MURDER OF WARREN YOUMANS AND OTHERS

BY

SAMUEL W. EATON

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FOREWORD

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In the following article, Samuel William Eaton recounts five murders committed in Olmsted County between 1865 and 1880. As Justice of the Peace, he presided over the preliminary hearings of two defendants.[1] He must have attended several of the trials because his portraits of the defendants resemble first-hand reports. Here, for example, is his description of Fred Hickman's reaction to being sentenced to life in prison by Judge William Mitchell:

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[1] **See pages 25 and 28 below. An early biographical sketch of Eaton omits his "judicial" career:**

> **Eaton, Samuel William, b. in Concord, N. Y. , Nov. 7, 1815; engaged in farming in Wisconsin, and in 1869 was ordained a Universalist clergyman; came to Minnesota in 1861; settled in Rochester, where he was editor of the Post; was a representative to the legislature in 1868.**

Warren Upham & Rose Barteau Dunlap, *Minnesota Biographies, 1655-1912* 197 (14 Collections of the Minnesota Historical Society, 1912).

> **His facial conformation would not denote either a fool or a villain, and yet he has a wicked-looking eye in his head. At the time of his arrest, and during his confinement, he maintained a wonderful firmness and self-control, and even in the last fearful ordeal in the courtroom his serf-possession did not entirely forsake him. While receiving the dreadful sentence which assigned him to a prisoner's cell until released by death, the blood rushed to his face and the nervous throbbings evinced a considerable degree of mental pain and disturbance.**

What interests us today, however, are Eaton's few passing comments about the conduct of the murder trials, not the murders themselves. They give us a glimpse into late nineteenth century criminal procedure.

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Warren Youmans was murdered by his neighbor, Patrick Callahan, during an argument over Callahan's cattle that had strayed onto Youman's property. Conflicts between neighbors over boundaries were not unusual at this time, and occasionally they ended in violence. Callahan was charged with first degree murder, but when two key prosecution witnesses became unavailable, the prosecution was forced to reduce the charge to second degree murder, which Callahan accepted. He faced one charge, not a multitude. One reason criminal trials were short in the nineteenth century was because prosecutors did not bring multi-count charges, which become the subject of negotiations. Callahan's plea to a reduced charge is what we call plea bargaining today.

He was sentenced to four years in prison, and this seems to have been the norm for that crime.

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During a robbery on the night of October 29, 1867, George W. Staley shot and killed Frederick Ableitner, a farmer in Olmsted County. He was eventually apprehended, confessed, arraigned, and tried in June 1868. The trial lasted nine days, an unusually long time in that period.[2] Staley testified that he was induced to confess by fear; however, when questioned further about the robbery and murder by the prosecutor, he refused to answer. The prosecution noted his refusal in his closing. Staley was convicted and sentenced to hang.

Staley appealed on the grounds that Judge Lloyd Barber erred by admitting his confession and in permitting the prosecution to comment on his refusal to testify about the robbery and murder. The statute on confessions in 1868 provided:

> **A confession of a defendant, whether made in the curse of judicial proceedings, or to a private person, can not be given in evidence against him, when made under the influence of fear produced by threats, nor is it sufficient to warrant his conviction, without evidence that the offense charged has been committed.[3]**

The court held that Staley's confession was properly admitted. Staley was able to testify that his confession was coerced only because the Minnesota Legislature passed a law effective March

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[2] This was unusually long. In contrast, the average length of a murder trial in Massachusetts in the 1860s was only three days. George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 119 (Table 5.3) (Stanford Univ. Press, 2003).

[3] Stat., Ch. 73, §93, at 531 (1866). The Supreme Court held in *State v. Laliyer*, 4 Minn. (Gil. 277) 368 (1860) (Emmett, C.J.), that a defendant's confession, uncorroborated by independent evidence, was insufficient to support a conviction.

6, 1868, that permitted a criminal defendant to testify on his own behalf at trial. This changed the 1866 statute, which codified the common law prohibition against defendant testimony.[4] The revised 1868 law provided:

> **All persons except as hereinafter provided having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witnesses may be drawn in question. And in the trial of all indictments, complaints and other pro-ceedings against persons charged with the commission of crimes or offenses, the persons so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presump-tion against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the courts. [5]**

Staley was one of the first criminal defendants in the state to take advantage of this law. But his lawyers misconstrued the protections in the last clause. On appeal, the supreme court

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[4] Stat. Ch. 73, §7, at 520 (1866) ("[N]o defendant in a criminal action or proceeding shall be a competent witness therein for himself, nor, until acquitted or convicted, for a co-defendant."). Justice Sherburne explained the rationale for the common law rule in *Baker v. United States*, 1 Minn. (Gil. 181) 207 (1854), which was cited after statehood in *State v. Dumphrey*, 4 Minn. (Gil. 340) 438 (1860)(Flandrau, J.).

[5] 1868 Laws, Ch. 70, §1, at 110.

held that when Staley testified that his confession was coerced, he opened the door to being questioned about the crime itself.[6]

George Staley did not hang. Responding to a popular petition, Governor William R. Marshall reduced his sentence to life in prison, and six years later Governor Cushman K. Davis granted him a full pardon. John Whitman, one of Staley's cohorts, was apprehended, charged with murder, and pled guilty to third degree manslaughter, another instance of plea bargaining. He was sentenced to eight years in prison, but was pardoned by Governor Horace Austin after serving only three. A third robber, Charles Edwards, disappeared.

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In December 1878, Fred Hitman pled guilty to "murder in the first degree," after being indicted by a grand jury in Rochester. He had killed John Schroeder, an itinerant farm worker, who carried a small amount of cash. Before imposing a life term, Judge Mitchell disingenuously remarked that he had "no disposition to intensify the effect of the sentence which he was about to pass," and proceeded to do just that by adding a harsh condition that was intended to compel Hitman to ponder and regret his crime at least one day of every remaining month of his life:

> **The sentence of the court is that you be taken to the state prison at Stillwater and there confined at hard labor for the remainder of your natural life, and that on the first day of each month you be kept in solitary confinement.**

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[6] The court's complete opinion in *State of Minnesota v. George W. Staley*, 14 Minn. (Gil. 75) 105 (1869), is posted in the Appendix below at 33-53, and discussed in Douglas A. Hedin, "The Emergence of a Criminal Defendant's Right to Testify at Trial in Minnesota" 9-12 (MLHP, 2011).

Mitchell appears to have been a creative sentencer. The following year, sitting in Winona, he gave Thorald W. Scheppegrell, guilty of stealing $25, a choice of serving one year and being released in the dead of winter or a longer term which would expire when spring arrived. The defendant chose early release.[7]

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Most trials in the nineteenth century were completed in one day. Some took longer, but not much. Once a trial started, it kept moving along, sometimes concluding in the middle of the night. George Staley's jury was charged at "about five or six o'clock in the evening," and returned with a guilty verdict "about six hours" later — around midnight.

A month after the bloody body of Terrance Desmond was found, Charles Van Allen was charged with murdering him. A preliminary hearing was held on Tuesday, July 27, 1880, which "commenced at one o'clock in the afternoon and lasted until three o'clock the following morning." Over thirty witnesses testified but the Justice of the Peace held there was not enough evidence to hold Van Allen. A few hours later, Edwin Reynolds was arrested and charged with the same murder. After being indicted, his case called for trial on Thursday, July 29, and given to the jury the following afternoon.[8] The jury "was out about twenty hours" before informing Judge Mitchell that they were deadlocked. The length of their deliberations, it seems, exceeded the evidentiary phase of trial itself.

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[7] See "Judge Mitchell's Court Calendars: March 13-18 & October 16-20, 1879" (MLHP, December 2008).

[8] In his account of the hearing over which he presided, Eaton wrote that it started on "Thursday, the 28th," but the 28th day of July in the year 1880 was a Wednesday. The proceedings likely started on Thursday, the 29th.

Why were trials so short and why did they sometimes go far into the night? The issue in most trials was simple and solitary — criminal defendants were not overcharged, for example. Pretrial discovery was nonexistent. Others fall under the headings Infrastructure and Climate — that is, travel was slow and the weather unknown. Once a trial was recessed, and the jurors, litigants, witnesses and court personnel returned to their lodgings, there was a risk that someone critical to the case would not appear at the next session because of travel problems or inclement weather or both. Newspapers did not carry weather forecasts in the nineteenth century, and no one knew what the next day's weather might be. This risk was eliminated if court remained in session, even into the night. For these and many other reasons, some jury trials in the nineteenth century operated according to a variation of a law of physics —once set in motion, they continued in motion until a verdict or impasse was reached.

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Frank Bulen did not have a lawyer when he appeared before Justice of the Peace Eaton on Monday, September 20, 1880, charged with murdering John Nevins. Bulen was twenty-two and had worked as a field-hand for Nevins. He was indicted by a grand jury, secured counsel, was arraigned, and pled guilty to second degree murder, for which Judge Mitchell sentenced him to four years in prison.

Bulen was represented by Charles Cudworth Willson, a lawyer in Rochester.[9] Given his circumstances, Bulen could not have

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[9] Here is Warren Upham & Rose Barteau Dunlap's sketch of Willson:

> **WILLSON, CHARLES CUDWORTH, lawyer, b. in Mansfield, N. Y., Oct. 27, 1829; was admitted to the bar in 1851; first came to Minnesota in 1856; settled at Rochester in 1858,**

paid much of a fee to Willson; it is more likely that Willson was appointed by the court to defend him.

During the territorial period, and the first years after statehood, the court was required to inform the accused at his arraignment that he had "the right to have counsel before being arraigned, and must be asked if he desired the aid of counsel." [10] On March 4, 1863, the first law requiring the court to appoint counsel for indigents charged with a felony was enacted. It provided:

> **That whenever the defendant shall be arraigned for any offence punishable by death or by imprisonment in the State Prison, and he shall request the Court to appoint counsel to assist him in his defence, and shall, if required by the Court, make oath that he is unable to procure counsel, the Court shall appoint such counsel as such defendant may select, not exceeding two, and may by an order direct such sum**

> **where he has since practiced law, and has also engaged in farming; was reporter of the Minnesota Supreme Court, 1892-5, editing volumes 48-59 of its Reports.**

Upham & Barteau, supra note 1, at 865.

When he was Reporter for the Supreme Court, Willson wrote a letter to the editor of *The Minnesota Law Journal*, published in the December 1894 issue, in which he suggests that lawyers accurately identify the parties in their pleadings and properly cite cases and statutes in their briefs. It is posted as "Citations" (MLHP, 2008).

[10] The Second Legislative Assembly enacted the following in 1851:

> **SEC. 101. If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have of his right to counsel before being arraigned, and must be asked if he desire the aid of counsel.**

Rev. Stat. Ch. 120, §101, at 550 (1851); and Com. Stat. Ch. 106, §4, at 763 (1849-1858).

> **to be paid to such counsel as may be reasonable, for their services, not exceeding fifty dollars, to be paid from the county treasury of the proper county in the same manner that jurors are paid.[11]**

In 1869, the appointee's fee was set at $10 a day for each day of actual trial work.[12] Willson probably was appointed under this statute, and received $10 for negotiating Bulen's plea agreement.

Interestingly, there were others, besides criminal defendants, who needed effective assistance of counsel. In several of Eaton's vignettes, the State Attorney General appeared at trial and helped prosecute the accused. In George Staley's trial, Attorney General F. R. E Cornell appeared as co-counsel with Olmsted County Attorney Charles M. Start, and cross examined the defendant after he testified that his confessions were not made voluntarily.[13]

A law, enacted in 1866, required the attorney general to assist in the prosecution of criminal cases when asked by the governor or the county attorney. It provided:

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[11] 1863 Laws, Ch. 38, at 81 (amending Chapter 106 of the Compiled Statutes, supra note 10.

[12] 1869 Laws, Ch. 72, at 86 ("The amount of compensation of such counsel shall be fixed by the said court in each case and shall not exceed ten dollars per day for each counsel and shall be confined to the time in which such counsel shall have been actually employed in court upon the trial of such indictment."). It was effective March 5, 1869.

Seven years later, the law was amended to limit the compensation of court-appointed lawyers in the metropolitan counties:

> ***Provided*, that the compensation to counsel in any one case shall not exceed the sum of $10, when such case is heard or tried in the counties of Hennepin and Ramsey.**

1876 Laws, Ch. 56, at 74. It was effective March 3, 1876.

[13] Francis Russell Edward Cornell (1821-1881), served as Attorney General from 1866 to 1874, when he was elected Associate Justice of the Supreme Court, where he served until death in 1881.

> **He shall, upon the written request of the governor, prosecute any person charged with an indictable offense, and appear in the district court in all criminal cases, when requested by the county attorney of the county in which the same arise, and in civil actions in which the state is interested, whenever, in his opinion, the public interest requires it.** [14]

This law recognized that some county attorneys needed help prosecuting certain felonies—especially, it seems, sensational murders—and were mismatched when it came to certain civil actions—probably those involving railroads, where the stakes were high.

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Samuel W. Eaton's article appeared first as Chapter 6, pages 667-685, of *History of Winona, Olmsted, and Dodge Counties*, published in 1883 by H. H. Hill Company of Chicago. The book's subtitle indicates its intended scope: *Together with Biographical Matter, Statistics, Etc., Gathered from Matter Furnished by Interviews with Old Settlers, County, Township and Other Records, and Extracts from Files of Papers, Pamphlets, and Such Other Sources as have been Available*. It is complete, though reformatted. Page breaks have been added. Eaton's original spelling and punctuation have not been changed.

This article may be read together with the "The Emergence of a Criminal Defendant's Right to Testify at Trial in Minnesota" (MLHP, 2011), in which *State v. Staley* is discussed on pages 9-12.

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[14] **Stat. Title 5, §36, at 89 (1866).**

CHAPTER VI.

MURDER OF WARREN YOUMANS AND OTHERS.

On October 10, 1865, a cruel and atrocious murder was committed in the town of Quincy, about eighteen miles northeast of the city of Rochester, Patrick Callahan being the murderer and Warren Youmans the victim.

The two men were neighbors, and, as was understood at the time, the crime grew out of some difficulty between them in reference to annoyance from cattle. On the day in question Callahan was mowing in a ravine not far away, when Youmans, who had been driving Callahan's cattle out of his field, came to him and commenced complaining about being annoyed by Callahan's cattle. The two men were now alone, but it is supposed that high words ensued, when Callahan started toward his antagonist with the uplifted scythe. Seeing his danger, Youmans attempted to escape by flight; but Callahan was too quick for him, and hooking the scythe around Youmans' legs, between the knees and hips, cut both legs to the bone, inflicting horrible gashes from ten to twelve inches in length. The poor man fell to the ground on the spot, and from all appearance died almost instantly.

Mr. Youmans not coming home at the time expected, search was made for him, and his dead body was found in a few hours in the ravine where he had met his cruel death.

An inquest was held by S. B. Clark, of Rochester, as coroner, [668] upon the dead body of Youmans, and the verdict of the jury was substantially in accordance with the facts as above narrated.

In the meantime Callahan had fled the country, and soon afterward the governor offered a reward of $500 for his apprehension and delivery to the sheriff of Olmsted county. Nothing, however, was heard of Callahan by the Olmsted county authorities until May, 1872, nearly seven years after the murder was committed. Callahan was described in the governor's offer of u reward as a '' laborer, thirty-five years old, five feet four or five inches high; eyes light blue or gray; sandy beard and complexion; brown hair, slightly mixed with gray; weight one hundred and twenty-five to one hundred and thirty pounds; slightly pock marked; naturally round featured, but cheeks a little sunken; speaks quick, with Irish brogue."

It seems that Callahan made his way to Chicago, and there, under an assumed name, hired out as a laborer. Forming an acquaintance with a fellow-laborer, the two became on quite intimate terms. In the course of their friendly intimacy, Callahan confided the story of his great crime to his new-found friend, and confessing himself a refugee from justice. Subsequently, however, it transpired that the two men fell out and became enemies, whereupon Callahan's confidant gave him away, by informing a Chicago detective by the name of Simonds, of his (Callahan's) criminality. Simonds, not aware that a reward had been offered for Callahan's arrest, came to Winona to see a brother of the murdered man, thinking that the brother would be sufficiently interested in the matter to pay a reasonable consideration for the capture and punishment of the alleged murderer. Mr. Youmans, brother of the murdered man, declining to come to the detective's terms, he applied to the sheriff of Winona county. From the sheriff Simonds learned that the murder was committed in Olmsted county instead of Winona. The sheriff and Simonds then concluded to confer with the sheriff of Olmsted county by telegraph, and the following dispatches passed between them:

Sheriff, Rochester:

Winona, May 18, 1872.

Do you want Callahan, the murderer of Warren Youmans some time ago? Reply at once. See county attorney.

J. F. Martin, Sheriff.

J. F. Martin, Winona:

Rochester, May 18, 1872.

You will keep the said Callahan, murderer of Youmans, and I will be after him Monday, the 20th. J. A. Ellison, Sheriff. [669]

No reply to this being received, Sheriff Ellison sends another dispatch, as follows:

J. F. Martin, Sheriff, Winona:

Rochester, May 20, 1872.

Have you got the man? If so, can you bring him? Answer.

J. A. Ellison.

J. A. Ellison, Sheriff, Rochester:

Winona, May 20, 1872.

He is in Chicago. I will bring him by your paying expenses, or you may send for him. Answer.

It appears that this last dispatch was signed, "T. F. Simonds, detective."

The next dispatch was as follows:

J. F. Martin, Sheriff, Winona:

Rochester, May 20, 1872.

What will be the expense to bring the man here? Answer.

J. A. Ellison, Sheriff.

Sheriff Martin replied as follows, under the same date:

Will deliver him to you at Rochester for $125, if no requisition be required; or you may send for him yourself to Chicago. Answer at once.

J. F. Martin, Sheriff.

The same day sheriff Ellison answered as follows:

Sheriff Martin, Winona:

If you will bring the said Callahan forthwith your money is ready.

J. A. Ellison, Sheriff.

In due time Patrick Callahan was brought to Rochester and delivered into the custody of sheriff Ellison. On the 25th of April, 1866, the grand jury of Olmsted county had indicted Callahan for murder in the first degree, and May 28, 1872, Judge Waterman issued a bench warrant for his arrest. The prisoner was arraigned in the district court at a special term June 26, 1872. County attorney Start conducted the prosecution, and John Van Arman, Esq., of Chicago, and Hon. Thomas Wilson, of Winona, appeared for the defendant. On being required to plead, defendant plead not guilty to the indictment, but plead guilty to murder in the second degree. In view of the fact that one of the most important witnesses on the part of the state had died and another had left the country, the county attorney advised to accept the plea, and the court convicted the defendant accordingly and sentenced him to the state prison for four years. [670]

THE MURDER OF FREDERICK ABLEITNER.

Among all civilized peoples the willful, malicious, wrongful taking of human life is regarded as the highest crime known to the law. The act never fails to excite the horror and execration of the community in which it is committed, and invokes the just and speedy trial, condemnation and punishment of the murderer. But in murder, as well as in other offenses against society and the law, there are degrees of guilt and criminality. In some cases there are extenuating circumstances, as great provocation, sudden impulse of anger, or other conditions which tend to modify, to a greater or lesser extent, the real guilt of the criminal, and are—and justly, too—plead and allowed in mitigation of punishment. The case, however, which we are about to relate may well be classed among the most brutal, cold-blooded and fiendish in the annals of crime. Three strong, healthy and vigorous young men get together and coolly, deliberately, and with a *sang-froid* strikingly shocking, plan, plot and proceed to murder a harmless and unsuspecting old man in his humble prairie home. The old man had never done his murderers any wrong; they had no motive to call him from his bed in the darkness of the night to assault and murder him, save that of robbing him of property justly and solely his own.

At the time our narrative commences, there were residing at or about the little city of St. Charles, in Winona county, three men, named John Whitman, Charles Edwards and George W. Staley. Whitman was a married man, about thirty-five years of age, and with his family, resided at St. Charles. Edwards and Staley were young men and unmarried. They were transient characters and had come into that neighborhood some time in the latter part of the summer of 1867, and engaged to work as harvest hands.

About two miles west of St. Charles, in the town of Dover, Olmsted county, was the farm residence of Mr. and Mrs. Frederick Ableitner, an old German couple. The country was then new and the old couple's home, though comfortable, was humble and unpretending, but, unfortunately for them, it was thought that they had a considerable sum of money in the house, recently sent to them from their native country. John Whitman, it seems, had been at Mr. Ableitner's house, and while there he claims to have seen the old gentleman exhibit quite a sum of money as he was paying off some harvest hands. He informed Edwards that the old man had $2,000 in gold put away in a chest. The two men were not very long in making up their minds to rob [671] the old German, and, taking Staley into the conspiracy, the three agreed upon the night of October 29, 1867, to put their wicked plan into execution. On the night of the murder the three men drank heavily at a saloon in St. Charles, and then, with brain crazed with whisky, and with robbery and murder in their hearts, they started for the scene of their horrible crime. It would appear that they had not fully determined upon killing their unsuspecting victim when they left St. Charles, but in talking the matter over, Edwards suggested that "dead men tell no tales,'' an adage which was readily agreed to by the other two men. Accordingly on the way they cut each man a club, Staley having with him also a loaded revolver. It was agreed that Edwards should call the old man to the door and knock him down, while Staley should watch him and Whitman assist Edwards in robbing the house. Arriving at the house Edwards knocked at the door, and Ableitner inquired: "Who was there and what was wanted." Edwards replied that a couple of men had lost their way and wanted to inquire the road to Chatfield. Upon this the old man came to the door, when Edwards knocked him down with his club. The victim got on to his hands and knees trying to rise, when Staley shot him with his pistol. Two or three more shots were fired at the old man. Edwards afterward lighted a paper,

by which they looked in and saw the wounded man walking about the house, holding his hand to his side and groaning piteously. The above is, in substance, the narration of the circumstances connected with the cold-blooded and brutal transaction as minutely detailed by Staley in his confession, and is probably true in the main.

Mr. Ableitner survived his terrible injuries a few hours, but before he died he stated that there was only about fifteen dollars in money in the house at the time he was attacked.

Of course the entire community was deeply stirred over the brutal deed, and measures were speedily taken to ferret out the guilty ones and bring them to justice. Edwards, soon after the murder, disappeared and was never seen afterward by any one having knowledge of the murder. Whitman and Staley, however, remained in the neighborhood, and suspicion resting upon Staley as having been concerned in the murder, he was arrested upon a warrant issued by Justice Stevenson, of Dover. In the meantime Whitman pretended to be very active and officious in searching out the murderers, and it is a singular fact that while Staley was in [672] custody daring his examination, he was placed in charge of Whitman, the people little thinking that the latter was one of the murderous confederates. Justice Stevenson, deeming the evidence insufficient to warrant him in holding Staley for trial, discharged him.

Whitman and Staley remained in and about St. Charles for a number of days, when the citizens held an indignation meeting and resolved to put the case into the hands of Chicago detectives. Soon after this, Whitman, with his family, and also Staley, left the country. Mr. D. J. Page, a Chicago detective, appeared at St. Charles about this time and set himself to work to hunt up and arrest the murderers of Ableitner. Gathering

what information he could. Page started east, as he believed, on the trail of the guilty and absconding Whitman. He traced the fugitive through Wisconsin, Michigan, Ohio and Pennsylvania to Runnelsville, New York, where he found Whitman's family, but no Whitman. He had been there but his then whereabouts was not known. Page was at a loss to know just which way to take, but finally concluded to start in a westerly direction. Upon arriving at Rochester, New York, he was fortunate enough to find a clue that finally led to the capture of his man. He there learned that Whitman was somewhere in the Michigan pineries, working as a teamster. With this slight clue, the wily and persistent Page pushed on to Michigan, and at a little town called Cedar Springs, in the pine forests of that state, he found and arrested Whitman, December 18. 1867. The detective brought his prisoner to Rochester and lodged him in jail. We will here finish our narrative concerning John Whitman and then take up again the case of Staley.

At the June term of the district court, 1868, Charles Edwards, John Whitman and George W. Staley were indicted by the grand jury for the willful murder of Frederick Ableitner. On October 6, following, the court being then in session, John Whitman plead guilty of manslaughter in the third degree, and on the 16th he was sentenced by Judge Barber to confinement in the state prison for the term of eight years. In the mean-time Whitman had manifested a good degree of remorse and penitence over his awful crime. He had confessed soon after his arrest that he was one of the men who was present at the murder, but charged the killing upon Edwards and Staley. Prison life, with a guilty conscience, however, did not seem to agree with him. His health began utterly [673] to fail him, and on March 24, 1871, Gov. Austin granted him a full pardon.

About two weeks after landing Whitman at Rochester, detective Page, with another Chicago detective, named James

Webb, started to look up Staley. Mr. Page had obtained a slight clue to Staley's whereabouts by a letter which he saw at St. Charles, written by a Mr. Poole, of Portage City, Wisconsin. With what information they could gather, meager though it was, the officers pursued their way to Sparta, Wisconsin, from whence they proceeded to Black River Falls, thirty or forty miles further on. From that place the officers, with two or three other men in company, proceeded to Neilsville, some twenty to thirty-five miles distant, from whence they went to a lumbering camp, allied "Allen's Camp." an obscure place in the Wisconsin pineries, in the northeast corner of Clark county. The party arranged to arrive at the camp in the night, as they thought that the arrest of Staley could be effected more easily and safely when all the lumbermen would be in bed. Accordingly, they reached the camp at two or three o'clock on the morning of December 26. The sleeping bunks or berths in the camp were arranged similar to those on a steamboat, and Page, with Staley's picture about him, passed through between the berths, and told the men to look up and show their faces. Most of them uncovered their heads and the question was asked, "What is wanted?" One man, however, held the blankets down over his head, but the officer pulled the covering off and immediately recognized Staley. Mr. Page said to him: "George, get up, I want you." The guilty murderer and trembling fugitive immediately got up, dressed himself, and under the escort of the officers arrived at Rochester about December 30, when he joined his fellow murderer, Whitman, in the common jail of Olmsted county.

June 15, 1868, Staley was arraigned in the district court— Hon. L. Barber presiding—on a charge of murder in the first degree. County-attorney Start and F. R. E. Cornell, attorney-general, conducted the prosecution. Hon. R. A. Jones, of Rochester, and Hon. Benjamin Franklin, of Winona, appeared for the defense. Two full days were spent in getting a jury to try the case. Over

one hundred men had been summoned before the requisite number (twelve) were selected. The jurors' names were as follows: W. P. Clough, John Morrison, A. D. Robinson, Aaron Richardson, R. R. Hotchkiss, J. Briggs, Barney Hacket, A. T. Hyde, D. A. Sullivan, James Ireland, [674] Robert McClosky and James Moody. Aaron Richardson was chosen foreman.

About a dozen witnesses were sworn on the part of the state, and about half that number for the defense. The trial, which lasted nine days, was very interesting and impressive, and the proceedings were witnessed with deep and unabated interest by a large number of spectators each day. The state, as well as the defendant, was represented by skilled, able and energetic attorneys; the struggle of legal acumen and adroitness in the examination of witnesses was frequent, sharp and incisive, while the arguments before the jury were marked for their ability, candor and soundness.

The case was given to the jury on the 26th, between five and six o'clock in the evening. The jury retired to their room to consult together touching their verdict, and after being out about six hours they returned to the courtroom, and, through their foreman, announced to the court that they had agreed upon a verdict, which was, "Guilty, as charged in the indictment.''

With all the circumstances and associations the scene was deeply sad and impressive, and was graphically described in the "'Rochester Post," in its account of the trial, as follows:

''During the trial the appearance of Staley underwent no great change. He is twenty-two years old, of medium height, well built, and in expression candid, sincere, and rather prepossessing. From long confinement in the cell his hands and face have faded to a delicate white. His dress is scrupulously

neat, his hair neatly combed, and hangs in graceful curls, giving him more the appearance of a drygoods clerk than of a prisoner on trial for his life. As the dread ordeal drew to a close, as the terrible recollection of that dreadful night of last October was renewed, as the fearful and ominous words, at the lumber camp, at the dead hour of night, "Get up, George, I want you," were reiterated, and as the web of condemning evidence continued to be woven around him, his earnestness of expression indicated a deepening interest in the results of the proceedings. But at no time did his self-control or steadiness of nerve forsake him. Confronted, face to face, at the lonely hour of midnight, with the twelve men, who, under God, held his fate in their hands; all nature hushed in repose, and the pale lamp casting a weird and ghostly glare over all objects in the now almost deserted courtroom, young Staley listened to the awful word "guilty" coolly, composedly, and without any apparent excite-[675]-ment or emotion. All present, including the court, attorneys and officers, were deeply moved with the sadly interesting and solemn scenes of that midnight hour."

The condemned man was remanded to the jail, and the next day his counsel moved the court for a new trial and suspension of sentence. The motion was heard by the court on the first Monday of September, 1868, and denied. County-attorney Start then moved for judgment of sentence. The prisoner arose to his feet, and the court asked him if he had anything to say why the sentence of the law should not be pronounced against him. Staley replied that he had "nothing to say." The court then passed sentence as follows: "It is adjudged by the court, now here, that you, George W. Staley, as a punishment for the offense of which you have been convicted, be conveyed hence to the common jail, in the county of Olmsted and State of Minnesota; that you be kept in said jail in solitary confinement until the fifth day of March, 1869, and that on said fifth day of March you be hung by the neck until you are dead."

On the 12th day of September an appeal was taken to the supreme court. The appeal was argued before that court at its session in January following. The judgment of the court below was affirmed.* A few days before the time fixed for Staley's execution, a petition to Gov. Marshal, asking for a commutation of the prisoner's sentence to confinement in the state prison for life, was drawn up and circulated for signatures by R. A. Jones, Esq. The petition was very generally signed by the jurors and leading citizens of Rochester and other near localities, and four days before the fatal "fifth day of March " the petition was presented to the governor by Mr. Jones. The governor granted the prayer of the petitioners, and Staley, instead of going to the gallows, was conveyed to the state prison.

Staley's uniform good behavior and cheerful compliance with prison rules and regulations, together with his youthfulness and agreeable manners, won for him sympathy, kindly feeling and respect, and after serving a prison life of six and one-half years, he was granted a full pardon by Gov. Davis, and has since, it is believed, led an innocent and honorable life.

In January, 1868, the legislature passed a bill appropriating $500 to be ex-pended in the capture of Edwards. Detective Page stated that he had heard from Edwards; that he was in Texas, and he believed he could find him. The money, or a portion of it, was [676] given to Page and he made the trip to Texas in pursuit of the fugitive, but without avail. Edwards was said to have been a Texas ranger; that he fought in the rebel army during the rebellion, and that the old German, Ableitner, was

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*** The court's opinion in *State v. Staly*, 14 Minn. 105 (1869), is posted below, in the Appendix , pages 33-53.**

not the first man which he had murdered. That he was, and still is, if not dead or reformed, a desperate character, a full-fledged villain and cut-throat, there seems to have been abundant evidence.

THE MURDER OF JOHN STHBOKUER.

In the summer of 1878 a couple of Germans, named Fred Hitman and John Schroeder, came into Olmsted county, from Davenport, Iowa, and hired out to work in harvest on Greenwood prairie, in the town of Farmington. They were strong, robust men, and at the time of their coming to Minnesota they could have had no thought of the tragic and terrible ending of their summer trip to the broad and golden wheatfields on Greenwood prairie. What that end was we will now proceed briefly to narrate.

On the 4th of September, 1878, Mr. Amos Parks, an old resident of the town of Farmington, came to Rochester and notified coroner Mosse that the dead body of a man had been found, and was then lying in a grove about fifty rods north of Mr. Parks' residence. Accordingly, coroner Mosse, together with county-attorney Eckholdt, sheriff White and constable Sherman went out to Farmington, a distance of about fourteen miles, the same evening, when the coroner proceeded to hold an inquest over the dead body in the place where it was found.

The facts brought out at the inquest, and which were substantially corroborated at the subsequent examination of the alleged murderer, were mainly as follows:

The body was fully identified as that of John Schroeder, who had recently come into the town of Farmington, and whose home was supposed to be at Davenport, Iowa. He had accumulated twenty-one dollars in money, which, a few days

previous, he had handed to a Mr. Schultz for safe keeping, and at the same time hired out to Schultz to work in threshing. On the last Saturday previous to the inquest it was shown that Schultz paid Schroeder seven dollars which he had earned in threshing, and at the same time handed to Schroeder the twenty-one dollars deposited with him. The same morning Fred Hitman went to the residence of Mr. Schultz, from whence Hitman and Schroeder went together to Pots-[677]-dam, a small village near by, and where they remained over Sunday. The two men were seen in company by several of the neighbors that day and the deceased told one of the witnesses that he and Hitman were going to sleep out in the brush that night. The same evening deceased went to the residence of Mr. Parks and asked for work. Mr. Parks told him that he did not wish to hire any help. Schroeder called for something to eat, offering to pay for it. He said he had a partner up the road. Mr. Parks looked up the road and saw a man standing there in the road. Mr. Parks told Schroeder that he could have some supper, and asked him if his partner did not want something to eat. Schroeder said he thought he did, but he did not believe he would come to the house to get it. Schroeder then left, but did not come back for his supper. Several persons passing that way in the evening noticed the camp-fire in the grove. Men's voices were heard in the brush about the fire, and one man, Mr. Schultz, recognized the voices as those of Hitman and Schroeder. The dead body was first discovered by a young man named Herbert Barnhart, while hunting rabbits in the grove. The skull of the dead man, on the right side, was fractured, and the verdict of the jury was to the effect that deceased came to his death by a blow upon the head "from a blunt instrument in the hands of a person whose name is, to the jurors, unknown."

Hitman was seen in Rochester a day or two after the murder, and then disappeared. By this time suspicion began to be generally fixed on Hitman as the murderer of Schroeder, and

sheriff White and his deputies immediately took active measures for his capture, for which purpose the telegraphic wires were industriously employed. In the course of four or five days sheriff White received a telegram from the chief of police at Davenport, Iowa, stating that Hitman had been arrested at that place and asking if he should hold him. Upon receiving this information the sheriff immediately left for Davenport. Arriving at Davenport, sheriff White obtained an interview with the chief of police, and the two officers went together to the jail, where Hitman was confined. The prisoner being brought out, the sheriff asked him a few questions about Schroeder and other matters connected with the prisoner's movements about Potsdam and Farmington. From Hitman's replies, and also from a well-executed photograph of him which sheriff White had with him, he was sure that he had found the man which he was in pursuit of, and brought him to Rochester and locked him up in jail. [678]

On Monday, the 23d, Hitman had an examination before Justice L. L. Eaton, of Rochester. County-attorney Eckholdt, assisted by C. M. Start, Esq., conducted the prosecution; Messrs. Jones and Gove appearing for the defense. The examination resulted in the accused being held to await the action of the grand jury at the next general term of the district court, commencing on the first Monday of December following.

The court convened pursuant to statute, Hon. William Mitchell presiding. The grand jury found an indictment against Fred Hitman for murder in the first degree. Upon being arraigned the accused plead guilty. He then arose to his feet and the judge asked him if he had anything to say why the sentence of the court should not be passed upon him. Hitman replied that he had not. Judge Mitchell then said he had "no disposition to intensify the effect of the sentence which he was about to pass upon him. You have plead guilty of the commission of the

highest crime known to the law and against society, by taking the life of a fellow-being. The safety of society, as well as persons and property, depends upon the sacredness of human life. The sentence of the court is that you be taken to the state prison at Stillwater and there confined at hard labor for the remainder of your natural life, and that on the first day of each month you be kept in solitary confinement."

It might be well to state here that capital punishment was practically abolished in Minnesota by an act of the legislature in the winter of 1869.

At the time of the murder Hitman was about thirty years of age. He is of medium height, of well-rounded, compact form; weight about 175 pounds. His facial conformation would not denote either a fool or a villain, and yet he has a wicked-looking eye in his head. At the time of his arrest, and during his confinement, he maintained a wonderful firmness and self-control, and even in the last fearful ordeal in the courtroom his serf-possession did not entirely forsake him. While receiving the dreadful sentence which assigned him to a prisoner's cell until released by death, the blood rushed to his face and the nervous throbbings evinced a considerable degree of mental pain and disturbance.

THE MURDER OF TERRANCE DESMOND.

On the 24th of June, 1880, coroner Nichols received a telegram from A. A. Cady, sent from Chatfield, stating that the dead body of Terrance Desmond, a farmer and former resident of the town of [681] Elmira, had been found in a grove on his farm, in a condition showing that the man had been murdered. Deputy-coroner Benjamin left immediately for the place designated, and took prompt measures toward holding an inquest over the remains of the deceased. A coroner's jury was duly summoned

and several witnesses were examined, when the following-named facts were elicited: Mr. Desmond was seen alive for the last time on the afternoon of Wednesday, June 23, about four o'clock. There were various conjectures respecting his sudden and mysterious disappearance, and a search for him was instituted. His scythe, which he had been using to cut weeds, was found hanging in a tree. Search was made in the immediate vicinity, but not finding the missing man, some of the party went to a field of sugar-cane where the deceased had also been at work on the afternoon of his disappearance. The body was found about twenty rods west of the canefield, and close by the remains there was a spot in the grass and weeds where it was evident that some person had been recently sitting down. Deceased was lying on the face, with his right hand under him and his hat directly in front of him at a spot just where he had evidently come out of the thick brush into the path. The blood from his wounds had run down the hill and his clothing was saturated with blood from head to feet. His throat had been cut from ear to ear. The gash was fully seven inches in length and severed the jugular vein and the windpipe. There was another cut just below the one first mentioned, and there were also two stabs over the left ear and one behind the ear. The skull was mashed in directly above the ear. About two rods from the body a heavy seasoned oak club, some five or six feet in length, upon which were bloody spots and hair, was found.

Mrs. Ellen Desmond, wife of the murdered man, testified that her late husband was last seen at four o'clock Wednesday afternoon, when he came down to the house from the field to look after some colts. She stated that her husband was in a hurry, saying that he must return to the field at once to finish some work before it was time to attend to the chores. Mrs. Desmond also said that there had been hard feelings between her husband and Edwin Reynolds, a brother-in-law and

neighbor of the deceased, but she did not think the enmity so great as to provoke murder.

The jury returned a verdict that Mr. Desmond came to his death by a blow from a club upon the head and by his throat being cut by some person to them unknown. [682]

Charles Van Allen, a boy eighteen years of age, and who was at work for Mr. Desmond at the time of the murder, was arrested on suspicion of having committed the bloody deed, brought to Rochester by sheriff White and lodged in jail.

On the 27th of July Van Allen had an examination, conducted by county-attorney Eckholdt, before Justice Laird, at Chatfield, on the charge of murder. The hearing commenced at one o'clock in the afternoon and lasted until three o'clock the following morning. Over thirty witnesses were examined, but the evidence not being deemed sufficient to warrant the court in holding the accused, he was discharged. Edwin Reynolds, before spoken of, and who was present at the examination of Van Allen, was immediately arrested by sheriff White on a warrant issued by Justice Laird and made returnable before Justice S. W. Eaton at Rochester. Reynolds was brought before Justice Eaton on Thursday, the 28th [sic], when an adjournment was had till nine o'clock the next morning. O. Kingsley, Esq., of Chatfield, and R. A. Jones, Esq., of Rochester, appeared for the defense; the state was represented by county-attorney Eckholdt. The examination lasted two days, twenty-five witnesses having been examined. The testimony in the case on the part of the state was, that Reynolds and deceased had for some time past been at great enmity with one another; that a few weeks previously the two had had a fight; that Reynolds had bitten Desmond's face pretty badly in the fight, though the former got soundly whipped at last; that Reynolds subsequently prosecuted deceased for an assault, lost his case and

had to pay the costs of suit, amounting to about $20. Several of the witnesses testified that Reynolds was of an ugly, quarrelsome nature, and that he had frequently been heard to say that he would "make away with Desmond before long." The examination resulted in the accused being held to await the action of the grand jury at the following December term of the district court.

The court convened on December 6, Hon. William Mitchell presiding. The grand jury found an indictment against Reynolds for the willful murder of Terrance Desmond. On being arraigned and required to plead to the indictment, Reynolds plead not guilty. On Wednesday, the second week of the session, the case of the State v. Reynolds was called, county-attorney Eckholdt being assisted by attorney-general Start, on the part of the state.

After some delay a jury was impaneled and the trial proceeded. [683] The case was given to the jury Thursday afternoon, and after being out about twenty hours, they returned into court and informed the judge that they were unable to agree upon a verdict. It was understood that the final vote stood eleven for acquittal and one for conviction.

Judge Mitchell required Reynolds to give bail in the sum of $2,000 for his appearance at the next term of court, but in default of bail he was kept in jail until March 18, 1881, when he was released on his own recognizance, and on August 6 following, Judge Start, successor of Judge Mitchell on the bench, ordered the action dismissed.

MURDER OF JOHN NEVINS.

On September 18, 1880, John Nevins, aged about fifty years, and a well-to-do farmer, residing in the town of Viola, was fatally

shot with a pistol in the hands of Frank Bulen, a young man, stepson of Mr. Robert Moody, of Haverhill. The circumstances of the shooting, together with the final disposal of Bulen, were substantially as follows:

About six o'clock in the afternoon of the day in question, Mr. John English, who resides in the town of Haverhill, came to Rochester and informed marshall Kalb and sheriff White that John Nevins had been murdered by a man in his (Nevins') employ, named Frank Bulen. Coroner Sedgwick, county-attorney Eckholdt, sheriff White and constable Cole immediately left for the scene of the murder, about ten miles northeast from the city of Rochester. As soon as the officers arrived a coroner's jury, consisting of Messrs. H. K. Blethen, Z. Ricker, Roger Mulvahill, Martin Brennan, Thomas Scanlan and John J. Lawlor were sworn and the examination commenced, conducted by county-attorney Eckholdt.

John Burk, the only eye-witness present at the shooting, was the first witness examined. From his statements, under oath, it appears that Mr. Nevins returned from Rochester at about three o'clock in the afternoon of the day of the murder. After putting his horses in the stable, Nevins commenced cursing his wife, who was near the stable, threatening to kick her. Mr. Burk, thinking Nevins was about to violently assault his wife, stepped between them and told Nevins to stop. Nevins then struck Burk in the face. The two men soon caught each other by the throat, and, after struggling some time, Burk called to Bulen, who was in the yard near the house, to come over and help him. Bulen started for the spot where [684] the two men were fighting, and when he had got within about one and one-half rods of them he pulled out a revolver and told Nevins he would shoot if he didn't stop. Bulen repeated the warning two or three times, but Nevins paid no heed to it, and Bulen discharged his revolver. Nevins cried out, "I am shot!" and spat

out a mouthful of blood. Nevins still kept hold of his antagonist until Frank fired the second shot, when Nevins let go his hold of Burk's throat, staggered back a few steps and fell to the ground, and in ten minutes he was dead. The witness stated, however, that the first shot must have been the fatal one, as the second shot did not hit Nevins at all.

As soon as the murdered man began to stagger Bulen started off on a run, and was soon out of sight. Several other witnesses were examined, and their testimony elicited some additional minor facts, entirely consistent with and corroborative of Burk's statements, and the verdict of the jury was in accordance with the facts as sworn to by the witnesses.

The guilty and terrified Frank ran about a mile, and hid himself in a straw-stack. Sheriff White made a vigilant search for him the same night, but failed to find him. The next morning, about six o'clock, Mr. John English, on whose farm the straw-stack was, saw Frank crawling out of the straw-pile. As he came up Mr. English said, "Is that you, Frank?"

"Yes, it is me," said Bulen, "and I have done a bad deed."

"Indeed you have, and you are my prisoner, Frank," said Mr. English.

Frank quietly surrendered himself, gave up his revolver, and went into Mr. English's house. The same morning Mr. English brought Bulen to Rochester, and turned him over to deputy-sheriff Bamber at the county jail.

From a lengthy and detailed account of the homicide, given by the "Rochester Post," of September 24, 1880, we extract the following:

"Bulen is a boy in stature, of what might be termed a stubby build. He is chunky in his make-up, about twenty-two years old, dark complexion, smooth face and short hair. He appears like a good-natured young man, and one whom no one would expect to find behind the bars of prison-doors, charged with the terrible crime of killing his fellow man.

"In answer to a question as to whether he wished to make a state-[685]-ment he replied in the affirmative: Bulen states that he has been work for Nevins for over two years. Nevins, he says, has been drunk frequently, and has abused him and the family very often. Mrs. Nevins' children, by a former husband, were also the objects of his abuse. It was only a little over a week ago that Nevins drove his stepson, Jerry Creed, away from home by his persecution.

"On Saturday afternoon Bulen came in from the field and went to the house to change his wet clothes for some dry ones. While he was there one of the Creed girls came to the house and told him that Nevins was trying to kill Burk. He ran down until within about thirty feet of them, saw that Burk's face was all bloody, and told Nevins twice to let go or he would shoot. He did not let up, but continued to strike Burk, and I fired to scare him, not intending to hit him. As the first shot did not scare him off, I shot again to scare; then I saw him stagger. I turned and went away. I walked around until dark, when I went to Mr. English's stable, and went to sleep, and was arrested as described before. Bulen said he had threatened to shoot Nevins for his abuse and vile epithets, but he only intended to shoot to scare him."

On Monday morning, after the murder, Frank was brought before Justice S. W. Eaton for examination on the charge of murder, county-attorney Eckholdt appearing for the state. The accused had no attorney, and, waiving examination, he was

committed to jail to await the action of the grand jury at the December term of court.

At the session of the court named the grand jury returned an indictment against Frank Bulen, for the murder of John Nevins. On being arraigned the accused took the statutory time to plead, C. C. Willson, Esq., appearing as his counsel. Bulen finally plead guilty to murder in the second degree, and Judge Mitchell sentenced him to state's prison for four years. The circumstances attending, or rather provoking and inciting, the murder, considered in connection with the youthfulness of the prisoner, and his evident lack of a proper conception of the nature and magnitude of his crime, were all taken into account by the court in fixing the penalty.

*** * ***

APPENDIX

The State of Minnesota

vs.

George W. Staley.

14 Minn. 105 (1869)

It is a matter of discretion in the Court to permit leading questions to be put by a party to his own witness, and although this a legal discretion that may be reviewed, this Court will not interfere, except in a clear case of abuse or prejudice.

The admission of immaterial evidence, where it is manifest that it was not prejudicial to the defendant, is not ground for a new trial.

A confession, made by a person charged with crime, is not admissible in evidence, if it appears to have been induced by the promise of any advantage, or threat of any harm, of a temporal or worldly nature, made by a person in authority. The officer making the arrest is, within the rule, a person in authority.

If proof of a confession is objected to on the allegation that it was improperly obtained, the judge is to determine, as a preliminary question, whether the allegation is true, and his decision thereon, though subject to review, will not be reversed unless it is manifestly against the weight of evidence. The admission of the confession in such case is, to some extent, in the discretion of the Court. [106]

The fact that a confession was made in answer to a question assuming the guilt of the person confessing, or was obtained by artifice, falsehood, or deception, or procured by a caution to the accused to tell the truth, if he said anything, does not render the confession inadmissible in evidence.

Unless there is a positive promise of favor, made or sanctioned by a person in authority, or the inducement held out is calculated to make the confession untrue, it will be admissible.

Where it is sought to discredit a witness, by showing he has made statements inconsistent with his testimony, it is only allowable to contradict him as to matters or statements to which his attention has been particularly called; and when an impeaching witness has done this, and the person calling him

seeks to draw out further conversation had at the time, such conversation is properly excluded.

When an exception is taken to the ruling of the Court sustaining an objection to a question, unless what is sought to be proved is made to appear, and it is something material, the rejection of which, as evidence, would be prejudicial to the party excepting, there is no ground for reversal.

A witness can be discredited by contradiction, only in relation to matters material to the issue on trial.

On the trial of a person charged with murder, a question arose, during the progress of the argument, after the parties had rested, as to whether the pistol with which it was claimed the homicide was committed, had been introduced in evidence, testimony tending to identify the pistol having been received; and the court decided that although it had been examined by the jury, and had been treated on the trial as actually in evidence, yet it had not been formally introduced. On application of the prosecution, it was then received in evidence, and the defendant offered ample time and opportunity to procure and introduce any further testimony which he might desire by reason of its reception. *Held*, that this was a matter within the discretion of the Court, and that such discretion was properly exercised.

The act of March 6, 1868, which allows a person charged with crime to testify in his own behalf, and provides that his neglect or refusal to testify, shall not create any presumption against him, and forbids the prosecuting attorney from alluding to or commenting upon such neglect, does not forbid the resort to any argument or evidence to impeach such witness. The party is not to be prejudiced by his silence, but if [107] he become a *witness*, his veracity may be attacked by any legitimate

argument, whether it refers to what he has said, or refused or neglected to say.

A mere general exception to a general charge of the Court to the jury amounts to nothing. An exception should only be taken to some particular point of law, as given by the Court. An exception to the whole charge, in these words, "to all of which the defendant excepts," is not sufficient.

It is proper for a jury to consider the circumstances under which a confession is made, with a view of determining what weight should be given to it; but it is not their province to reject a confession; nor is it the law, that if a party making a confession is not entirely free from fear, or wholly uninfluenced by present fear, or hope of favor, that the Court should reject his confession; if voluntary, it is receivable, whatever may be the motives of the party by whom it is made.

It is not error for the Court to refuse to give in charge to the jury a mere abstract proposition of law, inapplicable to the facts of the case, though it may be correct.

The proposition, that the charge against a person accused of crime, need only be established beyond reasonable doubt, discussed and applied.

The sufficiency of evidence to justify a verdict, considered.

The defendant was indicted with John Whitman and Charles Edwards, for the murder of Frederick Ableitner. The defendant was tried separately in the District Court for Olmsted county, found guilty, and sentenced. After verdict, and before judgment, defendant moved for a new trial, which was denied; he appeals to this Court.

The case is sufficiently stated in the opinion of the Court.

R. A. Jones for Appellant.

F. R. E. Cornell, Attorney-General, for Respondent.

***By the Court*.—Wilson, Ch. J.—The defendant having been convicted in the District Court of [108] Olmsted County of the murder of Frederick Ableitner, made a motion for a new trial, which was denied, and from the order of denial he appealed to this Court. We shall examine the several grounds on which he claims to be entitled to a new trial, in the order in which they were stated by his counsel.**

The wife of the deceased having been called as a witness for the State testified, that three men came to the house after dark, and having called her husband out, knocked him down and shot at him; that he fell inside the door and tried to shut it, but they would not let him. The prosecution then asked the witness the question, "Did any of the shot hit the door?" To which she answered: "The shot went through the door." The prosecution then asked the following question: "Did you see any signs of blood?" to which an affirmative answer was given. The defendant objected to each of these questions as leading, and excepted to the ruling of the Court admitting the answers. It is a matter of discretion with the Court to permit leading questions to be put by a party to his own witness. 1 *Greenleaf Ev.*, *Sec.* 435; *Moody vs. Howell*, 17 *Pick.*, 499; *Budlony vs. Van Nostrand*, 24 *Barb.*, 25; 2 *Phillips Ev.*, (*4th Ed.*) 891-2, *and note*; *York vs. Pease*, 2 *Gray*, 282; *State vs. Lull*, 37 *Maine*, 240; *Barton vs. Kane*, 17 *Wis.*, 37. And though this is perhaps a legal discretion which may be reviewed, this Court will not interfere except in a clear case of abuse or prejudice. *Passmore vs. Brighton*, 34 *Maine*, 240; *Stem vs. Aylesworth*, 19 *Conn.*, 244. Abuse of discretion, or prejudice to the defendant, cannot be pretended

in this case. The witness was examined through an interpreter, and, as the testimony shows, was not very intelligent, or quick of apprehension. For this reason it was not improper for the Court to permit the questions to be framed so as to call her attention directly to the subject of inquiry. [109]

The second objection urged is based on the ruling of the Court in receiving the testimony of Thomas Stephenson, a witness called by the State. He testified: "Last fall I resided in the town of Dover, in this County, and was a Justice of the Peace. I knew the defendant. He was examined before me on charge of murder of Ableitner; the examination was at Ableitner's house." * * The State asked the witness this question: "Did Ableitner make any request of you in regard to making his will, or in regard to the examination of Staley?" to which the defendant objected "as immaterial, and that there was no proof that Ableitner was then at the point of death, and so believed." The Court overruled the objection and the defendant excepted. The witness answered, "yes."

The State asked the witness this question: "State what he said upon the subject of dying?" To which the defendant made the same objection as before, and the Court overruled the objection and the defendant excepted. The witness answered: "I don't know as he said anything about his dying."

The State asked the witness this question: "What was his condition at the time?" The defendant objected that the witness was incompetent and the question immaterial. The Court overruled the objection and the defendant excepted. The witness answered: "I was called therein the evening of October 30th, by John Frazier. I got there about two o'clock at night. I found Ableitner on the bed. I examined the wound. He was groaning terribly and apparently suffering great pain. His abdomen was very much swollen. His attendants were

administering injections, once in fifteen minutes, to produce evacuation of the bowels. There was no doctor there.
The medicine was given by prescription of Dr. Wright. The wound was in the region [110] of the navel, on the left side. He wanted me to make his will, and told me why."

The State asked the witness this question: "What did he say about it?" to which the defendant objected, that no foundation was laid, and it was irrelevant. The Court overruled the objection, and the defendant excepted, and the witness answered: "He said he had been shot, and he wanted to make a disposition of his property in case he should die from his wound. That was all he said on the subject. I thought best to take his affidavit, so that it could be used in case he died. Staley's examination was the same day in the afternoon. Ableitner was present in bed at the time. John Coole acted as Staley's attorney, and cross-examined Ableitner."

Though part of this evidence at least seems to be immaterial, manifestly none of it was prejudicial to the defendant. From the answers to the first two questions, no inference could be drawn as to his guilt or innocence, and the answers to the third and fourth, only tended to establish a fact otherwise proven by indubitable and uncontradicted evidence. If incompetent—which we admit only for the purpose of this argument—it was merely immaterial, and not ground for a new trial.

The defendant made a confession, oral and written, to the admission of which in evidence he objected on the ground that it was not voluntary. The rule seems well settled, that if any advantage is held out, or harm threatened, of a temporal or worldly nature, by a person in authority, the confession induced thereby must be excluded. *Reg. vs. Baldey*, 12 *E. L.* & *Eq.* 590; *State vs. Grant*, 22 *Maine*, 171; *Com. vs. Moony*, 1 *Gray*, 461-3. Page, the officer who made the arrest, and by whom the

inducements are alleged to have been held out, is within the rule, a person in authority. [111] If proof of the confession is objected to on the allegation that it was improperly obtained, the Judge is to determine as a preliminary question whether the allegation is true in point of fact, and his decision of the question is, we think, subject to be reviewed by this Court. But the rule is well settled, that this Court will in no case reverse the decision of a lower court on a question of fact, unless it is manifestly against the weight of evidence. (The same rule obtains in respect to the finding of facts by a court, that does to the verdict of a jury; it must be clearly erroneous before it is set aside.) See 2 *Ohio State Rep.*, 583; *Humphrey vs. Havens*, 12 *Minn.*, 307 *and cases there cited.*

We are not called upon to determine whether the burden is on the State to show affirmatively that the confession was voluntary, or to negative any inducement to make it, for the Attorney General seems to have conceded that; and the evidence on the affirmative and negative of this preliminary question was all offered before its determination by the Court. The Court having received the confession, must have determined, as a matter of fact, that it was voluntary, and the question presented to us is, did it clearly err in this determination? Page was called as a witness and testified: "I told him if he was going to say any thing he must say the truth. * * I think we all told him everything depended on Edwards being caught, as we believed him the most guilty;" and denied that beyond what is expressed or implied by these words, there was any inducement offered. Several witnesses were called to contradict him, who testified that he had admitted that he had held out other inducements, and the defendant, called and examined on his own behalf as a witness on this preliminary question, testified: "I saw Page during the day (of the arrest). He spoke to me about confessing during the day; first time [112] was between one and two o'clock, right after dinner. He

at this time asked me where Edwards was. I told him I did not know. Webb was present. Page said to me that Whitman had made a confession, and stated some things that he said Whitman had stated to him. He then told me he had seen my father and mother and sister, and it was their request that I should tell him all about it. He then said Charley has got you in many a scrape, meaning Edwards. I told him he had not. He then went on to state more conversation ho said he had with Whitman; said Whitman had laid the blame entirely on me; and now sir, said he to me, 'the one of you that tells the straightest story shall have the privilege of turning State's evidence.' I was twenty-two years old last March." The written confession of this witness was exhibited to him on his cross-examination, and his signature thereto admitted, but he did not deny its truthfulness. Where his statements and those made by Page are at varience, it was for the Court below to say which of them was entitled to credence, and its determination of the question on a conflict of evidence, unless manifestly against the weight of evidence, is final. Nor is it very clear on which side was the preponderance of evidence. If the latter witness was contradicted by others, the former was discredited by the statements of his own confession. But in any view that may be taken of it, there was some evidence reasonably tending to sustain the finding and decision of the Court, which is sufficient. The admission of the confession is in such case to some extent in the discretion of the Judge. *Green. Ev., Sec.* 219. No recent case, I think, goes so far as to hold that such statements as it is admitted were made by Page, render subsequent confessions inadmissible as evidence. The earlier English cases that perhaps go to that length, have been modified or overruled. *Reg. vs.* [113] *Baldey*, 12 *E. L. Eq.*, 596; *Wharton's Am. Cr. Law*, (*6 Ed.*) *Sec.* 685, *and cases there cited*; *Roscoe's Cr. Ev.*, 39 *et seq.* The fact that the confession was made in answer to a question assuming the guilt of the person, or was obtained by artifice, falsehood or deception, or preceded by a

caution to the accused, to tell the truth if he said anything, does not render the confession inadmissible in evidence. *People vs. Wertz*, 37 *N. Y.*, 303; *Wharton's Cr. Law*, 690, 691; 1 *Phillips Ev.* (*4th Ed.*) 558-9; *State vs. Kirby*, 1 *Strobhart*, 378; *Roscoe Ev.*, 47; *State vs. Grant*, 9 *Shepley*, 174. Unless there is a positive promise of favor, made or sanctioned by a person in authority, or the inducement held out is calculated to make the confession an untrue one, I think it may be laid down as a rule based on reason, and deducible from the late authorities, that the confession will be admissible. See *Wharton Cr. Law, Sec.* 686 & 687*, and cases cited in notes*; *Corn. vs. Tuckerman*, 10 *Gray* 173; *State vs. Grant*, 9 *Shepley*, 171; *Reg. vs. Thomas*, 7 *Car. & P.*, 345. If we are right in sup-posing this to be the law in such cases, there was no error in receiving the oral confession.

Afterward the Attorney for the State offered the written confession made a few days later: to the admission of which the defendant objected on the ground that it was not voluntary. If the oral confession was admissible, it follows that the one reduced to writing was also, there having been no intermediate threat of harm, or promise of favor, or act done calculated to induce the defendant to make an untrue confession, and it appears that Hill, the Justice of the Peace before whom the confession was made, and by whom it was reduced to writing, cautioned him "if he had any statement to make, it might and probably would be used against him on his trial; that he was under no obligation to make one, [114] or to answer any question that might be put to him." We fail to discover anything in the circumstances under which the confession was made calculated to intimidate the accused, or influence him to make an untrue statement. Page seems to have resorted to falsehood and deception, in stating that Whitman had made statements which he had not, but we have seen this did not render the confession inadmissible. In the reception of the confessions, therefore, we think there was no error.

The witness, Page, having testified that he held out no inducements to the accused to confess, the counsel for the defendant called witnesses to discredit him, by showing that he had admitted in a conversation with the accused in their presence, the making of statements inconsistent with his evidence on that point.

His attention having been first called to the alleged inconsistent statements, these witnesses were asked whether they had not heard him make them, and answered in the affirmative. They were then asked to repeat the conversation. The Attorney General objected that this was not competent, and the Court sustained the objection. These witnesses having been called for the sole purpose of impeaching Page, it was only allowable to contradict him as to matters or statements to which his attention had been particularly called, and this having been done, any further conversation was not evidence, and was properly excluded. But admitting that the answer was erroneously excluded, the bill of exceptions does not show that the ruling prejudiced the appellant, and the error therefore is not ground for reversal. To justify a reversal of judgment, the record must show affirmatively material error. When a question is asked which is objected to, and the objection sustained, in taking an exception it should be made to appear what it [115] was proposed to prove, which must be something material, and the rejection of which as evidence would be prejudicial to the party excepting. *Stull vs. Wilcox*, 2 *Ohio St.*, 570; *Hollister vs. Rezwon*, 9 *Ohio St.*, 1; *Gandolph vs. State*, 11 *Ohio St.*, 114.

When the evidence was being presented to the Court on the preliminary question whether the confession was voluntary, the defense offered to show by one Poole, who was called as a witness, for the purpose of impeaching Page, "That during the day at Neilsville (when and where the defendant was arrested)

the defendant for several hours was in the sole custody of Webb, out of sight and hearing of Page, and that this witness discovered and arrested Staley, and that Page did not;" to which the counsel for the State objected as immaterial and incompetent, and the Court sustained the objection, and the defendant excepted. Even if it is admitted that it was allowable on the trial of this preliminary question, to offer impeaching evidence,—which seems to admit of great doubt—we are of the opinion that the Court properly refused to hear the evidence offered. A witness can only be contradicted on facts material to the issue; and the matter on which Poole was called to contradict Page was wholly irrelevant to the issue which the Court was then trying.

During the progress of the argument the defendant's counsel claimed that the pistol had not been offered and introduced in evidence; whereupon the prosecution insisted that it had, and had been examined by the jury. The Court decided that although it had been examined with the bullet by the jury, and had been treated on the trial as though actually in evidence, yet it had not been formally introduced. On application of the prosecution the same was then received in evidence, and the Court at the time informed the de-[116]-fendant if he desired to introduce any further testimony by reason thereof, he could do so, and the Court would give ample time to get or send for any such testimony, at the expense of the prosecution, to which the counsel for the State consented. The defendant objected to the reception of the pistol, "that the same had not been identified, and both parties having rested it was now improper." The Court overruled the objection, and the defendant excepted. It was in the discretion of the Court to admit the pistol in evidence. There had been evidence offered tending to, and which we think did identify it; but whether the evidence on that point was sufficient, was a question for the jury. The pistol had been handed to and examined by the jury, and whether it

was formally introduced in evidence or not, it was clearly within the discretion of the Court to admit it at the time and under the restrictions indicated, and we have no hesitancy in saying that the discretion was properly exercised.

In the argument of the Attorney General, it appears by the case, that "He called attention to the fact that the defendant had availed himself of his privilege to be a witness in his own behalf, and had testified upon one branch of the case, and when questioned by the prosecution in regard to his connection with the murder of Ableitner, he had refused to answer the question, and also called attention to the fact and commented upon it, that the defendant was a competent witness for himself upon the merits, and had refused to be a witness upon the main issue in this trial, whereupon the defendant asked that it be entered upon record in the case, and an exception be entered thereto on the part of the defendant," and the Attorney-General consenting, it was so ordered. It is argued by the defendant that this was prohibited by statute, *Chap. 70, Laws* 1868, and therefore is a ground for a new trial. [118]

The law referred to is as follows: "That Section seven (7), *Chapter seventy-three* (73), *of the General Statutes*, be amended so as to read as follows: All persons, except as hereinafter provided, having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions, or belief; although in every case the credibility of the witnesses may be drawn in question. And in trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a

competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the courts." The defendant, it will be borne in mind, was examined as a witness on his own behalf on the preliminary question as to whether his confession was or was not voluntary, and on that question his testimony was directly opposed to that given by Page. It was therefore an important consideration for the jury whether the witness was deserving of credence.

We think the law of 1868 does not forbid the resort to any argument or evidence to impeach the *witness*. The *party* is not to be prejudiced by his silence, but if he becomes a *witness*, his veracity or credibility may be attacked by any legitimate argument, whether it refers to what he has said, or refused, or neglected to say. In other words, while the legislature recognized the fundamental law, that no person should be compelled, in any criminal case to be a witness against himself, it does not forbid or lessen the [119] and right of the State to impeach the credibility of *any witness*. The defendant, having been a witness, and having admitted the making of a confession, which, if believed, must certainly have affected his credibility before the jury, it was competent for the Attorney General, for the purpose of discrediting him, to refer to and comment upon the fact that he did not deny the truth of his confession, though he was a competent witness for that purpose.

The charge given by the Court on its own motion, is admitted to be unexceptionable, except in the concluding sentence or sentences. To it the defendant excepted, as appears by the case, in the words, "*to all of which the defendant excepted.*" An exception can only be taken to some particular point of law; a mere general exception to a general charge amounts to

nothing. *Lansing vs. Wiswall*, 5 *Denio*, 218-19; *Jones vs. Osgood*, 2 *Selden*, 233; *Caldwell vs. Murphy*, 11 *N. Y.*, 416; *Oldfield vs. N . Y.* & *Harlem R.R. Co.*, 14 *N. Y.*, 312-313. The exception in this case is of the most general kind, and the correctness of the principal part of the charge is unquestioned; hence the case stands as if no exception had been taken, and the defendant is presumed to have waived any error that may have been committed. It is with regret that we apply this well settled rule of practice in a capital case, but it is essential to the administration of justice. It is possible that we might feel it our duty to grant a motion for a new trial, if it appeared that there had been errors committed prejudicial to the defendant, even without objection from his counsel; but for technical error, not excepted to, and to which the attention of the Court was not particularly directed, the rule is clearly otherwise, both in this Court, and in the District Court. But we are satisfied that even if there was the error in the [119[charge which the defendant's counsel alleges, it did not prejudice the accused.

The exception to the ruling of the Court, refusing to give the third, fourth and fifth instructions, asked by the defendant, was insufficient. But, passing by this objection, we think that each, as well as the sixth instruction, was properly refused. They are in these words:

"3d. Unless the jury are satisfied from the evidence beyond a reasonable doubt, that the confessions offered were made voluntarily, without fear or promise or hope or favor, they must exclude the confessions from their minds; and if the question of fear or favor operating upon the mind of the defendant is left uncertain, the jury ought to reject the confessions, and this rule applies as well to direct as to implied confessions.

4th. Confessions should be received, if received at all, with great circumspection and caution; any promise of favor, or threat made to defendant, or if the circumstances surrounding the defendant were calculated to produce fear, or so that defendant was not entirely free from fear at the time of the alleged confession, then the jury should reject the confession and not consider it.

5th. If the jury are not satisfied beyond a reasonable doubt, or if it is uncertain whether the confessions at St. Charles were the result of previous promises of favor, or inspired by present fear or hope of favor from the surrounding circumstances, then the jury ought to reject the confessions.

6th. If the jury find from the evidence that the confessions made *prior* to the alleged confessions at St. Charles, were made under promises of favor or advice by the officer having him in charge, and that the alleged confessions at St. Charles were made in the presence of the *same officer*, [120] in pursuance of an *agreement* between defendant and said officer to so make it, then it must be rejected by the jury, unless they shall find from the evidence beyond a reasonable doubt, and so as not to leave it uncertain that the *mind of defendant* was entirely free from the effect of such promise and agreement by a warning given *before he made the confession*; and such warning must be something more than the usual notice, that his confession might, and probably would, be used against him."

It is proper for a jury to consider the circumstances under which a confession is made, with a view of determining what weight should be given to it; but it is not their province to reject a confession. Nor is it the law, that if a party making a confession, is not entirely free from fear, or wholly uninfluenced by present fear, or hope of favor, that the Court should reject his confession. Confessions are ordinarily made

with a hope of favor, or under circumstances calculated to produce fear. It is, perhaps, the general rule, that a person who fully and freely confesses his guilt—especially where this may assist in the detection and conviction of others—hopes for favor on that account. And as confessions are usually made by persons under arrest on a criminal charge, they are certainly made under circumstances calculated to produce fear. If voluntary, they are receivable, whatever may be the motives of the party in making them, and they are not considered involuntary, because made under the circumstances supposed. See *People vs. McMahan*, 15 *N. Y.*, 384; *People vs. Wertz*, 37 *N. Y.*, 303. The sixth instruction asked was properly refused. The confession was made under advice of the officer, to the defendant, "if he said anything, to say the truth," and it was not for the jury to "reject" the confession, even if they found the facts as supposed. If it appeared to them [121] that the first confession was made on the inducement supposed, and that the influence of the inducement was removed by *any means*, then it was their duty to consider the confession voluntary. The usual motive might, in some cases, be considered sufficient, in others not; but whether or not in any particular case, is a question of fact for the jury.

The modification of the seventh instruction, asked by the defendant is not insisted on as error, and clearly it was not.

The defendant asked the Court to instruct the jury as follows: "The absence of all evidence of motive, is a strong presumption of innocence," which instruction the Court refused, as asked, but gave the same, with this modification: "The absence of all evidence of motive, is a strong presumption of innocence, when the fact of the commission of the offense is doubtful;" to which refusal and charge the defendant excepted. Whether the modification was right or wrong, it is unnecessary to inquire, for it would have been proper to have unqualifiedly refused

the charge requested. The evidence that shows that the defendant participated in the homicide, shows the *motive* for committing the crime. There is no absence of evidence of motive, but, on the contrary, the most satisfactory evidence thereof, and the charge requested was a mere abstract proposition, inapplicable to the facts of this case. Its denial would, for these reasons, have been proper, and its modification, if erroneous, was not prejudicial to the defendant.

The defendant further asked the Court to charge the jury as follows: "The burden of proof is on the State, to prove the guilt of *this* defendant beyond a reasonable doubt, by the best evidence; and in order to justify a verdict of guilty, the facts proved must be absolutely incompatible with the innocence of the defendant, and incapable of ex-[122]-planation upon any other reasonable hypothesis than that of his guilt," which the Court refused as asked, but gave the same, with the modification of these words, "upon circumstantial evidence," inserted and read after, and in connection with the words "in order to justify a verdict of guilty" as above asked; to which refusal and charge the defendant excepted. The charge asked was erroneous, and, as modified, was sufficiently favorable to the defendant. *Commonwealth vs. Webster*, 5 *Cush.*, 320 *Com. vs. Goodwin*, 14 *Gray*, 55; *Wills on Cir. Ev.*, 149, *et seq.*; *Wharton's Cr. Law, Sec.* 707, *et seq.*; 3 *Greenleaf's Ev., Sec.* 29 *and Notes*. Though A may point his gun at B, and shoot him through some vital part, and death to appearance immediately follow, these facts would hardly show to an *absolute certainty* that the former was guilty of a homicide, for the life of the latter may possibly have been terminated by sudden disease, an instant before, or at the very instant of the discharge of the gun, but certainly they would not with *absolute certainty* show a criminal homicide. They may have been the acts of an insane man who supposed he was doing his duty, or who was not a free moral agent. Our inability to discern the mental operations or the motives,

makes it impossible for us to determine with absolute certainty, the character of a particular act. Hence we have to act on a moral certainty, and the law only requires that the charge against a person accused of crime be established "beyond a reasonable doubt." It is difficult to make the meaning of this expression more clear by any circumlocution. "It is not mere possible doubt"—says Chief Justice Shaw—"because everything 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 [123] the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * 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. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends on considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." *Com. vs. Webster*, 5 *Cush*., 320. See also authorities last above cited.

It is argued that the motion for a new trial should have been granted, because the evidence is insufficient to justify the verdict—that there is no evidence of premeditated design. A most conclusive refutation of this position is found in the confession of the defendant. He said, after stating that they had agreed to hurt nobody, "We (Edwards, Whitman and defendant,) then started for Frederick Ableitner's house. * * When we got to the corner, near Ableitner's house, we sat down and talked over the matter. Whitman said Ableitner had $2,000 in gold, and said that we would take that or five dollars, or two dollars, or whatever amount we may find. We agreed

that Edwards was to call Ableitner out and knock him down. Whitman was to hold him, and I was to stand at the door, and Edwards was to go in and get the money. Whitman and I were to watch, and give the alarm if any one was seen to approach. Before we left the corner where we had sat, Whitman said that 'dead men tell no tales,' Edwards said that is so, 'dead men tell no tales.' I said that is so. We then started down toward the house. * * Edwards cut each [125] of us a club; gave me a club, and Whitman one, and took one himself. We then started for the house * * We all went up to the door. Edwards knocked at the door. Ableitner asked who was there; Edwards said, three men from Chatfield wanted to go to St. Charles. Ableitner came out of the door. Edwards stepped behind him and followed him toward the road. I followed directly behind Edwards, and Whitman behind me. When about fifteen feet from the door, Edwards struck him with a club, knocking him down. He fell on his hands and knees, and turning around came back toward the house on his hands and knees. As he came near me, still on his hands and knees, I fired my revolver at him. Immediately after I fired Edwards fired at him." The expression "Dead men tell no tales", assented to by each, is full of murderous meaning, and sufficiently shows the premeditated design.

We are of opinion that the order appealed from be affirmed.

***Berry, J.*—In this case the defendant *testified*, and his testimony was addressed both to the court and jury: to the Court upon the question of the admissibility of his confessions, and to the jury upon the question of weight to be given to the same. To such a state of facts, I think the prohibition (*found in Section 1, Ch. 70*, p. 110, *Laws* 1868) in regard to allusions to, and comments upon a defendant's neglect to testify does not apply. Upon this ground, rather than upon that taken by the Chief Justice, I prefer to rest my assent to the conclusion arrived at in the foregoing opinion in regard to the Attorney General's**

allusion to, and comments upon the defendant's neglect and refusal to testify in the case.

***McMillan, J.*—I concur in the views expressed by Justice Berry as to the construction of *Section 1*, *Ch. 70 of the Laws of* 1868, and its application to this case.** ■

Posted MLHP: July 3, 2011;
Reformatted June 9, 2013.