; Alley came from the direction of State Street; Fulton Street is in the direction of State Street; I saw some iron bars in Alley's wagon, and they were taken out and placed on the sidewalk while I helped Alley load the stove; the stove was for Mr. Smith, in Michigan Avenue; I remember that it was election day, because I went out to Somerville about noon and voted.

GEORGE L. ARMSTRONG *sworn*. I am in the crockery business at 1043 Washington Street, one or two doors this side of Risteen's store; my family is in Maine; I take my meals at a restaurant and sleep in the store; have occupied the store since April; Alley has done my teaming; on the evening of election day I saw Alley come out of Risteen's store after eight o'clock; I was going out of my store up the street to get my supper; walked with Alley about five rods to Wilson's saloon and talked with Alley about some baskets; Alley went in with me and had a glass of ale; I told Alley I wanted him to get some baskets for me at Somerville; after we came out of the saloon Alley went up Washington Street toward Roxbury, and I came down street a few steps and into my store; the next morning I saw Alley with a team backed up to Schouller's place, about fifteen or twenty feet from my store; it was between half-past seven and eight o'clock; I talked with Alley about five minutes; I looked into his wagon and saw a table in it; there were no barrels in the wagon; if there had been barrels in the wagon I could not help seeing them, as I stood at the tail of the wagon.

Cross-examined. The table was in the wagon when I first saw it; should think the table was three and a half or four feet long; it was dark colored, and did not look as large as a billiard or a bagatelle table, but looked more like a saloon table; Alley remained about five minutes after I saw him; on the 5th of November I did not see Alley but once; this was about eight o'clock in the evening, as he was coming out of Risteen's store; my attention was first called to the fact that I saw Alley on Tuesday, Thursday, or Friday following.

JOHN F. GARDNER *sworn*. I am sergeant of Police Station Number Nine. He produced the record of that station. The

record was shown to the Court, and it was decided not to be competent evidence.

Mr. Dabney wished to go further, and prove a fact by this witness in connection with the record, but the Court ruled that the fact was also incompetent.

Mr. Somerby saved the exception.

The record alluded to was that on the 16th of September, Alley reported that his stable was broken into, and that the bottom of a stove was taken, and other small articles were missing. The stable was ransacked throughout, probably by boys.

Mr. Somerby then inquired if they were to be excluded from proving the fact in any form.

The Court. We so rule.

Miss ABBY ALLEY *sworn.* Am a daughter of the defendant. On election night I took supper about six o'clock; went upstairs after supper and remained till half-past eight; did not see my father before I went upstairs; Mr. O'Toole came upstairs about eight o'clock; when I went downstairs, Mr. O'Toole had just gone; I came down stairs and went into the dining-room and read; while I was there Mr. and Mrs. O'Toole came in by the lower front-door and went into the kitchen; my father came in directly behind them and went into the kitchen; I went into the kitchen, also, and my father had a conversation with Mr. and Mrs. O'Toole: it was about ten minutes after I went into the dining-room that Mr. O'Toole came in; I was in the kitchen when the bell rang for nine o'clock; five or ten minutes after the bells rang the O'Tooles went upstairs.

Father and mother remained up till ten o'clock; soon after father and mother went to bed I went upstairs into the sitting-room and commenced reading; the sleeping-room of my father is over the kitchen and on the same floor with the sitting-room; I remained up till quarter-past eleven o'clock; before I went to bed my brother Daniel came in; I did not see or hear my father again that night after he went to his room; at half-past three o'clock the next morning I was called by my father who said my mother was sick; I went downstairs and found father in bed; I then went into the kitchen, made a fire, and made mother some tea; I remained in the kitchen till morning.

My father got up about five o'clock and went to the stable; when father got up I was lying on a lounge in the kitchen, and he told me to get up or breakfast would be late; father's usual time of going to the stable is about five o'clock; after I got up at half-past three o'clock father did not go out of the house till five o'clock.

Mr. Day took breakfast at six o'clock, Curtis and Tibbetts at half-past six o'clock; father came home about seven o'clock, and he and Daniel took breakfast together about twenty minutes past seven o'clock; father had but one suit of working clothes, which he had worn five or six months.

Cross-examined. First heard of the discovery of the remains of Mr. Ellis on Thursday night; heard Mrs. O'Toole read it; my father came in while it was being read, but do not recollect any conversation being had about it.

At this stage of the proceedings the counsel for the prisoner announced that their case was closed.

EVIDENCE BY THE GOVERNMENT IN REBUTTAL.

The first witness called by the Government in rebuttal was Henry M. Wightman, assistant engineer of the city of Boston. Mr. Wightman testified that he made the city map of Boston for 1861; from the corner of Fellows and Hunneman Street to centre of Metropolitan Place was eighty feet over one-fourth of a mile; from Metropolitan Place to Risteen's store was 4,709 feet; from Metropolitan Place to Washington, through Washington, Dedham, Dartmouth, and Beacon Streets to the Mill-dam was 11,900 feet; and from the sluice-way to Durham's counting-room through Beacon, Charles, Pleasant, Washington, and Northampton Streets was 16,915 feet, or $3\frac{1}{8}$ miles and 9 feet.

Cross-examined. I arrived at these distances by actual measurement, but by the scale on the map, the distance from Durham's to Metropolitan Place is 2,070 feet; from Durham's to Risteen's store is 4,979, and from Durham's to Washington Street is 1,170 feet.

Dr. S. Dana Hayes was recalled, and was asked by the Attorney-General to state the degree of dryness or freshness of the blood which he took possession of in Alley's stable on Saturday, November 9.

Mr. Somerby. I object on the ground that the matter had once been gone into.

The Attorney-General said he asked the question for the purpose of controlling the statements of witnesses who had said that the blood was spilled in the stable in September.

Mr. Somerby contended that Dr. Hayes had fully gone into the question of blood, and read from Dr. Hayes's testimony to support his argument.

The Attorney-General claimed that it had not appeared that Dr. Hayes had testified in relation to the corpuscles found in the blood in Alley's stable, or whether it was in reference to the general appearance of corpuscles in dry blood.

Judge Wells asked whether the question related to the ability of the expert, or to show that it was fresh blood which had been placed in the barn since last September.

The Attorney-General. The last one.

After further discussion the Court deemed the question competent in the aspect of the degree of dryness or freshness of the blood.

Some of the blood I took on the 9th of November was coagulated soft blood ; it was flexible, and could easily be bent ; after being in my possession a month the blood dried ; some of the stains I found were dry, but the majority of the blood was soft.

The Attorney-General. Could you tell how recently the blood came in the barn, — say within two or three weeks or days.

Mr. Somerby. I object. The matter has once been inquired into.

The Court. Mr. Attorney, we think you should first inquire whether the witness can tell the difference in the blood between September and the 9th of November ?

Dr. Hayes. I think I can.

Mr. Somerby. I object.

The Court. From your experience, Dr. Hayes, can you tell whether the blood had been there one week or six weeks ?

Dr. HAYES. I think I can. In my opinion this was fresh blood which had been in the barn only a few days.

Cross-examined. When on the stand the other day I did say I soaked the blood; cannot recollect whether I said I soaked the blood because it was dry; will not swear that I did not say the blood was dry; I did say I put the blood into a liquid; did not say it was soft, coagulated, or flexible, as I did not make use of either of those words.

Mr. Somerby. That is all.

Dr. CHASE was recalled, and the Attorney-General offered to prove to the jury that the difference in size of the corpuscles in human and horse's blood is ascertainable by a microscope of four hundred diameters. The defence had offered evidence to show that it could not be done.

Mr. Somerby objected.

The Court ruled that the evidence was inadmissible.

Officer JAMES R. WOOD was recalled, and testified that on the afternoon of the 8th of November, in company with Mr. Skelton, he had a conversation with Mr. Risteen. Witness asked Mr. Risteen if Alley was in the habit of coming into his store evenings. Mr. Risteen replied that he was frequently. Witness asked Mr. Risteen if Alley was in his store on election evening. Mr. Risteen replied, that he did not see Alley on that evening, and he was sure that Alley was not there. Mr. Risteen at that time was aware of the arrest of Alley.

Cross-examined. I have given all the conversation that took place between Mr. Risteen and myself; think I have given the precise words, and do not want to change what I had said; at the time it occurred I do not know as I charged my mind with it; think I first mentioned the conversation to the District-Attorney about two weeks ago; think I told the District-Attorney about it after I heard Mr. Risteen was going to testify; when I asked Risteen the questions I did not know he was going to testify; there were other persons in the store, but they did not hear the conversation, as it was strictly private; I am sure I asked Mr. Risteen if Alley came into his store, and not Leavitt Alley.

Mr. Somerby. That is all.

CHARLES L. SKELTON was recalled, and corroborated the evidence of Mr. Wood as to a conversation had with Mr. Risteen; witness had seen Mr. Sanborn the Saturday previous to the trial; Mr. Dearborn had a conversation with him and I heard it; Mr. Sanborn said that he did not see Alley on Wednesday, the sixth of November, until about twelve o'clock that day, that he went to work that day for Alley for the first time and that Alley was to bring the team, but instead of doing so it was brought by Curtis. Mr. Sanborn said he did not remember of Alley's telling witness, Curtis, and Tibbetts to go and get a load of wood; Sanborn said Curtis Alley asked him if he (Sanborn) did not remember of being told to go and get a load of wood by his father, and Sanborn replied that he did not, and would not give any such evidence.

Cross-examined. Mr. Risteen said that Alley was not in the habit of coming into the store evenings; cannot say whether Risteen told Wood he was sure that Alley was not in his store Tuesday evening. If it was said, I did not hear it.

Officer ALBION P. DEARBORN was recalled, and testified that he had a conversation with Sanborn a week ago last Saturday afternoon. Think the conversation took place at 1176 Washington Street. Sanborn said the team was brought by Curtis Alley, and that he did not see Mr. Alley until about twelve o'clock. Sanborn said Curtis Alley and a gentleman had been to him and asked if he (Sanborn) did not recollect of Alley's ordering them all to get a load of wood. Sanborn replied, "No, I do not, and I do not propose to swear to any thing I do not know." Have seen Sanborn talking with Mr. Way before he talked with Mr. May.

The cross-examination consisted in testing Mr. Dearborn's memory as to the accuracy of the conversation had between him and Mr. Sanborn.

MARTIN RONAN testified that he was employed by Captain Joseph Nickerson; that last fall he went to Alley's stable and got a load of manure; witness could not fix the time when he went, but was sure it was before the frost had fallen; never went but once myself, but ordered my brother to go and get another load; this was subsequent to the time I went myself.

WILLIAM RONAN a brother of the last witness, testified that he got manure from Alley's stable five or six times; could not remember the first time he went; remembered being sent by his brother to get a load; got a small horse load, but cannot say how much I left; the last time I went there was before the murder of Mr. Ellis; cannot remember what month it was.

Mr. COULLARD was recalled, and said that, from July to November, the manure in Alley's barn was removed from three to five times.

JAMES M. Day, a police-officer connected with Station Five, testified that on the morning watch on the 9th of November, he was stationed at Alley's barn; while there I made an examination of the barn.

The Attorney-General. Mr. Day, state whether you found any appearance of flesh or blood.

Mr. Somerby. Wait a moment: I object.

The Attorney-General. I offer this witness to contradict a witness for the defence in relation to blood in the stable. When the Chief of Police was on the stand I forgot to ask him about it, and I now wish to show how the blood came into the possession of Dr. Hayes.

The Court were inclined to the opinion that the evidence was not competent, but would give the question further consideration.

A recess was taken and the Court retired.

On returning Judge WELLS asked Mr. Somerby if he desired to be heard on the issue raised by the last witness.

Mr. Somerby replied that he did not see how it could be competent in any aspect of the case. Under the present condition of things, the Government had put in their case by piecemeal, and it would be unfair because the case for the Government was weak to allow them to put in new evidence to strengthen it, and thus reopen it. He had never heard of such a thing being done, and it would be a great injustice to his client, who was on trial for his life.

Judge WELLS said that, after considering the matter, the Court did not think it strictly competent to contradict the horse-doctor, but it might have a bearing in another way. The evidence should have been adduced as part of the evidence of the

Government in chief, and it now became a matter of discretion with the Court. As the Attorney-General had stated that the evidence he proposed to offer was forgotten by him, the Court, believing that the rights of the defendant would not be imperilled, had concluded to admit the evidence, but with the understanding that the defence should be allowed to meet the case. The interests of public justice seemed to demand that there should be a full investigation of every fact bearing upon the case.

Mr. DAY then continued his testimony as follows: I cut off four pieces of what I supposed to be flesh in the barn and delivered it to either Dr. Foye or the Chief; this was some time after daylight on Saturday morning the 9th of November; I took the pieces from the side of the barn.

No cross-examination.

Chief of Police SAVAGE was recalled, and testified that on Saturday morning I received a piece of brown paper from officer Day; it looked like a scab, and I afterwards delivered it to Dr. Hayes.

No cross-examination.

Dr. HAYES next took the stand, and produced a bottle containing tissues which he received from the Chief of Police. I have the brown paper which I received from the Chief (paper shown).

Dr. HAYES was about to state the contents of the bottle, when Mr. Somerby objected and desired an opportunity to cross-examine Dr. Hayes as to his qualifications as an expert.

The Court consented to the cross-examination.

Dr. HAYES made the following replies to Mr. Somerby's questions: I have never received a degree from any medical college in this country; have not studied medicine as a physician, but since boyhood I have studied medicine with my father; my father has practised as a physician, but did not make it a specialty; I have attended a number of medical lectures in this country; cannot tell how many lectures constitute a course; in about the year 1859, I attended lectures at the Medical School in Harvard College, and think I heard from twelve to fifteen lectures; cannot remember who lectured, and did not ask or receive a degree; I am thirty-three years of age; re-

member of hearing Dr. Bigelow lecture at the Massachusetts General Hospital; cannot fix the number of lectures I heard at the Hospital; have never given any particular attention or study to anatomy; have given attention and study to the examination of human flesh and tissue; all the study I have made with human flesh and tissue in this country has been with my father.

To the Attorney-General. The microscopic examination of human flesh and tissue is known as physiological chemistry; I have given this a great deal of attention since I was a boy, having studied with my father, and also in Europe, where I spent three years; have given testimony bearing on physiological chemistry in a number of cases, and this is the third murder case in which I have testified.

The Court decided that Dr. Hayes was qualified to testify as an expert.

Dr. HAYES continued. I found the bottle to contain cellular and fibrine tissue; when I received it it was fresh and raw like raw meat, and, in a month after it was dried, there were three little shreds of flesh.

The Attorney-General. Can you tell whether it is human flesh or that of a horse?

Dr. HAYES. I can only tell by inference, but cannot state positively.

Mr. Somerby. Wait a moment: I object.

The Attorney-General. I withdraw the question.

Mr. Somerby. That is all.

Dr. STEPHEN DAY *sworn.* He testified that he had been a veterinary surgeon for thirty-seven years; have practised fifteen years in Boston; am familiar with the anatomy of a horse and the mode of treating them; have formerly had occasion to bleed horses a great many times; in the foreleg of a horse there is what we call a plate vein which we sometimes lance; if a proper incision was made blood would not spurt, but would flow in a steady stream; in bleeding the jugular vein would depend upon the manner in which it was done: if the vein was pressed, blood would run in a stream, but if there was no pressure, the presumption was that blood would cease running.

Cross-examined. Blood from an artery in a horse would not

spurt out from the veins; alone in a healthy horse there was from seventy-five to eighty pounds of blood, or about ten gallons.

Dr. THEODORE S. VERRY *sworn*. Have had ten years' practice as a veterinary surgeon, having been educated at the Boston Veterinary School; am familiar with the anatomy of a horse and the mode of treating diseases; if blood was drawn from an artery it would come with a spurt, but if a vein was lanced it would require a pressure to make the blood spurt; the same would apply to the jugular vein; under the application of a ligature blood would not spurt to the middle of the diameter of a water pail.

Cross-examined. If an artery was struck by a lance, blood would spurt at each beat of the heart until it was stanched; blood would not spurt from the jugular vein, and the condition of the horse would have no effect upon it; if he was to bleed a horse in the jugular vein he should place a ligature between the wound and the heart; cannot tell how the recent horse disease affected the blood of horses; there are four arteries in a horse's leg.

At this point the Attorney-General said that the Government had no more rebutting evidence to offer.

The defence then called FREDERICK S. RISTEEN, who was sworn and testified that he told officers Wood and Skelton that Alley was in the habit of coming into his store frequently in the daytime, and occasionally in the evening. Risteen denied being asked by officer Wood if Alley was in his (Risteen's) store on election evening. Will positively swear that I did not tell officer Wood that I was sure Alley was not in my store on Tuesday night (election night.)

The defence here rested their case.

The Court cautioned the jury against having any discussion or forming an opinion until after the arguments of counsel and the charge by the Court.

The Court then adjourned until the next day.

EIGHTH DAY. — *Tuesday, 11th February.*

MR. SOMERBY'S ARGUMENT FOR THE PRISONER.

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

I congratulate you, gentlemen, upon the approach of the termination of this case. In the remarks I shall make I shall have to ask your indulgence, and if I weary you it will be in the discharge of what I consider to be my duty. In all cases where a decision is to be made, it is necessary to know what the question under discussion is, and that the parties should be free from all prejudice. I do not think a gentleman on the jury is conscious of being prejudiced; my client is satisfied with the jury, and I fear not that you would not do right, but some possible prejudice may tend to have its influence.

So, gentlemen, I pray you to free your minds from all possible prejudice from the fact that he is in the dock, or charged with crime, or from whatever you have read, and I know that you try this case, so far as you can, on your oaths, on the facts proved, and will look to the Government for the burden of proof. Now, gentlemen, what is the question? The Government arrest a respectable man, put him in the dock, and say they are to prove beyond a reasonable doubt to you that Leavitt Alley killed Abijah Ellis. On the other hand, Alley puts forward no proposition, but relies on the Government to prove the case beyond a reasonable doubt before convicting him. Now, Mr. May stated that this was an investigation as to who killed Abijah Ellis. This is not so; but the question is, Did the prisoner kill him? If Government do not prove it, then he is not guilty by reason that they do not prove it. There is nothing in this case which we cannot understand or discuss, and I contend that the Government has failed to sustain the burden of proof.

Now, first, there is the man in the dock, but is that any thing against him? It is an easy thing to place a man in the situation of the prisoner, for the hearing before the grand-jury is only *ex parte*, and the Court will instruct you that the fact that Alley is in the dock goes for nothing against him. Does he stand in that dock, Mr. Foreman, when we commence to

try him with as many chances that he killed Abijah Ellis as he did not? No. For the reason that the law presumes and says that the man, to start with, is innocent; it stands there as a buckler, and a shield and defence, and he stands there with this presumption for him and that presumption surrounds him, and until it is overcome he is an innocent man. It is law, and recognized wherever the English tongue is spoken, that a man is innocent until he is proved guilty. Therefore we start with this presumption in our favor. Of course if the Government can show that he has committed a crime, the presumption goes for naught, but you've got to overcome that presumption, and it must be overpowered by direct and positive evidence.

But in this case I do not stand on a presumption; I stand with something which is fortified, where the evidence is accumulated, that he is as honest and respectable a citizen as stands within the sound of my voice. Have not I proved to you that Alley is an honest man by his neighbors and associates in New Hampshire, who give him a character for which any man might well feel proud? The proposition of the Government is, that Alley killed Ellis for his money, and it is necessary to examine this question. Amid all this tumult and rumor by the public and the detectives, who used every means to convict him, is there a particle of evidence against him, except that he is an honest, straightforward, and hard-working man? You have heard the testimony of the witnesses brought here from New Hampshire; and, gentlemen, a man is not to be sneered at because he comes from New Hampshire, a State separated from Massachusetts only by an imaginary line, although they have been sneered at here.

Judge WELLS. Mr. Somerby, do you refer to my remark that "we do not know what sort of men they elect to office in New Hampshire"?

Mr. Somerby. I do.

Judge WELLS. It was not intended as a sneer, and the Court did not so consider it.

Mr. Somerby. Well, sir, I did consider it as a sneer; the poison has been infused, and it injured my case, beside hurting my feelings and those of my client.

Judge WELLS. I do withdraw it, if you consider it in that light.

Mr. Somerby. I am glad that your Honor has withdrawn it, though I wished it had been done at an earlier stage of the case.

Mr. Somerby, again addressing the jury: Then I am glad to hear it from the Court of Massachusetts, and from one of the most accomplished judges of that Court, that a man is not less thought of because he came from New Hampshire.

Gentlemen, no one in the State of Massachusetts, I trust, can ever forget that the exalted position she now occupies and has occupied as the great leading State of this Union, in whatever of loyalty and power she may possess, is due, in a great measure, to the transcendent ability and heroic exertions of her adopted son, her champion and former Senator in Congress: DANIEL WEBSTER was born in New Hampshire.

Nor that he who shed a light upon the pathway of jurisprudence which never was equalled and can never be excelled, who possessed in the highest degree all the qualities which distinguish men of great original strength, breadth, and vigor, came from the State of New Hampshire. I need not say I mean JEREMIAH MASON, who stood, not only in this State, but in the whole country, without a peer, the acknowledged head and front of the Profession.

Nor can I forget that he who now looks kindly upon us [pointing to the marble bust of Mr. Justice Wilde], once by his living presence graced and dignified this very Bench, by all that learning, experience, and fearlessness could do in the discharge of its duties, and that the rights of every person, however humble and obscure, when charged with the commission of a capital crime, were secure in his hands and were faithfully protected and defended:[1] Judge WILDE came from the neighboring State of Maine.

[The life of Alley from his boyhood in New Hampshire was then reviewed, and the idea scouted that a man of his age would have murdered Ellis for the $200 or $100 he might have had in his pocket.]

[1] Referring to the well-known dissenting opinion in the case of Commonwealth *v.* York, 9 Met. 93; Bennett & Heard's Lead. Crim. Cases, Vol. I. p. 322.

Gentlemen, I am one of those who believe that as a man is at forty or fifty years of age, so he will go into his grave, whether he be honest or dishonest. A man who has been honest until he is fifty-three years of age, and has formed a character, is not apt to change at that time of life, and would not have the inclination, desire, or heart to commit such a murder. If Alley killed Abijah Ellis the jury would first want the Government to show a motive or desire for the committal of such a deed. A man who is honest will not steal, and above all will not murder for money. So the Government have a load upon them to make the proof overwhelming; you cannot take a few straggling facts and overcome this man's character for fifty years. Now there is no one who believes that this man had the motive to do it. I say nothing of opportunity. First, show me the motive, because a man does not do any thing wrong without an intent; and above all, if his mind is peaceful, he will not murder for the sake of money. Well, the Government contend that Alley killed Ellis for money; but is there any testimony that he wanted money or was in need of it? The Government say that Alley was in debt, and could not pay Ellis for a house purchased of him in Metropolitan Place, and that this was a motive for murder. How preposterous and absurd is such a claim, for even the death of Ellis would not make the house Alley's until it was paid for! When the Government was driven from this position they set up the claim that Alley was in need of money, and therefore killed Ellis. The fact is that Alley was not so pressed as to kill Ellis for money.

Now here is this man arrested without law, his house ransacked, and his papers searched by the Dearborns and the Skeltons, who were on his track like hyenas, and only such papers are produced as they think will make against him. The pet dove in this case is Tibbetts, who has been put forward by the Government to prove that Alley had no money, because Alley could not pay him on the Saturday before the death of Ellis, saying that he had just paid fifty dollars on his house. Now where's that receipt? Either Alley told a lie, without reason, or told the truth. Tibbetts did not make up that story. But, assuming that Alley had not paid his rent in September or October, would it be any thing strange for a working-man with a

large family to support? Now strike out all that Tibbetts said, and Alley owed Ellis only $100. Would a man fifty-six years of age kill another for $100? They say he owed Mr. Durham $235 for lumber. If Alley did owe a little to different people, and made small payments to accommodate himself, it would be nothing strange; for, after accumulating a little property in New Hampshire, almost any man would cut off his right arm rather than sacrifice this little nest-egg, which, perhaps, he had saved for his family after he should be taken away, or even for himself in case of sickness.

Now put it all together, — $235 to Durham, $52 to Morse, $50 to Mahan, and $100 to Ellis, — and is this a motive for a hard-working man to commit murder? It is sheer nonsense for the Government to assert any such claim; for it can be assumed, with just as much reason, that James M. Bebee, or any other business man, would commit murder for a like cause. The old man has his furniture, his piano, showing his warm love for his children; his business-stand was clear, and he had notes in New Hampshire amounting to $650, —.and where is the motive? Have you not seen men in business, with property, who, for want of system, could not pay their debts, where the men were just as good as gold, and honest, and yet want time? How many honest men there are in the world to-day, who, if asked to pay immediately every cent they owe, could not do it; and is this a motive for murder? The Government will try to make it appear that Alley killed Ellis because he owed him; but the motive has failed. Who was Mr. Ellis? The Government have set him up as a man weighing one hundred and fifty-six pounds, and who carried a good deal of money, and they tried to sustain this by Miss Tuck, who gave him a two-dollar bill to keep, because she lost her pocket-book a month before, and picked it up under the stove in an hour afterward. This is rather a frivolous story for a woman of her age to come and tell a common-sense jury. This looks like the Skeltons and the Dearborns, and that two-dollar bill may have had their names on it, and I am afraid that Miss Tuck did not state what she herself remembered, but a story which she learned from her talk with the officers. I'll agree that Ellis carried a large amount of money, but is there

a particle of evidence to show that Alley ever knew it? All the witnesses who have testified to seeing Ellis carry money were parties who had paid him money. Did any man ever see Ellis and Alley together when there was a cent shown, except what Alley paid himself? Assuming, for the sake of the argument, that Alley knew Ellis carried money, was that any inducement for him to commit murder? Was there ever a case known where a respectable, honest, and hard-working man in Alley's position ever killed a man for money? A man at Alley's time of life is not apt to change his whole life in a moment, and commit a murder for money. Such might be the case, I admit, but it is not to be inferred, but must be proved beyond a doubt. In order to convict, the Government must show when and how he killed Ellis. Did you ever know an honest man of fifty-six, working for his family, robbing a man for money? What evidence is there that Ellis was ever in Alley's stable, or that Alley ever had an opportunity to kill Ellis? This must not be inferred, but must be proved.

Again, were Ellis and Alley on friendly or on hostile terms? Tibbetts said he had seen Ellis and Alley talking together, and they always appeared to be friendly. If friendly a short time before election day, why were they not friendly on election day? Because Alley had as much money before election day as he did afterwards; therefore no motive has been shown in this respect. But it would not do for the Government to leave the matter here, and so some feeling must be shown of an ill-will existing between Ellis and Alley. The Government tried to show this, and a pretty mess they made of it too. They found a man named Ru Dixon, who had never known Alley or Ellis in his life, who said that on election morning, between half-past nine and ten o'clock, he saw Ellis and Alley talking together in Clifton Place, and heard Alley say, "God damn you." Did you ever listen to a more improbable story in your lives? When I asked him what his business was, how did he act? Said he, "I shan't tell you; I don't know as it's got any thing to do with this case," but finally told his business, and rattled off at such a rate that neither the Court nor anybody else could stop him. The photographs of the man who got up that story

and of the witness should be hung up in the court-house. It is sometimes said liars must have good memories. I do not apply it to this case: you may. The trouble about the story is, the old man did not happen to be at Clifton Place at that time, and this fact is proved beyond doubt. When Ru Dixon's story was concocted, it was not known that the old man could show where he was between half-past nine and ten o'clock on election day, and it has since been clearly proved that at that time Alley was hauling a load of iron from a store in Fulton Street to a blacksmith's shop at the South End, a mile and more from Clifton Place. Now I want to know who got Ru Dixon to tell that story. Old John Batterman, the blacksmith, swears that between seven and eight o'clock on election day Alley was at his shop; Joyce and Richardson swear that he was at their place on Fulton Street before nine o'clock; he was in Union Street before ten o'clock, and the Battermans swear they received the iron by nine o'clock. The story told by Ru Dixon is a transparent lie from beginning to end, and I would like to know who made up that story, because it is in one sense the key-note to the whole case. I do not charge Ru Dixon with perjury, but some person persuaded him to tell this story, and that it was true. Who are the men that are talking with the witnesses, and are the unseen power of the Government? I do not know who they are; but I have my opinion, and so have you, gentlemen. This is the only piece of testimony in the case to show an ill-feeling between Alley and Ellis, but, as it is contradicted beyond doubt by the most respectable witnesses, it has fallen through, and I believe the whole case of the Government is rotten. A respectable merchant and an honest blacksmith, strangers to each other, do not conspire to tell a lie to favor Alley, in whom they have no interest.

To the rule of law governing the case as to proving the fact, I invite your careful attention. If a man sees another kill, he can swear to it positively. This case has this singular peculiarity about it, different from any case ever tried in this Commonwealth, that the Government does not claim that Alley was seen to kill Ellis, or that he was found in possession of Ellis's remains, but from certain other facts which have been put in they propose to *argue* that Alley killed Ellis. This is what is

called circumstantial evidence, and I do not know of a case where a man was convicted on this class of evidence, unless the body of the victim was found on the premises. I agree that a man can be convicted without this by other circumstances, but every link in the chain must be complete and proved beyond a reasonable doubt. It is your right, gentlemen of the jury, and also your duty, after retiring to your rooms, to inquire and see if every circumstance has been so proved. If you can show — admitting for the sake of the argument that one man killed another — that the body was found on the premises, or if it is proved that the circumstances all point to the prisoner, you must try each link in this chain by the same rigor. Every link must be proved to be strong, else the chain fails; each circumstance must be proved beyond a reasonable doubt; the Government must have a number of circumstances; every link must be consistent with every other; they must show that they all reasonably, fairly, irresistibly force the mind to the conviction that the prisoner is guilty. Unless the jury consider whether every circumstance is proved, they may hang an innocent man, such as has happened in cases where innocent men have been found guilty on circumstantial evidence only.

"A lamentable case occurred," says Starkie,[1] "some years ago (I state from common report only) which strongly illustrates the necessity of exerting the utmost vigilance in negativing satisfactorily every other possible hypothesis in a case of purely circumstantial evidence. A servant girl was charged with having murdered her mistress. The circumstantial evidence was very strong: no persons were in the house but the murdered mistress and the prisoner; the doors and windows were closed and secure, as usual; upon this and some other circumstances the prisoner was convicted, principally upon the presumption, from the state of the doors and windows, that no one could have had access to the house but herself, and she was accordingly executed. It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of a board thrust across the street, from an upper window of the opposite house to an upper window of the house of the de-

[1] 1 Starkie Ev. p. 513 note, 1st ed. A.D. 1825; p. 864 note, 4th ed.

ceased; and that the murderers retreated the same way, leaving no trace behind them."

Where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt, that acute judge, Baron Alderson, told the jury that, before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person;" and he then pointed out to them the proneness of the human mind to look for, and often slightly to distort, the facts, in order to establish such a proposition, forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.[1] In this Commonwealth, the true rule has been declared to be that the circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis; "that the circumstances, taken together, should be of a conclusive nature and tendency; leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty, that the accused, and no one else, committed the offence charged."[2]

"Circumstantial evidence," said Lefroy, Chief Justice of the Court of Queen's Bench in Ireland, "is to be weighed with reference to what the party against whom it is applied has the means and opportunity of explaining."[3] And we claim, gentlemen, that the prisoner at the bar has fully and unequivocally explained the complicated network of facts with which the Government has endeavored to encompass and entangle him.

Every fact must point to the prisoner, and you must be satisfied that no other person could have committed the murder before you can convict on circumstantial evidence. The

[1] Hodge's Case, 2 Lewin C. C. 227. "The human understanding is of its own nature prone to suppose the existence of more order and regularity in the world than it finds." Bacon Nov. Organ. Aph. XIV. — Rep.

[2] Commonwealth *v.* Webster, 5 Cush. 319. Commonwealth *v.* Goodwin, 14 Gray, 55, 57. 1 Lead. Crim. Cases, pp. 319–322.

[3] The Queen *v.* Redmond, 3 Irish Com. Law Rep. 505.

Government has not proved that Ellis was killed, but they have inferred he was killed. This is not enough, as it must be established by legal rules. Why could not any other person who knew Ellis had money have killed him, and carried him to Alley's stable and cut him up? All through this trial the Government have kept talking about murder, but they have not proved it. There is at all events nothing that points directly to the stable occupied by Alley. The fact that the remains were found in the barrels does not connect them with Alley, unless you can prove beyond a doubt that they were Alley's barrels. Those barrels in which the remains of Mr. Ellis were found — and by the way nobody identified the barrels except the Coroner, who put a mark on them — must be proved to belong to Leavitt Alley. The Government must show some connection between Leavitt Alley and the barrels; but there is no evidence to show that Alley had any particular barrels, but that when he went for shavings he took any that were at the billiard manufactory of Schouller. Even Tibbetts could not identify the barrels; he does not pretend that these barrels were marked. The barrels were common ones, and both Schouller and Tibbetts had testified to this fact. It is not pretended that there were any particular marks upon the barrels; and no man can identify them, which, according to the testimony, were used indiscriminately by every one. The only scintilla of evidence on this point came from a detective who said that Alley admitted that one of the barrels belonged to him. I contend that the old man never said that one of the barrels belonged to him. I tell you, gentlemen, I hope that a man's rights will not depend upon such a confession as this. If he said that, and that he could identify them, how could *he* do it? There is another ground that I put this on. Did it ever occur to you in the world how unsafe it is to rely on the confession of a man when it is thus extorted from him? If he had told the detective that it was his barrel, would he not have inquired how he explained its being connected with the murder? That would have been the natural question. And yet the detective did not ask him. But the conversation was fabricated and artificial. If he had identified the barrels, why did not the Chief of Police comment on the fact when he summed up the evidence against him to Alley, as he says he did?

Gentlemen, the law covers every man like the sky; it comes upon all like the rain; and every man is sure of his personal liberty unless restrained by forms of law. There is no right by which the meanest man can be taken into custody without due process of law. Would you have liked on that night, after going to bed, to have the Chief of Police and two officers come to your house at half-past eleven o'clock, wake you up and question you, and then be taken to the stable? By what right have the officers done this? Did they not put him to the crucial test? Did he falter? No. Because it was the triumph of innocence, and they do not pretend that there was in his manner or bearing any thing tending to show guilt. Was it right to come upon him like a thief in the night? They did it because he was a poor man and lived in a humble place. Would they have gone to James M. Bebee's or Gardner Brewer's or any other rich, influential man's house on Beacon Street at midnight? For shame, in this good old city of Boston, famed for its liberty, that this should have been done. Did they give him counsel? No. He went to the Chief's office, gave himself up; and how did they treat this respectable citizen? They neither arrested him nor let him go, but kept him in custody; and in order to torture the old man's soul, or to enhance their reputation as detectives, they took him to Cambridge and showed him the remains; they turned over the head of the dead man, and watched him to see if they could not extort something from him. Then they took him to the barrels, and went through the farce of questioning him. These five men, Savage (who, but for his excellence as a man, I should say is rightly named), Skelton (who ought to be called skeleton) and Dearborn and Ham and Wood kept him in custody five whole days, illegally, improperly, unfairly holding him, and then this magnanimous Government opens the case with the declaration that this is an *investigation;* they do not pretend he showed any guilt, and yet they come in and swear to this old man's declarations. Why? 'Twas a part of the drama; every thing he said was perverted and twisted. In regard to the specific questions did not Skelton and Wood contradict each other in attempting to contradict a respectable witness, Mr. Risteen, who was called for the defence?

Confessions, alleged to have been made under the circumstances testified to by the officers, were dangerous, because they were perverted by them. If Alley had acknowledged the ownership of the barrels, together with the finding of blood on his clothing, would not this have been sufficient ground for the officers to have committed him, and so informed him, and yet they did not. The trouble was that Alley never *said* such a thing, and the testimony was made up after they failed to get Tibbetts to identify the barrels. This is one of the links which the Government have not made out, and will you believe the evidence? As to confessions they must be considered with the greatest care, for there are numerous cases on record where innocent men have been convicted and hung on confessions extorted from them. In this connection I instance the case of the Bourne brothers in Vermont, who were convicted of the murder of Russell Colvin. One of the men was hung, and the death sentence of the other was deferred for a short time. Some of the people, suspecting that something was wrong, commenced an investigation and advertised the disappearance of Colvin, when, lo and behold! he came back alive and well from New Jersey, where he had been. Both the accused had owned to the killing of Colvin, and even told where his bones could be found; but, as it afterwards proved, a confession was extorted from the men, who were weak-minded. From this fact, gentlemen, very little weight is to be attached to the admissions which the officers say Alley made.

As to the barrels found in Charles River, the Government have failed to connect them with Alley. The fact that the barrels were found at the Cambridge gas-works is nothing to show that they were put in at the sluiceway at the Mill-dam in Boston. It is the theory of the Government that they were thrown in at half-past seven o'clock in the morning. If this is a fact, they could not have reached Old Cambridge at half-past three in the afternoon; half-past seven was just an hour and fifty minutes before the tide turned. They would have gone down with the tide and returned to the sluiceway about eleven o'clock. Now it is not possible for them to get to the gas-works at half-past three: the tide only runs at the rate of a

quarter of a mile an hour. How does the Government meet this? My proposition is: that, as far as their tide problem is concerned, it cannot be shown. Suppose we take another view, and let us show that they were not put into the river till half-past eight, according to their own witnesses. The man who swore to seeing Alley on the Mill-dam, also swore that he did not leave his house at the Highlands till eight o'clock. This did not suit the Government, and they have brought in witnesses to show that they heard the Brookline bells ringing, and that they ring at seven o'clock. But whom are we to believe as to the time when he left his own house? If it was at eight o'clock, what becomes of Mr. Richard's seeing him at half-past seven on Charles Street? If the Attorney-General should attempt to argue the half-past seven theory, the jury would have a right to ask him on what sworn statement he based his argument. If Ramsell's testimony is to be taken at all, he saw Alley at half-past eight o'clock. I will merely ask you, What fact can be relied on by Ramsell? He left his house when the bells were ringing at eight o'clock, came down to the Mill-dam, and saw a man whom he did not know, with a horse which had the disease: that fact, I say, proves neither that it was Alley, his horse, or his wagon or barrels. Nor does it prove that the barrels were put over the sluiceway. Tibbetts swears the piece of carpet produced here was the piece on the barrels, and Ramsell swears that it was not. If the Government argue that they were the barrels, ask them if they believe Ramsell or Tibbetts? Remember that no barrels have been proved to have been put in at the sluiceway.

With these remarks I leave the barrels; asking you not to forget, but always to remember, that the Government have not proved the identity of the barrels. It is said that there was manure in the barrels. I leave that; but let us examine the shavings that were also found. Schouller could not identify them; he says they are similar to black-walnut shavings found in any manufactory, and as far as the shavings are concerned they go for naught. The piece of paper in the shavings marked "M. Schouller, C. O. D., $10.31," does not show any thing; for by the testimony of Mr. Schouller it is shown that he was in the habit of letting anybody take shavings, and even

hired Alley to cart them to the dump. While it may be said that the piece of paper was in the shavings taken by Alley, it can also be said that others took it, as they had the same opportunity to do it that Leavitt Alley had. And upon this part of the case you must recollect that any thing relative to the barrels, shavings, or manure must be proved beyond a doubt.

We found a great mass of human blood in the stable, the prosecution say. And here I must say I do not understand the Government. I cannot imagine how a man with a soul, conscious of a hereafter, could come into this court and give an opinion, either which he has no reasonable grounds to know or which he did not believe. And yet Dr. Hayes came here, and as flippantly and as arrogantly as ignorance could allow him said that the blood was pure human blood. I have no ill-will against Dr. Hayes, but I must do my duty faithfully and fearlessly; and I must say that I was pained to hear what little regard he had for his oath. Science should not be degraded by such an ignoramus. He said the blood given to him was dry; and he swore upon this man's life that he had to take the corpuscles, which, when left to dry, lost their normal shape, and restoring them to a condition by a serum exactly of the same specific gravity as the natural blood, he could swear that it was human blood, and that the difference between it and horses' blood was as great as the difference between peas and beans. If we should take fresh blood, where the difference is so small, we might, perhaps, tell; but remember that these were taken when the serum had passed away, and the corpuscles were dry, and in drying had lost their natural shape and become twisted into all sorts of forms. Dr. Jackson, the father of these experts (a man of forty years standing and practice), said that when the corpuscles are dried you cannot tell the difference between human and animal blood, and his testimony is corroborated by Professor Babcock; and this was not only Professor Babcock's opinion, but he told us it was a thing long ago given up and laid down as an admitted fact in science, that you cannot distinguish between human and animal blood after it is dried. Dr. Harriman said it was impossible to tell the difference between human and animal blood. The thing was so delicate that it

could not be determined. The testimony of Dr. Jackson, Professor Babcock, and Mr. Samuels all concurred that the size of the corpuscles in a drop of dry blood of a man and a horse could not be distinguished. And yet Dr. Hayes, with all his learning, went on to the stand and swore that the number of corpuscles in a fresh drop of blood was 32,000 to an inch, while in a horse it was 42,000 to an inch. After sitting down and looking at his book, he said he would like to come back and correct a slight mistake; and then said he meant to have stated that the number of corpuscles in a fresh drop of man's blood was 3,200 to an inch, while in a horse it was 4,200. He only got it ten times as large as it was, which shows how accurate he is in his statements. The trouble is, these experiments have been made with fresh blood, with the corpuscles floating in the natural liquid. Now the authorities and the witnesses agree that an artificial liquid of the same standard as the original serum cannot be made. Therefore, we say the Government has failed to show it was human blood which was found in Alley's stable. My young horse-doctor was brought to prove that the horse was bled, and the Government has not attempted to disprove it. We did not pretend our horse-doctor was as experienced as Dr. Verry; but the fact is that he bled a horse in Alley's stable in September, and I guess, if the truth was known, he nearly bled him to death. Well, to meet it, the Government put on two witnesses to contradict our doctor, and they contradicted each other. Would it not have been better, instead of having wrangling among horse-doctors, for the Government to have put on Tibbetts, who worked for Alley, and knew all about the stable? The reason it was not done is because the Government knew that Tibbetts would say that a horse *was* bled in Alley's stable? If the Government mean any thing, I suppose they mean to argue that Alley and Ellis were together in that stable; and that Alley killed Ellis, cut him up, and packed him in barrels. There is not a scintilla of evidence to support this position, and I know you will not take the say so of the Attorney-General; and yet, for the sake of argument, I will admit that Alley killed Ellis in the stable. The Government not only say this man was killed in Alley's stable, but also cut up there. If he was cut up, where is the

blood? would it not have covered Alley's clothes and shoes and stockings, and saturated the entire premises? But they find only these few drops. Now is it not remarkable that there was no blood found on the floor? Why, it was sworn by the doctors that the body had been emptied of blood. I say it's absurd; had it happened there, there would have been some other mark. There was blood there, and I can show you more of it; but it's horse's blood, and they know it, and Dr. Hayes knows it.

Now where was Alley on Tuesday evening? It is sworn to by Tibbetts that Alley left his house about eight o'clock, and by the statement of the Chief of Police, Alley told him that he left the house about half-past seven o'clock. He went down to his stand on Washington Street to cover up a stove; he was seen in Risteen's store close by, and after a little while he goes out. It was after eight o'clock. He meets Mr. Armstrong, who also swears it was after eight; they go into a saloon for a few moments, and then they part, Alley going home and Armstrong going the other way. By accumulated evidence, which you cannot doubt, Alley got home at about twenty minutes or a quarter before nine o'clock, giving him just time enough to reach home in the slow pace at which he always walked; and is there any thing to contradict this? The Government say he was in the stable, but at what time? They can bring no one to testify to it, nor can they bring any proof that Alley was out of the house after nine o'clock on Tuesday evening. You will have to take the testimony of Alley's family that their father did not go out again that night; and yet the Government would have you believe that he killed Ellis, cut him up, and packed him in the barrels between seven and a half and quarter of nine o'clock. To show that Ellis was in the direction of Alley's stable at half-past seven o'clock, the Government has introduced witnesses to show that about that time Ellis was seen in Smith Avenue; while Mrs. Porter and her little girl, who knew Ellis well, because he used to board with them, testified to meeting him on Washington Street, near the Eagle Engine house, and going toward Dover Street, which was in a contrary direction and a mile away. If Mr. Ellis was at Smith Avenue at half-past seven o'clock, and wanted to

see Leavitt Alley, why did he not stop at his house in Metropolitan Place? The trouble is, that Ellis did not want to see Alley, and when Mrs. Porter met Ellis he was going to his lodgings down Washington Street, in an entirely different direction. The Government have been very cautious, and have not put Mr. J. Q. A. Brackett, the executor of Ellis, upon the stand, who could tell if the pocket-book is in his possession, and whether Mr. Ellis had a large amount of money or not.

But when did Alley kill him, cut him up, and barrel him? This is what the Government must prove to you, or their theory fails. But let us take him in the morning. But need I go any farther? He did not carry off the body of Ellis, unless he had killed him and cut him up the night before. The Government opened, and I hold them to it, that the old man got up at the usual time, went down and fed and cleaned his horses, drove to Metropolitan Place, got his breakfast, and then went to his stand down Washington Street. He told the Chief that when he left his stable he had four barrels in his wagon, took them to Mr. Schouller's, carried two upstairs, and the other two he left in the archway near his stand. Schouller says Alley carried two upstairs, and why do the Government not attempt to show that he did not leave them there? But Alley comes out of his stable, and his son asks him how the blood came on his shirt? He replied from a horse, and at that time the horse did bleed from the nose. He then drove up the street, went into a saloon, talked fifteen or twenty minutes, his coat all this while unbuttoned and the blood in plain sight. Afterwards he went home to breakfast, leaving his team, which contained the four barrels, on Washington Street, near Metropolitan Place, where he lived. He then went to Durham's, and was there at quarter before eight. At eight o'clock he was at Schouller's, and took in a table. Armstrong saw the table in the wagon. He, Schouller, and Sanborn, all swore that there were no barrels in the wagon at that time, and then he drove down the street with nothing but the table in his wagon. He then went to Haymarket Square, left his wagon there, went up to Mr. Stone's office in Court Square, was gone an hour, then came back, got his load, and was seen at twenty minutes of ten at the corner of Beach Street and Harrison Avenue. Alley got back

to his stand between eleven and twelve o'clock, where his team was taken by Mr. Sanborn. As to the afternoon I care nothing about it.

Now let us consider the testimony of the woman who heard the noise in the stable. She says at seven o'clock in the evening she went out; heard loud talking in the stable, saw a light, and heard a noise of rolling of barrels. This story is too apparent, and bears the same marks of paternity as the Ru Dixon story. I don't blame the woman, but I do blame those who fixed the story up for her. After Dr. Hayes has done his worst, after eight days' solid work, the Government forgot to put in a part of their case; and at that late day they put the learned Dr. Hayes on the stand to swear to a scab received from Captain Savage. Can any man on the jury believe that this was forgotten? But when it was brought up, could he say it was human flesh? He said he could *infer*, but I stopped him; I did not want any of his inferences; there was not any thing in it as a matter of evidence.

There is one thing more. They put in by the detectives that Alley bought an axe. About this you know that when he bought the new one the old one had been stolen, and he says the new one was also stolen. Is there any thing to prove that it was not stolen? On the contrary, it is the most probable thing in the world. You can judge what became of the axe from the fact, that we were not allowed to put in a record that the stable was broken into. The axe was stolen at that time, and is there one word said about it by Alley which is not true? The barn was a rickety old affair, which anybody could enter by simply pulling out a staple, and the boys used to ransack it at will.

The story told by the detectives as to what Alley said about the axe is as true as the one they told about the barrels. A great cry is made about the $150 he paid on Wednesday morning. But is not that met? Did his son Daniel not swear that he loaned his father more than $100 on that very morning, and will you not believe him, or any honest man, upon his oath?

Again, all the evidence offered by the Government conflicts with their theory as to *the time* Ellis was killed. It has appeared as a physiological fact, over which the defence had no

control, that it would take bread and milk three hours and a quarter to digest, and yet it appears that the bread and milk had all passed out of Ellis's stomach, though you are asked to believe that Alley killed Ellis and cut him up between half-past seven and nine o'clock on Tuesday evening.

The reason we have not put Alley's wife upon the stand, is because it would open questions which it would be indelicate for a lady to answer under the very peculiar circumstances of this case; and Curtis, his son, would have been obliged to testify, if I had called him as a witness, to the presence of blood on his father's clothing, which might tend to convict, and thus be a harassing recollection to him through life.

I have not attempted to argue to you, gentlemen, whether it was probable that Alley killed Mr. Ellis, or more probable than not, *but that it has not been proven.* The Government must rely on something else beside the evidence adduced if they ask you to convict this man. You have no right to rely on the opinion or assertions of any one either as to his guilt or innocence; but he must be tried solely on the fact. They will ask you to find him guilty on your suspicions, or the possibilities of the case on the declarations of the Government officers. But standing as you do between Leavitt Alley and his life, it becomes you as sworn jurors to weigh well the evidence. If the Government have proved to your minds that he is guilty, you will say so; if they have not fully proven this, you must bring in a verdict of not guilty, as I believe you will. Gentlemen, I thank you for the attention you have given me.

NINTH DAY.— *Wednesday, 12th February.*

ARGUMENT OF THE ATTORNEY-GENERAL FOR THE GOVERNMENT.

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

A more remarkable freight never floated on the beautiful stream which divides this city from her sister city than when floated upon its bosom on the 6th of November the remains of

one of our fellow-citizens. Four hundred thousand people reposed in safety, when they were startled by the discovery of the remains of Abijah Ellis. The murder of Kate Leehan had not passed out of remembrance, and there is nothing which so startles people as a secret homicide. So, instantly after the discovery of the remains of Mr. Ellis, every man, woman, and child constituted themselves detectives. After Mr. Lane had been shot every man answered the door-bell with fear and trembling, and this accounts for the great interest manifested in this case. We are poor, frail creatures, dependent upon the law, and its faithful administration is our only security. No case has ever occurred in this Commonwealth which has excited such attention since the Webster-Parkman trial, and I shall have occasion to call your attention to the great similarity between this case and that. The only difference is that Dr. Webster was educated, and moved in higher circles than Leavitt Alley; but his reputation did not save him, and the good reputation that Alley has sustained ought not to save him. The law was vindicated in Dr. Webster's case, and the people demand that the law should be vindicated in this case. Let us try this case by the evidence, and not be affected by outside influence. Do not let our minds be affected by sympathizing friends of the prisoner or counsel. Public sentiment is not to try the case, but you are to try it upon the evidence. I have in the preparation of this case endeavored to place myself in the place of a juror, and if I was not satisfied of his guilt I would not stand here to urge his conviction. It would be a sin to God, myself, and my fellow-men for me to stand here if I did not believe him guilty, and I should feel it my duty to either ask for an acquittal of the prisoner or to enter a *nolle prosequi* to the indictment.

Twenty years ago, Professor Webster was tried in this same court-room and was convicted on circumstantial evidence. The same arguments were then used against the admission of circumstantial evidence; but Professor Webster, before his execution, confessed the justice of the verdict. In the administration of justice it becomes necessary to use circumstantial evidence, and I will venture to say that there has been as much wrong committed by positive evidence as there ever was

by circumstantial evidence. Circumstantial evidence is used in the common affairs of life and must be used in cases of secret homicide.

[The Attorney-General then read from an extract read by Attorney-General Clifford in the Webster trial, bearing upon circumstantial evidence.]

Now, then, gentlemen, as in our social state secret offences will be committed, as it is necessary for the protection of the virtuous and good that laws should be enacted and acted upon, it is necessary that we should have officers to carry them out, and it is not to be argued that officers of the law are hounding a man to conviction, when they are only performing their sworn duty. I undertake, upon the evidence offered here, honestly to ask you to find the prisoner guilty beyond a reasonable doubt of the murder of Abijah Ellis.

Murder in the first degree is the killing with premeditated malice aforethought. The time of premeditation may be long or short, but it is enough if the intention is formed before the killing is done. The defence has not claimed that in this case there is any other degree of murder except the first degree, and in circumstantial evidence the law presumes that the killing was done with malice. The jury are not to believe the evidence presented as men and disbelieve it as jurors; they are to act as in the highest affairs of life when they say that Leavitt Alley was guilty. In this case we start with the remains of Abijah Ellis, and there is no mistake as to identity. Abijah Ellis was little known in this community, quite as humble as Leavitt Alley, though perhaps worth a little more money.

No wonder that the workmen at the gas-house at Cambridge shrank back aghast when they found the headless trunk of a murdered man. It was treasure trove that does not often float on tidal waters. Were men who fell dead in the street of heart disease mutilated in the manner that these remains were? Gentlemen, this evidence is as satisfactory as though Sanborn had sworn that he saw Leavitt Alley cut him up, and yet this is circumstantial evidence. After the finding of the remains the first question was, Who did it? and every person constituted himself a detective. The police are called, and the coroner takes possession of the remains. In the barrels are

found manure and shavings of a peculiar character, and the jury must assume that the person who killed Ellis cut him up and packed him in the barrels with the shavings and manure.

We go farther and find a piece of paper marked "C. O. D., M. Schouller, 1049 Washington Street." This is a piece of circumstantial evidence; but does any one doubt that the person who came in possession of this paper killed Ellis and then packed him in the barrels? We next go to Mr. Schouller and find that the piece of paper went out of his possession in October, and we also find that Leavitt Alley had shavings from that shop, and used them for bedding at his stable on Hunneman street. Then it is our duty to go to Leavitt Alley and find out what light he can throw upon these remains; for we have not yet found out whose remains they are. Captain Savage goes to the house of Leavitt Alley, treating him as an innocent man, but for the purpose of ascertaining whose remains had been found. Did anybody ever hear of any person's being abused by Captain Savage in his long experience in the police service, or that he ever went outside his office to obtain evidence to convict an innocent man? Nor does Captain Savage have associated with him men who are thieves or liars. They go to the house of Alley for the purpose of investigation, and with no view to extort a confession from him.

Now we have the fact that a man has been murdered and his remains packed in manure and shavings. [The Attorney-General then produced the skull of Mr. Ellis.] One of the blows was given from behind with an axe. You will see that the blow was produced by the back of an axe, and the break in the back of the hat corresponds with the edges of an axe. I claim it is perfectly clear that Mr. Ellis was killed by an axe, as other blows upon the skull show. Whoever killed Ellis did it with premeditation, for men do not kill one another in self-defence with an axe, when the blow was given from behind. The next morning Alley came to the office of the Chief of Police, and, without being compelled to go, went to Cambridge and identified Mr. Ellis and also one of the barrels.

Now the question is, Who killed him, and when and where was he killed? In the first place it is well to ascertain when

Ellis died. The Government have proved, and it is not denied on the other side, that Ellis died somewhere between six and half-past six o'clock and ten o'clock. The stomach was taken to Dr. Fitch, and by the contents of the stomach it was demonstrated that Ellis must have died about three hours after eating his supper. I think that the testimony of Mrs. Porter and her little daughter was correct that they saw Ellis about half-past seven o'clock, and that he was killed between that hour and half-past nine. I claim that Ellis was in full life at seven o'clock, and was killed two or three hours after. The next question is, Where was Ellis killed? I claim that it was done in Alley's stable between the hours I have indicated. That Ellis fell dead of heart disease and was cut up by some person who found him, as has been advanced by the other side, is so improbable that it does not need noticing. It would have been just as probable for them to have said that Ellis killed himself, cut himself up, and then crawled into the barrels.

It is a fact not to be disregarded that Ellis was packed in barrels like those owned by Alley; that Alley was in the habit of carrying such shavings to his stable from Schouller's and that on Tuesday night Alley carried similar barrels with shavings from Schouller's shop to this stable. Now were these barrels left in the barn Tuesday night, or were they removed? Alley says on Wednesday morning he found his barn in the same condition as when he left it on Tuesday evening, and there was no pretence that boys had stolen grain, axes, or any thing else. There are no shavings or manure like these in any other barn in that vicinity. I claim that the barrels remained in the barn over night, and that in every respect the barrels found in Charles River were like the barrels found in Alley's stable and seen at Schouller's shop. The only mention of the barrels came from Tibbetts and Alley. Alley says the next morning he carried back two barrels, left two at Schouller's and two in the passage-way. But where is there a man, woman, or child who will come forward and say what became of the two barrels said to have been left in the passage-way?

It is a rule of law that when a piece of testimony presses upon a man he is bound to explain it, and no explanation has

been attempted by counsel or prisoner. The larger barrel is not accounted for except that Alley says he left it in the passage-way, and even Mr. Schouller did not remember seeing him in his shop on Wednesday morning. Does anybody suppose that Ellis dropped dead in the street and then stole the barrels, went to Alley's barn and got the manure and shavings, and after all took the barrels and dumped them into the Charles River? It had been proved beyond doubt that the barrels belonged to Alley, as testified to by the Chief, officers Skelton, Dearborn, Wood, and Ham.

It has been argued that you were to disregard the statements by Alley. He came to the office of the Chief of Police and answered questions voluntarily, and without compulsion, and what he said was not in the nature of a confession. If the statements made by Alley to the Chief and the officers were true, then there could be no doubt that the barrels were in Alley's stable on Tuesday night. Having thus proved that the barrels were in Alley's stable on Tuesday night, it was clear that Ellis was killed in that stable that night; and if murdered there he was killed by Alley. The conclusion is clear and logical, as proved by the circumstantial evidence, as though any person had looked through a crack in the barn and saw Alley strike Ellis with an axe. With the proof submitted the jury must be satisfied that Alley killed Ellis, and that under the circumstances it could not have been done by any other person.

Now having, as I hope, established to your satisfaction that the murder took place in Alley's stable, the next question is, Who killed Ellis? Of this, I will prove beyond a reasonable doubt. The man killed him who packed him in Alley's barrels. If a stranger had killed him, he would have left the body in the stable to attract attention to the stable and divert suspicion from himself. The man who removed the body from the stable did so for the purpose of concealing the crime. This is common sense. Ask yourselves the question, Who had a motive for concealing the fact of the murder? Leavitt Alley is the person. Anybody else would have left the axe, the manure, and the shavings.

I say he was killed with an axe, because it was in the barn on Monday and Tuesday, and it was shown that Alley bought

an axe of Chandler & Gardner on the 31st of October. Alley denies not only that the axe was there, but he denies having bought an axe. Is there any mistake that Alley bought an axe? I think not. Does not Tibbetts tell you that there was a new axe painted red in the barn, which was used by him and Alley on Monday? Did not Chandler & Gardner say that they sold Alley a new axe on the 31st of October, and that they remembered it because it had an imperfection in the handle and was sold under price? Who knows where the axe is? Leavitt Alley. Who else may know? Curtis Alley. Whoever killed Ellis killed him with that axe, and that's the reason the axe is concealed, that's the reason Alley denied buying the axe, and that's the reason it is not produced, because if found it would be covered with the blood of Ellis.

Alley denied having bought a new axe, and, when pressed about mending the harness on Monday, he said that it was done with an old axe. He killed Ellis with the axe, and removed it, thinking that in its concealment there would be no evidence to show that he ever had a new axe in his possession. Any stranger who had decoyed a man into the barn and killed him would have left the axe to divert suspicion from him. Do you not believe, gentlemen, that if that head could be vitalized and could look upon Leavitt Alley, it would say, "You did it." And Leavitt Alley could reply. Webster denied just as stoutly that he killed Parkman as does Alley that he killed Ellis, but the Government proved that Webster was Parkman's debtor.

Mr. Somerby rose and denied that the allusion to the Webster case might prejudice this one.

The Attorney-General. I did not interfere yesterday with the able argument of my learned friend on the other side, though I could have done so every fifteen minutes.

Judge WELLS said that, as the counsel for the defence had transcended the rule, there was no occasion for the Court to interfere.

The Attorney-General. Compare the remarkable similarity of motive in this case as compared with that of Dr. Webster. Alley owed Ellis money just as Webster owed Parkman. Alley had bought a house of Ellis in Metropolitan Place, and was

behind in his payment. The accusation made by the defence, in the absence of evidence, that officer Dearborn stole those receipts from Alley's desk, was an outrage and unparalleled, and would never have been made except by counsel in the heat of argument and driven to desperation. Alley owes $200, and he is not a rich man. Neither was Professor Webster. I am willing to admit that Alley had some means, but he had no available means in New Hampshire. The property had been exaggerated, and could not have realized money to pay his debts. He owed Mr. Durham a note which had been protested, and Mr. Durham was pressing him for money.

This was on Monday, and Alley offered to give him a mortgage on his horses and wagons. He owed Mr. Mahan five notes of $50 each, one of which became due on Saturday. He owed Ellis $200, and on Saturday he paid $21.50 to Mahan, and had no money to pay Tibbetts. Now then Ellis was in pursuit of Alley on Tuesday night to make him keep an engagement which had been made for Tuesday noon, while Alley was absent with a load of furniture.

We find a state of facts which we all agree are true if we can find a motive. Now I want a reason for these two men coming together. Alley had no money, and had failed to meet his payments to Ellis. It is a reasonable proposition that Ellis should have been seeking Alley on Tuesday night, and it does not require a great deal of presumption or credulity to believe that Ellis was in search of him that night.

We are not required to show what time they came together; but, taking the fact that the barrels were found in Alley's stable, I claim that Ellis and Alley came together that evening. Some time on Tuesday night, while Ellis was in full life, I maintain that he and Alley came together in that stable on Tuesday night. I am not disposed to contradict the testimony of Mr. Risteen that Alley was in his store at eight o'clock on Tuesday evening.

No one fixes the time so close as Mrs. Porter, but none of them pretends to fix the time with any accuracy. Assuming that Ellis was seen at half-past seven, there was time enough between Alley's interview at Risteen's store, and any time he might have returned home for Ellis, to have gone to Alley's

stable by appointment. There was no other place where Alley would have been more likely to have taken Ellis if they were going to have a dispute.

Mrs. Kelly says that she saw a light in the barn at eight o'clock and heard voices at that time, and that at ten o'clock she heard a sound as if barrels were being rolled. If Ellis was at the Eagle Engine House at half-past seven o'clock, there was plenty of time for him to have gone back to Alley's stable and be killed by Alley, who returned home before nine o'clock.

We have shown that the murder was committed and where it was done, but we are not bound to show how the deed was done. It is easy to imagine how it was done, and probably the jury could imagine very nearly correct. Ellis met Alley at the stable and dunned him for the money which Alley owed him. High words ensued, and heat arose on the part of one of them, resulting in Alley's felling Ellis to the floor with the new axe.

The murder having thus been committed, the next thing was concealment of the axe, but not the body. We claim that Alley was on Beacon Street the next morning, and we undertake to say that he attempted to conceal the murder by dumping the remains in Charles River. We say Ramsell saw a horse, wagon, and barrels, all of which look like those of Alley.

But the defence say it must have been after eight o'clock, and therefore it could not be Alley. It is possible that Mr. Ramsell may be sure as to the fact and mistaken as to the time. The other fact is that Mr. Richards, who knows Alley, says he was on Charles Street, between seven and eight o'clock Wednesday morning; therefore it follows that Mr. Ramsell must have seen Alley on Beacon Street only a short time before.

These facts go far to corroborate the theory that Alley killed Ellis, and that to conceal his crime he dumped the barrels in Charles River, hoping they would sink and never be found. Is it asking a jury to force a presumption to say that the man who killed Abijah Ellis, cut him up, and packed him in barrels, took those barrels out upon the Mill-dam and dumped them into the river at the sluice-way, where the railing

is very low. The Attorney-General then adverted to the blood found in the stable.

No person he said had ever testified it was human blood found there. All we said was that the blood found there was not horse's blood. We found more than that; we found tissues of flesh, matter which came from the body of Mr. Ellis when he was being cut up, if it ever came from any one. The defence would give you to understand that the blood was all fiction. They called Dr. Jackson, who is about as favorably known in this community as an expert as is the witness Sanborn.

Now, if you believe that the tissues and flesh were found as testified to by the officers, that is all we need to show. To refute this the defence brought a young horse-doctor, who did not make a very favorable impression. If every word he had said was true, it would not account for the blood on the shavings. He bled the horse in both forelegs and then in the jugular vein; the horse lay down; they got him up, and then he lay down on a manure heap five feet high, and then they wanted some blood on Alley's coat, and the horse accommodated them by walking over and bleeding on the coat. Then the horse bled up Alley's clothing, and would the jury believe that Leavitt Alley wore that clothing in that condition from September to November? Again, on Wednesday morning, the 6th of November, Curtis Alley asked his father where the blood came from on his shirt.

Did Alley wear that shirt from September to November? Curtis Alley was not called, and that convicts his father. What has become of the shirt? He had it on that morning, Baker and Tibbetts saw it. On Friday night there was no blood on the shirt. It must have been washed to conceal the blood, and there was no motive in concealing the blood unless it was to conceal the murder.

I ought to have said that the first blow Ellis received was on the back part of the head, which knocked off the hat, and the other blows were given afterward. It was done by Alley and by no other person. The testimony in relation to the blood is just as conclusive that the murder was committed in the stable as that Alley committed the murder.

The defence say in the first place that the jury cannot be satisfied beyond a doubt on the Government's case. I wish the jury to bear in mind that the argument made by Mr. Somerby was a commentary upon the evidence offered on both sides, while I hope I have shown you how the case stood in my own mind as offered by the Government. Upon the whole case I contend that Alley is guilty, not having offered any explanation of the circumstances against him; and I confess that my heart shrank when the counsel for the prisoner took his seat without attempting to offer any reasonable explanation to show that Alley did not commit the murder. The plea of the defence was an *alibi*, — that Alley was somewhere else when the deed was committed. If Alley was not there at the time we undertake to place him, then of course he did not commit the crime. Every fact we have proved is consistent with every other fact. If the defendant can break a link of the chain upon which the case of the Government is founded, then the whole case falls; if not, he must be considered as guilty. We have proved the facts in relation to the body, barrels, axe, stable, his whereabouts on Tuesday and on Wednesday morning. There are two ways in which Leavitt Alley can answer. One is by accounting for his barrels, some story in relation to the manure and shavings and the blood in the stable, or he can set up an *alibi*, or both. If he sets up the first and then fails in that, and sets up an *alibi*, you begin to distrust both. Alley has been defended by able counsel, assigned by the Court, who have taken every advantage for their client. The only answer they have set up, however, is to criticise the case. It is not enough for counsel for the defence to make insinuations against scientific testimony as to the state of the tides in the face of facts, for the barrels went up Charles River and were found at the gas-works. It is not enough to say that a horse was bled in September, that Curtis Alley did not come upon the stand because he would be instrumental in accusing his father of guilt. If Alley was innocent, his son Curtis and his wife would both have been upon the stand. The defence have attempted to prove two *alibis*, one on Tuesday night and the other on Wednesday morning. There is a fact which seems to have a good deal of significance. As

soon as Alley heard barrels had been found at the gas-works, Tibbetts said, and no one attempted to contradict it, that Alley said that the barrels, shavings, and manure looked very bad against them, and that they had better make a memorandum of what they had done on Monday, Tuesday, and Wednesday. How did Alley know then that he was going to be charged with the crime, and why was he making a defence at that time? It was not known then who the man was who was murdered. It was a peculiar fact in this case, but Leavitt Alley knew that the time would come when he would have to account for the facts which were telling against him, as his plan of sinking the barrels in Charles River had failed. He was forearmed when Captain Savage went to his house; he had had the newspaper account read to him by his daughters, and it will take a more profound reasoner than my friend on the other side to convince me that there was no conversation about it in that house. Will any one believe it was not talked about? If it was talked about, it was consistent with Tibbetts's story, and it was a substantial reason why Alley should try to account for himself. Up to that time it had not occurred to that family what time Alley came home Tuesday night. It was a fact such as occurred in the daily history of every man's family. Now then the reason he gave to the Chief of Police that he got home about nine o'clock was because his wife told him so. That shows that they must have been talking it over among themselves before the Chief of Police went there, and were prepared to answer, so I do not place much reliance on Alley's statement as to the time he got home. Now, how do they undertake to control the time? Why should they be anxious on Thursday night to fix the time when he got home on Tuesday night. No one knew then when Ellis was murdered, or even who was murdered, because it was not known then whose remains they were. The fact was that something had happened on Tuesday night of which Alley and his wife were conscious. I am not going to say one word against Alley's family; they appeared as well as any person's daughters could do. I pity them, and sympathize with them, but it was my duty to cross-examine them, and to try and show that they had been prepared.

Risteen had accounted for Alley at eight o'clock, but the other end of the *alibi* as to the time Alley got home was left out. In my judgment Mrs. O'Toole is entirely afloat when she undertakes to fix the time when she went to Mrs. Taylor's. They undertake then to show that Smith came to the house at half-past seven o'clock, but there is a difference in the testimony on this point. Mrs. O'Toole went to Smith's house to see if he could remember the time he came to the house. Smith was undecided about it, and in this respect had the ladies any standard to fix the time of their father's leaving the house and returning. The jury did not know and could not tell what time Mrs. O'Toole left the house. The story that Mrs. O'Toole looked at the clock in the bake-shop was about as probable as that the barrels were not Alley's. Undoubtedly she got home about nine o'clock, but the affirmative proof by the defendant to establish an *alibi* fails, and the jury do not know what time Alley came in. This was an affirmative part of the case where the burden was on the defence.

The defence had argued that Alley must have killed Ellis after he left Risteen's store and before he got home. That he killed him in the intervening time I have no doubt, but when he cut him up I do not know. I do not know but Alley left the house between eleven and one o'clock, and cut up Ellis. There are two hours not accounted for. I don't know but what the sickness of Mrs. Alley was because of the revelation that her husband had committed the deed as shown by his bloody shirt. The excuse offered by the defence for not putting Mrs. Alley upon the stand was very weak, and the trouble was that there were fatal reasons for not putting either Mrs. Alley or Curtis Alley upon the stand. The Government say and believe that on Wednesday morning Alley left his stable with four barrels; two of which he left at Schouller's or in the alley way, and carried the other two to the sluice-way and threw them into the river. Baker says, and no one disputes him, that he went to Alley's stable at six o'clock Wednesday morning and saw four barrels in the wagon lying upon their bilges. Tibbetts was sent with a horse a quarter of a mile away to a blacksmith's. When he returned he found they had all gone from the stable, but he left the key at the blacksmith's shop,

which was inconsistent with Alley's statement that anybody could get into the barn without the least trouble. When Baker gets into the wagon he lifts one of the barrels, when the horse gives a start, and Alley tells him to come forward if he wanted to ride. Alley then goes to a liquor saloon and leaves about seven o'clock; thence, as he says, to Metropolitan Place; and then to his stand. Tibbetts, after getting his horse shod, turned back to the barn. Alley was not there. When Tibbetts passed Metropolitan Place, Alley was not there, neither was he at the stand when Tibbetts arrived, nor did Tibbetts see him until nearly noon that day. According to Alley's statement he should have been at Metropolitan Place eating his breakfast when Tibbetts went by. After Alley left Mahan he had plenty of time to do what he says he did, throw the barrels into Charles River and return to his stand a little after eight o'clock. Every fact in the case corroborates the Government's theory, and there is no conclusion to be arrived at except that Alley was conscious of his guilt. If my own mind is satisfied of the guilt of this defendant, it is my duty to satisfy you of it. You are to stand between the Commonwealth and the prisoner, and the community has a right to demand of you to stand up to your responsibilities, and if the prisoner is guilty to say so. Honest and Christian manhood demands that we stand up and meet our responsibilities in a firm and decided manner. This man has committed an atrocious homicide, and it is not for him to say that you should acquit him because the Government try to convict him on circumstantial evidence. If you are satisfied of his guilt, you are to say so, and are to shirk no responsibility because of the consequences which may follow. The consequences are not with us.

You are to ascertain the truth, and having ascertained it you are to declare it without fear or favor or reward, and the best reward that a man can have is the consciousness of duty well performed. This is no time to sympathize with murderers or to do any thing except exact justice. Remember that as justice is administered so is your and my life safe, and as justice is not administered so does the murderer of Kate Leehan and Lane walk abroad with the secret confined in his bosom; and, every hour and every moment he does it, he does

it at the peril of your life and mine, your sisters' and daughters', my sisters' and daughters', and the only protection we can have is a verdict of an honest, fair, and impartial jury.

Before proceeding to charge the jury, Judge Wells asked the prisoner if he had any thing to say, and he answered that he had not.

CHARGE OF JUDGE WELLS.

Judge WELLS said the jury were now to take the case to their room, and to ascertain the fact involved in the prosecution of the defendant, and declare that fact as it was ascertained. The prisoner was set at the bar, and the Government alleged that he killed Abijah Ellis with deliberately premeditated malice aforethought. If the fact was found that the prisoner killed Ellis, and that he killed him with deliberately premeditated malice aforethought, the law declares the consequences. The responsibility did not rest upon the jury alone, but upon several departments, — upon all who were intrusted with the administration and execution of the law.

The duty of the jury was the single and simple one of hearing the evidence, and declaring whether the fact alleged by the Government had been proved or not. The consequences of a verdict were not with the jury, and should have no effect upon their minds except to impress them with the duty to see that they freed themselves of all bias, prejudice, or even anxiety, and reached fairly the conclusion at which they arrived. The facts that the police suspected the defendant and prosecuted him, and that the Grand Jury investigated the case and presented this indictment, were not to be weighed by the jury at all. They were to take him as he stood to-day, and judge him by what they had heard, uninfluenced by the judgment or opinions of any who had preceded them in investigating the matter. Until proved guilty, the defendant stood before them as an innocent man. He was entitled, if he had lived a life of uprightness and honesty, to adduce that in support of the presumption of innocence; it was one of the rewards of well living that it did support the presumption of innocence and the improbability of guilt.

After defining the degrees of murder, Judge Wells said, that the evidence produced had extended over a long period of time and covered numerous transactions, many of which had little or no bearing on the case. The jury were to dismiss the unimportant matters from their minds and select those which seemed to have a bearing on the case, and consider how far they went to establish the facts relied on by the prosecution. The difference between direct and circumstantial evidence was then considered. Direct evidence consisted of testimony bearing directly upon the fact to be proved, so that all a jury had to say was whether or not they believed the testimony. In a case of circumstantial evidence the jury were required to ascertain the real fact in controversy by inferences to be drawn by themselves from other facts proved by the testimony. It was addressed to their judgment as men, not specially as jurors, but as men whose means of judging circumstances by inferring one fact from another had been gained by observation in their various positions and duties in life. Their judgments must tell them when they had sufficient of the surroundings to know what the fact was. It was true that in cases of this kind they were to exercise especial care, but in arriving at a conclusion they were to look upon matters as they would in the ordinary affairs of life, and not as experts.

The case, however, must be made out beyond a reasonable doubt, and this rule was to guide the jury in their deliberations; not that the case must be made out beyond the possibility of a doubt, but the question they must ask themselves was whether they had facts or circumstances enough to reach the ultimate fact to be arrived at; are any avenues of proof left unsearched which could supply them information; had they enough to enable them to reach a conclusion. Any floating feeling as to the possibility of a doubt, was to be thrown aside, as it was not a reasonable doubt. A man might so cultivate a doubt as not to be able to believe any thing, yet such a doubt was not a reasonable one.

In considering circumstantial evidence the satisfaction of the jury in arriving at a conclusion must be determined by the completeness of the surrounding facts and proof, and by the number of facts proved. They must all be consistent with

the conclusion sought to be attained by the Government. If all the circumstances pointed to one result the jury must go to that result, for there was where their judgment would lead them. Upon all the points necessary to be established by the Government in order to prove the killing of Ellis by Alley, the burden of proof, beyond a reasonable doubt, was on the Government.

Did Alley kill Ellis? This fact was to be established by the Government. In the first place was Ellis killed by anybody? and on this point the Government must satisfy the jury. It did not appear that any one saw Ellis after seven o'clock on Tuesday night. His body had since been found and identified. If the jury were satisfied that it was the body of Mr. Ellis, one point had been established. The next point to be considered was whether Ellis was killed. Whether Ellis came to his death by criminal homicide, or by other means, the jury was to decide. If they were satisfied that some person killed Ellis by blows on the head, that step was established. If he was killed by a dangerous weapon intentionally, it was murder. Could they infer from the wounds upon the head that he was killed by some person with a dangerous weapon? for it was not proved by direct testimony. When one person kills another by the voluntary use of a dangerous weapon, it is murder, unless there are palliating circumstances; and in the absence of these the jury could infer that it was a deliberate murder committed intentionally.

The next question was, Did Alley do it? Upon this point lay the great strain of the case. Perhaps it would be necessary, in the first place, to determine where the murder was committed, for by so doing the jury might obtain some aid from known relations of the parties with each other. Ellis was alive at seven o'clock on Tuesday night. His remains were found the next afternoon at three o'clock at the gas-works in Cambridge, so that it was evident that he was killed between Tuesday night and Wednesday. It was in this way that results were approached, and as fast as facts appeared beyond a reasonable doubt, they narrowed the inquiry. Was there evidence enough to satisfy them of the place where the deed was done?

The Government said it was done in the barn of Leavitt Alley, and the jury were to consider all the circumstances bear-

ing on this. They had seen the barrels, heard the testimony of Tibbetts as to the difference in their size, the testimony of Schouller as to the same, the evidence about the removing of the barrels with shavings from Schouller's to Alley's barn on Tuesday, the evidence about the barrels being in Alley's barn and then in the river, and the jury were to consider whether all these furnished a clew to show where the murder was committed. Did the contents of the barrels, or any fact in relation thereto, lead the jury to any conclusion, or aid them in the identification of the barrels?

The jury must also take into consideration the paper found in the barrels, and see how far that might go toward identifying the barrels, or the place where the murder was committed. In order to make their case more certain, the Government had put on police officers who say that Alley said that the large barrel was his. If this was true, this fact was not only established by inference, but by Alley's own admission.

It was true that the declarations put in must be received with care, as the parties to whom they were made were liable to have misunderstood, misremembered, or misinterpreted them. The jury must treat them fairly, considering the liability to err, but if they were satisfied the declarations were true they were to so regard them. If the admissions were extorted from the defendant by officers or others, the Court, upon having it brought to their attention by the objection of the defendant's counsel, would have excluded the evidence altogether. In the absence of such objection, the admissions are to be considered and weighed by the jury.

As to the argument made by the defendant's counsel, that the officers exceeded their authority in the arrest of Alley, the Judge said that it was not only their right, but their duty, on reasonable suspicion of felony, to arrest the party without a warrant. To this power of the police we owed our security. If the officers abused this power they did wrong, and the jury were to judge whether, if not, they reasonably exercised the powers the law gave them, and what effect, if any, that ought to have on their credibility as witnesses. It was the duty of officers on the commission of crime to investigate the facts. If they did not do it, nobody would.

Again adverting to the testimony bearing on the place where the deed was committed, Judge Wells said the jury were to consider whether there had been an axe there, and if its absence the next day had any thing to do with the question where the deed was committed. The finding of blood in the barn was next alluded to. There was some evidence to show that the blood was recent, and this was important in considering the evidence of the defence as to the bleeding of the horse in the barn in September. If the blood was fresher when found in the barn than it could have been if deposited in September, it pointed to something more recent. Perhaps the jury might not think it worth while to consider the difference between the medical experts, but if they could get any help out of it they would give it such weight as it deserved.

Did all the facts together enable the jury to say that the stable was the place where the murder and cutting up of the body occurred? If they were satisfied that the murder was committed in the stable, did it help them in determining who perpetrated the act? did it satisfy them that some one having access to or connected with the stable did it? Did all the circumstances point in any particular direction? It was not necessary for the Government to prove its theory that Alley killed Ellis at any particular time or place; but, if the jury were satisfied that Alley killed Ellis, they were to find him guilty.

The Government claimed that Ellis was killed by Leavitt Alley some time in the fore part of Tuesday night; that he cut him up with an axe, packed him in barrels, and the next morning carried the barrels and threw them into the Charles River. Did all the facts satisfy the jury that this was done?

The time when the transactions occurred had been the subject of much discussion and contradictory evidence. On the point of time persons were liable to be mistaken, for memory could not mark time as it marked visible objects. The jury in considering this question were to consider how far the witnesses connected a precise time with the transaction, and whether Alley had or had not the opportunity to do what was done. If at any time during the night he was shown to be

where he would have time to commit the deed, it shows the opportunity, but does not show that he embraced the opportunity.

If Alley shows that he was at other places at the only times or time when the murder could have been committed, then he was to be acquitted. To establish the fact that Alley was at other places at the time the Government alleged the killing to have been done, the burden of proof was upon the defendant. If the defendant accounted for himself at that time, so that the jury on the testimony of the Government were left in doubt as to the commission of the murder, then it was a reasonable doubt, and the defendant was entitled to the benefit of that doubt.

The Government had rightly argued to the jury that when circumstances point to a party, and the party fails to explain them when he has an opportunity so to do, the jury might properly infer that the explanation would not relieve him. A failure to explain what can be reasonably explained, and a false account or false denial, might be taken as evidence that the truth, if told, would not aid him. The jury were to judge whether Mrs. Alley or Curtis Alley could have given any explanation in relation to the charge against the defendant. As to the defendant, the law forbade that his silence should be construed against him; it was his right not to testify, and it was a constitutional right. This distinction should be kept in mind by the jury.

Taking all the evidence in the case, were the jury convinced of the main facts which the Government offered to prove, viz., that Ellis was killed and that Alley killed him? If the jury were satisfied of this, it was their duty to the public to convict him; if not, then to acquit him. If the jury were not satisfied beyond a reasonable doubt, it was their duty to acquit the defendant. If the jury was satisfied that the murder was committed with intent to rob, it was murder in the first degree; if it was committed with great atrocity or cruelty, it was murder in the first degree. Any thing done after the murder was committed, with a view to concealment, was not the atrocity contemplated by the statute; so that after killing Ellis, if Alley cut him up that would not be atrocity or cruelty. If the

Government had failed to establish murder in the first degree, it would be murder in the second degree.

It was not necessary for the Government to show a motive in order to support its case. If one was shown, however, it aided in the inference to be drawn from facts. A motive which might lead the jury to suppose that Alley intended to kill Ellis was a strong indication, if supported by circumstances. The absence of motive did not show that Alley might not have committed the deed. In conclusion, Judge Wells said that if they were satisfied beyond a reasonable doubt that Alley committed the murder, they must convict him; if they were not satisfied beyond a reasonable doubt, it was their duty to acquit him.

Judge WELLS concluded his charge shortly before six o'clock, and the jury retired to decide upon their verdict.

At precisely a quarter before ten o'clock the prisoner was placed at the bar, and the jury entered and took their seats upon the panel. The Court directed the clerk to inquire if they had agreed upon their verdict.

Clerk. Mr. Foreman, have you agreed upon a verdict?

The Foreman. We have.

Clerk. Leavitt Alley! hold up your right hand! Foreman! look upon the prisoner.

What say you, Mr. Foreman? Is Leavitt Alley, the prisoner at the bar, guilty, or not guilty?

The Foreman. NOT GUILTY!

Clerk. Gentlemen of the jury, hearken to your verdict as the Court have recorded it. You, upon your oaths, do say that Leavitt Alley, the prisoner at the bar, is not guilty. So you say, Mr. Foreman? so, gentlemen, you all say?

Alley was thereupon discharged from custody, and the Court adjourned.

APPENDIX.

APPENDIX.

I.

Arraignment. — Sentence on an Indictment for Murder after a Plea of Guilty.

In Massachusetts, "Two or more justices of the Supreme Judicial Court shall have and exercise the powers of a full court in the trial of indictments for the crime of murder." St. 1872, c. 232. "A person indicted for a capital crime may be arraigned before the Court held by one justice, and if he pleads guilty, such Court may award sentence against him according to law." Gen. Sts. c. 112, § 8. Prior to the statutory provisions on this subject, it was decided that an arraignment before a single justice vitiated the entire proceedings in a capital case, and a new trial was granted after conviction to a prisoner who had been thus arraigned.[1]

In the case of Green *v.* Commonwealth,[2] it was decided, in 1866, that under Gen. Sts. c. 112, §§ 5, 8, and c. 160, §§ 1–3,

[1] Commonwealth *v.* Hardy, 2 Mass. 303, A.D. 1807. The prisoner was afterwards arraigned upon the same indictment, tried, and acquitted.

It was in this case that Chief Justice Parsons observed, in delivering the opinion, that, "If even quibbling is at any time justifiable, certainly a man may quibble for his life." 2 Mass. at p. 316.

[2] 12 Allen, 155. In the case of Commonwealth *v.* Hardy, 2 Mass. at p. 307, which was also an indictment for murder, the counsel for the prisoner correctly stated the law when he said, "If the prisoner voluntarily confesses the fact, the Court has nothing to do but to award judgment," citing 4 Bl. Comm. 329, Co. Ent. 360, and Plowd. 387. The State Trials abound in instances where the Court proceeded to award sentence in capital cases after a plea of guilty.

the Court had the power, when held by a single justice, to arraign a prisoner indicted for a capital crime, and, on a plea of guilty, to award sentence.

The attention of the Court had previously been called to Green's case by an order of the Governor and Council, in pursuance of the provision of the Constitution, c. 3, § 2, and they were unanimously of opinion that the judgment and sentence were duly entered up and recorded. 9 Allen, 585. "The opinion thus given," said Bigelow, C. J., "like all others of a similar character, was formed without the aid of counsel learned in the law, or any statement of the reasons on which the regularity or validity of the proceedings had been called in question. Although it is well understood and has often been declared by this Court, that an opinion formed and expressed under such circumstances cannot be considered in any sense as conclusive or binding on the rights of parties, but is regarded as being open to reconsideration and revision, yet it necessarily presupposes that the subject to which it relates has been judicially examined and considered, and an opinion formed thereon." [1]

[1] In answering the questions proposed by the House of Lords in M'Naughten's Case, Mr. Justice Maule said: — "I feel great difficulty in answering the questions put by your lordships on this occasion: First, because they do not appear to arise out of, and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the Bar and the Court being confined to questions arising out of the facts of particular cases: Secondly, because I have heard no argument at your lordships' bar or elsewhere on the subject of these questions, the want of which I feel the more, the greater is the number and extent of questions which might be raised in argument: And, thirdly, from a fear, of which I cannot divest myself, that, as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges, may embarrass the administration of justice when they are cited in criminal trials." 10 Clark & Finnelly, 204; 1 C. & K. 131.

II.

View.

In cases involving some question which depends on the relative position of places, it is often desirable that the jury should have an opportunity of viewing the spot in controversy ;[1] since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps or plans, which are often inaccurate and obscure, and may perhaps have been prepared with an express view to mislead.[2] It is hardly necessary to add that a view is granted for the purpose of enabling the jury to understand and apply the evidence.[3]

It is always entirely within the discretion of the Court to grant a view or not.[4] And it has been decided that the view must be made in the presence of the accused.[5] In a recent Crown Case Reserved, it was decided that it is no irregularity to allow the jury to have a view of the premises after the presiding judge has summed up the case.[6] Bovill, C. J.: "We are unanimously of opinion that there was no irregularity in allowing such a view. It is always entirely in the discretion of the Court to allow a view or not; though such precautions as may seem to the Court necessary, ought to be taken to secure that the jury shall not improperly receive evidence out of court."

In Commonwealth *v.* Parker, 2 Pick. 550 (1824), which was a capital case, the Court refused to grant a view; Parker, C. J., saying, "*It would seem to violate an important principle, that all the proceedings should be in the presence of the accused.*" On the first trial of the case of Commonwealth *v.* Knapp, 9

[1] For an early instance of this practice, see the case of Mossam *v.* Joy, 10 Howell State Trials, 562, 631, A.D. 1684.

[2] 1 Taylor Ev. § 502. [3] Chute *v.* The State, 19 Minn. 271.

[4] The Queen *v.* Martin, L. R. 1 C. C. 381. Chute *v.* The State, 19 Minn. 271. In Rex *v.* Redman, 1 Keny. 384, there was a motion for a view on behalf of the defendant, who stood indicted for a forcible entry. *Per Curiam:* There can be no view in a criminal prosecution without consent.

[5] The State *v.* Bertin, 24 Louisiana Annual, 46. Commonwealth *v.* Knapp, 9 Pick. 516.

[6] The Queen *v.* Martin, L. R. 1 C. C. 378.

Pick. 515, 516 (1830), which was also a trial for a capital crime, the Court refused to grant a view, saying, "We know not what the jury may hear, and what impressions may be made upon them while they are taking the view. The case should be decided by the evidence given in court." Upon the second trial, the jury themselves requested that they might be permitted to see the place of the murder, and the counsel on both sides expressed their desire that permission should be allowed. The prisoner likewise gave his consent. The Court granted the request, but with hesitation, because they said this course was without precedent, and, if it should turn out to be incorrect, they had doubts whether they could hold the prisoner to his consent. The Court directed that no person should go with the jury, except the officers having them in charge, and that no person should speak to them, under penalty of a contempt." In 1836 it was enacted that "The Court may order a view by any jury empanelled to try a criminal case." Rev. Sts. c. 137, § 10. Gen. Sts. c. 172, § 9. In Commonwealth *v.* Webster, 5 Cush. 295 (1850),[1] which was a capital case, the jury were allowed to view the premises, attended by officers of the Court, and by one counsel for the prisoner, and one for the Commonwealth.

III.

Credibility of the Testimony of the Police. — Dangers peculiar to Circumstantial Evidence. — Mr. Justice Grier's Charge. — Charge of Chief Baron Pollock. — Distinction between Real and Circumstantial Evidence, if real, is useless.

The following passages from Taylor's very excellent Treatise on the Law of Evidence, §§ 49, 59, are worthy of the attention of every person engaged in the practice of the criminal law: —

"With respect to policemen, constables, and others employed in the suppression and detection of crime, their testimony

[1] Bemis's Report, p. 32, note.

against a prisoner should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives, and to give a coloring of guilt to facts and conversations, which are, perhaps, in themselves consistent with perfect rectitude. 'That all men are guilty till they are proved to be innocent,' is naturally the creed of the police; but it is a creed which finds no sanction in a court of justice. As a set-off to this tendency on the part of the police to regard conduct in the worst point of view, it must in fairness be stated that, in every other respect, the general mode in which they give their testimony is unimpeachable; and that, except when blinded by prejudice, they may well challenge a comparison with any other body of men in their rank of life, as upright, intelligent, and trustworthy witnesses."

"With respect to cases supported by *circumstantial evidence*, juries should bear in mind that, although the number of facts drawn from apparently independent sources renders concerted perjury both highly improbable in itself, and easy of detection if attempted; yet, the witnesses in such cases are more likely to make unintentional misstatements, than those who give direct testimony. The truth of the facts they attest rests frequently on minute and careful observation, and experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses, respecting dates, footprints, handwriting, admissions, loose conversations, and questions of identity. Yet these are the links in the *chain*[1] of circumstances by which guilt is in general sought to be established. The number too of the witnesses, who must *all* speak the truth, or some link will be wanting, renders additional caution the more necessary. Besides it must be

[1] "It has been said that circumstantial evidence is to be considered as a *chain*, and each piece of evidence as a link in the chain; but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength." Pollock, C. B., in Regina *v.* Exall, 4 Foster & Finlason, 929.

remembered that, in a case of circumstantial evidence, the facts are collected by *degrees*. Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and, with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Innocent actions may thus be misinterpreted; innocent words misunderstood; and, as men readily believe what they anxiously desire, facts the most harmless may be construed into strong confirmation of preconceived opinions. It is not here asserted that this is frequently the case, nor is it intended to disparage the police. The feelings by which they are actuated are common to counsel, engineers, surveyors, medical men, antiquarians, and philosophers; indeed to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth."

"We easily believe what we wish to be true," said Mr. Justice Grier in a charge to a jury. "We are prone to be satisfied with light proof, or any fallacy in favor of a preconceived opinion, prejudice, or feeling. When we suffer ourselves to be thus tempted, we act as tyrants, not as judges. In the midst of our virtuous indignation against crime, we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice. 'Trifles, light as air,' then become 'strong as proofs of holy writ.' Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt, which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject."[1] "The human understanding," wrote Lord Bacon, "when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all

[1] Turner *v.* Hand, 3 Wallace Jr. 107, 112. The entire charge is particularly fine.

things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; prejudging the matter to a great and pernicious extent, in order that the authority of its former conclusions may remain inviolate." [1]

On a trial for murder, Chief Baron Pollock said: "There was no doubt that it had been said that there ought to be certainty. There ought to be the highest certainty that there was in human affairs; and the rule that Lord Tenterden laid down was this, and I pronounce it in his very words: 'The jury should be persuaded of the guilt of the prisoner before they find him guilty to the same extent, and with the same certainty, that they would have in the transaction of their own most important concerns. They ought to have the highest practicable degree of certainty: demonstration was not required, nor was absolute certainty; for that was not attainable in any case whatever. Direct testimony might be always got rid of by the suggestion that the witnesses were perjured; and they never could have absolute positive certainty; it was idle to speculate as to what might be to one man the most important matter in his life; but there were occasions, — with reference, for instance, to the deepest interests of those whom one loved most dearly; there were interests that might be called in question to require the highest consideration, and all the certainty that could be attained in human affairs. He did not think it necessary to say certainty as to this or that particular matter, but it was the certainty men would require in their own most important concerns in life; and he thought that to hold any other doctrine or to act on any other view would be to paralyze the law entirely in its criminal application, and to make it difficult, if not impossible, to have a satisfactory administration of justice.'" [2]

Finally it may be observed that "the practice of insisting on the distinction between direct and circumstantial evidence,

[1] Bacon Nov. Organ. App. XLVI., Works, vol. iv. p. 56, ed. Spedding.

[2] Regina *v.* Köhl, 12 January, 1865. Reported in "The Times" newspaper.

as if it were a difference which involved a distinction in the strength of different kinds of evidence, has a tendency to make not only juries but judges suppose that a direct assertion, not shown to be false, leaves the jury no choice, and takes all responsibility out of their hands. Such cases are in fact precisely those which impose the heaviest responsibility, and in which the judge ought to do his utmost to assist the jury and to arouse their imaginations — generally torpid and sluggish — to a sense of the fact, *that it is by no means a light thing to believe the oath of a man whom they have never seen before, so fully as to punish another unknown person on the strength of it.*" [1]

IV.

General Worthlessness of the Testimony of Experts.

"Perhaps the testimony which least deserves credit with a jury," says an accomplished writer,[2] "is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions;* and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think: but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with Faith as defined by the Apostle,[3] and it too often is but 'the substance of things *hoped for*, the evidence of things *not* seen.' To adopt the language of Lord Campbell,[4] 'They come with such a bias on

[1] Stephen, General View of the Criminal Law of England, p. 270. Chapter VII. of this work is devoted to the discussion of "The Principles of Evidence in Relation to Criminal Law." This branch of the law is admirably treated.

[2] 1 Taylor Ev. § 50.

[3] Hebrews xi. 1.

[4] The Tracy Peerage, 10 Clark & Finnelly, 191. Gurney *v.* Langlands, 5 B. & Ald. 330.

their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence.' "

" After making every allowance for the natural bias which witnesses usually feel in favor of causes in which they are engaged," says one of the ablest of the text writers, " and giving a wide latitude for *bonâ fide* opinions, however unfounded or fantastical, which persons may form on subjects necessarily depending much on conjecture; there can be no doubt that testimony is daily received in our courts as ' scientific evidence,' to which it is almost profanation to apply the term; as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury, — an offence of which it is extremely difficult, indeed, almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters." [1]

The admission of witnesses of this class obviously throws a high responsibility on juries, carefully to weigh the credit due to such witnesses, by all the legal means in their power. In a matter of plain fact, where the witness must know how the truth is, and therefore must testify truly or commit perjury, the jury would probably be more likely to give him credit; but when it is matter of opinion, and when opinion is so easily warped by prejudice and interest, and as experts usually come with a bias on their minds to support the cause in which they are embarked, and are animated by all the feelings and passions which stimulate parties to litigation, little weight should in general be attached to the evidence which they give.[2] " Experience," said that acute judge, Mr. Justice Grier, " has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations to test the skill and knowledge of such witnesses and the

[1] Best Ev. § 514, 6th ed. This is a work which the late Mr. Justice Willes characterized as one of the best books on our laws. Regina *v.* Briggs, Dearsly & Bell C. C. 102.

[2] Dickenson *v.* Fitchburg, 13 Gray, 555.

correctness of their opinions, wasting the time and wearying the patience of both Court and jury, and perplexing, instead of elucidating, the questions involved in the issue." [1] "It often happens," said Chief-Justice Chapman, in a very recent case,[2] "that experts can be found to testify to any theory, *however absurd.*"

V.

The vivâ voce Examination of Witnesses.

In delivering the judgment of the Privy Council in a very recent case,[3] Sir John Taylor Coleridge, thus eloquently discoursed of the advantages of the *vivâ voce* examination of witnesses: — "The most careful notes often fail to convey the evidence fully in some of its most important elements, — those for which the open oral examination of the witnesses in presence of prisoner, judge, and jury is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of any thing of particular moment. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied when given openly and orally, by the ear and eye of those who receive it."

VI.

Difference as to the Effect of Evidence in Civil and Criminal Proceedings. — Moral Certainty.

"There is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings," wrote the late

[1] Winans *v.* New York & Erie Railroad, 21 Howard, 101.

[2] Commonwealth *v.* Samuel M. Andrews, Trial, p. 256 (1868). In Stephen's General View of the Criminal Law of England, pp. 209 *et seq.*, this subject is learnedly discussed.

[3] The Queen *v.* Bertrand, L. R. 1 P. C. 535; 10 Cox C. C. 625 (1867).

Mr. Best.[1] "In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal,[2] have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty;[3] or, as that eminent judge, Baron Parke, expressed it, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."[4] The expression "moral certainty"

[1] Best Ev. § 95, 6th ed.

[2] The concluding words of M. Paillet, in his eloquent defence of Madame Lafarge, were as follows: "At this last moment, gentlemen, I will only add one word, and it is this, that the condemnation of the innocent is, of all social evils, the most deplorable, because it is the most irreparable. All is doubt in this melancholy transaction, and *doubt in a criminal trial suffices for the acquittal of the accused.*"

[3] The oath of the jurors seems framed with a view to the above distinction. In England, in civil cases and in misdemeanors, the juror is merely sworn "well and truly to try the issue joined between the parties," &c., whilst in treason or felony the charge to the jury is peculiarly solemn: "You shall well and truly try *and true deliverance make*, between our sovereign lady the Queen and the prisoner at the bar," &c. Per Crompton, J., in Regina *v.* Charlesworth, 1 Best & Smith, 486. The General Statutes of Massachusetts, c. 172, § 6, enact: —

"The following oath shall be administered to the jurors for the trial of all criminal cases *not capital*: —

"You shall well and truly try the issue between the Commonwealth and the defendant (or the defendants, as the case may be), according to your evidence; so help you God.

"In *capital* cases, the following oath shall be administered to the jurors: —

"You shall well and truly try, *and true deliverance make*, between the Commonwealth and the prisoner at the bar, *whom you shall have in charge*, according to your evidence; so help you God."

[4] "A reasonable doubt," said Chief Justice Shaw, "is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel *an abiding conviction to a moral certainty of the truth of the charge.* It is not

is here used in contradistinction to physical certainty, or certainty properly so called;[1] for the physical possibility of the innocence of any accused person can never be excluded. Take the strongest case, — a number of witnesses of character and reputation, and whose evidence is in all respects consistent, depose to having seen the accused do the act with which he is charged; still the jury only believe his guilt on two presumptions, either or both of which may be fallacious, viz., that the witnesses are neither deceived themselves, nor deceiving them; and the freest and fullest confessions of guilt have occasionally turned out untrue. Even if the jury were themselves the witnesses, there would still remain the question of the identity of the person whom they saw do the deed, with the person brought before them accused of it; and identity of person is a subject on which many mistakes have been made.[2] The wise and

sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it." Commonwealth *v.* Webster, 5 Cush. 320.

[1] "By 'knowledge,' strictly speaking, is meant when we have an actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term 'certainty' is properly applicable. But *knowledge* and *certainty* are constantly used in a secondary sense which it is important not to overlook; viz., as synonymous with settled belief or reasonable conviction: as when we say that such a one received stolen goods, *knowing* them to have been stolen; or that we are *certain*, or *morally certain*, of the existence of such a fact, &c." Best Ev. § 6, 6th ed.

[2] In Shufflebottom *v.* Allday, Exch. M. 1856, M.S., Alderson, B, mentioned a case which occurred at Liverpool some years before, where a prisoner was identified by six or seven respectable witnesses; but their evidence was encountered by that of the jailer and all the officers of the prison, who deposed that at the time in question he was there in their custody. Best Ev. § 517 note, 6th ed.

In the case of Commonwealth *v.* Webster, 5 Cush. 296, 302, several witnesses called for the defence testified that they saw Dr. Parkman at various places in Boston, at different times between the hours of a quarter before two and five, in the afternoon of the 23d of November.

The Attorney-General, for the purpose of rebutting the evidence for the prisoner, proposed to call witnesses to show that there was a person about the streets of Boston, at the time of Dr. Parkman's disappearance, who bore a strong resemblance to him, in form, gait, and manner; so strong that he was approached and spoken to, as Dr. Parkman, by persons well acquainted with

humane maxims of law, that it is safer to err in acquitting than condemning, and that it is better that *many* guilty persons should escape, than one innocent person suffer,[1] are, however, often perverted to justify the acquittal of persons of whose guilt no *reasonable* doubt could exist; and there are other maxims which should not be forgotten, Interest reipublicæ ne maleficia remaneant impunita, Minatur innocentes qui parcit nocentibus."

VII.

The Duty of Counsel as to stating to the Jury his own Belief as to the Guilt or Innocence of the Prisoner.

In the case of Ryves *v.* The Attorney General, which attracted so much notice a few years since, where Mrs. Ryves attempted to establish her claim to royal lineage, this occurrence is reported: —

"Dr. Smith then proceeded to address the jury for the petitioner, and was beginning to say that 'on his honor he believed his client's case to be well founded,' when the Lord Chief Justice interfered, and peremptorily said he 'could not allow the learned counsel to pledge his honor on his own belief. To do so were a violation of the rules of the profession, and a dishonor to counsel.' Dr. Smith apologized."[2]

the latter. The Court excluded the evidence, remarking that perhaps there might be no objection to the introduction of the very person supposed to be Dr. Parkman, but that this testimony of other persons, as to the resemblance of an unknown stranger, was quite too remote and unsatisfactory.

[1] "It is better that one offender should *occasionally* escape than that the fundamental principles of the criminal law should be violated," said Chapman, C. J., in Commonwealth *v.* McDonough, 13 Allen, 585. "It is to our mind a far less mischief to leave a point undecided and an alleged offender unconvicted, than to break in upon the established course of practice without strong reason," said Lord Denman, C. J., in Regina *v.* Turk, 10 Q. B. 544.

[2] The North American Review, April, 1871, p. 393.

VIII.

The Verdict of Not Proven.

The nature and effect of the Scotch verdict of "Not Proven" is thus lucidly stated in Forsyth's "History of Trial by Jury," pp. 334–339: —

"It is a peculiarity of the Scotch jury system in criminal trials that it admits a verdict of 'not proven,' corresponding to the *non liquet* of the Roman law. The legal effect of this is equivalent to 'not guilty;' for a prisoner in whose case it is pronounced cannot be tried again. According to the homely but expressive maxim of the law, no man can be made to 'thole an assize' twice. It is worth considering whether it is advisable to retain in Scotland or introduce in England this kind of verdict. Sir Walter Scott applied to it the term 'bastard,' and this not unaptly describes its nature. It is in fact a sort of compromise between conflicting opinions, and affords a convenient refuge where the mind is in doubt as to the effect of evidence. It cannot be deemed that such a verdict correctly indicates the result at which we arrive in cases where some crime has been committed, and circumstances of grave suspicion, which yet do not amount to proof, point to a particular person as the perpetrator. And we are often justified in holding this opinion even where the verdict of 'not guilty' has been given. We thereby mean to imply that the fact of the innocence of the accused is not established to our satisfaction, while, on the other hand, we cannot say that we are convinced of his guilt. And this state of mind occurs with reference to many things which do not readily, if at all, admit of demonstration. The verdict of 'not proven' would, perhaps, correctly express the opinion of many as to the existence of apparitions, or the alleged facts of animal magnetism. We feel disinclined to believe them, and yet the evidence for them is so strong that it seems almost impossible to explain them on the hypothesis of either imposture or delusion.

"Now if by verdict of 'not guilty' a jury were understood affirmatively to declare that they in their consciences believed the prisoner to be innocent of the crime imputed to him, it is

clear that they could only pronounce it where they had no moral doubt on the question, and must in other cases, where this doubt was felt, resort to some such mode of expression as ' not proven,' to indicate the effect of the evidence upon their minds. But this is not the meaning of ' not guilty.' It does not necessarily imply more than that the legal evidence is not sufficient to produce that degree of certainty which would justify or render safe a conviction. And a proof of this is furnished by the fact, that this verdict is returned in cases where the guilt of the accused is notorious, but owing to some technical difficulty or mistake the jury are directed to acquit. They do not thereby say that he has not committed the crime, but merely that it is not legally proved that he has. There is therefore nothing in the verdict which need alarm the most scrupulous conscience, for it may be, and indeed ought to be, given whenever a juror is not fully and beyond all reasonable doubt satisfied of the guilt of the accused. And we must remember that the law presumes every man to be innocent who is not proved to be guilty, so that the jury do no more than their strict duty when they declare him to be not guilty whom the evidence falls short of convicting, however dark and unfavorable may be their suspicions respecting him.

" Such then being the case with respect to the verdict of ' not guilty,' it is not difficult to show that there are grave objections against that of ' not proven.' In the first place, it favors too much the natural indolence of the human mind, which thus escapes the necessity of coming to a definite conclusion upon doubtful facts. There must be always a strong temptation to adopt it where there is much suspicion, but a deficiency of legal proof. But is this fair towards the accused ? Surely if the evidence does not establish the charge against him, he is entitled to an absolute acquittal. But although the verdict of ' not proven ' is so far tantamount to an acquittal, that the party cannot be tried a second time, it falls very far short of it with regard to the effect upon his reputation and character. He goes away from the bar of the Court with an indelible stigma upon his fame. One hardly sees how he can afterwards hold up his head amongst his fellow-men, when there stands recorded against him the opinion of a jury, that the evidence

respecting his guilt was so strong that they did not dare to pronounce a verdict of acquittal. So that many of the evil consequences of a conviction follow, although the jury refuse to convict. When Sir Nicholas Throckmorton was tried and acquitted by an English jury in the first year of Mary's reign, he said, 'It is better to be tried than to live suspected.' But in Scotland a man may be not only tried but acquitted, and yet live suspected, owing to the sinister influence of a 'not proven' verdict. This is a state of things which ought not to exist. It occasions too much peril to innocence, when, as often happens, circumstances have woven a dark web of suspicion around it. For it may be feared that a jury will too readily resort to such a verdict where they find a difficulty in coming to a definite conclusion. At the same time it must be admitted that there are cases in which a jury, even where they cannot convict, are almost justified in recording their sense of the impression which the evidence has left upon their minds. Such was the famous trial in Scotland, in 1839, of the *soi-disant* Earl of Stirling, charged with having forged, and knowingly uttered as forged, certain documents in support of his claim to the peerage. The unanimous verdict in that case of 'proven' as to several of the documents being forgeries, and by a majority 'not proven' as to the prisoner having forged them, or uttered them knowing them to be forged, was a merciful one, of which, I think, the accused could have no reason to complain, especially after Lord Meadowbank's charge to the jury. That learned judge said: —

"'Gentlemen, the prisoner may have been the dupe in all these transactions, and so his counsel, I think, endeavored to persuade you that he had been. This is possible, no doubt; but we have only an ingenious surmise in support of the proposition, while you have it clearly made out, that the only person who enjoyed the fruits of the imposition is the prisoner himself, and but one very trifling piece of evidence that can be alleged to support the theory of the learned counsel. . . . Our business is to do justice, and you in particular have to weigh the evidence calmly and deliberately; and, should you doubt of that evidence being sufficient to bring the charges here made home to the prisoner, to give him the full benefit of

that doubt. But to entitle you to do so, these doubts must be well considered, and the circumstances on which they are founded deliberately weighed. To doubts that are not reasonable you have no right whatsoever to yield. You are not entitled to require at the hand of the prosecutor direct proof of the facts laid in his charge. In no case can such be exacted. The circumstances laid in evidence must be put together, and it is your duty then to consider what is the rational and reasonable inference to be drawn from the whole of them, — in short, whether it be possible to explain them upon grounds consistent with the innocence of the party accused; or whether, on the contrary, they do not necessarily lead to a result directly the reverse.'"

A writer in "The Law Magazine," Vol. XLIV. p. 198, thus addresses the lawyers of England on the introduction into the jurisprudence of that country of the verdict of "not proven," and his observations are equally applicable to the institutions of this country: —

"A few words now to our English law reformers and amenders. With the exposition we have given them of the peculiarities of the Scotch verdict, we ask them, as cautious and thoughtful men, more anxious for real improvement than for mere novelty of system, or change for change's sake, to say, upon their deliberate and enlightened judgment, whether the law of England demands such a serious innovation as the introduction of this verdict would occasion? Whether the spirit of our jurisprudence allows it? Whether our ancient judicature would receive it? Whether our old established forms would not be too much disturbed by it?

"There is difficulty in giving a decided answer one way or the other. Many Scotch lawyers, admitting that it works well in their courts, disapprove of the verdict and prefer our plan; and among the members of the English bar there is a great difference of opinion. Perhaps the general inclination of the professional mind in this country is against its adoption. The subject, however, is a most important one, and is not to be lightly or rashly treated. We have endeavored to describe the Scotch practice, and to explain the reasons of that practice; showing how, taking its rise in arbitrary times, it gradually

moved the genius of the northern jurisprudence, in which for upwards of a century it has been a distinctive attribute of its criminal justice.

" All that should be taken into account by us. Many of the lawyers who returned answers to the queries issued by the Criminal Law Commissioners, to which I referred at the beginning of this article, lamenting the evils that are alleged to be attendant in this country, as the indiscriminate use of the verdict of ' not guilty,' or an uniform mode of acquittal, express opinions favorable to this verdict, but suggesting that the Scotch law should not be followed to the full extent of that system. They would have the verdict, but they think that in the event of its being returned there should be a new trial, and that in no case should it justify the plea of autrefois acquit. In this view we are not indisposed to concur, and at the same time to advise that every precaution should be taken to prevent such a verdict defeating ultimate justice.

" But we would not dogmatize on the subject. Its discussion should be influenced by many weighty considerations; for we plainly see that the adoption of this form of verdict would lead to other changes. It would not, we fear, work with the existing organization of our Criminal Courts. Our method of criminal pleading would then require to be altered, and our procedure otherwise so regulated as to keep this verdict in its right place. That fine constitutional idea, ' the presumption in favor of innocence,' must remain intact; and if at times the verdict of ' not guilty ' allows its humane character too much, let us take care that this new verdict does not affect it too little."

IX.

Maxim " Hearsay is not evidence." — Inaccuracy of it. — Hearsay often confounded with Res Gestæ.

" The rule which requires the production of the best evidence of which the case, in its nature, is susceptible," wrote the late Mr. Best,[1] " is commonly enunciated, both in the books and in

[1] Best Ev. § 495, 6th ed.

practice, by the maxim, "hearsay is not evidence," — an expression inaccurate in every way, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind; first, directly, that what a person has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable, — positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him, and, on the other, written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with res gestæ, *i.e.* the original proof of what has taken place; and which the least reflection will show may consist of *words* [1] as well as of *acts*."

"Acts by whomsoever done," said Parke, B., "are res gestæ, if relevant to the matter in issue. But the question remains, What are relevant?" [2] It is, perhaps, not possible to lay down any general rule as to what is a part of the res gestæ which will be decisive of the question in every case in which it may be presented in the ever-varying phases of human affairs. The judicial mind will be compelled frequently to apply the general principle, and deduce the proper conclusions.[3] Rightly guarded in its practical application, there are few principles in the law of evidence more safe in their results. There are few principles which rest on a more solid basis of reason and authority. "The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine," say the Supreme Court of the United States.[4] "The tendency of recent decisions has been to restrict within the most narrow

[1] "Verbal acts indicating a present purpose and intention."

[2] Wright *v.* Tatham, 7 Ad. & El. 355.

[3] Beaver *v.* Taylor, 1 Wallace, 642. In the case of Insurance Company *v.* Mosley, 8 Wallace, 397, the authorities are thoroughly reviewed. See, also, the judgment of Hosmer, C. J., in Enos *v.* Tuttle, 3 Conn. 250; Lund *v.* Tyngsborough, 9 Cush. 37; Hanover Railroad Company *v.* Coyle, 55 Penn. St. 402; Brownell *v.* The Pacific Railroad Company, 47 Missouri, 239; Rouch *v.* Great Western Railway Company, 1 Q. B. 51; 4 Per. & Dav. 686.

[4] Insurance Company *v.* Mosley, 8 Wallace, 397, A.D. 1869.

limits this species of testimony," say the Supreme Judicial Court of Massachusetts.[1]

In the case in the text, p. 38, the fact that Ellis was inquiring for Alley was admitted in evidence as "a fact" and not as "a declaration." If this ruling can be sustained, and it is very doubtful if it can be, it must be on the ground that the evidence was an original, material, verbal fact.

X.

Evidence of Police Officers.

Chief Justice Bovill, in his charge to the jury in the Eltham murder case, with reference to the police inquiry said: "It did unfortunately happen that men constantly engaged in the detection of crime, when they found they had got a clew followed it in only one direction. For that reason, judges and juries should be always on their guard with respect to that part of a case which depended on the testimony of the police. If the minds of the police had arrived at one conclusion, every thing of importance tending in that direction was remembered, and circumstances that pointed in a different direction were too often but lightly regarded."[2]

[1] Commonwealth *v.* Hackett, 2 Allen, 140, A.D. 1861.

[2] Quoted in Currie's Indian Code of Criminal Procedure, p. 65 note, 6th ed.

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