JUDGE WILLIAM H. DONAHUE

(September 6, 1858 • May 2, 1909)

William Henry Donahue graduated the University of Michigan Law School in May 1881, was admitted to the Michigan bar, and promptly moved to Minneapolis, where he joined Martin Koon's firm.[1] Later he practiced with Stephen Mahoney and, still later, with Simon Meyers.

The nature of his practice changed over time, from criminal law in his first decade or so to civil matters in the 1890s. His most celebrated criminal defense was of the Barrett Brothers in 1888-1889.[2] Their lead attorney was William W. Erwin, one of the most famous criminal defense lawyers in the Northwest during the last quarter of the Nineteenth Century.[3] Here is Walter N. Trenerry's capsulized account their crime:

	Peter Barrett	
1889, March 22	***and Timothy Barrett***	**Minneapolis**

> **On July 27, 1887, these delinquents, whose family ran an illicit saloon called the "Hub of Hell," held up a horsecar and shot its conductor, Thomas Tollefson. The robbery netted them twenty dollars. Their brother, Henry, who had also taken part in the crime, confessed and furnished the testimony which sent them to the rope. They were hanged on a double gallows in the midst of their prayers. On the same day the pretty widow of their victim went quietly to Osceola, Wisconsin, where she remarried.[4]**

Judge William Lochren presided over both trials in Hennepin County District Court. Unsuccessful appeals were taken to the Minnesota

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[1] There is some uncertainty about the procedure Donahue followed to gain admission to the Minnesota bar. When his appointment to the bench was announced in 1909, the *Minneapolis Journal* reported that he "prepared for the State Bar association examination" while in Koon's firm. This cannot be correct. A "State Bar association examination" did not exist in 1881-1882. At that time applicants to the bar were examined by a committee of three experienced lawyers who were appointed by the district court judge, and upon their recommendation, the applicant was admitted in open court immediately thereafter. This surely was the process Donahue went through when he was admitted to the Minnesota bar in 1881-1882. However, for some reason, he did not take steps to have his name recorded on the rolls of the Minnesota Supreme Court until December 23, 1902. *Supreme Court, State of Minnesota, 1858-1970* 62 (Minnesota Digital Library).

[2] *Minneapolis Journal*, May 3, 1909, at 6 ("Judge Donahue at one time made a specialty of criminal practice and was one of the attorneys for the defense in the Barrett murder trials. Recently he has confined himself to civil practice and prior to his appointment to the bench he was attorney for the Anthony Kelly estate.").

[3] John T. Byrnes and Cyrus Wellington were also members of the defense team.

[4] Walter N. Trenerry, *Murder in Minnesota* 221 (Minn. Hist. Soc., 1962).

Supreme Court, which affirmed the convictions on January 28, 1899.[5] The men were hanged seven weeks later. [6] Though he lost his clients, his reputation was enhanced.

In 1902, having practiced in Minneapolis for two decades, he placed the following profile in Hiram Stevens' *History of the Bench and Bar of Minnesota*. It emphasized his corporate clientele:

> **William H. Donahue, of the Minneapolis bar, was born at Allen, Hillsdale county, Michigan, September 6, 1859, and is a son of James and Ellen Donahue. He attended the public schools of his native village, took the high school course at Hillsdale and read law under the preceptorship of Ezra L. Coon, of Hillsdale. He also attended the University of Michigan at Ann Arbor, and in May, 1881, graduated from the law department and was admitted to practice at Hillsdale, Michigan.**
>
> **Mr. Donahue at once came to Minnesota to begin his career, and has successfully practiced civil law in all the courts, showing more than usual ability in his profession. He is attorney for Anthony Kelly & Company and the Singer Manufacturing Company; and so meritorious is his work that his clientage is extended and lucrative. He is a member of the local bar association. Mr. Donahue was married April 25, 1888, in the city of Chicago to Miss Mary L., daughter**

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[5] The full texts of *State v. Timothy Barrett*, 40 Minn. 654, 41 N.W. 459 (1889) and *State v. Peter Barrett*, 40 Minn. 77, 41 N.W. 463 (1889) are posted in the Appendix, below.

[6] The double execution has been vividly described by John D. Bessler, the foremost historian of capital punishment in this state:

> **On March 22, the Barrett boys were hanged as planned in the Hennepin County Jail. With an estimated five thousand people waiting outside it, the trap was sprung open at 11:14 A.M. after priests conducted a short ceremony on the scaffold. County sheriffs and newspaper reporters with telegraphic instruments packed the spectators' platform inside. "Every inch of space was utilized by the lookers-on," but a photographer John Bodley, was notably missing. Having expressed his desire to record the Barretts' last scene on the gallows, he had been imprisoned the day before for selling "obscene pictures" that depicted the condemned men in jail. The murder victim's widow, Mrs. Thomas Tollefson, who remarried while the Barrett brothers were "under the surveillance of the death watch," was also unable to attend. When Mrs. Tollefson and her new husband, Morris Lonsberry, requested passes, policemen told her "no ladies would be present at the execution."**

John D. Bessler, *Legacy of Violence: Lynch Mobs and Executions in Minnesota* 111-112 (Univ. of Minn. Press, 2003) (citing sources). Bessler does not mention Donahue.

of James Walsh. Their family is composed of five children. Mr. Donahue is a member of the Catholic church. [7]

He was a member of the Minneapolis Charter Commission that drafted home-rule charters submitted to voters in 1906 and 1907, but neither garnered enough votes to become law.[8] In politics, he was a staunch Democrat, and was elected a delegate to several national party conventions. It probably was during party meetings that he met John Albert Johnson, governor of the state from 1905 to 1909.

On January 5, 1909, Judge Frederick V. Brown resigned from the Hennepin County District Court. This may have surprised the public and some members of the bar because he had been elected in 1906, and had served barely one-third of his six year term. Governor Johnson, however, must have been forewarned because the very next day he appointed Donahue to fill the vacancy. [9] On February 1st, when Brown's resignation

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[7] Hiram F. Stevens, 2 *History of the Bench and Bar of Minnesota* 157-58 (1904).

[8] *Minneapolis Journal*, May 3, 1909, at 6. However, neither draft received the necessary "four-sevenths of the qualified voters" voting in the election required by Article 4, §36, of the Constitution (1898), to be ratified (all blank votes were considered no). In the November 6, 1906, there were 38,419 total votes but only 65% voted on the charter question; 17,296 voters favored the charter, while 7,488 were against. *Minneapolis Journal*, November 8, 1906 (incomplete: 8 out of 144 precincts missing). In a special election on September 17, 1907, 7,018 voters favored the charter while 9,241 were opposed (9,288 needed for adoption) *Minneapolis Journal*, September 18, 1907, at 1.

[9] The *Minneapolis Journal* broke the story:

HELD OFFICE BUT ONCE
William H. Donahue, Who Succeeds Judge Brown, Has Practiced 28 Years.

William H. Donahue, who will be appointed a judge of the Hennepin county district court to succeed Judge Frederick V. Brown, who tendered his resignation to Governor Johnson yesterday, has been a practicing attorney in Minneapolis for twenty-eight years. During that time he has never held elective office, although he has served as a member of the city charter commission.

Mr. Donahue is 48 years old. He is a native of Michigan, and was graduated from the University of Michigan law college when he was 21 years old. Coming directly to Minneapolis after his graduation, he entered the law office of Judge M. B. Koon, where he prepared for the State Bar association examination. Since his admission to the bar, his practice has been general.

Although Judge Fred V. Brown will have only served two of the years of his six-year term when he retires from the bench on Feb. 1, Mr. Donahue will only hold office until the next general election in the fall of 1910.

Minneapolis Journal, January 6, 1909, at 9 (photo of Donahue omitted). He was required to stand in the next election because Art. 6, §10 of the constitution required an appointed judge to run "at the first annual election that occurs more than thirty days after the vacancy shall have happened."

took effect, Donahue was sworn and presided over his first case. The *Journal* carried the story:

DONAHUE ON THE BENCH

Newly Appointed District Judge
Assumes His Duties.

> Judge William H. Donahue, appointed by Governor John A. Johnson to succeed Judge Frederick V. Brown, on the Hennepin county district bench, began his official work today. He took the oath of office before Judge David F. Simpson.
>
> The first case before him this morning was the suit of Jacobson representing the Gold Leaf Reducing company, against Olof F. Searle to collect disputed amounts on stock subscription. A disagreement over the price of the stock was the cause of the suit. Judge Donahue begins his work with a clean slate. Judge Brown finished up all his judicial business Saturday.[10]

At this time, Donahue had cancer of the neck. In mid-April he took a leave of absence to seek treatment at a hospital in Philadelphia. On Sunday, May 2nd, shortly after undergoing surgery, he died. He was fifty-one years old. The morning *Minneapolis Tribune* carried his obituary on its front page:

Judge Donahue
Dies in the East

Minneapolis Jurist Passes Away,
Following Operation on Neck.

Wife at Bedside When the
Patient Succumbs at
Philadelphia.

Was Leader in Democratic
Councils and Won Fame
As Attorney.

[10] *Minneapolis Journal*, February 1, 1909, at 7.

PHILADELPHIA, May 3 — [Special] —
Judge William H. Donahue, of the district court of Minneapolis, and the first grand knight of the Minneapolis Grand Knights of Columbus, died at 4:22 o'clock yesterday morning at the American Oncologic hospital, forty-fifth and Chestnut streets. He was in his fifty-first year.

Judge Donahue, who was a leading member of the bench and bar of Minnesota, came to this city from Minneapolis 16 days ago, to obtain treatment at the hospital for the growth of a cancerous nature which had developed on his neck. An operation was performed from which he did not recover and he died, with his wife, who had accompanied him here, at his bedside.

The body was placed on a train that left Broad street station for the northwest at 7 o'clock last night. Dr. W. D. Bacon and Michael Keough, two members of the West Philadelphia council of the Knights of Columbus, acting as escort. They will accompany it to Minneapolis with Mrs. Donahue and there represent the local Knights of Columbus here at the funeral.

BORN IN MICHIGAN

Judge Donahue was born in Allen, Hillsdale county, Mich., in September, 1858, and was a graduate of the law department of the university of Michigan. He came to Minneapolis immediately after his admission to the bar in 1881, and entered at once upon the practice of his profession. For a few years he was in the law office of M. B. Koon, and later he formed a partnership with Stephen Mahony, the firm being Mahony & Donahue.

In the early years of his practice, Judge Donahue made a specialty of criminal cases, and the first notable case with which he was associated was the trial of the Barrett brothers in the late eighties. Although two of the three boys were found guilty and hanged, Judge Donahue made an able defence, and his success as an attorney dates from that time.

Later on, he gave his attention exclusively to civil cases, and for many years he was legal advisor for the Anthony Kelley estate. In fact, he remained in this capacity up to the time he was appointed to the district bench three months ago.

SUCCEEDED F. V. BROWN

Judge Donahue's appointment to the bench as Judge F. V. Brown's successor was made by Governor Johnson not so much as a political reward as a recognition of high legal attainments and judicial fitness. At the time of his death, Judge Donahue had two years left to serve.

Aside from his place on the bench, he never held public office of any kind, although he served on the commission that drew up the city charter voted on in 1906 and 1907. As a member of the drafting committee, he drew the franchise section, which is regarded by lawyers and experts as a model of its sort.

A lifelong Democrat, Judge Donahue was one of the ablest leaders of the party both in the city and state. He served for years on the judiciary campaign committee, and three times in succession he was chosen to represent the Minneapolis district in the national Democratic convention.

In 1888 Judge Donahue married Miss Mary Walsh of Chicago, who survives him, together with five children, James, Catherine, Jule, Helen and William.

LEADER IN LODGES

Although a man of strong domestic tastes, Judge Donahue was for many years affiliated with both the Knights of Columbus and the Ancient Order of Hibernians. He had held high office in both organizations. During the time that he was sick in Philadelphia, the Knights of Columbus lodges there took special pains to provide flowers and other tokens of their esteem.

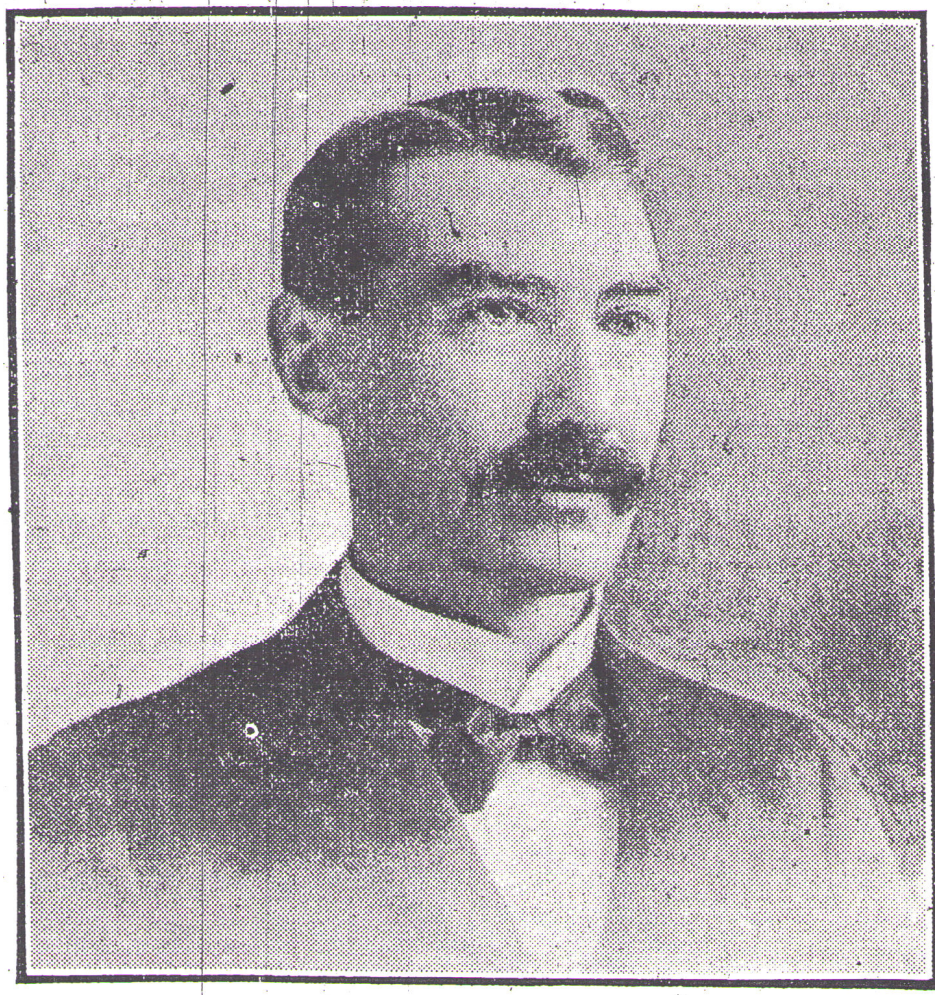
During practically the entire length of his residence in Minneapolis, Judge Donahue was a member of Immaculate Conception church. He was especially interested in the project for building the new pro-Cathedral and was a member of the general committee in charge of its erection.[11]

This was an era when the local bench and bar coalesced for a period of mourning after the death of a district court judge. More than fifty members of the Hennepin County Bar and the Knights of Columbus met the train bearing Donahue's body from Philadelphia and formed an escort of honor

[11] ***Minneapolis Tribune*, May 3, 1909, at 1 (funeral arrangements omitted).**

as it was taken to an undertaker. The guard of honor included Donahue's five colleagues — Judges Frank C. Brooks, David F. Simpson, Andrew Holt, Horace D. Dickinson and John Day Smith.[12] Following custom, the courts were closed on May 5th, the day of the funeral. [13]

MINNEAPOLIS JURIST, WHOSE DEATH FOLLOWED HOSPITAL OPERATION



JUDGE W. H. DONAHUE,

[12] *Minneapolis Journal*, May 4, 1909, at 6. At the funeral, each judge was either an active or honorary pallbearer. Id.

[13] *Minneapolis Journal*, May 3, 1909, at 6 ("Court Will Adjourn"); *Minneapolis Journal*, May 4, 1909, at 6 ("Out of respect for the memory of Judge Donahue, district court rooms were closed today and court work will not be resumed until Thursday. No session of probate court will be held tomorrow."). This photograph of Judge Donahue ("Minneapolis Jurist, Whose Death Followed Hospital Operation") accompanied the *Journal's* story on May 3.

On May 15th, the county bar association convened in district court for Donahue's memorial service. The evening *Journal* reported the proceedings:

PAY TRIBUTE TO JUDGE DONAHUE

Associates on Bench and Minneapolis Bar Adopt Appropriate Memorial.

Judges of the district court and members of the Minneapolis bar honored the memory of the late Judge William H. Donahue today by attending a special memorial session of the district court in courtroom No. 1 in the court house. The five judges who were Judge Donahue's colleagues on the bench, presided, and the more than 100 members of the Minneapolis bar were in attendance.

Judge F. C. Brooks, who was a close personal friend of Judge Donahue, voiced the sentiments of the district court judges in a short memorial address, and tributes to the memory of Judge Donahue were made by Rome G. Brown, A. H. Hall, A. M. Harrison, Simon Meyers and James Kellogg.

Memorial Adopted.

H. G. Hicks, chairman of the memorial committee, appointed by Edward Savage, president of the Hennepin County Bar Association, presented the following resolution as the unanimous sentiments of members of the association:

William H. Donahue was born on a farm in Allen Township, Hillsdale County, Michigan, September 6, 1858, where he spent his early life. He received his education at Hillsdale College and the University of Michigan, from which latter institution he graduated in 1881. In the same year he was admitted to practice and came at once to Minneapolis, where he continued the practice of his chosen profession up to within a few weeks of his death, which occurred May 2, 1909.

Judge Donahue held but one strictly public office, that of District Judge for Hennepin County, but during the short period of his service he had the entire confidence, esteem and respect of the Bench and Bar, as well as the public generally. He was an influential and active member of a

commission appointed to draft a charter for the city of Minneapolis and was largely instrumental in the framing of the chapter pertaining to franchises of public service corporations, one of the most important problems of public interest. He twice represented Minnesota in the national conventions of the political party of which he was a life long member and he gave freely of his time and services to the solution of problems of public interest.

But it is as a man, citizen and lawyer that we best knew and most vividly recall our departed friend. His marked characteristics were an uncompromising honesty, deep sincerity, and fearlessness in the expression and advocacy of his convictions. He had very high ideals for the legal profession, its dignity, its ethics and its membership. In this he furnished an example for all of us to follow.

He was an able lawyer. He had good mental capacity and a sound knowledge of the principles which lie at the foundation of our profession. But professional eminence was not alone what distinguished him among those with whom he worked.

Hated Injustice.

He was more than a good lawyer. He was a good man, who loved justice and hated injustice. He had an intense sympathetic nature. No one in distress ever applied to him without receiving help and encouragement. His best efforts at the bar were made for those who needed help, and who could make little or no return therefor.

He was a true and loyal friend, who never tired in his efforts to serve those whom he called his friends. This quality was so marked in him that it sometimes stood in the way of his own advancement.

Had he been spared, he would have made an excellent judge. His judgment of human nature was keen and accurate. His motives were of the best. His sense of right and wrong was so delicately attuned that no technical legal objection would ever have served as an excuse with him for doing an injustice.

His home life was ideal. Its history is written in the hearts of the wife and children whom he left behind. Into that shrine of his affections it is not proper that we should intrude.

The supreme test of his character came after his appointment to the bench. We know now, from remarks which he made, that he felt that his lifework was about to end. He felt the touch of an incurable malady upon him. Yet with what patience and courtesy he continued to perform his duties. This required higher qualities than mere intellectual attainment. He earnestly believed that life in this world is but a preparation for a life to come. Let us hope that he is now enjoying the reward he sought to merit.

But why memorialize? Why resolve? The evidence of Judge Donahue's life is all submitted. The verdict has been rendered. It was recorded by your presence here today. We cannot by mere word change that verdict. Surely, none of us desire to do so. The verdict of the men among whom he spent his life is that Judge Donahue was an able and upright lawyer and judge; a good and valued citizen; a true and loyal friend; a loving and loved husband and father. What more could a man be?

We now move that this brief statement of the life and work of our departed associate and judge be spread upon the records of this court, there to continue as an expression of our appreciation of his virtues and to our regret at his seemingly premature death, and that a certified copy of that record be sent to his family.[14]

At the annual convention of the Minnesota State Bar Association in 1910, the following memorial, a shorter version of that adopted by the Hennepin County Bar Association, was presented:

William H. Donahue was born on a farm in Allen Township, Hillsdale County, Michigan, September 6, 1858, where he spent his early life. He received his education at Hillsdale College and the University of Michigan, from which latter institution he graduated in 1881. In the same year he was admitted to practice and came at once to Minneapolis, where he continued the practice of his chosen profession until his appointment to the District Court Bench on February 1, 1909. Upon arriving at Minneapolis, he entered the office of the well known legal firm of Koon, Merrill and Keith, but in the course of a few months formed a co-partnership with Hon. Stephen Mahoney, which continued until the latter's appointment as Municipal Judge. In the year 1890 he associated with Simon

[14] ***Minneapolis Journal*, May 15, 1909, at 6.**

Meyers under the firm name of Donahue & Meyers, though no partnership existed between them, and this continued until his retirement in 1909, for the purpose of accepting the position upon the Bench which had been tendered to him. His death occurred at Philadelphia, Pa., on May 2, 1909, and was a shock to the entire community in which he had previously lived.

Judge Donahue held but one strictly public office, that of District Judge for Hennepin County, but during the short period of his service he had the entire confidence, esteem and respect of the Bench and Bar, as well as the public generally. He was an influential and active member of a commission appointed to draft a charter for the city of Minneapolis and was largely instrumental in the framing of the chapter pertaining to franchises of public service corporations, one of the most important problems of public interest. He twice represented Minnesota in the national conventions of the political party of which he was a life long member and he gave freely of his time and services to the solution of problems of public interest.

He was deeply sincere in all his undertakings and fearless in the expression and advocacy of his convictions; he had very high ideals for the legal profession, its dignity, its ethics, and its membership, and these, together with the great love which he bore toward his family, were marked characteristics of his life.

On April 25, 1888, he was married to Mary L. Walsh of Chicago, Ill., who, together with three daughters and two sons, survives him.

Governor Johnson was out-of-state when Donahue died. By the time he returned, about a dozen candidates for the judgeship had come forth; after "giving a final hearing to their friends," he appointed Wilbur F. Booth on May 21.[15] This was the beginning of Booth's thirty-five years on the bench. He was elected to the district court in 1910; in 1914, President Wilson nominated him to be federal district court judge for Minnesota, and he was confirmed; in 1925, President Coolidge elevated him to the Eighth Circuit Court of Appeals. He died in 1944, at age eighty-two.

Governor Johnson's fate was similar to Donahue's. He died on September 21, 1909, following surgery in Rochester. He was forty-eight years old. •

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[15] ***Minneapolis Journal*, May 20, 1909, at 1.**

APPENDIX

A.

State of Minnesota
vs.
Timothy Barrett.

40 Minn. 65, 41 N. W. 459

January 28, 1889.

Trial for Murder— Challenge of Juror—Actual Bias — Trial of Challenge—Discretion of Court.—The defendant, upon trial for the crime of murder, challenged a juror, who was of the regular panel, on the ground of actual bias, claiming that in a conversation upon business matters with his (defendant's) mother, the juror had manifested the alleged bias. The mother was called, sworn, (Gen. St. 1878, *c.* 116, § 28,) and testified to expressions of ill-will made by the juror, all of which he positively denied. It further appeared that the conversation was in the presence of the juror's clerk, whereupon defendant's counsel demanded that the court issue its process, and compel the attendance of the clerk, that he might be examined as a witness as to the juror's competency. *Held*, that under the circumstances of the case the court did not err in refusing to issue a subpoena, suspend proceedings, and secure the attendance of the clerk

Same—Juror of Foreign Birth—Proof of Declaration to become Citizen.—When upon the *voir dire* of a proposed juror he states that he is of foreign birth and parentage, but, without objection, is also permitted to testify that he has declared his intention to become a citizen of the United States, the apparent disability is removed.

Same—Certified Copy of Affidavit of Declaration.—The original affidavit of such declaration, or a copy thereof, properly certified to by the clerk or deputy-clerk of a district court of this state, attested by its seal, is also competent evidence of the declaration of intention.

Same—Clerk and Deputy—Appointment—Judicial Notice—Form of Signature. —Judicial notice will be taken in a district court of the signature and official character of all persons who have been duly appointed deputies by the clerk, as all such appointments must be approved by the judge of the court. Nor, in proceedings in the same court, is it material whether a deputy of the clerk, when signing the jurat to an affidavit of intention to become a citizen, designates himself as a "deputy," or a "deputy-clerk."

Same—Use of Seal of Court.—The clerk is not one of the officers specially required by law to have and use a seal upon all occasions. The court itself has a seal, which must be used by the clerk as prescribed by statute.

Same—Evidence of Naturalization.—In collateral proceedings strict and technical rules should not be applied when determining whether or not the disability arising from alienage has been removed by proceedings under the naturalization laws.

Same —Witness — Impeachment — Particular Facts — Material Facts — Contradictory Statements—Confessions.—A witness may be discredited by evidence as to his reputation for truth and veracity, but specific and particular acts cannot be shown, except in some classes of cases, which need not be specified here. Foundation being properly laid therefor, a witness may be impeached by showing that he has elsewhere made statements upon some matter material to the issue, contradictory to those made upon the witness stand. If such statements are, in fact, confessions, the court should first pass upon their admissibility, precisely as if impeachment of the witness was not involved. If they are not confessions, the court should, as it did in this instance, charge the jury that statements not voluntarily made, or induced by fear or by the hope of an advantage held out to a witness, should be rejected, and not considered.

Same—Possession of Pistol—Circumstances of Obtaining Possession — Instruction to Jury.—The testimony tended to show that the bullet which killed the deceased was of the calibre known as "38." It was therefore proper, and of some importance, to prove that the accused had a pistol of the same calibre in his possession upon the night of the homicide. The defendant denied possession of the weapon on the night in question, and also its ownership. He testified that it belonged to a brother, who was a witness for the prosecution. Thereupon the

state introduced testimony in rebuttal, which tended to prove when and under what circumstances the accused first obtained possession of the revolver, a few weeks prior to the murder, and that it was while engaged in the commission of another felony. The object of this testimony, and the sole purpose for which it was received, was clearly and forcibly stated to the jury in the charge of the court. *Held*, that there was no error.

Same—Capital Punishment—Discretion of Trial Court.—Certifying to the existence of exceptional circumstances in a capital case, whereby the punishment is mitigated to imprisonment for life, is a matter peculiarly within the province of a trial court. The appellate tribunal should not interfere with its conclusions unless there has been a palpable abuse of discretion.

Same—Newly-Discovered Evidence.—Rulings in former cases, where the motion for a new trial has been made upon the ground of newly-discovered evidence, followed and applied.

The defendant was indicted with his brother Peter Barrett in the district court for Hennepin county for the murder of Thomas Tollefson on July 27, 1887, in the city of Minneapolis. Defendant, having demanded it, was allowed a separate trial, was tried before *Lochren*, J., and a jury, was convicted of the crime of murder in the first degree, and was sentenced to be hanged. Defendant appeals from the judgment and from an order refusing a new trial. The circumstances of the killing, as shown by the testimony, are stated by the court in the next following case, *State v. Barrett*, infra, p 77:

***W. W. Erwin*, *Wm. H. Donahue*, *John T. Byrnes*, and *C. Wellington*, for appellant.**

***Moses E. Clapp*, Attorney General, *H. W. Child*, *F. F. Davis* and *Robert Jamison*, for the State.**

COLLINS, J. The defendant, indicted for the crime of murder in the first degree, jointly with his brother Peter, having obtained a separate trial, was found guilty of the offence charged. From an order denying a new trial, and from the judgment, he appeals, alleging numerous errors of the trial court in impanelling a jury, and in admitting and excluding testimony. He also avers error of the court in refusing to certify of record its opinion that by reason of exceptional circumstances the penalty of death should not be awarded, error in refusing a new trial on the ground of newly-discovered evidence, in its judgment inflicting the sentence of death by hanging, and error in other matters, to which we deem it unnecessary to make further allusion.

Upon the preliminary examination of a proposed juror—C. C. Wilson—he was challenged by the defence for actual bias. To establish this condition of mind, wholly denied by Wilson, the mother of the accused testified to the use of certain language in conversation with her upon a business matter, but in reference to defendant and his brother. It further appeared that whatever was said was in presence of Wilson's clerk, whereupon the counsel for defendant demanded the process of the court, whereby the clerk could be compelled to attend and testify to the conversation. The court did not err in refusing this demand, nor in submitting the merits of the challenge to the triers. It is statutory, (Gen. St. 1878, *c.* 116, § 28,) that witnesses may be examined on either side upon this preliminary question, and by the ordinary rules of evidence, but the defendant had nc absolute or unqualified right to ask, under the circumstances here presented, that all proceedings should be brought to a halt, the compulsory process of the court issued, and the clerk produced as a witness. The juror was of the regular panel, of which the defendant undoubtedly took notice. The expressions of ill-will are alleged to have been made to the mother, and she must have known that the clerk was present at the time. Had the counsel made a natural and simple inquiry upon this point, they would have been advised that he was in a position to overhear all that was said between the mother and the juror. They should have been prepared to submit the material testimony bearing upon the juror's competency, and it was not an abuse of discretion for the court to refuse to issue its process and suspend proceedings, that the desired witness might be had. It follows that the court was justified in directing the triers to pass upon the merits of the challenge for actual bias.

It is next contended that, while impanelling the jury, the court ruled erroneously upon the qualifications of certain persons of foreign birth and parentage, thereby compelling the defendant to use five of the peremptory challenges guarantied him by statute upon men who, for the reason stated, were incompetent to sit as jurors in the case. It is the fact that when the last juror, William Powles, was called to the box, defendant had exhausted his right to challenge without showing cause; that five of these challenges had been used upon men who were disqualified, unless there was competent evidence of the declaration of each to become a citizen of the United States; and that Powles was also of foreign birth and parentage. The state submits the proposition, however, that upon the *voir dire* of these persons it was shown by proper testimony that each had in due form declared such intention in conformity to the various acts of congress commonly known as the "Naturalization Laws," and was therefore, by virtue of Gen. St. 1878, *c.* 71, § 3, and *c.* 107, § 3, a qualified juror. It is the admissibility and sufficiency of such portions of the evidence on this point as was received and held ample, despite the protests of defendant's counsel, and against the objections then presented, which we are now called upon to determine. Most of the objections interposed during the voir dire were common to each case. In some the fact that the proposed juror had declared his intention to become a citizen was first

established by parol, (as had been the foreign birth and parentage,) no objection thereto being made in behalf of the defendant. This was clearly sufficient; but the state went further and produced, as it did with each man whose general qualification was questioned, the original declaration of intention, or a copy of the same, properly certified by a clerk or deputy-clerk, and attested by the seal of a district court of this state. The original declarations so offered and received were found, with many others, in books kept among the files and records of the clerk of the court in which this case was being tried, and known as the "Declaration Books." They were identified by the clerk as the books in which could be found the original affidavits made before him or his deputies, by such aliens as had appeared and declared their intention to become citizens. The objections made to these originals were that they were not records of the court; that some were not attested by the clerk, but by persons who signed as deputies only, without the name of the clerk anywhere appearing; and that the seal of the court had been omitted from each. Section 2165, title 30, U. S. Rev. St. provides that an alien who wishes to become a citizen "shall declare on oath before * * * a court of record of any of the states having common-law jurisdiction, and a seal and clerk, * * * that it is his *bona fide* intention to become a citizen," etc. By an amendment (subdivision 6 of the same section) this declaration may be made before the clerk of any such court, and in all cases it is the duty of the clerk to record the proceedings. Gen. St. 1878, *c.* 8, § 259, authorizes the appointment by the clerk of one or more deputies, who are empowered to perform all the duties pertaining to the office. These appointments must be approved in writing by the judge, and the appointees are then the officers of the court. How said deputies should designate themselves upon papers,—precisely what shall be their official appellation,—the statute nowhere states. They act independently of the clerk, performing their duties personally; and we see no reason for holding that the deed should be described as that of the clerk, by his deputy. It would be absurd, as well as untrue, to describe the act of the deputy in administering an oath as that of the clerk, by his deputy.

In the case of juror Bergquist, the deputy described himself as "clerk," instead of "deputy;" and in Powles' case the deputy, Dickey, signed the jurat merely as "deputy." There was testimony, however, as to the official position of each on the days upon which they administered the oaths. But the appointments of these persons as deputy clerks must have been approved by the judge who presided at the trial, or by a judge of the same court, and in either event judicial notice might well be taken of the signature and official character of each.

The clerk of the district court is not one of the officers who are by law specially required to have a seal. The court itself must have one; and in the attestation of papers, and upon all writs and process, the seal of the court, not that of the clerk, must be impressed. Gen. St. 1878, *c.* 22, § 2, and *c.* 64, §§ 12, 13.

The declaration of intention is an important step towards a formal judgment admitting an alien to full citizenship. Evidence of the declaration must be produced when final action is taken, and the judgment then rendered is of the same general validity as any other judgment of the same tribunal. The law requires the applicant to take the oath, and imposes upon the clerk the duty of properly certifying to the fact, and preserving a record thereof. As the applicant for citizenship has no supervision over the clerk, and cannot enforce obedience to the requirements of the law imposed upon that officer, it would be unjust to establish very strict or technical rules by which to determine, in a collateral proceeding, as this was, whether or not the disability arising from alienage has been removed. A record can be kept in no better manner than that adopted by the clerk who produced the books, and which is the customary method throughout the state. Blank declarations are bound in permanent book form, and used as occasion requires, until each blank is filled. This produces uniformity, neatness, convenience, and great safety. These originals are thus preserved in the best possible form, and are, as well as properly certified copies thereof, competent evidence of the recitals therein contained. *In re Coleman*, 15 Blatchf. 406. These remarks dispose of each of the alleged errors as to the selection of the jury.

Very few words are needed to dispose of the claim that the court should have permitted an answer to the question propounded the witness Henry Barrett, as to his attempt to kill his mother; and to Mary Coleman, relative to Henry's robbing his mother, and his threats in reference to her. The admitted object of such questions was: First, to attack the credibility of the witness; and, second, to show a motive upon his part for testifying for the prosecution, and against his brother. A witness may be discredited by evidence attacking his reputation for truth and veracity, and he is supposed to be constantly in readiness to repel an assault of this character; but specific or particular acts cannot be proved. *Rudsdill v. Slingerland*, 18 Minn. 342, (380;) *Moreland v. Lawrence*, 23 Minn. 84. It must be noticed, however, that we are not now dealing with acts which are really of the *res gestae*; nor with threats which tend to indicate a hostile feeling towards a party against whom the witness is called, as was the case in *State v. Dee*, 14 Minn. 27, (35;) nor with an exceptional case of the classes, or their kind, mentioned in *White v. Murtland*, 71 Ill. 250; *Ford v. Jones*, 62 Barb. 484; *Betts v. Lockwood*, 8 Conn. 487. In connection with the effort to prove the acts and threats just mentioned, an attempt was made by the defence to have the witness Mary Coleman state acts and declarations of Henry Barrett "which show or tend to show" that his hostility towards his mother was caused by her determination to disinherit him. The fact that Henry had manifested hostility towards his mother could not, of itself, affect his credibility as a witness in a case in which his brother was defendant. But the counsel intimate, without attempting to argue the point, that if his anger was caused by her decision to deprive him of a share of her estate, a motive is at hand for his very serious charge against a brother. The

reasoning is too far-fetched for practical purposes. Henry's accusation would not tend to placate her, nor would it lead to an abandonment of her scheme, if she had one, to favor other children in a final disposition of her property. It is hardly necessary to suggest further that the question also called for the witness' opinion as to what particular acts and declarations possessed the tendency inquired about.

Although the evidence shows that one bullet passed through the thigh of the deceased, it is quite clear that his death was caused by the ball which was found in the body, and produced in court. This was of the calibre known as "38." It was therefore proper and of some importance to trace into defendant's possession a pistol of the same diameter of bore. On his direct examination, Henry Barrett had identified a revolver of "38" calibre as one owned and carried by the defendant on the night of the murder, and, if Henry's account be true, the one used by defendant when shooting Tollefson. This revolver, on which had been cut defendant's initials, "T. B.," was also recognized by the witness Truax, a policeman, who had taken it from defendant, when arresting him for some trivial offence, subsequent to the murder. The defendant denied the ownership, and testified that the weapon belonged to Henry. All testimony, therefore, which tended to fix the ownership or possession of this revolver in the defendant, became material, and was admissible in rebuttal. This was the purpose of the state in introducing the witness Chamberlin, who had been feloniously assaulted in the night-time, a few weeks before the murder, by two armed men. Chamberlin was also armed, but in the struggle had his revolver wrenched from his grasp by one of the would-be robbers, and carried away in the flight which promptly followed. He also lost his "Derby" hat. Immediate search revealed two revolvers and a "slouch" hat—neither the property of Chamberlin — lying upon the ground. The witness identified the revolver in evidence as the one taken by his assailant, and, with some degree of certainty, the defendant as the man who took it. With less positiveness Chamberlin asserted that Peter Barrett was the associate. It may be conceded that revolvers of this same make and calibre are quite common, that it is difficult for a person to positively distinguish one from another, and that Chamberlin had a limited opportunity to study the faces or voices of the men who attempted to rob him; but his testimony had some value and bearing, precisely as if he had sold or given the weapon to a stranger, but could identify the person and article with the same degree of certainty. It is probably unfortunate for the defendant that this testimony, that of Minnie Barrett in reference to a change of hats made by him from one of the variety usually known as the "slouch" to a stiff "Derby," and the further testimony in regard to the loss, the recovery, and the sale of a horse about the time the assault was made upon Chamberlin, tended to connect defendant with that affair, but such fact is not sufficient reason for excluding the evidence. In this connection we may also allude to the charge of the court, in which particular and special attention was called to the only purpose for which this testimony was introduced or could be considered. The jurors were specially and carefully

charged—if they found the revolver to have been taken from Chamberlin by defendant—to draw no inference prejudicial to him, to give the circumstance no more weight than if the testimony of the witness had disclosed a sale or a gift of the pistol to the defendant, instead of a felonious taking by him. It must also be held that the cross-examination of the defendant in regard to the revolver was pertinent and proper. The certified case states that he had, upon the direct, categorically denied the story of the murder, as previously detailed by Henry, which included testimony connecting the defendant with this revolver, and its use by him when shooting the deceased. It also shows that upon the cross-examination, in answer to a question as to his being at a circus, he volunteered the statement that he had no revolver on the night of the murder, but that Henry had. By these denials and assertions he took issue upon vital points in the testimony of a witness for the prosecution, and invited a thorough and complete cross examination.

Defendant's counsel insist upon treating all that part of his testimony, and that of his brother Peter, which was contradicted by the witness Jameson, as in the nature of evidence of confessions, and strenuously seek to apply the rules relating to the admission of confessions thereto. If the statements made to the officers were, in fact, confessions, the court ruled properly as to their admission; and, as will be seen later on, forcibly admonished the jury concerning their value as testimony. And if these statements made by Peter, when questioned as to his whereabouts on the night of the homicide and complicity therewith, could by any method be fashioned or transformed into a confession, there was but little testimony indicating that there was any positive promise of favor made, or that harm was threatened, or that an inducement was held out calculated to make the confession untrue. *State v. Staley*, 14 Minn. 75, (105.) [16] The great preponderance of testimony was the other way; and, applying the rule contended for, the court made no mistake. But the statements were not confessions. Timothy and Peter, when questioned by the officers, who perhaps hoped to secure confessions of guilt, denied in the most emphatic manner all knowledge of the murder. Instead of acknowledge-ing the transgression, they persistently affirmed their innocence.

It was claimed by the state that at various times the defendant and his brother Peter had made statements material to the case, contrary and at variance with those made upon the trial when under oath. Thereupon, first laying the foundation therefor, the state introduced evidence of the alleged contra-dictory statements, which, if believed, tended, under a most familiar rule, to impeach the witnesses, and injure their credibility. This was especially permissible in the case of Peter, who, upon his direct examination, was minutely interrogated, and who, in response, gave a full account of the efforts made to secure a confession from him. The defence, by this course, invited his

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[16] On the *Staley* case, see Douglas A. Hedin, "The Emergence of a Criminal Defendant's Right to Testify at Trial in Minnesota," 9-12, 27-32 (MLHP, 2011-2015).

impeachment, if within the power of the prosecution, and should not have been surprised at a prompt refutation of the charges made by the co-defendant. All of the circumstances surrounding the parties and the transaction were spread before the jury, and a most favorable charge of the court impressed upon them a duty to reject statements not voluntarily made by the witnesses, or such as were induced by fear, or by the hope of an advantage held out to them.

The death penalty is fixed by statute as punishment for the crime of murder, except in cases where the trial court shall certify that by reason of exceptional circumstances it should not be imposed, in which case the punishment shall be imprisonment for life. The court refused to certify to the existence of exceptional circumstances in the case at bar, and this refusal is alleged as error. This is a matter which is peculiarly within the province of the court before whom the accused has been tried. No appellate court should interfere with its conclusions, unless there has been a palpable abuse of the discretion which should be exercised upon so momentous an occasion. We can safely say that the importance of the question will invariably quicken the mind and conscience of the tribunal which must decide, and lead it to a just, a wise, and, in a meritorious and exceptive case, to a merciful determination. After a thorough examination of the testimony herein, we have no hesitation in saying that there is nothing which indicates that the learned judge, who felt impelled to refuse a certificate which would have made the sentence a much easier one to pronounce, omitted or neglected to carefully weigh and earnestly consider every circumstance, and all that could be said in extenuation by counsel for the convicted man.

The assignment of error numbered 26, by which it is urged that the statute granting power to and making it the duty of the governor to fix and designate by warrant the day of execution (Gen. St. 1878, c. 118, § 3,) has been repealed by the adoption of the Penal Code, was disposed of adversely to this contention, in *State v. Holong*, 38 Minn. 368, (37 N. W. Rep. 587.)

Upon the motion for a new trial herein, (which came on for argument after the trial and conviction of the codefendant, Peter Barrett,) there were used in support of the claim of newly-discovered evidence the affidavits of Julius C. Heyn and his wife, Gertrude, Adolph Heyn and his wife, Louisa, Patrick McLaughlin, Mary Story, and E. A. Mitchell. Each of these persons had testified for the defence on the trial of Peter, without affecting the result, and the court states in its order, when treating of this branch of the motion, that such fact largely affected its conclusion that upon this, as well as other grounds, the motion should be denied. In this view the court was fully justified, but could have easily stated additional reasons. One of the proposed witnesses,—Julius Heyn,—it appears from his affidavit, was at his house when the first shot was fired at Tollefson, and within 130 feet. He ran towards the scene, boarded the car after the team commenced to run with it, stopped them, and was the first

person to learn that Tollefson had been killed. He went with the body of the deceased to police head-quarters, and as a witness appeared at the coroner's inquest. Had the defendant's counsel made any inquiry, or had they read the minutes of the inquest, this would have been discovered, and the testimony presented when it should have been. Each of the other persons making the affidavits, except McLaughlin, resided in the immediate vicinity of the scene of the tragedy, and, had the counsel exercised care and prudence, or diligently investigated the circumstances, all that the witnesses knew material to the issue could have been learned long before the trial.

The principal effort of counsel in the preparation and production of these affidavits seems to have been to establish that more than two shots were fired during the encounter. This, at best, would have been cumulative and unimportant, except that it might have had a tendency to contradict or discredit testimony given by other witnesses as to the number of shots. In either case it affords no ground for a new trial. Of the many cases upon these points, we cite *Knoblauch v. Kronschnabel*, 18 Minn. 272, (300;) *Fenno v. Chapin*, 27 Minn. 519, (8 N. W. Rep. 762;) *Peck v. Small*, 35 Minn. 465, (29 N. W. Rep. 69.) The affidavit of McLaughlin differs so much from his testimony, as given on the trial of Peter, as to excite suspicion and distrust, even if its contents were of great materiality. In conclusion, upon this point, we may say that these affidavits were well met, and in the main disposed of, upon the argument of the motion, by the affidavits produced in behalf of the state. This, of itself, is sufficient, when we fully indorse the doctrine that on motions of this character much must be committed and permitted to rest in the sound discretion of the court below. *Mead v. Constans*, 5 Minn. 134, (171 ;) *Lampsen v. Brander*, 28 Minn. 526, (11 N. W. Rep. 94;) *Eldridge v. Minn. & St. Louis Ry. Co.*, 32 Minn. 253, (20 N. W. Rep. 151;) *Peck v. Small*, *supra*.

Having thoroughly examined the assignments, and found no error, the judgment and the order refusing a new trial are affirmed. The case is remanded for further proceedings. ◊

B.

State of Minnesota
vs.
Peter Barrett.

40 Minn. 77, 41 N.W. 463

January 28, 1889.

***State v. Barrett*, *supra*, p. 65, followed.—Various assignments of error disposed of by following rulings in the case of *State v. Barrett*, *supra*, p. 65, a codefendant, in which the same assignments were presented.**

Murder by Two or More Engaged in Felony. — A person may be guilty of a murder actually perpetrated by another, if he combines with such other party to commit a felony, engages in its commission, and death ensues in the execution of the felonious act. If two or more persons, having confederated to attack and rob another, actually engage in the felony, and in the prosecution of the common object the person assailed is killed, all are alike guilty of the homicide.

The defendant was indicted with his brother Timothy in the district court for Hennepin county, for the murder of Thomas Tollefson. Upon the trial before *Lochren*, J., and a jury, defendant was convicted of murder in the first degree, and sentenced to be hanged. He appeals from the judgment and from an order refusing a new trial.

***W. W. Erwin*, *John T. Byrnes*, *William H. Donahue* and *C. Wellington*, for appellant.**
***Moses E. Clapp*, Attorney General, *H. W. Childs*, *F. F. Davis* and *Robert Jamison*, for the State.**

COLLINS, J. The appellant, indicted with his brother, Timothy Barrett, but separately tried, was convicted of the crime of murder in the first degree, and sentenced to be hanged. From an order denying a new trial he appeals.

Twenty-eight assignments of error, many of them frivolous, are presented for review. The alleged erroneous rulings are chiefly upon the admissibility or inadmissibility of testimony, but error is claimed in the refusal of the court to certify that, by reason of exceptional circumstances, the death penalty should not be imposed. It is further urged that the evidence did not warrant the verdict of guilty as charged in the indictment, and that the sentence and

judgment are contrary to law. But this point, as well ns the one suggested in regard to the refusal of the trial court to certify to the existence of exceptional circumstances, whereby the punishment might be reduced to life-imprisonment, have been fully considered and disposed of in the case of *State v. Barrett*, (*supra*, p. 65,) a codefendant, convicted of the same crime, upon substantially the same testimony, in which a lengthy opinion has just been filed.

The testimony, as appears from the record herein, was much the same as that given in the case against Timothy Barrett, so far as it went. There were a few more witnesses on minor points, and slight, but immaterial, changes in the phraseology; and all testimony bearing upon the time and manner in which Timothy obtained possession of the revolver marked with his initials, except what was stated by the accused in his interview with the officers, was purposely and properly omitted. From the nature of things, the testimony, as well as the innumerable objections made by counsel for the prosecution and the defence, and the rulings upon these objections, as the trial progressed, would be the same in substance. As we have covered, in the opinion in the other case, all of the assignments' of error which, in our judgment, merit comment, there exists no good reason for going over the same ground in this. The trial court ruled correctly upon the many questions brought to its attention while receiving the testimony.

It is averred that the evidence was insufficient to warrant the verdict. Evidently the main reliance of the state was upon the testimony of the accomplice, Henry. In order to convict the defendant it was essential that this witness be corroborated by evidence which tended in some degree to establish the guilt of the accused. By it a prima facie case need not be made out. *State v. Lawlor*, 28 Minn. 216, (9 N. W. Rep. 698.) But a fragment of the charge of the court is before us, but we have no doubts of its sufficiency on this point, and that the jury was clearly and carefully instructed that corroborating testimony, to the degree above mentioned, was absolutely necessary before conviction could be had. An examination of the evidence satisfies us that the corroboration was ample, and the verdict justifiable on this ground, at least.

The next important inquiry is as to evidence of defendant's participation in the murder, assuming, as we do, that it was actually committed by Timothy. From the testimony it appears that upon the night of the homicide the three brothers, Timothy, Peter, and Henry, left the house together, early in the evening, for the avowed purpose of visiting the business part of the city. Timothy and this defendant Peter carried revolvers. When returning home, late at night, they resolved to rob a street-car driver, and in furtherance of the scheme placed planks across the track at one point. Later the three approached Tollefson as his car was op the turn-table at the end of the route, near a cemetery, and demanded his cash-box, Timothy and Peter presenting their weapons. Tollefson, the deceased, resisted, the accused fired his

revolver, and, with the witness Henry, ran towards the cemetery. Almost immediately another shot was fired, and Timothy joined them, with the driver's cash-box under his arm, saying that he had "killed him; shot him through the head." The three then returned to their residence, the money found in the box was poured out upon a table, and the box buried in the cellar. Later it was dug up and cut in pieces by the accused and Timothy. The car tickets found therein were secreted under the house, and the pieces of the box thrown in a lake by the latter and Henry. It is manifest, as before stated, that the fatal shot was fired by Timothy, while that fired by this defendant passed through the thigh of deceased, causing a severe, but not necessarily fatal, wound. These circumstances are sufficient to make all principals, although the crime was actually perpetrated by only one of the number. The men had conspired and confederated to waylay and rob,—to commit a felony. In the prosecution of this common object or purpose, murder resulted. The act of Timothy was in furtherance of the original unlawful design. It was a natural and probable consequence of it, for which all must be held accountable. In the eye of the law it was the act of each. 1 Russ. Crimes, 56; 1 Archb. Crim. Pr. & PI. [8th Ed.] 56, Pom. note 1; *Brennan v. People*, 15 Ill. 511; *Reg. v. Jackson*, 7 Cox, Crim. Cas. 357.

As we find no error in the case, the judgment and order denying a new trial are affirmed, and the case remanded for further proceedings. ■

Posted MLHP: January 1, 2016.