THE REPORTER,

A Periodical Devoted to Religion, Law, Legislation, and Public Events.

SPEECH TO THE JURY

OF

RICHARD T. MERRICK, Esq.,

ON THE

TRIAL OF JOHN H. SURRATT,

IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA,

SITTING FOR THE TRIAL OF CRIMES AND MISDEMEANORS,

ON AN INDICTMENT FOR

Murder of President Lincoln,

BEFORE HIS HONOR GEORGE P. FISHER,

One of the Justices of the Supreme Court for the District of Columbia.

Commencing Monday, June 10, 1867.

ARGUMENT FOR THE DEFENCE.

R. SUTTON,

WASHINGTON CITY, D. C.

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R. SUTTON, *Reporter*,
Washington, D. C.

THE REPORTER.

A Periodical Devoted to Religion, Law, Legislation, and Public Events.

CONDUCTED BY R. SUTTON, CHIEF OF THE OFFICIAL CORPS OF REPORTERS OF THE U. S. SENATE, AND D. F. MURPHY AND JAMES J. MURPHY, ITS PRINCIPAL MEMBERS.

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TRIAL OF JOHN H. SURRATT.

Continued from No. 95.

SPEECH TO THE JURY OF RICHARD T. MERRICK, Esq.

ARGUMENT FOR THE DEFENCE.

Forty-Fourth Day.

WEDNESDAY, July 31, 1869.

The court re-assembled at ten o'clock a. m.

Mr. MERRICK. May it please your honor: Gentlemen of the Jury: The feelings with which I approach the argument of this case are beyond my power to express. They are new to me in my experience in professional life, as the case in its character, its nature, and the manner of its prosecution, is new to the judicial history of the country. Its magnitude is beyond that of any case of which I have ever known, and its surroundings are peculiar and painful beyond any experience. Under your oaths you have in charge the prisoner at the bar, and it is your duty to pass upon his guilt or innocence. His life is in your hands, and by the social and political organization of the community it is the duty of the Government to pursue, through the forms of law, any who may violate its obligations. The Government, entering upon this cause, and apparently believing that this young man has violated the law in the particular set forth in the indictment, has caused him to be arraigned before this tribunal, and his future destiny to be committed to you. But there is something in this prosecution beyond the mere arraignment by the Government, and beyond the ordinary courses pursued by the governmental power in bringing a criminal to justice. I find arrayed against my client the best talent at the bar, a numerous combination of counsel in court and out of court, and I find certain high officers of the Government temporarily abandoning the duties committed to them in the particular functions which they are to discharge, and devoting themselves to the manipulation of the witnesses to be sworn before this jury. And this combination of legal gentlemen, aided by official personages outside, with motives such as we may see before the case is ended, I find surrounded by a swarm of spies and detectives, scattered all over the country, supported and remunerated from the treasury of a Government with hundreds of millions at its command. And all this machinery to pursue to the gibbet one penniless young man, who rests upon professional charity for the vindication of his name and the defense of his life.

I regret that it will become my painful duty to speak some truths that I would leave unspoken; I regret that it will become my painful duty to inquire into the motives that are influencing the conduct of men: and I am inclined to believe, gentlemen, that the inquiry which I will make may lead you to the conviction, that whilst we have been talking a great deal of conspiracies to abduct and conspiracies to murder on the part of rebel sympathizers, with a view to the destruction of the national life, that there have been other conspiracies in higher places to commit a murder through the forms of law, and in utter disregard of every principle that should govern a just and honest man. I say I regret that it will become my duty to speak these painful truths; for I desire to say nothing that will pain anybody; but at the same time, in the discharge of professional duty, I shall say what I believe that duty involves the necessity of saying—not, I trust, without the fear of God in my heart, but always, I hope, without the fear of any living man before my eyes.

Why is it that all these appliances and this vast machinery are in this case? Why all this wonderful array of counsel here and elsewhere? What do they represent? They nominally represent the Government; but the course of this prosecution has convinced me, even without evidence outside upon which to found the opinon further than the evidence which has been before your eyes in the conduct and the manner of men, that, although they so nominally represent the interests of society, there are two sets—one that represents the Government of the United States in its assumed offended majesty, and the other that represents certain officers of the United States seeking for their own purposes the shedding of innocent blood.

In a prosecution such as this, conducted against one of its citizens by a government, what should be the course of that government, and what is due to the jury and the prisoner? Whatever there is that can throw light upon the alleged crime should be let into the jury box; all evidence that could go before the human mind calculated to impress it with conviction or modify its opinions should be allowed to come before you. What has been the case with regard to this trial? Wherever any technical rule of law could by any constraint whatever exclude a piece of testimony calculated to enlighten your judgment, it has been invoked to exclude that testimony, and bent from its uniform application and its generally understood uses to secure, if possible, the conviction of the prisoner, even against the manifest truths of the case. I shall find no fault with his honor on the bench in his rulings, for it would not be becoming in me to express an opinion about the decisions of the court. A member of the bar should be respectful to the tribunal before which he practises to the fullest extent of gentlemanly and professional courtesy, and in the court-room bow with complaisant acquiescence to whatever the judge may say. With that acquiescence I bow; but yet I must say, in justice to myself, that nothing has fallen from his honor, in the adjudication upon these questions of testimony, which has changed my settled convictions that the testimony should have been allowed to go to the jury. One hundred and fifty exceptions taken by the defendant's counsel encumber this record. It is certainly

strange that there should have been so wide a difference between ourselves and the court; I regret it; and without complaining, as I said, of the decisions of the court, the circumstance to which I have adverted can only be accounted for from the fact, that the attorneys representing the Government in this case have strained every principle of law, and invoked in their behalf every discretionary power of the court as against the prisoner at the bar.

What again, in another aspect of the case, should be the course of the United States? The prisoner is here arraigned for a particular crime, and the jury are charged with an investigation of his guilt or innocence as to the crime for which he stands indicted. Prejudice should find no place in your hearts. Feeling should raise no cloud to obscure your judgments. The United States should stand before you, represented by its attorney, the impersonation of stolid logic, and without an emotion or sentiment to sway or direct the mind. Instead of representing the United States in that capacity and in that character, every feeling that could rock the human heart upon its foundations has been invoked to influence you, and every sentiment calculated to excite your prejudice has been urged upon you with a violence, a rigor, and a virulence such as I have never seen equaled in a court of justice. The question for you to decide is, whether or not John H. Surratt is guilty of the murder of Abraham Lincoln? My learned brother, the district attorney, whilst he congratulates you upon the return of peace to our blood-stained land, upon the end of war and the restoration of fraternal love, in the very next breath tears open the wounds of war and pours into your mind a torrent of invective calculated to keep alive forever fraternal hatred, and asks for a renewal of all the animosities engendered in a war that is now at an end, and with which should end every animosity and every sentiment that was its unfortunate but natural offspring. Why has he done this? Why has he told you of the shooting of Union soldiers as they were making their escape? Why has he told you of the hanging of the operator of a telegraph wire during the war in the Confederacy? Why all this? Why has he, against every rule of professional courtesy, and the instinct of an honorable heart, pointed to the prisoner as an already convicted and dying man, and told him that he stood upon the brink of the grave—and violated the decency of forensic debate by exclaiming, "You, dying man, you are a traitor and a coward?" Why has he done this? Why has he sought to delineate to you the sentiments and feelings of the prisoner as in sympathy with the Southern Confederacy. It was to stir your hearts; it was to carry you back from the present day of peace to the past days of animosity and war; and placing you amid the conflict of arms, and the passions of a few years ago, ask you from the remnant of vengeful feelings that have been dead in your heart to revive them long enough to give an iniquitous verdict of guilty. Facts not bearing on the case; facts not related to the case, and having no connection with it, have been thrown before you, to fan into a flame the dying embers of extinguished passion and revive a deceased war in a court of justice!

Shame on the United States! I blush to see my country thus bowed to the degrading office of asking twelve jurors, sworn to try the issue upon the facts in proof, to decide this case according to the prejudice and animosities of a past day. Peace has returned nominally; my learned brother thinks it has returned entirely. Would to God it had; but it has not. We know, however, in our hearts that peace has at least in part returned; that the war is over, although as yet all the consequences of peace have not come. In the southern hemisphere some of the stars that glitter upon our national banner shine with a sickly light through the clouds of party animosities; but the time will yet come when these party animosities will be thrown aside forever as the mist before the rising sun, and the galaxy of the Union, combined in one united stream of glorious light, will belt the earth in its course. I repeat, peace has come, but all its consequences have not come; and its consequences never will come if the Government of the United States stands before a jury to continually tear open afresh the wounds of war and to visit in time of peace vengeance for deeds done in time of war. Accursed forever be the heart that in this day would create one single sentiment of animosity among this people. Our land has been drenched in blood; passions have been fierce, and desolation, such as the world never saw, has swept over this country. But it is now at an end. Let fraternal love and harmony be restored; let the dead past bury its dead; let the dead past be forgotten and forgiven. No triumph was allowed in Rome to the hero of a civil war. And why? Because it kept alive in the memory of the people the animosities that divided them in the strife. Our civil war is over. Let there be no triumph, no jibes, no animosities, and no invectives. Let the North extend the hand of friendship to the South; and, gentlemen, you who found your associations disunited by the clash of arms and the temporary domination of political sentiment, restore those friendships; take back the estranged brother to your arms, and feel that in doing so you are consummating and accomplishing the great purpose of Christian charity implanted in your hearts as Christian men, and the great purpose of patriotic citizens in reuniting your divided land.

My learned brother is mistaken in speaking to you of God as a God of vengeance and a God of wrath, as widely as he is in talking of our country as a country in regard to which we should cherish the animosties that ought to be dead, and with *good* men are extinguished. God is a God of love and of kindness. He is a God of mercy, and most mercifully has He dealt by this great land. Although it has been chastised with affliction by His hand, still mercifully the wrath is stayed, and we must, by conforming to His great law, in the spirit of Christian charity, and answering responsive to that great prayer, "Forgive us our trespasses as we forgive those who trespass against us," continue for the future the blessing He temporarily suspended in the past. As I have no feeling, no prejudices, I shall not endeavor to excite any in others. I should be false to my duty if I did. You, gentlemen, are under the solemn obligations of an oath to do justice according to the evidence. If sentiment, if party feeling is around you, and you see it, and hear it—if a legal discussion on the part of the United States is converted into a political harangue—discard it. Come out from prejudice, and stand free, honest, and upright men, with unobscured judgments and true hearts, administering, as the counsel has said, that part of the divine justice which it is committed to man to administer in behalf of the eternal God that sees all things. Judge, gentlemen, as you would be judged.

What is John H. Surratt charged with? In the wide digression and protracted argument of the counsel, I presume you have almost entirely lost sight of the cause. We must recur, and asking your kind indulgence, I can only give you as a promise for the favor of its bestowal that I will be as brief as possible, and trespass on your patience for comparatively but a short time. The first count in this indictment charges that John H. Surratt, with his own hand, willfully, feloniously, with malice aforethought, did kill and murder Abraham Lincoln. That count is abandoned. The second count charges that John H. Surratt and John Wilkes Booth made an assault on Abraham Lincoln, and continues as follows:

"And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Wilkes Booth, and the said John H. Surratt, the said Abraham Lincoln, then and there, in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and government of the said United States of America."

The charge in this count is, that John H. Surratt and

John Wilkes Booth did then and there kill and murder Abraham Lincoln. The third count charges that John H. Surratt, John Wilkes Booth, David E. Herold, George A. Atzerodt, Lewis Payne, Mary E. Surratt, and other persons to the jurors unknown, with force and arms, at the county of Washington, in and upon one Abraham Lincoln in the peace of God and of the United States, then and there being, feloniously, willfully, and of their malice aforethought, made an assault, and that they did then and there kill him the said Abraham Lincoln.

I want you to bear in mind, gentlemen of the jury, one feature in this indictment. I shall make no remark about the first and second counts; but as you will notice, the third count specifies that Surratt, Booth, Herold, Atzerodt, Mary E. Surratt, and other persons, to the jurors unknown, did, on the 14th day of April, 1865, with force and arms, at the county of Washington, in and upon one Abraham Lincoln, in the peace of God and of the said United States of America, then and there being, feloniously, willfully, and of their malice aforethought, did make an assault, &c. I shall presently come to the discussion of the principles of law, which are founded in common sense, and I now address myself to your common sense as jurors upon the subject of what you have to find. You have to find whether or not what is said in that paper is true. Is he guilty or not guilty as indicted? The third count says that these parties, Herold, Atzerodt, Booth, Surratt, and Mary E. Surratt, with force and arms, on the 14th day of April, at the city of Washington, *then and there* made an assault on Abraham Lincoln; these parties then being here in the city of Washington, made an assault on Abraham Lincoln; and it concludes:

"And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Wilkes Booth, and the said John H. Surratt, and the said David E. Herold, and the said George A. Atzerodt, and the said Lewis Payne, and the said Mary E. Surratt, the said Abraham Lincoln, then and there, in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and Government of the said United States of America."

Now, what is the other count? That Herold, Atzerodt, Payne, Booth, Mary E. Surratt, John H. Surratt, and others unknown, did combine, confederate, conspire, and agree together, feloniously to kill and murder one Abraham Lincoln, and that the parties named, and others unknown,

"On the said fourteenth day of April, in the year of our Lord one thousand eight hundred and sixty-five, at the county of Washington aforesaid, unlawfully and wickedly did combine, confederate, and conspire and agree together feloniously to kill and murder one Abraham Lincoln; and that the said John Wilkes Booth, and the said John H. Surratt, and the said David E. Herold, and the said George A. Atzerodt, and the said Lewis Payne, and the said Mary E. Surratt, and other persons to the jurors aforesaid unknown, not having the fear of God before their eyes, but being moved and seduced by the instigations of the devil, afterwards, to wit, on the said fourteenth day of April, in the year of our Lord one thousand eight hundred and sixty-five, with force and arms, at the county aforesaid, in pursuance of said wicked and unlawful conspiracy, in and upon the said Abraham Lincoln, in the peace of God and of the said United States, then and there being, feloniously, willfully, and of their malice aforethought, did make an assault."

It differs only from the third count in this: the third count charges that all the conspirators made the assault at that place and at that time, and did then and there kill him; while the fourth count charges that the conspirators conspired to do it, and did it in pursuance of the conspiracy. It ends with saying that they *then and there murdered him.* Now, the charge in the third and fourth counts is, that these parties murdered Abraham Lincoln *then and there.* What precedes the final close of the count is simply inducement: "And the jurors, upon their oaths aforesaid, do say that the said John Wilkes Booth, &c., then and there, in manner and form aforesaid, feloniously did kill and murder Abraham Lincoln." This is the charge made by the indictment.

Gentlemen of the jury, what are you trying? Are you not trying John H. Surratt for the murder of Abraham Lincoln? Is there any thing else in the case? Is there any thing else in the indictment? What is to be your verdict? Guilty or not guilty, as charged in the indictment. How is he charged in the indictment? He is charged with the murder of Abraham Lincoln. The only question for you to decide is, "Did he commit the murder?" I am not surprised that my friends on the other side, having found their original theory of the case fail them, should be driven to the extreme principles they have attempted to assert, but I should be surprised, I should be amazed, if they ever get this jury to adopt any such absurd and unprecedented rules of adjudication. They desire to try this prisoner, apparently, for carrying dispatches; for being a sympathizer with the rebel government; for being in some sort of a conspiracy; any thing and every thing but the charge which we have come here to meet—that of murder. Conspiracy is one crime; murder is another. If we three conspire to do an act, that is a crime, provided the act is illegal. If we do the act, that is another crime. Mr. Todd, Mr. Ball, and myself may conspire to do some unlawful act; before the act is consummated, we may be indicted for the conspiracy. If two do the act, and one retires before it is done, the one may be indicted for having conspired, but the two that did the act can be indicted for the commission of the deed. To conspire is one thing; to act is another.

This being the indictment and the crime, what are the principles of law that apply? You have heard the principles read. I shall have occasion to review them. Why have they adopted these principles? When did they determine to enforce them? When did it first suggest itself to them that this extreme necessity was upon them in the case? You recollect, gentlemen of the jury, when Mr. WILSON made his opening statement to the jury, he averred that it was simply an indictment for murder. When he made his opening address on behalf of the Government, he looked upon this indictment as a simple indictment for murder, and said they would prove the prisoner's complicity in the murder, and his presence here in Washington, helping to do the deed of murder. Was not that all? Did we then hear any of these novel principles of law announced, which no tribunal in the country has yet had the honor of declaring? No; it was a simple, plain narrative, exceedingly impressive, filled with enough facts to have convicted this man before any jury in the world. They went on according to Mr. WILSON'S programme; they followed out his theory; they attempted to prove that Surratt was here, that he had been in the conspiracy; and they proved, as a circumstance to show that he was guilty, that he had agreed to be guilty; the presumption being that what a man agrees to do he is likely to do. They showed, or attempted to show, that he was in front of Ford's Theatre, participating with Booth in the act, and went through their whole case very smoothly, and made it complete. What followed? Why, we needed but an opportunity, as I said the other day, to strike their witnesses, and we laid at their feet a mountain of such corruption as never infected the air of a court of justice in the United States. One by one, they fell as they came. Strand by strand this artfully woven chain, which the gentleman says is to bind this party to the body of the crime, was undone. It is an iron chain, is it? Aye, iron; but under the light of the truth in this case it has melted, and [turning to Judge PIERREPONT] writes your name in characters you can never erase. Their case being destroyed by the defense, some new device must be resorted to. What are we to do, is the question they asked themselves. The Government of the United States, acting up to the measure of its uniform dignity, should have said, "We have been mistaken; we have been imposed upon by these witnesses. They have told us falsehoods, which you have exposed. We discover that they are of infamous character; they have polluted and contaminated the court into which we have brought them, and dishonored the contact into which we came with them. Let the case go according

to the truth." Such should have been and such would have been the language of the United States; but the United States did not stand alone in this case. Others stood beside her—others, who had within their hearts that rankling secret of which the counsel speaks, "that will out, and makes men forget their prudence"—others, that had dreams by night less sweet than Sergeant Dye's, and saw visions by day growing stronger and stronger as they advanced from the scene of their crimes to the tribunal before which an eternal God will hold them ultimately responsible. The case must be gained; innocent blood must again be shed to wash out the damning record of innocent blood already shed. The verdict of a jury must vindicate the fearful deed they had committed. Then, for the first time, start up these new doctrines of law. Then, for the first time, changes the policy of the case; and has it not changed? I submit it to you, gentlemen. Has it not changed? It has changed—not only once, but it has changed twice. I shall show you, and illustrate from the manner of its changes,

"What a tangled web we weave
When first we practice to deceive!"

I repeat, it has changed not only once, but twice. It has changed in the principles of law, and it has changed in the facts. They put Surratt, as I will show you, on the New York train in Montreal at 3:30 p. m. on the 12th of April, 1865, and would have brought him whistling down to Washington by Albany and New York; but the testimony that he was at Elmira became so strong that they could not meet it in the front, and must therefore resort to a flank movement. They could not deny that he was in Elmira, and they put him in Elmira on the 13th, and attempt to bring him from that city.

They had it all safe, then; he was in Elmira. "Oh, yes! that is all right; now we will agree to that; we admit that he was in Elmira, and we will start him out on the night of the 13th, and have him here on the morning of the 14th in time for Wood, the negro barber, to shave him." That was their policy. They did not know that a freshet had swept the bridges away and that there was no night train from Elmira. This startling intelligence only came to them from our evidence. They stood amazed! Gentlemen, you should have talked to your railroad conductors and masters of transportation. Finding they could not get him out of Elmira by any passenger train on that night so as to have him here on the morning of the 14th, they start him on a special train, which DuBarry says never ran; bring him to Williamsport, and thence carry him on by gravel and construction trains. I must not anticipate, however. I will show you that he never could have got here in time for Wood to shave him, even starting, as they say, at half-past ten on the 13th. I will show you that he could not have got from Montreal to Elmira in time to leave there before ten o'clock at night on the night of the 13th.

In their various twistings and changings they have put this case in such a shape that it is almost an insult to an intelligent jury to argue it, for they have not only themselves shown John Surratt's innocence of this murder by the witnesses they brought here to attempt to prove his guilt, but they have rendered his presence here a physical impossibility. This they felt and knew. What was the consequence? Why, they say to themselves, "We must get along without having him here. How shall we do it? We cannot place in his hands a telescopic rifle long enough to reach from Elmira to Ford's Theatre. We cannot do that; and, as our next best chance, we must go to his honor, and tell him that to murder a President is like murdering a king; that such a crime has no accessories; that wherever Surratt was he is guilty of the murder; and we will further tell his honor that he *dare* not decide differently; that the voice of the people demands the decision." The voice of the people! Is not that strange language within these sacred walls? What people speak here? The wise that are dead speak through the books; the traditions of our ancestors speak from the bench the sacred principles of established law, and only those. The popular voice stops at that door. What language is this, to dare a judge—defy the court! My learned brother (Mr. PIERREPONT) says he is not familiar with our rules of practice. I grant him he has shown it. It may be New York law and New York custom, but it is not the custom of this District. Dare a judge by threatening popular indignation against him! The very sentiment is an insult to your honor and to the country that gentleman professes to represent. Spotless and fearless is the ermine. Keep it so. Has your honor's conduct in this case, in being complacent, justified this arrogance? I hope he sees no justification for the language. Does your honor tremble at the threat? Look at the bulwark of American liberty. See it there; look at these twelve men, and remember Thermopylæ. One man may tremble; a judge may tremble; but see that jury. When a jury trembles at a menace liberty is gone.

Where can you get twelve such men as these? Dare them! Threaten them! Attempt to intimidate them! They dare do right. You honor dares do right. Not as a lawyer, but as a Christian man, I simply dare you to do wrong; not because the popular voice will approve or condemn, not because there is to be an appeal taken from this tribunal to any meeting in Central Park; but because you have invoked the living God to the justice of your action, and because you stand here free from all men, all prejudice, and all danger, responsible alone to Him whose justice you administer. But, sir, it is fortunate for you, in the aspect in which the learned gentleman has put this question to you, that under our law you do not stand alone responsible for these questions. The jury is specially charged, it is true, with the facts, but they are also charged with the law. You are to instruct them by your learning, your wisdom, and your authority; you are to advise them; but they must *know*, and they must *believe*. My learned brother upon the other side (Mr. CARRINGTON) seemed to feel that it was necessary to press this jury very hard upon their obligation to follow the instructions of the court. I have never heard him utter those sentiments before. Other cases have been tried by him before this, but I have never heard him talk so earnestly to the jury about being obliged to follow the instructions of the court. Why is he so solicitous in this case? Does he think you, sir, will not dare to do right? He told, you, gentlemen of the jury, that you were sworn to try this case according to the law and the fact, and that you must take the law from the court; and if you departed from the law the court gave you, you would be perjured. I tell you it is no such thing. If you find a verdict of guilty, and do not believe the party to be guilty in every particular in your judgments and in your hearts, then you are perjured men. I care not what the court's instruction is. But has my learned friend read the oath aright? Mr. Clerk, will you be kind enough to read it?

The CLERK. "You do solemnly swear, that you will well and truly try, and a true deliverance make, between the United States and John H. Surratt, the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence."

Mr. MERRICK. Where is "the law?" Why did you tell the jury what you did? Did you not know better? The language is, "And a true verdict give according to the evidence." My learned brother has had that oath ringing in his ears for six years. Why did he not tell you what it was? You are, gentlemen, to find a verdict according to the evidence. What sort of a verdict are you to find? Guilty, or not guilty. That is all you can say. You cannot say, "Guilty, under the court's instruction," or, "Not guilty, under the court's instruction." If you say guilty, you say, "Guilty as indicted;" upon your consciences resting the weight of the verdict. If your verdict should be

"guilty," it will be followed by blood; for you see that there is no mercy anywhere in those that represent the Government. If your verdict is guilty, then indeed you look upon a dying man. Upon your consciences will rest the responsibility of that verdict. And let me say to you, gentlemen of the jury, that in that awful day when you shall stand before the last tribunal to be judged, and the all-seeing Eye shall look into your hearts and ask you why you found this verdict of guilty, think you He will hearken if you say, "The judge's instructions made me do it." He will say to you, "Were you not free agents, with minds and intellects, sworn as a jury in a free country? Were you not told by the counsel for the prisoner that it was your duty to find this verdict according to your judgments and your consciences, and why did you disregard what was said? If Judge FISHER's instructions made you find it, bring Judge FISHER to answer; where is the judge?" Think you he will step forward and say, "I will take the burden." No, gentlemen. By the laws of the land and the laws of God, the responsibility is on you. The responsibility is on the judge to instruct you rightly, to guide you correctly, to give you wise and judicious counsel; not as mandatory and binding on your consciences, but as advisory to your judgments, and to enlighten the pathway you are to tread in your investigation. We shall ask from the court no instruction, and desire none. The law of murder is too plain to need any, and you, gentlemen, are too intelligent not to understand it. Indeed, if we did desire some explanation, we would prefer to give it to you in the way of argument, rather than trust it to the distinguished judge who presides. We would trust it to argument, because upon these plain questions all men can comprehend what the law is. We would trust it to the weight of our own characters with the jury, as men and lawyers. But is all this mere speculation with me? Let me see. I read from 3d Johnson's Cases the words of Chancellor Kent, *clarum et venerabile nomen*:

"In every criminal case, upon the plea of not guilty the jury may, and indeed they *must*, unless they choose to find a special verdict, take upon themselves the decision of the law as well as the fact, and bring in a verdict as comprehensive as the issue, because in every such case they are charged with the deliverance of the defendant from the crime of which he is accused."

The jury are "charged with the deliverance of the defendant from the crime of which he is accused;" not from part of the crime, but "from the crime," made up of law and fact. After specifying the cases of various crimes, the same authority proceeds:

"In all these cases, from the nature of the issue, the jury are to try not only the *fact*, but the *crime*, and in doing so they must judge of the *intent*, in order to determine whether the charge be true, as set forth in the indictment." * * * *

"As the jury, according to Sir Matthew Hale, assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law; and it is the *conscience of the jury*, he observes, that must pronounce the prisoner guilty or not guilty. It is they, and not the judge, that take upon them his guilt or innocence. (Hist. Com. Law, c. 12, H. H. P. C., vol. 2, 313.)

This is the language of Chancellor Kent, approving the principles laid down by Sir Matthew Hale, and incorporating them in American jurisprudence. I could not refer to two more revered and venerable authorities in the history of English or American law. Their great minds shine upon us from the past with an effulgence time can never dim, and guide all upright jurists in the pathway illumined by their light.

Your consciences must be satisfied. You must go forth from this room, if you would have peace in this life hereafter and hope for the world to come, with consciences that will sing to you the delightful song, "Well done, thou good and faithful servant." To do that, your verdict must respond to the dictates of your consciences as against the world. I have been led into these remarks by the extraordinary address of my learned brother on the other side.

Now, may it please your honor, and gentlemen of the jury, I beg to call your attention to the propositions of law presented by the counsel on the other side, and submit to your consideration some authorities which, I think, will so clearly elucidate them that there will be no difficulty for either judge or jury. The district attorney, in laying down his propositions, does not venture to go so far as the learned counsel with whom he is associated. He is wiser. He will not trust to the pinions of *Icarus;* and my learned brother will discover, in the course of his voyage over this new sea which he has ventured to explore, that he will experience the same sad fate of that mythological character, and find his wings melted, even when he is in his loftiest flight. But Mr. CARRINGTON, although more modest, does not yet meet the measure of professional wisdom which I think his judgment would have meted out if other feelings had not interposed.

I have nothing to say on the first and second propositions presented by the counsel, (Mr. PIERREPONT;) and the third I shall pass for the present. I wish to call your attention to his fourth proposition, which I will read:

"If the jury believe from the evidence that President Lincoln was killed as aforesaid, in pursuance of said conspiracy of which the prisoner was a member, he being either actually or constructively present at the time, it is a legal presumption that such presence was with a view to render aid, and it lies on the prisoner to rebut such presumption by showing that he was there for a purpose unconnected with the conspiracy."

I do not understand that. It may be that I am not capable of comprehending the subtlety of the learned gentleman, but I must say that I do not understand that proposition. "It is a legal presumption that such presence was with a view to render aid"—a *presumptio juris et de jure*, I suppose, which cannot be rebutted. That is not the law.

The law is plain, and is this: If it be proved that the prisoner was a member of a conspiracy, the fact that he was a member goes in evidence to the jury as a circumstance to show that he participated in executing the design of the conspiracy; but, outside of that fact, you have to prove that he was actually present; or, if you cannot prove he was actually present, you must prove that he was so near as to render material aid, and that he was there for that purpose.

I may as well state now, before I come to consider Judge PIERREPONT's propositions, the rule applicable to this case, as I understand it. Even if the gentlemen prove that Surratt was in Washington city on the night of the murder, it is not enough; they must prove that he was actually present at the murder, or near enough to the place of the murder to give material aid and assistance to the doing of the deed, and there for that purpose. This is a plain, long-established, and well-understood principle of law, and the prosecution so regarded it, and attempted to bring their case within it. In the first instance they not only attempted to prove that the prisoner was here, but, by Sergeant Dye, that he was participating. Then they went on to prove that he was in this city; and, their purpose is to argue to the jury that if he was in Washington at the time of the murder, they may presume that he was present aiding and abetting. I grant them that it is an element of evidence for the jury; but to say that it is a presumption of law, with all due respect to my learned brothers, is to say that which is absurd in law. That he was present, aiding and abetting the murder, is for the prosecution to prove. If they prove that he was a member of the conspiracy to do the murder, that is an element of evidence for you, gentlemen, upon which you may reason that he was present at the murder; but you must come to the conclusion that he was there actually present, doing the murder, or near enough to help the assassin in his work, or receive him with the warm blood on his hands, and aid him in flight. That is the rule of law.

Now, I come to some novel specimens of jurisprudence. Says Judge PIERREPONT, in his first proposition:

"Each confederate in the conspiracy is liable for the acts of every co-conspirator, and the declarations of *each* may be given in evidence against every other; and though the conspiracy may have been

formed years before the prisoner ever heard of it, yet, having subsequently joined in the conspiracy, he is in all respects guilty as an *original* conspirator."

Now, there is something in that which is true; but the main element that they want to establish is obscurely veiled and untrue. That each confederate in the conspiracy is liable for the act of his co-conspirators is true, where the act of the co-conspirator is in the furtherance of the general project of the conspiracy to this extent, that the act may be given in evidence against him, in order to prove him guilty of some particular act which he did; but he is not liable for the act that somebody else did; and that is the case in 12th Wheaton, as I will show your honor. Whatever one conspirator does after the conspiracy is established may be given in evidence against his co-conspirator; but his co-conspirator cannot be indicted for the particular act of his confederate, unless he directly aided in doing it himself. It goes in evidence as a part of the general plan to develop the movements of the general body; but it is not a substantive matter of criminal allegation, except as against the party who did the act or those aiding and abetting. In case of a conspiracy for a misdemeanor where there are no accessories, a different rule applies from the case of a conspiracy to commit a felony.

What is the next proposition?

"Second, That when several persons are finally confederated in a conspiracy they are like one body, and the act of each hand, the utterance of each tongue, and the conception and purpose of each heart, (touching the common plan,) is the act of each and all, and every one of the several persons forming the confederate body is responsible for the acts, sayings, and doings of each and of all the others."

Well, that is the same as the other proposition, in different words. Why did you not indict Surratt and the parties named with him at once as a corporate body?

The third is:

"That a conspiracy to kidnap, abduct, or murder the President of the United States, in time of rebellion or other great national peril, is a crime of such heinousness as to admit of no accessories, but such as to render all the conspirators, their supporters, aiders, and abettors, principals in the crime. That such is the common law of England, and is the law of this country."

I must confess that I listened to that proposition yesterday with infinite amazement, not to say much amusement and pleasure—amazement, that a lawyer of the reputation of the gentleman should advance such a doctrine, and pleasure, when I felt that he would not have periled his reputation by so monstrous and absurd a proposition, except as the last resort for a failing cause. Your honor, he says, dare not decide against it. My learned brother is a bold man if he dares to confront the profession after announcing such a rule as, in his opinion, the rule of English or American law. He is a brave man, for it takes a brave man to do such a thing as that. What does he say? I read from the Associated Press report of his remarks, which is a mere synopsis, of course. It will be observed, that in this report the expression to the effect that the court "dare not decide against the principle he enunciated" does not appear:

"It is the first time, said Mr. PIERREPONT, that an opportunity was ever afforded to test the fourth point, for the fact seems to be lost sight of that this whole conspiracy was for the purpose of overthrowing the Government; but neither the court nor jury could escape from that view of the case, and if this was considered only as an ordinary murder, the country would hold both court and jury responsible. It was a monstrous doctrine to enunciate, that if an abduction only was contemplated, and a murder ensued, therefore the conspirators to abduct were not guilty of murder."

The learned counsel maintained that proposition by this system of logic: The crime is so heinous, that there can be no accessories; and it is heinous, because the man killed was a President. And he tells your honor that it is your extraordinary privilege to enunciate from the bench, for the first time in America, this doctrine. Well, sir, he may regard it as a privilege; but, as the representative of this young man before your honor and this jury, I will say that we do not desire you to be exercising privileges or decorating your name by the enunciation of new principles. We demand that you discharge the duty of determining the law as it is, and we deny your right to make new law not heretofore announced in the country. He says it is the law of France and the law of England. As I said the other day, there is a class of gentlemen in the United States who, since the commencement of our late war, seem to have entirely lost sight of all the free and glorious traditions of our country, and abandoned all love for constitutional liberty, and become dazzled with the prospective glory of stars and garters, titles of nobility and rank, crowns and diadems, and it may be that before the days of republican liberty are over we shall have to meet that class of men in order to preserve our Constitution. Ideas of monarchy and rank are growing among the people, and military satraps are being dazzled with the glitter of their stars and grow dizzy at their unnatural elevation. May it please your honor, the very dead of the Revolution—of the last war with Britain—and of the late war for freedom and constitutional independence, rise to condemn the gentleman and repudiate his doctrine. Give me the Constitution of my country and her ancient liberty, undimmed by the darkness of a single decoration and unsullied by the restraint of any tyrannical power. The President is a simple American citizen, the representative of the free people of America. The monarch of this country, grand and sacred beyond touch, and beyond reach of assault, is the embodied will of the people in the Constitution of the United States, our only emperor, our only king, is the Constitution of the United States. It is the only sovereign of the Republic, the supreme law of the land, representing the collected will of the people; and when that ceases to be the supreme law of the land, and we attach to individuals in office especial privileges, especial powers, and especial grace, we take away a part of the sanctity that belongs to that Constitution to give it to men. Sir, I will never consent to see my country thus dishonored. If I might venture to use the language of the gentleman, and did not feel that it was transcending the propriety of forensic debate, I would say your honor dare not sanction such a doctrine.

No man feels more keenly than I do the enormity of this great crime, the disasters that it brought, and the disasters that it was likely to bring, committed by a parcel of inconsiderate and half run-mad individuals. But yet the consequences of a crime cannot change the nature of the crime in contemplation of law. If a captain at sea, with one passenger on board of his vessel, scuttles his ship and escapes from it, he is just as guilty as the captain of a steamship, charged with a thousand lives, who scuttles his vessel and sends the whole thousand to eternity. It is murder in the one, and it is murder in the other. And although the consequences of this crime might have been disastrous beyond the killing of an ordinary individual, yet, in contemplation of law, the killing was but the killing of an individual, and the charge is murder, and nothing but murder.

But, says the counsel, there are no accessories. What does he mean? There is but one crime known to the law to which there are no accessories, and that is treason. Are you trying the prisoner for treason? Gentlemen of the jury, are you sworn to try this as a case for treason? What is the law of treason? A party indicted for treason is entitled to a list of the witnesses against him. If my client is indicted for treason, why did you not furnish me with a list of that battalion of infamy that you brought into court? You indict the prisoner for treason, and hold him responsible for all the penalties incident to treason, and yet you deny him the right which he is guarantied by the statutes of the United States in the case of treason. What more is he entitled to? To have the overt act of treason charged in the indictment proved by two witnesses. You indict for murder, and one witness is enough; in treason you must have two. Treason, your honor, in its practical application to an individual where he is indicted for it, has two features that mark it as distinct

from every other crime. One is, that he is entitled to have a list of the witnesses against him; and the other is, that you must prove the act by two witnesses. Why did you not give me a list of witnesses when I called for them? If you meant to call this treason, which you made murder on your record, and meant to hold my client responsible for treason, when I called for that list, why did you resist it, keeping back the secret purpose to hold him responsible for treason, when you denied him the privileges that the law gave him if he was indicted for treason? It is dishonest; it is attempting to trick a man out of his life. Courts of justice were not made to play tricks upon individuals, and hang them by chicanery. You talk about public sentiment. The American Republic would revolt at such an idea, and the whole heart of the country would condemn such a piece of conduct and crush beneath the weight of its indignation any individual who would participate in so nefarious an outrage.

The sixth proposition sets forth:

"That the personal presence of the prisoner in Washington is not necessary to his guilt in this case. He could perform his part in the conspiracy as well at Elmira as at Washington, and be equally guilty at one place as at the other. That if he left Montreal in obedience to the order of his co-conspirator Booth, to aid in the unlawful conspiracy, it matters not whether he arrived in time to bear his allotted part or not. Being on his way to take part, any accident which may have delayed him does not change his guilt."

"He could perform his part in the conspiracy as well at Elmira as at Washington?" Common sense would suggest that, in regard to that, even if the principle of law were true, the counsel ought to have alleged in the indictment that he was in Elmira for the purpose of performing his part. If he happened to be in Elmira for something else, does the learned gentleman mean to contend that he is still guilty, even according to his own bad law? It was necessary to show that he was there for the purpose of performing his part. Was he there for that purpose? Does the gentleman mean to argue that he was there participating in the conspiracy? Does he mean to contend that that was his allotted place? Turn back to the reported proceedings of this case, and blush for shame, gentlemen, if that is your purpose! When we offered to prove why he went to Elmira, and what he was doing there, you told the court that there had been no proof on your part as to what he was doing there, and, therefore, we could not offer any; and so the court decided. If you mean to contend that he was in Elmira, performing his part of the conspiracy, then I say you have tricked us again, for the reason that, you remember, gentlemen of the jury, we had General E. G. Lee on that stand, prepared to prove what Surratt went to Elmira for, and what he was doing in Elmira, and to show that his business there had nothing to do with this conspiracy, and the court said, "You cannot prove it, for the reason that there is no charge that he was in Elmira helping the conspiracy, and therefore it is not necessary for you to show for what purpose he was there." If there had been one scintilla of proof, or if there had been an intimation from the counsel that they intended to claim, that he was in Elmira helping the conspiracy there, and doing in that city the allotted part assigned him, then the court would have said, "Gentlemen, that being part of the charge, you may disprove it, and Lee may give his evidence." But they disclaimed it then, and it is too late now—too late for law and too late for honor. Let us deal fairly by this young man, and even if the reputation of Joseph Holt should not have the vindication of innocent blood shed by a judicial murder, let us do justice still.

I will waste no more time in the consideration of their propositions of law. I come now to the authorities on my own. The propositions of law submitted by the counsel on the other side give rise to the consideration of the question as to who are principals and who are accessories; and that question subdivides itself into another question, to wit: who are principals in the first degree and who are principals in the second degree? Your honor is perfectly familiar with these distinctions in the law, and you are also perfectly familiar with the broad distinctions that have been observed for time out of mind. To be a principal in the first degree involves the commission of one crime; to be a principal in the second degree involves the commission of another crime; to be an accessory before the fact involves the commission of a third crime. A principal in the first degree can never be a principal in the second degree, and a principal in the second degree can never be a principal in the first degree, and an accessory before the fact can never be a principal either in the first or second degree.

Now, I ask the attention of your honor, as also your attention, gentlemen of the jury, while I read a few passages from that great authority in criminal law, Hale's Pleas of the Crown. I read from page 438, vol. 1:

"To make an abettor to a murder or homicide principal in the felony there are regularly two things requisite: First, he must be present; second, he must be aiding and abetting *ad feloniam et murdrum sive homicidium.*"

Even if the counsel are correct in their position that to kill a President is something more than to kill an ordinary individual, I still cannot comprehend why these principles should not apply; for I am not familiar with any decision in which a distinction is drawn between *murder*, as ordinarily and commonly understood, and the *murdrum magnatum* which the prosecution claim this homicide to have been.

"If he were procuring or abetting, and absent, he is accessory in case of murder, and not principal."

Presence constitutes the distinction between accessory and principal. He who strikes the fatal blow is the principal in the first degree. He who stands by and sees it done, aiding and abetting it, and ready to help it, if help should become necessary, is principal in the second degree, and commits the same degree of moral guilt which the principal in the first degree has committed. But if, instead of being present doing the deed, or present aiding and assisting another to do it, and ready to give him material help in doing it, I, for instance, have simply counseled it to be done, employed a man to do it, paid him money to do it, and given him weapons with which to do it, and he does it in my absence, I am accessory, and not principal. There is the distinction between accessory and principal. The principal must be present; the accessory is absent. The accessory may be just as guilty as the principal, but still, not being present, he is not principal, and if accessory, can only be indicted as accessory. I will show you now from the books that I have stated the principle correctly. I have already read to you that there are two requisites to make a principle. "First, he must be *present;* second, he must be *aiding and abetting.*"

Judge FISHER. Let me see if I understand your position, Mr. MERRICK. I understand you to hold that he who strikes the blow causing the death is principal in the first degree, and he who is present giving aid, countenance, and assistance, though not participating in the blow, is principal in the second degree, and that he who counsels, aids, or assists, but is not present at the time of the giving of the blow, is merely an accessory.

Mr. MERRICK. Yes, sir.

Judge FISHER. I understand you to say further, that he who strikes the blow, being principal in the first degree, is indictable for one crime, and he who is present giving aid at the time of the infliction of the blow is indictable for another.

Mr. MERRICK. No, sir.

Judge FISHER. I misapprehended you.

Mr. MERRICK. I said the moral guilt is the same; but the frame of the indictment may be different.

Judge FISHER. Do you hold that they cannot be joined together?

Mr. MERRICK. I do not mean to make that point—it is not in the case; I shall not state any thing that is not law.

Mr. BRADLEY. They may be joined together, or they may be indicted separately.

Mr. MERRICK. Certainly. Now, I will read from Hale—page 615—quite a clear exposition of this principle:

"By what hath been formerly delivered, principals are in two kinds: principals in the first degree, which actually commit the offense; principals in the second degree, which are present, aiding and abetting of the fact to be done.

"So that regularly no man can be a principal in felony unless he be present, unless it can be in case of willful poisoning, wherein he layeth or infuseth poison *with intent* to poison any person, and the person intended or any other take it in the absence of him that so layeth it; yet he is a principal, and he that counselleth or abetteth him so to do, is accessory before.—*Co. P. C., cap.* 64, *p.* 138."

Now, your honor, and you, gentlemen of the jury, will observe that here is one exception, where a party may be a principal and yet not present. That exception is where he lays poison. The counsel yesterday, in his address to the court, asked me to tell him something about what jurisdiction could take cognizance of the crime committed by an individual who started a locomotive out of Maryland and ran it into the District of Columbia, where it run over and killed a number of children, the man remaining in Maryland. Why, sir, the man is a principal in the second degree. He is a principal in the murder. If I am in the house of Mr. McLean, for instance, and whilst partaking of his hospitality prepare poison for him, and put it where I know he will get it, and then go to New York, and he one week afterwards takes the poison and dies, I am principal. And why? Because I am present with the material thing that did the deed. My hand is still there. No other will has come between me and the act. So, if I start a railway car, and it goes by the impulse of the steam, under the guidance of my will, that first put it in motion—it being a thing without volition and without consciousness—I am responsible for what it does; because my will is infused into it, and my consciousness is in it. So my will is in the poison, and my consciousness is in the poison. Being a material thing, without will of its own, it acts by my will; I breathe life into it, and I give it power of mischief, and direct it to mischief; and, if death follow, my life must answer for it. But how is it with an individual? I want to commit a murder upon Mr. Bohrer; I employ a gentleman in town to kill him, giving as compensation for the deed a thousand dollars. I ask him, "When are you going to do it?" He replies, "I will do it next Saturday." "Very, well," say I; "here is your money; I am going to New York." I go to New York, and the man kills Mr. Bohrer. In that case I am an accessory before the fact, but not a principal. And why? Because the agent that I employed to do the deed was a reasonable creature, having a consciousness of his own, and it was optional with him whether he did it or not. He had a will of his own, and, although my agent, he was nothing more than my agent. I being absent, he must be hung as principal in the first degree, and I tried as accessory. But in the other cases there was no principal to try. You could not try the locomotive, and you could not try the poison. In order to have an accessory, there must be a principal that you can try. There must be a principal that is responsible. The locomotive is not responsible; the poison is not responsible; but wherever you employ a rational creature to commit a crime—one who is responsible and can be tried—and the deed is done, that creature becomes principal, and he being the principal, I become accessory. That is the law.

I will read a little further. I read from page 435:

"In case of murder, he that counselled or commanded before the fact, if he be absent at the time of the fact committed, is accessory before the fact; and though he be in justice equally guilty with him that commits it, yet, in law, he is but accessory before the fact, and not principal."

He that *counseled* or *commanded*, if absent, is accessory, and must be charged as accessory, and cannot be charged as principal. I read from page 615 of the same book:

"An accessory before, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit felony, and it is an offense greater than the accessory after; and therefore in many cases clergy is taken away from accessories before."

An accessory before the fact is he that is *absent*, but, being *absent*, hath *counseled* and *commanded* the thing to be done. Again, on page 616:

"That which makes an accessory before, is command, counsel, abetment, or procurement by one to another to commit a felony, when the commander or counsellor is absent at the time of the felony committed, for if he be present he is principal."

If he is present, he is principal; but if he has commanded the thing to be done, or procured it to be done, and is absent at the doing, he is accessory. On page 617 I find the illustration that I just now suggested, of using a thing that had no consciousness:

"A lets out a wild beast, or employs a madman to kill others, whereby any is killed; A is principal in this case, though absent, because the instrument cannot be a principal."

You cannot indict the beast, and, since you cannot indict the beast as principal, there can be no accessory, and consequently the man that employed the beast to do the thing, or set the beast loose, is principal himself.

These principles lie at the very foundation of the English law, and I apprehend that your honor scarcely sits on that bench to attempt to uproot that ancient and established inheritance of Englishmen and Americans. The learned counsel would ask you to abolish all distinction between accessories and principals. I humbly submit that it cannot be done. I will now trace the principle as it has been brought down through the courts of England, and then follow it through the courts of the United States. I refer your honor to the case of *Rex* vs. *Soares*, in Russell and Ryan's Crown Cases, page 25, where there was a conspiracy to utter forged paper, and it was decided that "persons privy to the uttering of a forged note, by previous concert with the utterer, but who were not present at the time of uttering, or so near as to be able to afford any aid or assistance," were "not principals, but accessories before the fact." There had been a conviction at *nisi prius*, but—

"The case was taken into consideration by all the judges on the first day of Easter Term, 1802; and again, in the same term, on the 29th of May, 1802, when they were all of the opinion that the conviction was wrong; that the two prisoners were not principals in the felony, not being present at the time of uttering, or so near as to be able to afford any aid or assistance to the accomplice who actually uttered the note, and they thought it too clear to order an argument on it."

As far back, then, as 1802, all the judges of England took into consideration this principle in a case identical in character with the case at bar. Certain individuals had entered into a conspiracy to utter forged paper. One of them uttered the paper, but the other conspirators were not present when he uttered the paper, nor near enough to give assistance, though they had sent him to the town to utter the paper; and the court said that as the other conspirators were not near enough to give assistance to the uttering of the paper, they were accessories before the fact, and not principals. This decision was concurred in by all the judges of England, there being no dissent; and I defy the learned counsel on the other side to find a single case in the history of English law controverting the principles of that great father of English jurisprudence, Lord Hale, which I have read to your honor. There is a uniform and unbroken current from the earliest dawn of the law to the present time in England. I refer your honor to another case decided in 1806—the case of *The King* vs. *Davis and Hall*, page 113, of the same book. The case came originally before Baron Graham, but it was carried up before all the judges:

"In Eastern Term, 28th April, 1806, all the judges except Lord Ellenborough being present, the conviction was held wrong as to Hall, he not being to be considered as aiding and abetting."

It was held "not to be sufficient to make a person a principal in uttering a forged note that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up a lit-

tle before he uttered it, joined him again in the street a short time after the uttering and at some little distance from the place of uttering, and ran away when the utterer was apprehended."

Could you have a stronger case, your honor? Two parties conspire to utter a forged note. They go to the town together, they put up at an inn together, and one of them utters the note, but the other, not being present or so immediately near as to give material aid, was held not to be a principal. That was decided in 1806. I next refer your honor to page 249 of the same book; the case of *The King* vs. *Babcock, et al.*, where it was held by all the judges that,

"If several plan the uttering of a forged order for payment of money, and it is uttered accordingly by one, in the absence of the others, the actual utterer is alone the principal."

At page 363 of the volume, the same principle was again applied in 1818 in the case of *The King* vs. *Stewart*, and the doctrine announced that "persons not present nor sufficiently near to give assistance are not principals." In this case "Ann was employed to commit a crime, and the parties who employed her were indicted as principals;" but it was held that although the crime was committed by employment, and she was the guilty agent, they furnishing the means of payment, yet they were only accessories before the fact.

On page 421 of the same volume will be found the case of *The King* vs. *Patrick Kelley*, where, on an indictment for larceny, it was held that,

"Going towards the place where the felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he was such a distance at the time of the felonious taking as not to be able to assist in it."

Here the parties had agreed to steal certain property; one went forward to commit the theft, the other went forward to be there in time to help to carry off the stolen property; and the court held, notwithstanding the conspiracy to commit the larceny, and notwithstanding the co-conspirator accompanied his confederate for the purpose of carrying off the stolen property and did carry it off, yet he was not a principal, because he did not get there in time to help at the theft.

What becomes of the learned gentleman's principle, that if Surratt started from Canada, in obedience, as he says, to the summons of Booth, but did not get here, he is responsible? Is what I have read the law of the land, or are we to have some new doctrine, devised for the occasion, to be first promulgated in this trial, in order to secure, by some trick, the judicial murder of this boy? Try us, your honor, by the law of the land. It is the inheritance of American citizens. We brought it from England when we came here, and we kept it pure against her tyranny and her devices. It is the shield of every American citizen against wrong and oppressions. I love it, and I honor it. Educated in it, I will never do it wrong by straining any of its principles—at least never against the charities of a Christian heart. Keep it, your honor, as long as you sit on that bench and desire to bear an honorable name; keep it free from the impurities with which you are now sought to desecrate it. Parliamentary statutes and legislative acts have not impaired its power, but with judicial constructions of its principles have only preserved the harmony of its proportions and decorated its glory; and to this time it has stood, like a rock in mid-ocean, firm and unshaken in the midst of the upheaving sea of political passions, the unfailing refuge of the people, defying the tempests, and dashing back in frothy insignificance the waves that angrily beat against its breast. We want that law in this case, the law of the land as it now is, without modifications to gratify the passions or interests involved in this trial; we have a right to it, and we demand it.

I have now shown your honor that from the earliest days down to the latest in England the principle for which we contend has been recognized, and the learned gentleman can find no case contravening it. What expedient is adopted in this emergency? He tells me that by the law of England to kill the President of the United States is so heinous a crime that there are no accessories. Can he find a parallel case in England? Was anybody ever tried there for killing a President of the United States? No, sir. He may find a case of compassing the king's death. Has the President of the United States ever had his temples pressed with a crown? Is he the State? The counsel says he can find an authority in France. I grant it. To imagine the death of Louis Napoleon, by the laws of France, is treason. Is it treason here to imagine the death of Andrew Johnson? Is it treason here to wish his death? If it be—then, sir, when your grand jury meets, charge them to indict Thaddeus Stevens and all his entire corps of treasonable incendiaries. No, sir; it is not treason. We can wish and desire what we please in this free land, and our public men are open to the freest and severest criticism. If in the Corps Legislatif an individual passes censure on the emperor, what is the consequence? The president stops him, for the sanctity of the imperial person will not bear the censure of a private mouth. How is it here? Here, thanks be to God, we have freedom of speech, with a restored Constitution, temporarily suspended by usurping power, but once again in the possession of our people as the birth-right of Americans. He may find you a case in France, and he may find you a case in England, where imagining or compassing the death of the sovereign is treason; but that is not a parallel case. The pride of our country is, that neither the anointed of man nor the anointed of the Lord claims political power by virtue of the anointing. Political power flows from the people, and is the gift of the people. Will he find me a case in England or in France where, except in revolutionary times, you may impeach the emperor or the king? To make the case parallel you must show that the same disabilities affect the people in the one country that operate in the other. In France, can the Corps Legislatif impeach the emperor? In England the Commons did impeach Charles—aye, sir, and the French Deputies impeached Louis, and the head of each answered to the impeachment; but it was the impeachment of passion, and not the impeachment of law. Does the learned gentleman think he could induce M. Thiers to bring forward a motion in the Corps Legislatif to impeach the emperor? Could he have an investigating committee to sit for almost twelve months out of the year, seeking for causes of accusation against the emperor? No, sir; these are republican luxuries, not imperial. There is no divinity that doth hedge with its sanctity the person of our President. The pride of our free institutions is that the President of the United States is, like a private man, our servant, fenced around by the hearts of the people, and sustained by the public approbation that put him in power. He claims no factitious authority; no factitious sanctity. The line of his duty is marked by the Constitution, the extent of his power is defined by law, and his relation to the people is well ascertained. If the gentleman cannot find in England any authority to controvert the principles I have laid before your honor, can he find any in America? I will show your honor that in the United States we have repeatedly, again and again, ratified and confirmed the principles which I have been reading from the English law.

The leading authority to which I refer your honor is the case of *The Commonwealth* vs. *Knapp*, 9th Pickering, pages 517 and 518.

In that case, gentlemen of the jury, there was a conspiracy between the Knapps and Crowninshield to murder an old gentleman living in a village in Massachusetts by the name of White. Crowninshield was to perpetrate the murder, and the Knapps were to pay him for it. Crowninshield did perpetrate the murder, and afterwards committed suicide. One of the Knapps was subsequently tried as principal in the second degree for being present, aiding and abetting in the murder. It appeared in proof that the house of Mr. White had

been entered by some one having the confidence of the proprietor, and the window had been left open for the access of Crowninshield. The evidence showed that from the window to the ground a plank had been extended in order to admit the entrance of the murderer; and the evidence further established the fact, that whilst the murderer was in the house doing the deed of murder, the prisoner at the bar, Knapp, was in an alley about fifteen or twenty yards off, where he could see what was going on, where he could hear, and from which place he could be heard. In other words, he was in the alley, where he could render material assistance, and the question was, "What kind of presence was necessary in order to constitute him a principal in the second degree?" He was stationed there by previous direction, by previous agreement; and the evidence further was that he received Crowninshield after the murder, and went with him to deposit under the steps of a church the club with which the deed was committed. In considering the principle, the court said:

"The person charged as a principal in the second degree must be present, and he must be aiding and abetting the murder. But if the abettor at the time of the commission of the crime were assenting to the murder, and in a situation where he might render some aid to the perpetrator, ready to give it, if necessary, according to an appointment or agreement with him for that purpose, he would, in the judgment of the law, be present and aiding in the commission of the crime."

That is constructive presence. Now, analyze this, and what is it? He must be near enough, in some position where he might render aid to the perpetrator. What kind of aid? Aid in doing the deed; aid in resisting opposition to his doing the deed; aid in striking down the strong arm that might come to protect the victim from the assassin's dagger—material aid in making the blow deadly and effective. He must be where he can reach the scene of action at a shout, or reach it in time to consummate and make perfect the murder. He must be there by appointment, too. It is not enough that he should be there incidentally; it is not enough that he should be there accidentally, without the fact of his presence being known to the principal. It must be a part of the plan that he should be in that particular spot, that knowledge may nerve the principal's arm, may strengthen his heart, uphold his failing courage, and assist him in the perpetration of his murderous design. He must be there by appointment, by preconcert, and not by accident or circumstance. "It must, therefore, be proved," says the learned judge, "that the abettor was in a situation in which he might render his assistance in some manner to the commission of the offense;" not assistance generally, not assistance by creating confusion in New York, or confusion in some other State; but he must be in a position where he can render assistance to the commission of the particular offense.

"It must be proved that he was in such a situation by agreement with the perpetrator of the crime, or with his previous knowledge consenting to the crime, and for the purpose of rendering aid and encouragement in the commission of it. It must also be proved that he was actually aiding and abetting the perpetrator at the time of the murder."

It must be proved that he was where he could assist; it must be proved that he was there by preconcert; and it must be proved that whilst there he was actually aiding in the perpetration of the murder.

"We do not, however, assent to the position which has been taken by the counsel for the Government, that if it should be proved that the prisoner conspired with others to procure the murder to be committed, it follows, as a legal presumption, that the prisoner aided in the actual perpetration of the crime, unless he can show the contrary to the jury."

This answers Mr. CARRINGTON'S proposition, which is, that if they prove that the prisoner conspired originally, it is a legal presumption that he aided in the perpetration of the crime. This learned judge says that the court in Massachusetts does not agree to that proposition; it is not a legal presumption "that the prisoner aided in the actual perpetration of the crime unless he can show the contrary to the jury."

"The fact of the conspiracy being proved against the prisoner is to be weighed as evidence in the case, having a tendency to prove that the prisoner aided; but it is not in itself to be taken as a legal presumption of his having aided unless disproved by him. It is a question of evidence for the consideration of the jury.

"If, however, the jury should be of opinion that the prisoner was one of the conspirators, and in a situation in which he might have given some aid to the perpetrator at the time of the murder, then it would follow, as a legal presumption, that he was there to carry into effect the concerted crime; and it would be for the prisoner to rebut the presumption by showing to the jury that he was there for another purpose unconnected with the conspiracy."

If they prove that this man was in the conspiracy, and if they prove that he was near the theatre, where he could have given aid at the time of the murder, then I admit that the burden is upon me to show what he was doing there; because, having proved that he was one of the conspirators, his proximity to the scene of action, according to the course of ordinary reasoning and common sense, would induce you to believe that the probabilities were that he was there for the purpose of carrying out the plan of the conspiracy. They must prove, however, that he was there, where he could give aid at the time; that he was near enough to help, to give aid to him who was to strike the blow—near enough to help, at a call, to strike down the defenders of the victim it was determined to kill.

I now refer your honor to Burr's trial. Chief Justice Marshall, in this great case, about which I shall have something to say to you, gentlemen of the jury, delivered one of his most elaborate opinions, after probably the ablest forensic discussion that ever took place in the United States. In that opinion, on page 333, he says:

"Hale, in his first volume, page 615, says: 'Regularly, no man can be a principal in felony unless he be present.' On the same page he says: 'An accessory before is he that, being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony.' The books are full of passages which state this to be law. Foster, in showing what acts of concurrence will make a man a principal, says: 'He must be present at the perpetration; otherwise he can be no more than an accessory before the fact.'"

Then, on page 334, he observes, and I call especial attention to the beauty and simplicity of this illustration of the principle:

"Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual; and each performs the part assigned to him. Some ride up to the individual and demand his purse; others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed. If murder or robbery actually take place, all are principals, and all, in construction of law, are present. But suppose they set out at the same time or at different times, by different roads, to attack and rob different individuals or different companies—to commit distinct acts of robbery; it has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do, indeed, belong to the general party, but they are not of the particular party which committed this fact."

A band of robbers confederate to rob; there are three roads, and three individuals are coming down the three roads the same night; some of the band go one road, some another, and some the third, each to perpetrate his particular robbery and bring the booty to the common rendezvous for distribution. One succeeds; the other two fail. Nobody, says Chief Justice Marshall, ever contended that those who failed were responsible for the robbery that was successful. In this case, as an element of that prejudice of which I have spoken, as a circumstance to harrow up your feelings, disturb your judgments with irritation, and create an indignant animosity to the prisoner, there has been introduced that most shocking scene at the residence of the Secretary of State. What it had to do with this case I know not. What it had to do with the argument of my learned brother on the other side (Mr. CARRINGTON) you have seen and heard. What it will have to do with the argument which is to follow you can readily imagine. You are to see it in all its graphic coloring, described in all its shapes and phases—see young Seward beaten by Payne over the head, his mother dying with grief and sorrow, and the sister and daughter stricken down, and all the terrible suffering of that afflicted family, in order that your feelings may be

harrowed up and your hearts made to palpitate for vengeance. And what has all this to do with the case? Suppose Booth started out by one road to murder the President, and Payne started out by another road to murder Seward, could Booth be held guilty of the murder of Seward as a principal? Says Chief Justice Marshall, no; he may be an accessory before the fact; he has his own murder or robbery on his own hands, and he has nothing to do with the physical act of the robbery or the murder that was put upon the hands of his confederate in the conspiracy. I will read from page 336 of the Burr Trial, where Chief Justice Marshall says:

"In felony, then, admitting the crime to have been completed on this island, and to have been advised, procured, or commanded by the accused, he would have been incontestibly an accessory, and not a principal."

To what does that apply? Aaron Burr, the spirit and mind of the conspiracy, gathered his forces together and rendezvoused them at Blennerhassett's island. Burr was the master-mind that had formed the plan. His was the genius that had devised the scheme; his the judgment and his the controlling power that directed it. He was indicted in Richmond for treason. The overt act of treason was laid at Blennerhassett's island, and it was alleged that Burr was present at the commission of the treason, just as it is alleged that Surratt was present here at the commission of the murder. It appeared in proof that Burr was not at Blennerhassett's island, nor near there, although in point of fact he had started out the forces that were gathered on that island. There were no accessories in the treason, and Judge Marshall was reasoning upon the case, supposing it to be felony, and he said:

"In felony, then, admitting the crime to have been completed on this island, and to have been advised, procured, or commanded by the accused, he would have been incontestibly an accessory, and not a principal."

If, then, there was a felony committed on Blennerhassett's island by Burr's co-conspirators—a felony which Burr had devised, conceived, procured, and directed—and Burr had sent the parties to the spot, and paid their expenses, and appointed that as the place of rendezvous, and promised to be there to co-operate with them, but had not reached there in time for the act, says Chief Justice Marshall, *he was incontestibly an accessory and not a principal.* Does your honor dare to follow Chief Justice Marshall? Do you think the people of America will censure your honor when you follow in your judicial pathway a light of such undimmed glory as that great judge? I want no new law. Give me the old law; the old guarantees of freedom; the old lights that burned in purer days, and by following the illumination of which we can alone go forth from the deep corruption into which we have descended.

The court took a recess for half an hour, re-assembling at one o'clock p. m.

Mr. MERRICK. At the time your honor took a recess I was discussing the opinion of Judge Marshall, in the trial of Burr, relating to and elucidating the points involved in this case. And now I beg leave to call your honor's attention to a decision at a yet later day, and even nearer home. It is your honor's own decision in this cause. I think the jury will recollect that your honor, with a clear view of this question, has determined it according to the principles I stated this morning. When the counsel for the prosecution proposed to prove, in their rebutting testimony, (by way of meeting our proofs that the prisoner was in Elmira on the 14th,) that he was in New York on the morning of the 16th, and had been transported from Baltimore to New York on the night of the 15th, we objected, on the ground that the testimony was not properly in rebuttal, not properly in reply; that we had proved him to have been in Elmira on the 14th, and that they could not reply to this proof by showing that he was fleeing from Washington on the 15th, because his presence in Washington, being essential to the commission of the crime with which he was charged, it was part of their case-in-chief, and ought to have been proved by them before they closed their testimony. Your honor, in delivering the opinion and deciding that they could introduce the proof that he was in New York, and could introduce the proof in regard to the transportation from Baltimore, provided they could connect the prisoner with it, which they afterwards, as your honor recollects, failed to do, and your honor struck it out, said:

"In the case which we are now trying it was not necessary to prove that the prisoner at the bar was ever in New York city, or anywhere else than in Washington. It was not necessary to prove that he came here from Elmira on the 13th or 14th. It was sufficient for the original case to prove that he was here, and participated in the deed of murder, and unnecessary to trace his history further in the past or the future. When it is attempted to show that he was at Elmira, or some other place in the State of New York, at such a time as would have made it impossible for him to be present here at the time of the murder, common sense would certainly indicate to men of ordinary intelligence and reflection that to prove him on the cars coming to this direction, at such a time as would place him here on the night of the murder, is directly responsive to the matter set up."

So your honor decided our motion upon the ground that it was unnecessary to prove the prisoner was anywhere else but in Washington on the night of the murder; and that it was sufficient for the original case to prove that he was here participating in the deed of murder, and unnecessary to trace his history further. It is then apparent that your honor has already in this cause determined this question; and that in the determination which your honor has pronounced upon this question the case has been shaped, and evidence has been ruled out and ruled in. It is for this case by your honor *res adjudicata.* And his honor states there, as you see, gentlemen, the very principle for which I have contended: that they must show that he was here, and not only that he was here, but here participating in the murder.

I beg to call your honor's attention to another point. I have shown the jury and the court that the indictment charges that he was here; it charges that he was present, made the assault, and committed the murder. Now, I maintain that if the theory of law of the learned counsel upon the other side is correct, viz: that being in the conspiracy to murder, he could be guilty of the murder, being elsewhere than at the place of its perpetration, the indictment must charge the fact as the fact is. If his theory of the law be correct, that, being in Elmira, the prisoner at the bar could commit a murder in Washington, the indictment must charge the fact that he was in Elmira, and, being in Elmira, by certain means he committed a murder here. And I refer your honor and gentlemen of the jury to the case of Burr again on that point. What was the point in that case, and upon what was it finally determined? As the learned judge says, there are no accessories in treason; all are principals. So says the counsel on the other side, there are no accessories in this crime. He conceives this to be a sort of *murdrum magnatum*, and all are principals. In Burr's case the overt act of treason occurred on Blennerhassett's island. An assemblage of men had been gathered together there by the strong intellect of Aaron Burr. He was the soul and body of that conspiracy. The indictment charged, that, being the body and soul of that conspiracy, he was present on Blennerhassett's island, and there levied war. The proof showed that he had sent troops there, that he was co-operating in another place, and that he was in such a relation to the deed done that if it had been felony, he would have been an accessory; and, therefore, being treason, and there being no accessories, he was in such relation to the deed done that he became a principal. What said Chief Justice Marshall? Said he, on page 350:

"Now, an assemblage on Blennerhassett's island is proved by the requisite number of witnesses, and the court might submit it to the jury whether that assemblage amounted to a levying of war; but the presence of the accused at that assemblage being nowhere alleged except in the indictment, the overt act is not proved by a single witness, and of consequence all other testimony must be irrelevant."

The overt act of treason was charged to have been committed on Blennerhassett's island, and the indictment alleged that Burr was present; but Burr was not present, although he was a principal; and the further proof in the case stopped with the motion, upon the ground that the indictment must conform to the fact. If Burr was in Chillicothe giving aid and shipping men to Blennerhassett's island, the indictment should have alleged that he was in Chillicothe; that having been in the conspiracy and combination, he was in Chillicothe giving aid and comfort and abetting the levying of war on Blennerhassett's island, and therefore guilty of treason, and he might have been convicted; but the indictment did not so allege. The indictment alleged that he was there on Blennerhassett's island, and although he was a principal in the offense, yet the indictment not having charged the fact as the fact was, the court ruled it to be defective, and stopped the introduction of testimony. When my learned brother prepared this indictment for murder, he meant murder; when he wrote it, he meant nothing but murder. His mind, habituated to the ordinary courses of criminal procedure, had not then been enlarged to the new speculative theories which his associate has introduced. Having prepared an indictment for that purpose, it cannot now be twisted to suit the ingenious devices of his senior associate. They must get up another indictment if they are right in their theory of law. They cannot try a new case made yesterday on an indictment prepared for an old case made by the district attorney months ago.

I think, gentlemen of the jury, I have made these points of law sufficiently plain, and I feel a satisfied conviction that I have scarcely uttered one single word in regard to the legal propositions for the guidance of this jury which your honor will not repeat in giving them the assistance you are bound to give in your judicial position, aiding them to reach the truth through the ways of inquiry.

There is one other principle of law to which I beg to make a very brief reference. The district attorney stated yesterday that there was much misunderstanding in regard to the principle that the jury must find a verdict of not guilty unless they were satisfied beyond a doubt. I apprehend there is no misunderstanding about that rule among you, gentlemen of the jury. You know what the principle is. You know what a doubt means; you know what a doubt is. The learned gentleman did not state it with entire accuracy; and yet the natural instincts of his heart bent him down to the principle, even when he would fly from it. That you should find a verdict of acquittal unless you are satisfied beyond a reasonable doubt of guilt, is a principle founded in the charity of the human heart and in the beautiful precepts of the Christian Church. It is not allowed to man, whose judgment is limited, at best, and whose vision is but obscure, even when most seriously and earnestly strained, to take the life of his fellow-man upon simple probabilities and chances.

It is a difficult task, at best, for us, with such testimony as we may obtain, to enter into all the motives and circumstances connected with the conduct of our fellow-man And I suppose there is no truly upright gentleman living in organized society that would not wish and pray to be delivered from the necessity of sitting in judgment upon his fellow-citizen. Why? Because the apprehension of doing wrong to another makes the human heart shrink with fear from the undertaking to do justice. To aid us in this office, to enable us to discharge our duty with satisfaction, and be assured that no wrong shall come, the law says you shall not convict unless guilt be proved beyond a reasonable doubt. You must be satisfied in your own mind to a certainty; not a mathematical certainty—that we cannot reach—that is not attainable—but you must be satisfied to such a degree of certainty that you can say, I have no doubt about it. I will illustrate. Suppose that ten of your number should, after a careful weighing of the testimony and hearing the arguments, say they were satisfied this man was innocent, and two should say, "we are satisfied to the contrary."

The very existence of the opinion of innocence, under the same opportunities to judge, of ten honest men, must inevitably shake the conviction of the two. I have opinions in my mind and heart that are firm, and clear, and decided, and yet when I hear the contrary opinion of a man with equal advantages I begin to doubt, and I want to talk it over, and if responsibility accompanies the doubt, I give the benefit of that doubt, and avoid the consequence of assuming the danger. I do not say that one or two should yield convictions. You are sworn to do your duty, and find according to your judgments. But judgment and conviction are made up from many influences legitimately in the case, and the conviction of others' judgments operates upon your own, and shapes your own more or less. I will read the rule of law on this subject, as it has been determined in this court time and again. I read to the jury and your honor from Roscoe's Criminal Evidence, Sharswood's edition, page 697.

"On a trial for murder, where the case against the prisoner was made up entirely of circumstances, Alderson, B., told the jury that before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be *inconsistent with any other rational conclusion than that the prisoner was the guilty party.*' Hodge's Case, 2 Lew. C. C., 227."

Apply this rule, gentlemen, in your examination and determination of this case. Take the facts of a criminal case, fit them to every hypothesis you can conceive; fit them to every possible condition of circumstance; and if these facts are reconcilable with any hypothesis that involves innocence, you cannot find the prisoner guilty. Take the case at bar; suppose you should believe that John H. Surratt was in a conspiracy to abduct the President; that there was such a conspiracy, and that all the facts are reconcilable with that conspiracy, and that the facts occurring on the 14th of April are reconcilable with the hypothesis that the conspiracy to abduct had failed, and that a new conspiracy to murder had been created; you cannot find this prisoner guilty. I care not what he may have done—whether he carried dispatches, shot down Union soldiers, (which I will show you is not to be credited,) or fought a gun-boat; I care not what he may have done; if you find that these facts are reconcilable with the theory that he was in a conspiracy to abduct, which conspiracy was abandoned and a new one created, of which he was probably not a member, you cannot find him guilty. This principle of law is again repeated by that most excellent judge, now beside his honor presiding in this case, (Judge Wylie,) who has ruled in this court, "That unless the jury find that the whole evidence in the case excludes a reasonable supposition of the prisoner's innocence, and also is perfectly reconcilable with his guilt, they must acquit." So says Baron Alderson, that you must acquit unless the facts be such as "to be irreconcilable with any other rational conclusion" than that of guilt.

You are to take up the facts as proved, test them by the various theories you may form, and see whether they will fit any theory that is consistent with innocence. If they do, you must acquit. I do not suppose my learned brother on the other side differs from me on this point.

Again says Judge Wylie—(I read from the records of this court): "In all cases the jury must from the whole evidence find the material fact charged against the prisoner to be true to a reasonable and moral certainty" —not probability, but a reasonable and moral certainty—"a certainty that convinces and directs the understanding, and satisfies the reason and the judgment." It could not have been expressed in better language—"convinces the understanding, satisfies the reason and the judgment." There must be no lurking apprehension, no latent doubt, no slumbering fear, no possibility in your minds that hereafter your dreams

will be disturbed or your waking hours haunted by the ghost your verdict is to make. There must be a conviction controlling the understanding, satisfying the judgment, and filling the full measure of the conscience asking to be left at peace.

That being the law of this case, and these the principles which are to apply to it, I come to the consideration of that fact most immediately suggested by the principles I have been discussing; for I propose, gentlemen, as far as I can in the course of this argument, which is not to be protracted much longer, to lead you along from one point to another, as the points themselves shall suggest each other. If the principles of law I have stated and argued be correct principles, what is the first inquiry? Was John H. Surratt in the city of Washington on the night of the 14th of April, 1865? His presence here aiding and assisting the murder is essential to his guilt, and his absence at the time of the murder not only entitles him to a verdict of "not guilty," but is a powerful circumstance alone by itself to show that he was not in the conspiracy, and had no connection with it; for if he was in the conspiracy to murder, it would be a circumstance to show that he was here. I concede it; when you prove him to have been in a conspiracy to murder, not a conspiracy to abduct—for bear in mind you cannot change the purposes of a conspiracy, in the absence of one conspirator, and involve the absent conspirator in the new design—if you are satisfied beyond a reasonable doubt that he was in a conspiracy to murder, then it is a circumstance to be weighed by you to show that he was here, aiding in the consummation of the purposes of that conspiracy.

Now, if I show to you that he was not in the city of Washington when the purpose of the conspiracy was accomplished, it is a conclusive, or at least a very powerful, circumstance to show that he was not in the conspiracy. When the bud had blossomed, and the appointed hour arrived when the deed was to be done, if you are satisfied from the evidence that a party alleged to have been in the conspiracy was not present with his confederates, doing his part in the conspiracy, it is a strong and powerful circumstance to show that he was not in the conspiracy, and had not undertaken to do that which he is charged with having done. Upon this point the burden of proof is with the counsel on the other side to show that he was here. As the court has said, in the opinion I have read, it was necessary for them to show that he was here, and not necessary to show that he was elsewhere; it was a part of the case-in-chief to show that he was here in Washington, and that he was here aiding and abetting the murder. They come into court to prove that. We come into court to meet it. How do they prove it? The first witness introduced for the purpose of establishing his presence here is Sergeant Dye. My learned brother said I had published a libel on Sergeant Dye by asking the court to admit a record under the seal of Pennsylvania to show that he had been indicted for passing counterfeit money. I would make no reference to it here but for the remark of the prosecuting attorney; and I speak now, not to assail Sergeant Dye, but to defend myself. Why did I offer that record? I received under the broad seal of Pennsylvania a certificate that he had been held to bail for passing counterfeit money; that an indictment had been found against him, which had been set for trial at a term of the court sitting in Philadelphia at the time he testified in this case.

Mr. BRADLEY. The case was dismissed there after he was examined here.

Mr. MERRICK. When that record came to me I asked no question where it came from. It came under the seal of political and legal authority, spoke for itself, and proved itself. I asked his honor to admit it; he refused. Was it a libel? If it was, it was a libel published by Pennsylvania, not by me; and let the gentleman hurl his anathemas at the State of Pennsylvania, not at me. As my associate says, that case was dismissed *after* he testified here, and after I offered the record in evidence—dismissed, *not tried*—and dismissed by the authority of the United States before the time at which it was to have been tried.

What says this redoubtable sergeant? He sat in front of Ford's Theatre on the night of the 14th, on the platform arranged for persons getting out of carriages to enter the theatre. He was there for half an hour. He saw two men talking—one a villainous-looking man, the other a genteel-looking man. He saw a third, a genteelly-dressed man, come up and speak to them; time was called; the genteel man went up street and came down; he heard the time called again; the genteel man went up the street a second time, and came down; and he heard a third call of the time—*ten minutes past ten*—when he went up the street rapidly; Booth entered the theatre, Sergeant Dye goes to take his oysters, and the next thing he hears is that the President is shot. Says Judge PIERREPONT, in a style and manner that delighted me, for I like drama, "Have you ever seen that man before?" "I see him now," says the sergeant; "that is the man—the prisoner at the bar." I will stop with Sergeant Dye at that place, and comment on his testimony for a moment before I take him down H street. When Ford and Gifford were put upon the stand, I handed them a plat, which they proved was a correct representation of the front part of Ford's Theatre. Sergeant Dye stated that he was sitting on the southern end of the carriage-platform, and that when the prisoner came and called the time he saw him distinctly; he saw that pale face; he has seen it in his dreams since then; it has hovered over him by night, and walked beside him by day. Says my learned brother on the other side, "Deep impressions necessarily involve the consequence of dreams, and this was a very deep impression." I will show you, gentlemen, before I get through with him, that he dreams too freely, he dreams too much, and there is too much speculation in his dreams. He saw that pale face. When did he see it? He saw it when the prisoner was looking at the clock. When I got that answer I thought I had nearly exhausted the subject, for I was satisfied in my own mind; but I was reminded that jurors are sometimes shrewder than lawyers, for, when he was about retiring from the stand, some one of you asked him, "How much of the prisoner's face did you see; did you see the whole of it, or one-third, or one-half of it?" He answered, "Sometimes I saw two-thirds; occasionally the whole." The thing was answered. [Exhibiting the diagram of the front of the theatre.] You see, gentlemen, where that platform was. Dye sat on the southern end of it; here it is; here is the spot occupied by the two men who were standing in front of the theatre; here is the ticket-office; here is where Surratt, as he says, entered to look at the clock, [pointing out the various positions indicated,] and when he looked at the clock and turned partly around to speak to Booth and the other men who were standing there, the back of his head was directly in front of Sergeant Dye's eyes. Look at the plat, gentlemen, and you will see it. From the position that he describes, when Surratt walked up to look at the clock and turned in the manner indicated to give the time, the back of his head bore the same relation to Sergeant Dye's that mine now bears to Mr. Bohrer. [The learned gentleman turned his face from the jury.] Then he turns and goes up H street. That was the first circumstance that satisfied me that his testimony was not to be relied upon. But what further? He says he saw these three men aligned. When the second act was over, and the crowd came down, they seemed to expect the President was coming out, and aligned themselves opposite the space he was to pass. Then he had them standing shoulder to shoulder and side by side. They had excited his suspicion, and he was watching them, he says, and examining them critically; and, having them in that position, side by side, he could tell with almost positive certainty what

was the relative height of each. He says he is a better judge of height now than heretofore, because he has been a recruiting sergeant. That may be very well when he is looking at a man standing out by himself alone; but when he looked at two men together, he could tell which was the taller as well in 1865 as now. He saw these three men standing together, and, when summoned before the military commission, he testified to what? That one was Booth; the other he thought was Spangler—in fact, he was positive as to Spangler; but who was the third? Who called the time? He did not know the man, but described him as the smallest of the three; he testified that he was five feet six or five feet seven inches high, and the others were taller—both Spangler and Booth much taller. That was his testimony then. I asked him, "Why did you so state?" "Why," said he, "I only threw in the five feet six or seven inches; I meant the heaviest man." I pitied the creature as he stood before me. He swore before the commission that the man who called the time was five feet six or seven inches, and that he was the smaller of the three men. If he had simply sworn he was five feet six or seven inches, it would have been a reasonable excuse to say that he could not well tell how tall a man was; he cannot tell you the height of a man, seeing him standing alone; but surely he could tell you which was the tallest and which was the smallest, and he swore that the man who called the time was smaller than either Booth or Spangler. We have proved on the stand that John Surratt is taller than either.

Let us see a little further. The solemn sound of that calling of the time seemed to produce a deep impression. It was the warning-note of conspirators bent upon murder, the creeping sound that called the felon to his work. We bring before you the very man that called the time. My friend smiles. Let him get rid of it if he can. I defy him. We show you that Carland and Hess were standing before the theatre; that Carland called the time at Hess's request, and Hess recollects that it was ten minutes past ten, the identical time called by the party to whom Sergeant Dye testifies. The learned counsel calls in Hess, and says, "I want the prisoner to stand up." The prisoner stood up. Hess stood beside him. "Gentlemen, look at them," says the counsel. I thank you, Mr. Attorney, for your kindness in so presenting them to the jury. Who answers to Sergeant Dye's description? That man (the prisoner,) six feet tall, or Hess just five feet seven? Who answers Sergeant Dye's description of the man that called the time? He said the man who called the time was five feet six or seven inches; and the counsel stood the two up beside each other, and has proved our case. Dye swore also that the other two men were five feet eleven inches. You saw Hess and the prisoner standing here side by side. Could he have made such a mistake as that? Could he have made the mistake of taking a man of Surratt's size for a little fellow like Hess of five feet seven. He had discretion enough about the height of men to say that the other two were five feet eleven. He said the man who called the time was five feet seven. He has been dreaming—dreaming too freely. Gentlemen of the jury, that same calling of the time has sent one man already to the Dry Tortugas. Now the learned counsel wants to make it hang another!

Sergeant Dye takes his oysters, hears that Lincoln is killed, and goes up street. He passes 541 H street; a window is raised, a lady asks, "What is going on down town?" "The President is killed." "Who killed him?" "Booth." They pass on to camp—he and Sergeant Cooper. "Who is the lady; have you ever seen her since?" "Yes, I think I saw her at the conspiracy trial; I think it is Mrs. Surratt." "When did you come to that conclusion?" "I only came to that conclusion after I came down here and learned that it was her house." "Had you not heard something about this before?" "Yes; when people commenced to say she was not guilty I knew she was guilty; I did not believe these things; and when I came down here and found that that was her house I was satisfied it was the place at which I stopped, and that she was the woman I saw, and I recollect her." Two years have passed. It was a dim night, moonlight if you choose; say it was eleven o'clock or half-past ten; the moon just about at an angle of eight or ten degrees above the horizon. Mrs. Surratt's house fronted to the north, and as long as the moon pursued its circuit in the southern hemisphere the front of this house was necessarily in the shade. The sidewalk in front of that house never during the course of the moon at that season of the year sees one ray of moonlight. We have proved what kind of a night it was; how dark it was. But give them the benefit of whatever they choose about the night, that side of the house was in shadow; the moon had scarcely risen above the horizon, and threw its rays of light upon the side of the steeet opposite to that on which Sergeant Dye was. This lady puts her head out of a window on the dark side of the house and speaks to him. He sees her at the conspiracy trial, but sees in her countenance nothing to suggest that she is the woman he saw on that night. He now knows the woman was Mrs. Surratt. Nothing that he then sees or hears suggests to him that she is the woman until after the lapse of two years, when he comes to testify in the case of her son, and he then swears that from that casual glimpse he recollects that she was the woman he saw at the conspiracy trial. Gentlemen, I say it is simply absurd; I do not care to say it is worse. This man is a dreamer; a speculative dreamer. It may be perjury; I do not need so to denounce it; but if it is not perjury, it is an image created by a mind overwrought by its reflections upon some subject that it has thought too much of. Such things run men mad; such things make men fanatics; such things bring them round a table to communicate with spiritual mediums. He has thought of this; he has dreamed of it until his intellect has become perverted, and every thought that comes upon his mind is colored by the peculiar tint it has taken. You know, gentlemen, it is the character of the human mind, when deeply excited with apprehension upon any subject, to fasten upon whatever occurs as something to create apprehension and alarm. Disturb it by excitement, and the excitement fevers it, and colors and shapes every object it sees. The best illustration is in the knowledge all of you have of the days of childhood, when in the darkness of the night probably you were sent off by yourselves to bed, or else traveling from school you went through the woods and felt timid at the darkness, and you could see through the shadows that surrounded you men and images and spirits, made by the excited mind from stumps and boughs of trees and mounds of earth. In that excited condition of the human intellect we fly from the creations of our own imagination; and as it is true of men so it is of boys, for "the boy is father to the man." Such was the condition of Sergeant Dye's mind; weak by nature, and peculiarly nervous in its organization, it has become alarmed, excited, and overturned by the great and terrible events that have formed the subject of its reflections and the material for its dreams, and in its fevered and distorted workings it bodies forth to his view the images of things that have no substantial existence, and which are shaped, fashioned, and created by itself.

The court took a recess until to-morrow at ten o'clock.

Forty-Fifth Day.

THURSDAY, August 1, 1867.

The court re-assembled at ten o'clock a. m.

Mr. MERRICK. With submission to the court: Gentlemen of the Jury, I should perhaps remark, before proceeding, that in reading this morning the report of my remarks in the newspapers I observed several grave errors, and a statement of some positions which I did

not assume in the argument; but that report must necessarily be imperfect, for it does not profess to be a stenographic report. I make this remark simply that counsel on the other side may not misapprehend me.

Gentlemen, at the close of the session yesterday I was considering the testimony of Sergeant Dye. I shall take up the line of argument where I left off, and, with as little delay as possible, I shall hurry to the conclusion, impelled by a sincere regard for your patience, and fully appreciating the earnest solicitude you have manifested throughout this protracted and arduous trial.

I left Sergeant Dye on H street talking, as he professes to have done, with Mrs. Surratt. I had shown you how improbable his statement was. I was about to mention that Sergeant Dye's statement in regard to that conversation was met and controverted by an honest gentleman sitting at his door on Sixth street, fronting on H, not fifty yards from the scene of the alleged conversation. He was sitting there, he represented to the jury, from ten until after eleven o'clock, smoking a cigar. The night was still and calm; and in that section of the town there is nothing to disturb its almost perfect noiselessness. A conversation held by a passer-by on the street with an individual in what might be said to be the second story, for it was so, would necessarily be in a tone sufficiently loud to be heard fifty yards on such a night as that. The counsel upon the other side will endeavor to represent to you that this witness was sitting upon Sixth street, and not on H street. You will remember that he says that the steps of his house pass down by the side of the house that fronts on Sixth street and terminate within half a yard of H street, and that he was sitting at the foot of his steps, and could see up and down H street and hear what passed, and, from his knowledge of the locality and the character of the night, he thinks he should have heard this conversation if it had taken place. This witness, therefore, as far as negative testimony can contradict positive, contradicts Sergeant Dye.

But the sergeant says the lady was middle-aged, and wrapped in a shawl. The dress will aid the proof. But, apart from the inherent evidences of a want of truth—whether that want of truth arises from a failure to recollect, disordered and fevered imagination, or from a willful misrepresentation, is immaterial—we have another fact which entirely overthrows his evidence. In reading the trial, a lady of this city, and of the highest character—whose reputation and position the learned counsel on the other side could not possibly have known at the time she was on the stand, else he would not have gone so far as to wound the tender sensibilities of such a person; and he did, I may say, transcend the proper limits of cross-examination—a lady of the highest character, reading the testimony in this case, observed this statement of Sergeant Dye. She at once remarked, that "Here is a most extraordinary coincidence; that identical conversation took place with me, at my window, on that identical night." I placed her son on the stand, a young gentleman whom you saw, and whose appearance bespeaks his character, now in the employ of the Federal Government in this city, and at the same time a student of law, and he describes the house in which his mother resided. The description answers in every particular to the description of Mrs. Surratt's. It is a block and a half further to the east, on the same side of the street, the same high steps, and the same peculiarly-constructed basement and upper stories. Mrs. Lambert tells you that, upon that night, hearing some noise in the street, she got up, called for her servant, got her shawl, went to the parlor, opened the window, and, with her shawl on, had the identical conversation with one of two soldiers that Sergeant Dye tells you he had with Mrs. Surratt. Is not Sergeant Dye mistaken? Was the conversation he testified to before this jury as having been with Mrs. Surratt the conversation that he had with Mrs. Lambert? If he is not mistaken, he is certainly one of those extraordinary characters in life who in their course through the world meet with most singular coincidences; for it is a most extraordinary coincidence that the same conversation should have taken place between two soldiers near about the same hour, in front of two houses built identically alike, on the same side of the street, and with a middle-aged lady dressed in a shawl. All the features—time, circumstance, conversation, and individual—correspond without the slightest variation. And again, a party, a witness to a second singular and most remarkable coincidence, both occurring on the same night and both connected with the same transaction! If he is right that these conspirators were in front of the theatre calling the time, then it is a singular coincidence that there should have been two parties present, both calling the time, one for the purpose of murder, the other for the purposes of his own private employment on the stage, and each calling ten minutes past ten! Gentlemen of the jury, I feel assured that you cannot entertain for a moment this testimony of Sergeant Dye as involving the prisoner at the bar in guilt or probability of guilt. I feel that you will ascribe it to that disordered state of mind in which Sergeant Dye is evidently laboring, and leave him to enjoy that luxury of his dreams which may be luxury to him, without harm to others, and not hang a man because Sergeant Dye saw his pale face at midnight over his sleeping pillow.

I pass from Sergeant Dye to the only other witness who attempts to prove Surratt in or about the theatre—Mr. Rhodes. Who is Mr. Rhodes? If he is known to any of you, gentlemen, he is a stranger to me. He comes upon the scene near its close, apparently a volunteer. We knew nothing of him before he testified; we know nothing since, except his testimony. Now, what is his testimony, gentlemen of the jury? He tells you that at twelve o'clock on Friday, the 14th of April, when he was walking down the street, he passed by this theatre, and, impelled by curiosity, he entered to look at it. A day laborer, working at his trade—supposing him to be honest—he was consuming profitable hours in useless entertainment. He enters the theatre between eleven and twelve o'clock, goes into the box that was being prepared for the President for that night. He there sees a man, and he identifies the prisoner at the bar as that man. He tells you that when he went in, there was a man in the box, and just as he entered the man retreated from him. He then took a view of the theatre from the box, and noticed a new curtain that was down, and observed the pictures on the curtain. He again tells you that some one called from the theatre, and he represents that the man who was in the box with him responded, and that he went back out of the box, and disappeared to the rear towards the stage. The learned counsel on the other side will attempt to meet this contradiction in Rhodes's testimony. The district attorney, in his argument to you, admitted, with inadvertent candor but honest sincerity, that Rhodes was contradicted; when his associate, with some irritation and haste, checked him, and said, no, not so. The learned counsel who checked the district attorney will attempt to meet the difficulty of Rhodes being contradicted by Ford and Raybold and everybody else who knew any thing about the theatre, by saying to you that the man was in the first box when Rhodes came in, and he retreated into the second box, but did not go out of the two, the partition being up. But, gentlemen, when Rhodes was in that box the partition was down, and there was only one box there. Rhodes tells you the chair was brought up while he was there; and Raybold tells you he ordered the chair to be brought up, and that it could not be put in until the partition was down, for the reason that the box, when the partition was up, was too small to admit a chair with rockers of the dimensions that chair had. There was, then, but one box; the partition was down. Where did that man that Rhodes speaks about retreat to? There was neither exit nor entrance to that

box except the door from the front that led into it; all else was closed. There was no passage through which he could retreat. If he came out of the box, he had to come out of the same door that Rhodes went in, and Rhodes says he did not come out of that door, but out of another, and disappeared to the rear of the box. He says all the calm was undisturbed except by the preparations in this box. We have shown you, by Raybold and by Lamb, that there was a rehearsal going on in the theatre at the very same hour Rhodes says he was in the box. The rehearsal commenced at eleven, and reached through until one or two; the stage was crowded with the actors, preparing for the night's performance; and yet Rhodes tells you it was quiet, with the curtain down. Lamb and Raybold both testify, and you yourselves know the custom of these theatres, that there are rehearsals, and rehearsals at that time of day. When we attempted to prove the uniform custom they checked us. "You shall not give the jury the benefit of that light—the light of the uniform, invariable habit, proved by the manager of the theatre. You shall be restricted to the particular fact." We then proved the fact by those who saw the rehearsal and knew that it was going on. We further proved that the curtain was up, and not down. Rhodes swore it was down. We proved by Lamb, who was engaged in painting there all the day long, that the curtain was not down from nine in the morning until six in the evening, when he left his work. And incidentally from him and Raybold came out the circumstance that the curtain of a theatre is never down in the day-time. It is dropped upon the audience when the performance closes at night; and when the characters disappear and the theatre disgorges those who have been in attendance, the curtain is raised, and remains raised until the next evening when the performance is about to begin.

Again, gentlemen, it appeared in evidence that that box in the day-time was so dark that, although you might see a man in it, it was almost impossible to recognize him. When Judge Olin went to examine the door and look about the evidences of preparation for assassination, he carried a light with him; there was no window in the box, no light entering the box except from through the aperture made for parties in the box to see on the stage. It was built not for the light of day, not to enable you to see in it in the day-time; it was built to be used at night by gas-light, and at night alone.

You then have these circumstances contradicting Rhodes: a rehearsal going on at the time, the curtain not down, the box dark, the individuals that brought up the chair seeing no one else there, and being there at the very time Rhodes says he saw this prisoner there. You have, then, the further fact that the doors of this theatre were locked upon the public. Do you suppose that, at that hour of the day, when a rehearsal is going on, the proprietor of a theatre is going to leave his doors open for the free ingress of the public who choose to attend that rehearsal? It is further testified by the man who had charge of the door and kept the key that the doors were locked, and that there was no admission except by special privilege granted by the party who kept the key, and who alone was authorized to turn the key in the lock.

These two witnesses, Sergeant Dye and Rhodes, are the only witnesses who bring Surratt near the theatre at all; and I think that you, as sensible men, bringing to bear on their testimony the same habit of logic you would bring to bear on questions of ordinary life which you desire to solve, will conclude that the testimony of neither is reliable as the basis of any judgment to be formed in this cause. Who is the next witness, gentlemen, by whom the prosecution attempts to establish Surratt's presence in the city of Washington? A counselor from New York, not a counselor assisting the prosecution, but a counselor assisting the witnesses—Squire Vanderpoel. Stimulated by curiosity, he leaves his professional desk in the mercantile metropolis to come to the political metropolis to witness this trial. To this he testifies. He sees the prisoner at the bar and recollects that he saw him before. He recollects that on the 14th of April, 1865, after having been at the paymaster's department to draw his pay, he being then in military service, coming down Pennsylvania avenue, and hearing music on the other side of the avenue, he goes over to Metropolitan Hall, enters the hall, and sees Booth and four or five others sitting at a round table drinking, and among them the prisoner at the bar. This was the first time he ever saw him, the only time he ever saw him, and he saw him then only for five minutes. Dance, music, and revelry in the room, and he going there for the purpose of the dance, music, and revelry, singles out from a crowd sitting at a round table, in the midst of some sixty people, this individual, plants the image in his memory, and paints it to you. This was between two and three o'clock or one and two o'clock in the day. He told his story straight enough, but I presume there was not a man on that jury who did not see in his face, without one word from me, enough to discredit every word he said. And if he did not see it in the face he saw it in the extraordinary and singular fact that after the lapse of two years, with but a single glance under such circumstances, he should so remember a face as to speak with the positive certainty with which he spoke on that stand. And, at the conclusion of his testimony, he gave vent to an expression which would lead your feelings to coincide with your judgments, when he evidenced the vulgarity of the blackguard, after having given the testimony of the perjurer. We met the testimony of this man Vanderpoel by showing to you that there never was any music or dancing at Metropolitan Hall in the afternoon; that throughout the whole time of its existence under Henze, who owned it at that time, there never was a rehearsal or performance there in the day-time, and there never was a round table in the room. We showed to you by Henze, the proprietor, that he was then in Philadelphia, and left the place in charge of his brother. We proved by his brother that there was no rehearsal and no performance on that afternoon; we proved by the leader of the band that there was no rehearsal and no performance, and by the policeman that there was no rehearsal and no performance that afternoon; no music, no dancing, no revelry, no crowded assembly, no noise to attract the passer, no entertainment to bring in the idler. Are you satisfied? Was he at some other place? Was he at some other hall? Had he forgotten the locality and forgotten the name? Why did you not prove it? We had crushed him on his own statement. Did you leave it to vague speculation with the jury that there might be another place? Ah! gentlemen, you are too wise for such tricks as those. If there was another place, and this man had mistaken the room, had mistaken the hall, the burden was on you to prove it, when we had proved that the hall he named was a place at which the circumstances to which he testified could not have transpired. I dismiss it; the testimony of such a man is beneath the dignity of contempt.

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TRIAL OF JOHN H. SURRATT.

Continued from No. 96.

Cushing and Coleman saw Surratt, as counsel say, talking to Booth on the avenue. This is a mistake. Both are clerks in the Departments. One says he does not recollect the man he saw talking to Booth. The other says he thinks Surratt looks like that man. We asked him, "Did you not tell the counsel in our hearing you could not identify him?" and he said, "I did not say it loud enough for you to hear." But he did say so; he did say, upon seeing him in this room, that he failed to identify him. But, gentlemen, the testimony of these two men is distinctly met by another most singular circumstance; and, indeed, throughout this whole case, it seems as if by some special interposition of Divine Providence the defendant was enabled to meet, by direct testimony, the entire scheme devised by the prosecution; for never since I came to the bar, never in the whole course of my reading, have I known or heard of a case in which the prosecution was met at every point by testimony so satisfactory and so conclusive. There is the circumstance of calling the time—we produced the man by whom it was called; the conversation of Dye with a lady on H street—we produced the lady; the circumstance of the meeting of these two clerks with Booth and Surratt on Pennsylvania avenue—we produced the man with whom Booth conversed at the identical time and on the identical spot, and showed it was not Surratt. Forced, under all these circumstances, to the difficult proof of a negative, we prove the negative by being able to prove a responsive affirmative. We bring before you Mr. Matthews, and put him on the stand. He tells you that at one of the triangles on Pennsylvania avenue, on that afternoon, at the time named by these gentlemen, he met Booth; Booth leaned over his horse's neck talking to him earnestly, as the men describe he was talking to Surratt. It was in that conversation Booth gave him the paper containing articles of agreement, bearing the signatures of the conspirators to the assassination, which is not before the jury. The existence of the paper, and the fact that the paper was given to him, given to him in that conversation, is before you, and the reason of the earnestness of the conversation is in evidence. It was Matthews these men saw talking to Booth, and not Surratt. The testimony of these two witnesses need not be considered further. They are mistaken, and they do not testify with any degree of certainty or positiveness whatever.

Grillo saw him for a moment at Willard's Hotel; thinks it may be the man; is not positive; never saw him before; has never seen him since. I may as well make a suggestion as to testimony of this character, here as elsewhere, which no doubt has already crossed your own minds, and which will serve you as a guide in considering evidence in regard to identity. There is nothing more unreliable than proof of identity. There is no testimony about which you should hesitate so long as in regard to testimony which attempts to identify an individual casually met and casually passed. Tell me, can you recollect a man's face you never saw before which was seen two years ago in a hotel, and whom you passed going to the office of that hotel? Can you recollect every man you saw two years ago? Can you recollect every man you met upon the street yesterday in coming up from the Seaton House to this court whom you casually passed, and who attracted your notice but for a moment? I defy the human memory to perform such a task. Gentlemen of the jury, the features of individuals make but slight impressions on us at first sight, and I presume that is the experience of each of you. You know two sisters, and at your first acquaintance you were unable to distinguish between them—twin sisters—features alike apparently, manner alike, nothing to distinguish them. Upon the first, second, or third visit you could scarcely tell one from the other. Yet, upon a matured acquaintance, you look back upon the earlier days of that acquaintance and wonder you could ever have seen a resemblance that should have confused you. Features make but slight impressions until they become burned on the human mind. Identity is more certainly established by conversation, tone, manner, deportment, and bearing. I never would give credit to the testimony of a witness who simply saw the face of an individual in passing, and two years afterwards swore he recognized that face again, when he had never seen it before or since. But if a man tells you he had seen that man two years ago, conversed with him, remembered the conversation, the tone of voice, the deportment, the bearing, and peculiar action of the person, I would trust that man and believe him, because these are the things that stamp the recollection of the individual upon the memory. But the simple picture, floating like some vague thing through the air, seen for a moment, is forgotten the next; and when it is pretended to identify the face thereafter, and the party swears to it and swears honestly, I can only account for it upon the ground that, when the mind is wrought up by surrounding circumstances to believe a particular person is a certain man known in some past transaction, the imagination lends wings to memory, and it takes a flight beyond the reach of judgment and beyond the scope of actual recollection.

The next witness upon whom they rely is Ramsell. I must read a part of his testimony, because, I think, when you hear it again, you will be entirely satisfied to dispose of him. His testimony is that he was going out of the city on the Bladensburg road early on the morning of the 15th and he saw a horse tied; he noticed the horse; it had no rider.

"About fifteen minutes after I passed this horse a man rode up to me on this same horse and asked me if there would be any trouble in getting through the pickets; or something of that kind.

"Q. What did you tell him?

"A. I do not recollect what I told him exactly, but I think I told him that I thought there would be; or something of that kind. I asked him if he had heard the news of the assassination of the President.

"Q. What did he say?

"A. He did not make any answer, but gave a sneering laugh.

"Q. What did he do?

"A. He looked back and on both sides.

"Q. In what manner?

"A. He appeared to be very uneasy, fidgetty, and nervous.
"Q. Could you discover any thing that arrested his attention?
"A. There was a man coming from the city, an orderly, I think, carrying dispatches to Fort Bunker Hill. As soon as he saw him coming he rode away.
"Q. What did he say when he saw this man coming?
"A. He said he thought he would try it, and rode away.
"Q. Try what?
"A. Try the pickets?
"Q. How did he ride?
"A. The horse went at a pretty fast gait.
"[The prisoner was here requested to stand up in such a position that the witness might set his back.]
"Q. Did you ever see that man [pointing to the prisoner] before?
"A. I think I have seen that back before.
"Q. Did you see it on that horse?
"A. I think I did."

Gentlemen, I could but fancy a private theatrical between my learned friend Judge PIERREPONT and Ramsell.

"Judge PIERREPONT. 'Do you see yonder cloud, that is almost in shape of a camel?
"The WITNESS. 'By the mass and 't is like a camel, indeed.
"PIERREPONT. 'Methinks it is like a weasel?
"The WITNESS. 'It is backed like a weasel.
"PIERREPONT. 'Or like a whale.
"The WITNESS. 'Very like a whale.'"

Why, gentlemen, it is playing unbecoming pranks before a dignified jury in a solemn case, as the gentleman calls this, to be introducing such evidence.

Another witness, brought forward and relied on to sustain the essential element in this case—Surratt's presence in the city of Washington on the 14th of April, his participation in the murder—is John Lee. What shall I say of John Lee? We have followed him wherever we have known him to have lived, and proved by troops of witnesses from every locality in which he has resided that he has been consistent throughout life in establishing everywhere a character for lying almost beyond parallel. The testimony shows him to be infamous; and from among all his acquaintances the Government, with the aid of its countless detectives and spies, has been able to find only two persons who would believe him on his oath.

But there is another circumstance connected with this man's testimony that should induce you to disregard all that he says, and strongly tends to show that the prosecution knew the character of the witness they were imposing upon you.

After he left the stand we recalled him. He was in the court-room; he came forward and stood with one foot upon the witness-stand. The prosecution objected to any further cross-examination. We desired to lay the foundation for contradicting him, and for showing that he had repeatedly said before this trial commenced and since that he did not know the prisoner and had never seen him. With all the earnestness of fear the counsel for the Government resisted our motion, and the court sustained them. They knew Lee better than we did, and knew his evidence could not stand the test of such investigation. But there are other serious inquiries suggested by this evidence. I intend to show you that this accumulation of infamy upon these witnesses, this mass of corruption they brought here to infect the atmosphere of justice, poisons their whole case and poisons them and disgraces those who are stimulating this prosecution. I do not say this to induce you to disregard Lee's testimony, for I know it is doing an insult to your judgment to attempt by argument to refute that testimony. Your own kind hearts and honest minds have already refuted it. But I refer to him and his evidence as circumstances which I will connect with others to show the infamy of this prosecution.

Wood, the negro barber, is their great reliance. To what does he testify? "At nine o'clock on the morning of the 14th April Booth came into my shop with McLaughlin and two others. I shaved Booth, then I shaved Surratt. I recognize the prisoner at the bar. I never saw him before; I have never seen him since. It was nine o'clock." "Do you fix the time?" "Yes; I had been to breakfast; I had shaved Mr. Seward; and that is how I know what time it was. It was about nine o'clock. Whilst I was engaged in shaving him McLaughlin takes out of his pocket some curls and a braid, and decorates his hair with the disguise of a woman, and turns around and inquires. 'Would not I make a nice-looking lady?'" The reply is, "You are a little too tall." He identifies McLaughlin more emphatically than he does Surratt. How have we met that testimony? We have proved by Edward A. Murphy and Bernard J. Early where McLaughlin was every minute of the time from Thursday night until Friday morning. They came with him from Baltimore; they were with him at the hotel; they were with him on the streets; they did not leave him for five minutes which is not accounted for, and he never was in that shop. Some gentlemen outside asked me, and indeed you might have asked in your minds, why all this proof about McLaughlin? They did not see what Murphy and Early were proving. They did not seem to see where the arrow was intended to strike. We could not account for Booth. There was no incident here that we could meet except the incident of McLaughlin's presence, and we therefore proved where McLaughlin was, and contradicted this negro emphatically as to him. The gentleman said he did not know whether he was white or black—a good many folks don't know whether they are white or black now-a-days and that may be a trouble with the district attorney; but Wood is a genuine negro. The time at which Wood shaved him is fixed, not on cross-examination, not drawn out by counsel straining their ingenuity to get at a particular point, but it is fixed in his examination-in-chief. I will read to you what he says, for it is somewhat important in another aspect:

"A think it was near about nine o'clock. I had had my breakfast.
"Q. Where had you been?
"A. I had been up to Mr. Seward's."

There is another circumstance in connection with this testimony to which I will call your attention. It is something singular that he should have shaved two of this party. Where were the other chairs in this large shop? And again, where are the other men who were in that large shop? These are circumstances to be considered only in connection with other circumstances tending to break the force of his testimony. It was near nine o'clock. At that hour in the morning you, gentlemen of the jury, know that a barber's shop is almost invariably crowded, persons are coming in and going out; and I ask you as plain men of common sense will you attach any weight to the testimony of a man whose business is of such a character as leads him necessarily to be subject to a torrent of a hundred men probably every morning, and out of that torrent pouring in every morning he fixes one man who was there on the 14th of April two years prior to the day on which he testifies, and says, "Though I never saw him before and have never seen him since, that man was in my shop at that hour." According to the multitude of new faces that we see each day is the difficulty of our identifying any one of them. If an entire day should pass and we saw but one face we might recollect it. If we saw ten, the probabilities of our recollecting any one would be less. If we saw twenty, they would be less still. So in proportion to the number we see is the difficulty in identifying and recollecting any one.

Here was a place that was the rendezvous of crowds, of hundreds, going through identically the same operation, the same performance, generally the same conversations, with nothing to mark this one individual; and yet, after the lapse of two years, he identifies him as the man. But the conclusive answer to Wood's testimony is the position in which the learned counsel have placed Surratt. They represent to you that Surratt left Elmira at ten o'clock on Thursday morning; that he was ferried across the river, and reached Baltimore at 7:25 a. m. on Friday. The only train arriving in Baltimore from Harrisburg, in the morn-

ing, according to Mr. DuBarry's testimony, (page 907,) arrived at 7:25. Mr. Koontz testifies that the next train after 7:25 that left Baltimore reached here at 10:25. You have him in the depot at 10:25; give him, if you choose, five minutes to meet his companions, Booth and the others—that is half-past ten; give him a quarter of an hour to talk with them, lounge and go into the barber's shop, and you have it near eleven o'clock. Could this barber, whose business in the shop marked the hours of the day, have made such an egregious blunder? When he testified on the stand the gentlemen for the prosecution expected to have Surratt in Washington city by eight o'clock at the furthest, and by the line they then intended to bring him he would have reached here at that hour; but in the course of their evidence, by their change of plan, they have so placed him on the roads that it was a physical impossibility, according to their own showing, for him to reach here until 10:25. That, gentlemen, I take to be a conclusive answer to Wood's testimony. But another circumstance. He gave him a clean shave all round his face.

"Q. You say he had no beard on his face?
"A. No, sir; he had a slight moustache.
"Q. No imperial, goatee, or any thing on his chin?
"A. No, sir."

He says, "I shaved him clean round the face, with the exception of his moustache. He had a slight moustache at the time." Every witness in the case that testified in regard to him gives him a goatee at the time, not so long as he now wears, but one a barber would certainly notice. This barber says he shaved him all round, and he had no beard, no hair on his face, except the moustache. Now, however slight this circumstance may be in considering a question of identity with an ordinary man, yet as it is in the line of a barber's business it becomes a very material circumstance with a barber. He shaved him all round, and he had no hair on his face. This, gentlemen, is not the man he shaved.

Feeling themselves grow weak in the testimony, they fell back upon whom? Upon Mr. William E. Cleaver. I must confess I was very much surprised when I saw Cleaver come upon the stand and recollected the denunciations I had heard thundered against him by the district attorney, and recollected the fact, which came out in evidence, that only a few weeks since, for a crime without a name, a verdict was brought in against that man and he was sentenced to ten years in the Albany penitentiary. A new trial was granted on technical grounds, and he stands for trial in this court now. I say a crime without a name. It is a crime not without a name in law; but it is a crime that cannot be named in this presence. Murder; not only murder, but "murder most foul and unnatural;" and the spirit of the ungrown girl stands before the eternal throne as the accusing spirit of that accursed man. Why, gentlemen, has the United States Government bowed itself to the low humiliation of using such an instrument as that? An instrument infamous in itself and infamously prepared for the uses of this prosecution. I do not speak of him to induce you to discredit his testimony; for this purpose you need no argument from me. I am satisfied your indignation was deep and profound when you saw the villain on the stand; but I speak of him and his testimony and the circumstances connected with its development as parts of this prosecution, and as circumstances showing its character and the spirit in which it is conducted and the means by which it is to be made to accomplish a bloody result. We have not been allowed to introduce any evidence as to Cleaver and the process by which he was made a witness and prepared for his task, except such as we have drawn from Cleaver himself. Incarcerated in your jail with that most notorious felon Sanford Conover, whose name has passed into history with the record of the Bureau of Military Justice, and upon whose body yesterday grated the iron doors of the Albany penitentiary, Cleaver found, in this fabricator of perjury for the military commission, a congenial companion, and for their mutual benefit they devise the story he has detailed in this case. I say together they devised and planned it, for no other conclusion can be drawn from Cleaver's statement by any honest man, in view of the characters and positions of these two persons. Conover, having duly disciplined his pupil, calls in Ashley to examine if the education is complete, and Ashley hands over this man, dug up from the jail's infamous depths, to the prosecuting attorneys in this case, and they put him on the witness-stand, and ask you to accept and believe his evidence!

Gentlemen, this man Conover has met his fate; the vile and pliant tool of a master scarcely better, he is now a convicted felon; and Cleaver, the lesser tool, awaits his fate, temporarily suspended by the technical rules of law, and he will receive it whenever his case, now pending, is brought to trial. Shall I ask you to discredit the testimony of such a man, proposed under such circumstances? Counsel, in bringing forward witnesses, may, in the heat of professional and partisan zeal, sometimes forget what is due to themselves; but a jury such as this cannot forget what is due to the cause of justice and the dignity of honest manhood. I do not ask that you reject this testimony; I demand that you *spurn* it—indignantly spurn it and cast it from you. It pollutes the court and dishonors the cause.

David C. Reed, upon whom the prosecution relies, thinks that he saw the prisoner in this city on the day of the murder. He does not swear positively, and so weak and insufficient was his testimony, that we deemed it unnecessary to introduce evidence impeaching him. Living in this community, you know him. You know his business; you know his craft. He tells you in his cross-examination that he had previously stated that John H. Surratt had been in his room, and he believed it; but he now thinks he was mistaken when he said he saw him in his room. He tells you he had seen him at Pumphrey's stable and talked to him time and again. Pumphrey tells you that he kept a stable, and never saw Surratt there more than two or three minutes at a time in his life, and that Reed testified falsely when he spoke of his habit of sitting there at the door. Reed tells you he knew Surratt from the time of his childhood, and that he is now some thirty or thirty-five years of age. Look at him, and you see the boy, broken down by imprisonment and wasted and worn by suffering as he is, with the harrow of suffering making the wrinkles of age on his brow; and you see, even in this condition, that no sensible man would pronounce him thirty years of age. He is proved by his brother to be only twenty-three, and yet this man, who has known him ever since he was a child, says that when he saw him in the street he saw a man of thirty or thirty-five years of age. My learned brother, on one of the days which he devoted to an eloquent address to you, thought proper to speak of one of our witnesses as dealing out iniquity, death, and sin in the shape of fluid. Who is David C. Reed? What does he deal out? Iniquity in the shape of liquor sold at a bar? No; oh, no! The fiery draught that inflames men's blood in order that he may get what they pay for the poison they imbibe? That is not his business. It is to inflame their blood that he may rob them at his faro bank. Of this man's reputation in the community I will say no more.

Who is next relied upon to support this prosecution? Susan Ann Jackson. She made a statement that produced a deep impression on this jury at the time she made it; it sank into the heart of the whole community. She told a simple story from that stand of having seen John H. Surratt on Friday night, the 14th of April, 1865, in his mother's house, and having, at the request of his mother, prepared supper for him. It was a happy circumstance that she went a little further. She not only says she prepared supper for him, but she gives a part of the conversation, and, as if by another

one of those interpositions of Providence in behalf of this prisoner, we are able to prove the identical conversation, and when it took place. She swore that she saw him that evening, prepared supper for him, and that when she came in Mrs. Surratt said to her, "This is my son John; is not he like Anna?" She had never seen him before. She never saw him afterwards. She never saw him but once; she did see him once; and this was when she saw him. Gentlemen, it struck me as somewhat remarkable that Susan Ann Jackson should have testified to this fact before you, and that, having done so, she should then, in answer to a question of mine, say that she had given the same testimony before Captain Olcott soon after the assassination, and that it was taken down in writing. You know, gentlemen, and every man in America who reads knows, that the Government raked the city of Washington and the whole country to find proof that John Surratt was in Washington city at the time of the assassination. You know that if they had been advised of any individual that could have proved John Surratt's presence in Washington city at that time, the individual who could give the proof would have been summoned before the military commission and required to testify. It struck me at once with amazement that she should then have advised the Government that she knew this very material and important fact, and that the Government should not have called her to testify before the military commission. I was not then prepared to believe all about this prosecution that I am now prepared to believe and do believe. You have her evidence before you, that she stated to the officers of the Government in 1865 the facts to which she now testifies. That is what she says. Does she know? Does she recollect? Is it so? I apprehend that she recollects what she then said, but I apprehend there was no such testimony written down by Captain Olcott. If there was, as I have said, they would have used it then; if there was they would use it now. Gentlemen, the prosecution knew she was lying on that stand, and they sat here and acquiesced in the lie. They knew, for they had before them her examination before Captain Olcott, that she had sworn on that examination not as she swears here. They had the record of her examination in the Bureau of Military Justice; they have seen it; they knew that she had either failed to recollect or was willfully lying, and they acquiesced in the lie, whether made up maliciously or narrated erroneously. Now, what is the proof? She is asked on page 429 if she knew Rachel or Eliza Ceyphas. No, she did not know any such woman. She was asked whether she knew Rachel or Eliza Hawkins, who once came to see her. "No, I do not know her; no such woman ever came to see me." Her own husband, brought here to vindicate her character by proving that what she had said was true, proves that this very woman, Rachel, came to the house to see her, spent a day there with her, and was carried to the provost marshal's office in her company. That is the testimony of the prosecution, not ours. Why did she deny that she knew Rachel? It is evident that it was a palpable falsehood; she did know Rachel. Why did she deny it? Because she knew that the next question would be as to what she had told Rachel about this business, and she knew she had told Rachel that she had seen John Surratt on the 3d of April, and never saw him afterwards. The very instant she was asked if she knew Rachel she saw the toil in which she was caught, and she met the battle boldly in the front, and commenced lying the very instant she found she had to lie to extricate herself from the difficulty she was in.

What does Rachel say? Rachel says she was here spending her Easter holidays in 1865; that she called on this woman to see her and to see her own child. She knew her, and she went to Mrs. Surratt's to see her. They had a talk about Mrs. Surratt. Susan was apprehensive about her home, and about getting her money. Rachel told her she would get her money; that Mrs. Surratt would pay her if it took the last cent she had on earth. The conversation then comes up about John. She then declared that she had not seen John for two weeks, he had not been there for two weeks, and spoke of his resemblance to Anna. This was on the Monday or Tuesday after Friday, the 14th. Rachel, as you all saw, manifested a kindly heart. A good old negro, she is an excellent specimen of that class which is passing away, and which hereafter will be remembered in romance and in story. The gentleman upon the other side thought she showed a little too much sympathy. His education in the North has not made him familiar with the institutions of our section of the country, and the habits and traits they develop and cultivate. The honest and earnest sympathy of these old family negroes for those among whom they have lived is beyond expression; but this sympathy and love never exists except with those who are thoroughly upright and honest. The old family negro who has nursed and cared for the children and grandchildren of her master, and borne in the family the endearing name of "mammy," whose heart still warms with the love this relation begets, is always honest and sincere and truthful. These are all congenial sentiments, and the invariable growth of the same soil. They thought Rachel exhibited too much sympathy for the family. She came out boldly with it: "Yes, indeed, I do feel sympathy with them; I love them; I want this man to get off." Mr. BRADLEY asked her, "Do you love him well enough to tell a lie?" "No, bless God, I would not tell a lie for any thing on this earth," speaking in the plain vernacular of the darkey, and manifesting a character with which you, gentlemen, are all familiar, and which at once impressed you with the truth of every word of her testimony.

But, gentlemen, Rachel does not stand alone in this contest with Susan Ann Jackson. She is corroborated by Clarvoe, who was at Mrs. Surratt's to search the house on the night of the murder. Clarvoe came down stairs, and saw two negro women there. He speaks to one of them in the door, and says, "Aunty, where's Mr. Surratt?" "I do not know Mr. Surratt; do you mean Mrs. Surratt's son John?" "Yes." "I hain't seen him for two weeks." Did that conversation occur? There is not one of this jury who will doubt the word of Clarvoe. Is Susan Ann the woman? Clarvoe says that while he was coming to court he met a woman on the steps, and was startled by the thought that she was the woman with whom he had this conversation. He believes she is the woman. McDevitt was present and heard the conversation. He will not say whether she is the woman or not. You will recollect that Susan Ann Jackson, when recalled, stated that when these men were there she covered herself up in bed, and did not see anybody. Clarvoe tells you he searched her room, searched her bed, found the bedclothes turned down, and that nobody was in that bed. Do you believe him? He examined the room; he looked under the bed; he was there to search, to find whoever might be concealed, to unkennel whatever might be hid.

But that is not all. The good angel of this case, whom the district attorney commends so highly, Miss Fitzpatrick, settles the whole question. Honora Fitzpatrick says that when John Surratt came back on the 3d of April, she was in the parlor and received him with his mother; that his mother sent her down to get some supper for him; that she went down and got supper and set out the table. She then goes down with the mother and John Surratt into the supper-room; they take their seats, and presently Susan Ann Jackson comes in with a pot of tea. Says Mrs. Surratt, "Susan, this is my son John; don't he look like Anna?" Then it was she saw him; then it was this conversation took place. That was the only time she ever saw him, for she swears she never saw him but once.

My learned brother says you must accept Miss Fitzpatrick's word as truth. I agree with him. Her simple and guileless manner convinces you of the purity of her heart, and she did not need the commendation

he has bestowed upon her. This commendation, however, was only the prelude of an attack. He says she is mistaken as to the date, and that the conversation and incident to which she testifies took place on the 14th of April, and not, as she testifies, on the 3d. Fortunately alongside this good angel of the case, testifying against this perjured negro, is also the bad angel of the case. The war of light and darkness will, I presume, go on forever; the contest of good and evil will never end; between Ormuzd and Ahriman there can be no peace; there can be no peace between virtue and vice, between the angel and the fiend, and the conflict manifests itself upon every field of human action; the widest and the loftiest as well as the most contracted. But evil and vice, though rigorous, are often blind, and sometimes aid the purposes of a noble justice, even when designing to accomplish the most malicious and iniquitous mischief. Weichmann, the bad angel of this case, the accursed fiend, who seems to combine in himself all the evil qualities of the various spirits the district attorney has conjured up from hell by the magic of Milton's wand, and whose character, as manifested by himself on the stand, is composed of every vice that makes man the abhorred and detested of his fellow-man—Weichmann, whose conscience, according to the evidence, drives him madly before its applying lash, though evidently determined to convict the prisoner if his oath can accomplish that result, without appreciating the importance of his testimony and these apparently insignificant particulars, fully sustains and confirms Miss Fitzpatrick in regard to this most important and conclusive fact. Weichmann testifies that John Surratt was not at supper on the night of the 14th. He tells you that he came back from Surrattsville with Mrs. Surratt about half-past eight or nine o'clock; that when they came back they went down and took supper together; that he went up with the family into the parlor immediately after they were done supper, and remained there with Mrs. Surratt, and talking to the girls; that Mrs. Surratt could not possibly have left the parlor and gone to supper without his knowing it; that she did not leave until ten o'clock, when he went to bed.

He also proves that he did see John Surratt at the house on the evening of the 3d of April. I shall have occasion to recur to this; but I mention it now as confirming the testimony of Miss Fitzpatrick and refuting and exposing the story devised for Susan Ann Jackson. With your own devils will I exorcise your devilish spirit; with your own devils will I destroy your accursed kingdom. Weichmann says she could not have gone down to supper with John Surratt, nor could she have given him supper without his knowing it. Is not this enough to destroy this woman? Is she mistaken or is she lying? So far as her testimony is concerned, it is so completely demolished, that simply as evidence it is not worthy consideration; but I am sorry to say that the course of this prosecution and its attendant and surrounding circumstances convince me that this woman was lying deliberately, willfully, and maliciously, with the full knowledge of the United States Government and of the officers here representing that Government.

One other witness I have not mentioned—St. Marie; impeached, but defended. He says Surratt admitted to him that he was here, and escaped the morning after the murder. I presume there is no member of this jury who would, after the attack on St. Marie, be willing to find a verdict upon that man's word. The learned counsel rests a good deal upon confessions. I shall have something to say of the force of confessions hereafter. I attach small importance to them. He says that St. Marie was a friend of Surratt's in the Papal Guard. Why is he here? Why should he betray his friend? Gentlemen, the jingle of the yellow earth has been the knell of many a man's honesty. Why was he in the Papal Guards? He was pursuing this man. If he was his friend in the Papal Guards, why is he here, consenting to come? How could you get him here? Why should he give information to the American consul? Is he so very public-spirited—does he so love American justice and American glory that he should voluntarily, and without hope of reward or benefit, come forward and inform on his friend? Gentlemen, for myself, I cannot, without sickening at my heart, hear the testimony of any one of these professed informers. In the course of my professional experience I have learned to look upon them with suspicion, distaste, and hatred. During our civil war the land swarmed with the paid emissaries of private and political malice; and spies from the Bureau of Military Justice, subsidized perjurers, and deputy kidnappers infested the whole country. They were prowling about every kitchen, eavesdropping at every corner, and growing rich on the rewards paid from the public treasury for falsehoods fabricated on honest men. The worst habits and most wicked expedients of corrupt aristocracies and more corrupt monarchies became the daily food of American society, and even to-day and now, since the return of peace, a part of this army of scoundrels is retained to serve the bloody purposes of certain authorities, and paid from the public treasury and fed at the public board. The system is infamous, the tools are infamous, and the men who use them more infamous than either the system or the tools.

Now, gentlemen, I have gone through with their testimony as to the presence of the prisoner in Washington city on the night of the murder. I think I have shown you that it is corrupt from beginning to end, unprecedented by any thing within your recollection. What other evidence is there? Negative evidence, but strong. If John H. Surratt was in Washington city on the 14th of April, is it not a remarkable fact that no one single acquaintance who knew him met him? Of all the witnesses who testified, not one single individual had ever seen him before, except Reed, and he did not speak to him, but nodded in passing. They have not brought here one friend or one acquaintance, except Reed, who saw him on that day. Strangers saw him here, as they say, undisguised, open, wearing no concealment, moving about the streets—walking on Pennsylvania avenue, says Reed; drinking at Metropolitan Hall, says Vanderpoel; riding on H street, says Cleaver. He was everywhere visible to strangers, yet not one single friend or acquaintance saw him or spoke to him. Is it not remarkable?

They say that Mrs. Surratt's house was the rendezvous of the conspirators. Mr. CARRINGTON says it was the rallying point. If it was the rallying point, and John Surratt was here on the 14th of April, preparing for the consummation of the great iniquity and the realization of the hopes of that conspiracy, why did he not go to the rendezvous? Would not that have been the first place to which he would have gone? Booth was there at one o'clock, says Weichmann. There was no concealment about that. If John Surratt was in town, why was not John Surratt there? Was he there? Mr. Holahan, who was in the house, says he was not. Mrs. Holahan says he was not. Miss Jenkins says she knows he was not, because she was there all the time. Miss Fitzpatrick says he was not. Weichmann says he was not. Booth was there; Booth was his friend; Weichmann was his friend. Where should he have been but in the company of these two friends at the place of their common meeting?

But there is another who testifies in his behalf, as not being there; a voice from the grave—a nameless grave, without a stone or flower. Mrs. Surratt says he was not there, and that he had not been there for two weeks. Weichmann says, also, not only that he was not there, but that he had not been there for two weeks; and if Weichmann ever told the truth, it was on that night, before his heart had commenced to feel the fear with which he was terrified in prison, and before his judgment commenced to devise the story that was to protect his

life by sacrificing another's. If he ever told the truth, it was then; but this voice from the grave speaks in behalf of the child. Says Clarvoe to Mrs. Surratt, "I want to know where John is." "I got a letter from him to-day; I have not seen John for two weeks." Is it true? The living that are truthful bear testimony that he was not here; the dead speak from the grave that he was not here. Her declarations in this conversation are in evidence; we cannot produce her to protect her child; but this one single voice, rising from the tomb, and, as if ascending to Heaven, is re-echoed back to protect that boy. You [addressing counsel for the prosecution] have broken the cerements of that grave; you have brought her before this jury; now close those cerements if you can. She sits beside him, and covers him with a protecting wing. You thought it was adroitly done; that you would lay the blame on us; but when you brought her before this jury we had not said one word; and in bringing her before them you disclosed your plan. Her trailing garments from the tomb sweep through this room. We feel the damp air of death as it chills upon us. You may bid the spirit down, but it will not. It is here, as it has been elsewhere. It speaks to this jury—a mother pleading for her son, and testifying in his behalf. Beware, gentlemen, lest the speculation and the scheme you devised to shield iniquity by the perpetration of a greater crime, may not serve to deepen the infamy you are seeking to defend. Beware, lest in the scheme you have devised you have given a lingering life on earth to that spirit which speaks to living men, and hisses in the ear of those who did its damning murder. Enough for the present that she says her son was not here on that fatal night. I shall refer to other matters connected with her in the course of my argument hereafter. I feel that I amdrawn to it—drawn to it, even to the overleaping of the matter that regularly follows in the sequence of my argument. I feel that a spirit I cannot resist impels me to say something it is painful to say, but I will say it in its proper place.

You then have, gentlemen of the jury, their witnesses proving Surratt's presence here stricken down. You have the living among his friends testifying that he was not here. You have his dead mother casting this last protection around her child, saying he was not here. But if he was here, how did you get him here? They prove that he was in Montreal on the 12th of April, 1865. How do they get him to Washington? He left Montreal, according to the testimony of their witnesses, at 3:30 on the afternoon of the 12th. They put him on the New York train. You see [illustrating by a large map spread out before the jury] the train runs to Albany, New York, and Washington, forming almost a straight line, with a slight curve at New York. They admit that on the 13th he was in Elmira. They start him from Elmira at ten o'clock on the morning of the 13th in order to reach Washington city. Now, they must bring him from Montreal to Washington city, and have him in Washington by nine o'clock on the 14th, in time for Wood to shave him. How will they manage it? Remember, they bring him by way of Elmira. Now, what is the time? Leaving Montreal at three; Rouse's Point at 5:45; St. Albans, 7:25; Essex Junction 8:30; Burlington, 9:05; Troy, 5:20; Albany, 5:45—sixteen hours from Montreal. Then, at 5:45 on the morning of the 13th he was in Albany. Now, if he had come straight to New York he would have reached there by three o'clock that day in time to take the night train from New York, reaching here the next morning at six or seven. That was the line by which they intended originally to bring him—there is no doubt about that; but our testimony that he was in Elmira was too strong, and instead of meeting it boldly in front they had to flank it; and, therefore, they concluded to put him in Elmira on Thursday, the 13th. Very well, we now have him at Albany at 5:45 on the morning of the 13th, the earliest possible time at which he could arrive there. How will they take him to Elmira? He leaves Albany at seven o'clock, reaches Syracuse at 1:20 p.m.; Canandaigua at 4:52; from there to Elmira in three hours—say eight o'clock. I want you to see these courses and distances. The earliest possible moment at which he could then have reached Canandaigua was between four and five o'clock in the afternoon of Thursday, the 13th. Then he reached Elmira that night. There is no night train running from Elmira; the bridge over the river is broken up; the road is temporarily destroyed; the trains go out at eight o'clock in the morning. He must therefore stay in Elmira all night. The counsel for the prosecution were not aware of that when they determined to say he was in Elmira, and they were obliged to resort to a burden train or special train leaving at ten o'clock in the morning. But how could he get to Elmira, is the first question, by ten in the morning? We have shown you the time from Albany; it is eleven hours to Canandaigua, and he cannot get to Elmira without going to Canandaigua. Is there any other route by which he can do it? There is no other route, and it is proved by their own testimony in this way: They put him on the New York train in Montreal; the New York train from Montreal runs down by Burlington and Albany. They start him on the New York train, and they can only get him off at Albany, in order to take him to Elmira, and they can only take him to Elmira by Canandaigua, and they cannot get him to Canandaigua until five o'clock Thursday evening. It is a physical impossibility; and yet they want to tell you he was in Elmira at ten o'clock that morning. Now, if that is not a mathematical demonstration, I cannot understand it. In order to make the thing doubly sure I asked Clarvoe, who traveled over the route, how many hours it was from Montreal to Albany. He said nineteen. I asked Chamberlain, who lived in Canandaigua, how far it was from Albany to Canandaigua. He said ten hours; making twenty-nine hours from Montreal to Canandaigua. Will the gentlemen bring him by any other route? You put him on the New York route; we followed him by that route to the only point where he could diverge to go to Canandaigua. We take him where you give him to us. If there was any other route, and you meant to bring him by another route, it was your duty to prove it.

Gentlemen of the jury, I invoke your serious consideration, for although there may be doubt and difficulty about a question of identity, there can be no doubt about these physical facts. I have shown you that it was physically impossible that the prisoner could reach Elmira in time to leave there so as to be here on the morning of the 14th, or at any time on that day. They did not know the railroad connection had been broken up at Elmira when they placed the prisoner there on the 13th. They had not found out that there was no night train. When they did find it out they ought to have given up their case. I may not know myself; prejudice may blind my eyes; but I do believe and I state it to you, gentlemen, with all the earnestness of solemn truth, that if I were prosecuting this case, whatever prejudice I might have, when these physical facts were developed to me, I would have abandoned the case. They are insurmountable. Go to work, gentlemen, and figure them up. Overcome them if you can. Appoint a committee of three to escort him from Montreal to Elmira. When you go to your room ballot and appoint this committee, and let them report to you in committee of the whole. See how you can do it. Before you make up your minds, figure close and figure well. Take the starting-point by the three-o'clock New York train from the city of Montreal on the 12th of April. Run him with all the speed a locomotive can carry, and determine when you can get him to Canandaigua, and when you can get him to Elmira. I say it is a physical impossibility to get him there in time to leave that city so as to reach Washington at any time on the 14th. But suppose you get him to Elmira; what follows? Whilst my learned brothers on the other side were fighting so hard on this side of the

road between Elmira and Washington, they seemed to have overlooked the other side of the road. They were trying to get him out of Elmira, but they had not thought how to get him in there. They had him there, and they seemed to take it for granted that he reached there on the morning of the 13th; but in fact he reached there on the afternoon of the 13th, or the evening of that day. These physical facts, these figures, are things that do not lie, and cannot lie. They are mathematical certainties. But I will take their standpoint; put him in Elmira. Very well, now, you have him in Elmira, having come from Montreal in the unprecedented short time of some thirteen hours. Put him there at ten o'clock in the morning; (the gentlemen do not pretend to say he was there before ten o'clock;) how do you get him out? From Elmira to Williamsport is five and a half hours; Williamsport to Sunbury two hours; from Sunbury to Harrisburg two and a half; from Harrisburg to Baltimore four and a half. But at that date, the 13th of April, 1865, the time was twenty-three hours. They put him in Elmira now after eight and before ten o'clock of the 13th. There were two passenger trains and two burden trains out from Elmira that day, and they left at 8 o'clock and 8:5. Was there any train after that? The counsel has put a witness upon the stand who testifies that he thinks he brought Mr. DuBarry down on that day, and that he left at 10:30. Fitch says that there was no train from Elmira going south on the 13th, as I understand him, after the regular train at 8:05, special or otherwise, for if there had been it would have been upon his records, and it is not there. DuBarry confirms Fitch; and when recalled, at page 904, states most emphatically that there was no train, special or otherwise; that such a train would be on his records, and that he has searched the records, and cannot find it; that he has no memory of any, and if there had been any—passenger, freight, or otherwise—there would have been a memorandum of it; that he has no recollection of coming down in any special train on that day. Again, the passengers coming from Elmira would lie over at Williamsport until ten at night. That could not be avoided. Leaving Williamsport at ten, they reached Harrisburg at two, and the witnesses in their first testimony say they would reach Baltimore about seven; but the time is afterwards definitely fixed on page 904 at 7:25. Now, suppose they put him on a special train from Elmira at ten and a half, and run him down to Williamsport. At Williamsport there is a ferry, and they have him ferried over, and prove it by Montgomery.

Mr. BRADLEY. No; not Montgomery—Drohan.

Mr. MERRICK. Yes; Montgomery. Montgomery created him a witness, and Montgomery paid him, and, as he says, Montgomery brought him here. I mean Montgomery. Drohan is the man that testified; Montgomery is the master under whom he testifies—Montgomery, Sanford Conover's pet—Montgomery, Richard Montgomery, who has been shown to the country as having co-operated with Conover in the scheme of perjury devised against absent men before the military commission—Montgomery, the gentleman's (Mr. PIERREPONT's) right-hand man and friend. Conover made Montgomery; Montgomery made Drohan. What does Drohan say? He was a ferryman, ferrying passengers across at Williamsport. He ferries a man over on the 13th; he fixes the date and hour; he comes here; he is asked who is the man; he says "that is the man," and when he says it he is not looking at the prisoner, but was looking three yards away from the prisoner, and pointing at a person three yards from the prisoner's seat. He was too stupid even to have learned his lesson well. How does he identify him? He identifies his coat. This ferryman, living in the backwoods of Pennsylvania, identifies a peculiar coat he had on. Gentlemen, perjury will out. Too great particularity shows device instead of recollection. Why, that coat had not figured among other witnesses yet. He was coming here in that coat; he left Montreal in that coat; he was in Elmira in that coat. If this man Drohan, Montgomery's legal son, saw him in that coat, why did he not have that coat on when Reed saw him? Why did he not have that coat on when he was shaved just fresh from the car, without an opportunity to change his apparel, traveling in burden trains, gravel trains, construction trains, without a change of raiment? Why did he not have that coat on when he was shaved? Reed, who has been a tailor, I believe, notices his clothes particularly, and thought it was a nicely-got-up suit, but nothing so fantastic as a Garibaldi jacket. Drohan is the only man who saw him in that peculiar coat. Montgomery has overleaped himself. He had better quit business until his partner gets out of the penitentiary, the senior member of the firm and the genius of the establishment. He does not do his work well, gentlemen; [addressing the prosecuting attorney;] you ought not to have such a bungler in your service.

Drohan ferries him over; and they get him to Sunbury. The freight train left Sunbury at 4.30; the passenger train at 12.13 midnight. Could he have reached there in time for the freight train? He might have done so. The freight train, however, runs to Marysville, reaching Marysville at 9.20 p. m. From that time until 3.30 a. m. no freight or passenger train left Harrisburg south. They had some difficulty in getting him out of Elmira. They had difficulty first in getting him into Elmira, and when they got him there they found it difficult to get him out; and when they get him out of Elmira and to Harrisburg, how are they to get him away from Harrisburg? No trains, freight or passenger, left Harrisburg for the south until 3:30 a. m. The 3:30 train arrived in Baltimore at 7:25, and the passengers by that train left Baltimore at 8:50 and arrived in Washington at 10:25; so that, giving them the advantage of every connection—gravel trains, construction trains, freight trains, special trains, horse cars, Drohan ferries, and Montgomery's aid—they cannot get him here in time for the negro barber Wood to shave him at the hour, or near the hour, at which he testifies he performed that operation.

But go back a little: Although they cannot get him here in time for the barber to shave him, can they get him here at all on the 14th? DuBarry tells you and Fitch tells you that no train left Elmira after 8:05 on the morning of the 13th, special or freight. But even suppose you get him by special train or freight train down to Williamsport—give them the benefit of all they ask—will you, gentlemen of the jury, with your experience in railroads, tell me that, running on gravel trains and construction trains, you make the time once in a thousand; and if you are to determine this verdict upon the close connection of gravel and construction trains between Williamsport and Sunbury, is there not a rational doubt? Is there not a positive certainty? Is it not ridiculous to ask the jury to do any such absurd thing?

But, gentlemen of the jury, there is one other point. These are figures, and material physical facts. Now, here is a moral fact, which comes in appropriately to aid these physical, material facts. What say the learned gentlemen on the other side? Booth wrote to Surratt that it was necessary to change their plans, and to come immediately to Washington—wrote to him from New York, say they. McMillan says Surratt telegraphed to Booth from Elmira to New York, and found he had left. When did Booth leave New York? Have you thought of it? He left New York on the 7th of April. Bunker tells you that he was at the National Hotel from the 8th to the 14th, and that after the 8th he never left the National Hotel. So he writes to Surratt on the 7th from New York, and Surratt keeps the letter in his pocket without acting until the 12th. Such negligence is not the conduct of a well-disciplined soldier or deeply-interested conspirator. Booth is at the National, in his room, on the 8th, and never leaves the National until the assassination. They say he wrote from New York; and, having writ-

ten from New York, he wrote before the 7th. The mail from New York to Montreal is twenty-four hours. Surratt must then, in due course of mail, have received the letter on the 8th; he did not budge until the 12th; and when he did budge, which way did he go? He is ordered to Washington; he understands Booth is in New York. Even when he gets to Elmira he thinks Booth is in New York. If he thought his commander-in-chief was in New York, and he was ordered to Washington, his first object would naturally be to see his commander; and why did he not go to New York, where the commander-in-chief was? For what did he go to Elmira? Look at the map. Look at the relative positions of Montreal, New York, and Washington—almost in a direct line. If Washington was the point at which he was aiming and seeking to reach with all the expedition naturally desired by a conspirator in such a plot, why should he diverge from the direct line of his journey by going to Elmira, twelve hours out of his way? His general is in New York, he has written from New York; instead of coming to New York, he leaves the road to that city when within six hours' travel, and goes round to Elmira. Why was this, if his destination was either New York or Washington? He goes to Elmira and telegraphs to New York. He then, on the 13th, supposing that to be the day he telegraphed, did not actually know where Booth was. This conspirator—this Beelzebub, as the district attorney poetically calls him, on the 13th, on the day before the assassination, did not know where Booth was—where Satan was. Is not this a most extraordinary circumstance? Conspirators, moving on time to do their bloody work, counting minutes as honest men count hours, sworn by a brother's oath to stand by each other, dye their hands in the blood of innocence, and share a common fate! And yet twenty-four hours before the fatal event the second in the conspiracy does not know where his principal conspirator is! They say he telegraphed him from Elmira to New York. If he did, it is a circumstance in his favor; but where is the telegram? Why did not the gentlemen bring it in? But why should he have gone to Elmira? My learned brothers upon the other side say he may have been doing the work of mischief in Elmira. His honor has settled that, so far as his judgment goes to settle it, and it goes a great way. His honor says you shall not prove what he was doing in Elmira, because they have not proved that his being in Elmira had any connection whatever with this conspiracy. He has pronounced that judgment from the bench, and it has regulated and controlled the evidence. It shut out the testimony of E. G. Lee; it closed down the defense. We could have proved what he was there for—that he was there on innocent business, having no connection with this conspiracy—upon business which showed that his connection with Booth and these people, if it ever existed, had been dissolved. But, said his honor, "you cannot tangle up this case with testimony that is not intended to knock down any thing; when they set up that fact you may knock it down; but they have not set it up; there is no proof in the case that his visit to Elmira had any thing to do with the conspiracy." Then, in the name of God and justice and common sense, why did he go to Elmira if he was coming to Washington, and not go by New York, where he could have met his commander-in-chief?

The court took a recess for half an hour, re-assembling at one o'clock.

Mr. MERRICK. With submission to the court: Gentlemen of the jury, I think I have shown to you that the testimony by which the prosecution has attempted to establish the fact of John Surratt's presence in Washington on the night of the assassination is not to be relied on, and that its infamous character and the circumstances under which it was prepared and introduced discredits, soils, and dishonors the entire case of the Government.

I think I have further shown to you, from evidence the prosecution itself was compelled to adduce, and to the correctness of which we agree that it was a physical impossibility for John Surratt to have left Montreal at the time at which it is agreed he did leave that city, and, coming by way of Elmira, have reached this city on that fatal night. And, although you may think it an unnecessary repetition and useless caution, I beg again to urge upon you that, in your deliberations, you will, with pencil and paper and the time-tables before you, take him up in Montreal on the 12th of April, 1865, put him on the train for New York at three o'clock of that day, as it is agreed he was, and follow him from station to station, and ascertain to your satisfaction what was the earliest hour he could have reached Elmira, and then bring him by the speediest possible route to this city, and determine at what hour he could have arrived.

I have further shown to you that none of the prisoner's friends and acquaintances saw him in this city on the 14th of April, in so far as they have been brought as witnesses before you by either side, and that all, with one exception, who testify to his presence, are persons who never saw him before or since that day, and never saw him on any other occasion. I think we could safely have rested our defense on the testimony establishing these conclusions. But, in addition to this, we have proved his presence in Elmira on the 14th of April, 1865, by some of the most respectable witnesses that have been adduced in the case, and as respectable as any that could be brought upon the witness-stand. You saw them, you felt their character, for it was manifest in their deportment.

In reference to the credibility of a witness and the belief of a juror, there is a difficulty in reducing it to any philosophical proposition. You see a man, you hear him testify; and you believe him or you do not believe him, according to the instinct of nature, which is a power in the human breast exercised unconsciously, but which often leads us better than judgments. You saw Stewart, and you heard his evidence as to having seen Surratt in Elmira on the 13th or 14th—he did not know which; but he fixed the time at which he saw him as one of the two days during which his partner was absent in New York, and he fixed the period of his partner's absence by the books of the firm. You heard Carroll's testimony, and listened to the severe cross-examination, in which the counsel professed to lay the foundation for a contradiction he did not afterwards attempt to build upon. He laid his foundation, endeavoring to induce you to believe that he had something behind that he would afterwards introduce to the discredit of the witness; and having laid his foundation, he failed to put one single plank in his superstructure. A witness was called on the stand with the hope and expectation, no doubt, of contradicting Carroll; but the witness, instead of contradicting him, confirmed him, and, therefore, the testimony of Carroll stands before you unquestioned and undisputed. He says he saw Surratt in his shop on the evening of the 13th, as he believes, and again on the 14th of April, 1865. Mr. Atkinson swears to the fact that he saw him in that shop on the 13th or 14th of April, 1865; and Mr. Cass testifies in a manner of unmistakable truth, and gives to his evidence the impress of the solid character of a substantial and a truthful man. He says that on the morning of the 15th, when the news of the President's death was coming in, he was at his store. He saw a gentleman coming across the street, whom he took to be a Canadian friend of his; but as he approached he saw it was not his Canadian friend. The gentleman came into his store and wanted to purchase some clothing of a character that he did not have. They entered into conversation. The conversation became partly political, when some sentiments were expressed of which Mr. Cass did not approve, and which were, when he manifested his disapproval, withdrawn, and the conversation was then pleasantly renewed. He said, without hesitation, when

asked the question, "This is the man." That was on the morning of the 15th of April, when he was about shutting up his store in honor of the memory of the deceased President, after the news had come that he was dead. You recollect, gentlemen, how I afterwards examined him to test the identity of the person he had seen. "Do you recollect the man's face and his features; or is it from his manner and his action that you identify him?" "I thought I recognized his face, but when I came to talk with him, to observe his action, hear his voice, and notice his manner, I knew it was the man." He identified the man by his voice, action, deportment, and manner, and not by his face alone. Not one of their witnesses who testifies to having seen the prisoner in this city ever talked with him before or since. These witnesses from Elmira have talked to the prisoner, observed his action, and they swear, not to the dim impressions made on their recollections of features, which are liable to be effaced by new features succeeding with succeeding days, but they swear to manner and action and conversation, the *tout ensemble* of the man, and they recognize and identify him from all these things, and not simply from the features of his face.

Then, gentlemen, there is Dr. Bissell, upon whom there was a vigorous and violent attack made, whose testimony came to us without our ever having known or heard of him, further than this: that we knew that Surratt had talked to some man in Elmira on crutches. His character has been tainted, though not successfully assailed; but throw his testimony out of the case if you doubt it. I want no tainted witness, and he is the only one. Throw his testimony out if you choose. I care not for his evidence. Our case rests upon the evidence of men of unimpeached and unimpeachable characters and physical circumstances, that speak not by man's recollection, but by the unalterable laws of God.

One other circumstance connected with these witnesses from Elmira is worthy of your consideration. They all testify to the peculiar kind of coat, known as a Garibaldi jacket. You saw a pattern of it exhibited in court, buttoned round the throat, belted around the waist, and plaited in the back and in the breast; a coat like unto which there is none in this room, and probably none in use in the city of Washington. They testify to seeing that identical coat on this man. We then show by Mr. Reeves that he made this identical coat for this man in Canada, prior to the 9th of April, 1865. We bring here from Canada the tailor who made that coat; and he swears that he made it for Surratt, and we find Surratt in that coat in Elmira. He then returns to Canada, and they prove by the agent of the hotel, the clerk who kept the register, that when he came there, on the 20th of April, 1865, he had on that identical coat.

Now, gentlemen of the jury, they start him out from Canada on the 12th of April, 1865. We put him in a certain coat on the 9th of April, 1865, and find him in that same coat in Elmira, observed by these witnesses, on the 13th and 14th and 15th, and when he gets back to Canada he has on the identical coat in which he left Canada, and which he wore in Elmira, unseen by any of their witnesses, except Montgomery's precious son.

But, say the learned gentlemen, he was coming here, as I have stated to you before, in obedience to the mandates of Booth, and they insinuate that he was performing his part in this conspiracy at Elmira. I have already noticed that position. I have already shown you that Booth went to the National Hotel on the 8th and did not leave until the 14th; and by McMillan's testimony that Surratt did not know where Booth was. Having shown you, gentlemen, that he was not here, that he had had no connection with Booth from the 7th to the present time, it is a circumstance to show that he was not in this conspiracy, for the reason that, if he was in the conspiracy, it is to be presumed that he would have been in Washington city, performing his part in it. He was not in the conspiracy to kill the President, and had nothing to do with it, nor any knowledge of its existence, and did not leave Montreal in obedience to Booth's mandate. Booth wrote him, says McMillan, from New York; but he did not start immediately. Booth left New York on the 7th. Now, what was the statement that Surratt made to McMillan with regard to this subject—for it is upon McMillan's testimony that they rely to show that Surratt was in this conspiracy. McMillan says Surratt stated that he received a letter from John Wilkes Booth, dated New York, ordering him immediately to Washington, as it had been necessary to change their plans, and to act promptly. Change their plans! Change their plans to what? Can the counsel on the other side account for the change, and specify what it was? He is notified that the plan is to be changed. Changed from what to what? Did he tell McMillan what the plan had been, and what the change was? McMillan does not disclose it. But there was a change of plan. What was it? Cameron discloses the fact of what occurred between Surratt and McMillan, for we must take McMillan's testimony, gentlemen, with many grains of allowance. McMillan has himself told you that he sees the reward glittering in the future, and that he is entitled to the reward if anybody is. And whilst he has made a declaration which the learned district attorney has been pleased to quote as a sentiment worthy of repetition and creditable to the human heart, to wit, "that he gave him up because he regarded him as an enemy to society and civilization," the district attorney forgot to tell you of the additional stimulus of prospective profit—for McMillan himself says that when he did give him up he expected a reward. In his cross-examination, to which your attention will be called, you will find that whilst he swore that he had collected from Father Boucher, through a bailiff, the money that was due, he forgot his own receipt; and he falsified the truth in his testimony concerning that receipt after it was handed to him. It refreshed his recollection, but not until he found that he had told that which was not consistent with truth. It was a receipt dated in June, for five dollars in full of all demands, and yet just before it was shown to him he had sworn that in the August following Boucher was indebted to him for services rendered one year before! If his memory is so unreliable as to his own matters, how can you trust it as to the affairs of others; or if he cannot be credited with small things, how will you reconcile it with your duty to credit him in greater things?

But what does Cameron say? I read from his evidence:

"Q. Did he (McMillan) ever state to you that Surratt told him that he was in Elmira; that he went from there to some town, the name which he could not recollect, but which had an Indian derivation?

"A. He so stated. I tried to recollect the town by repeating all the names of towns in New York having an Indian derivation I could think of; but he could not recollect, nor could I"

You will call to mind the fact, gentlemen, that some of the towns in New York have an Indian derivation. There are a great many that have, and among them is *Canandaigua*. It is unnecessary I should pursue this point. It is a matter about which I care to speak as little as possible.

"Q. Did he further state that Surratt first learned of the assassination of President Lincoln at the city of Elmira, and that he immediately turned his face towards Canada?

"A. Yes. He assigned that as the reason.

"Q. Did he ever state to you in any conversation on board that boat, or elsewhere, that he was on intimate relations with Surratt on shipboard; that Surratt could not have been guilty of participation in the assassination; that he really regarded him as a victim?

"A. He did, in answer to my question, whether he was in favor of compromising himself as an officer of the line of steamers, by furnishing shelter and affording facilities to such a man for leaving the country.

"Q. Did he ever state to you that Surratt told him that the plan for the abduction of Mr. Lincoln was the individual enterprise of Booth, and that he furnished $4,000 or $6,000 for that purpose?

"A. He so stated; and mentioned those sums specifically.

"Q. Did he state that the whole plan was laid by Booth?

"A. Yes, by 'that reckless man Booth,' I think was the expression; and that he always regarded it as the individual enterprise of that man.

"Q. At what time was it that you had these conversations with him—do you recollect the date?

"A. Not without reference to my diary. [Diary consulted by witness.] It was on Monday, the 30th of October. I left on the 28th.

"Q. Did he ever say to you at that time, or after the 16th of September, 1865, that he had never communicated his conversation with Surratt to any one else?

"A. He stated so emphatically. I made a very earnest appeal to him not to state what he had mentioned in that conversation in regard to Father LaPierre. He stated that he was his early schoolmate, and that he had not repeated it to any one else; he told me so positively and solemnly; and he cannot deny it.

"Q. Did he tell you that Surratt did not know of his mother's position until about the day of her execution?

"A. He did; he defended John Surratt when I assailed him on that point."

This is the conversation Cameron had with this man McMillan about twenty days after he had seen Surratt. McMillan's statements in this conversation are entirely inconsistent with the testimony he has given in the case, and you must determine between his statements and his evidence. According to these statements, Surratt said he was in Elmira, and when he heard of the assassination he returned to Canada; that the plan of abduction which had been laid was Booth's own plan, and had failed entirely. Now, there are some circumstances in the case that may justify the jury in believing there was a plan of abduction. If there was a plan of abduction, and there are some circumstances in the case going to show it, and the plan that was carried out was not an abduction, but a killing, then the change of the plan was probably from the abduction to the killing; for, bear in mind, gentlemen of the jury, that the killing did not occur in the attempt to carry out the plan of abduction. It was not an effort to abduct; it was a new plan, a new scheme, which was to kill. If there had been an abduction, and in abducting it had become necessary to kill in order to carry out the abduction, then the abductors might be held responsible for the killing. If there was a plan of abduction, and that plan was given up and abandoned, and a new plan was formed to kill, and the parties went to the theatre with the intent of killing, and not abducting, it was no part of the conspiracy to abduct, but a new conspiracy, with which the original parties to the conspiracy to abduct had nothing to do, except in so far as they *personally* agreed to the new plan.

But, say my learned brothers on the other side, "This man Cameron is not to be believed; we will bring in witnesses to impeach him." They did, and they swore to his character. A few of them thought he was an erratic, uncertain man. From Elkton these gentlemen came; came with their feelings, came with their prejudices! When we examined McCullough, we found that his opinion of Cameron was founded upon the fact that early in the late war Cameron ordered an article to be published in a Baltimore paper with reference to the doings of some Union soldiers, which contained statements not entirely true. A portion of it was the coinage of his imagination. Why, gentlemen of the jury, if every man who published things that were not entirely true during the late war is to be held as unworthy of belief in a court of justice, I apprehend that a large portion of our people in high positions would be discredited.

But, says the prosecution, he is not to be believed because he has rebel sympathies; and the court has allowed them to go into this question of rebel sympathies to test credibility. Gentlemen of the jury, as I have stated in an argument to the court in the progress of this case, I was no secessionist. I desired the preservation of this Union; I desired its complete and entire preservation, with all the States unimpaired in their rights as States, and the preservation of the Constitution of the United States, untorn by the carpings of demagogues, North or South. I desired peace—a safe and perpetual peace; and union—an harmonious and equal union under the Constitution of the Union; and, whilst I feared the rebellion, I feared the suppression of the rebellion as much and more than I feared the rebellion itself. I believed I saw, moving abroad through the country, a spirit that was seeking *vengeance*, *blood*, and *money*, under pretenses of patriotism, and conducting the war as it would run some great manufacturing machine; I believed this spirit would outlive the war and perpetuate hostility in the tyrannical domination of party after the war was ended, and that it would then tear down our Government, subvert our Constitution, and destroy our liberties. My anticipations have been realized. That spirit is abroad and at work to-day, and is shaking the very pillars of the Republic. It assails the Executive of the United States because he defends the Constitution and is seeking to preserve it, and it inculcates hatred to the vanquished South, and vengeance and animosity against her people and all who defend their rights under the Constitution. It introduces even in this case all the passions and resentment of war. The prosecution calls on you to discredit all who *may have had sympathies with the South in her conflict.* Gentlemen, there were honorable men in the South as there were in the North. There were men of rebel sympathies who were as honest and as true as those who were opposed to the rebellion—men whose hearts were as bold, whose characters were as unstained, whose consciences were as pure, and whose convictions were as sincere. I defend not the act of treason; I defend not the iniquity, North or South, that stained this land with blood; but now that the war is over, I arraign and condemn that bad feeling of bad hearts that would keep alive and embitter the prejudices and the hatreds of the war. And if the veracity of men is to be tested by their sympathies on one side and the other of the fatal line, it would not be entirely satisfactory or creditable to our friends of the North to try *them* by the records the two sides have respectively made since the close of the war. Who has best kept the faith of the surrender at Appomattox Court House, where Lee gave up his sword to Grant? Is it the acquiescent and submissive southerner, adhering to the obligation he then assumed, of obedience to the supreme law of the land; or is it the dominant power of incendiary fanaticism in the North, thirsting still for further vengeance, and blotting out nine States from the national galaxy, and establishing military despotisms upon the ruins of constitutional government? Who has best kept the faith, again I ask? Gentlemen, I sorrowed for my country in her bloody trial, when her sons stood arrayed in battle against each other; and now, that peace has come, and I see treason, not in arms, but treason in noiseless security, sapping the foundations of the Republic—treason crushing the liberties of one-half the people, and disregarding the sacred obligations pledged by the Congress of the United States, that the war was a war for the Constitution and the Union and for no other purpose, I feel more deeply grieved than in the darkest hour of the rebellion, for I feel that my country and her Constitution is in greater and more imminent peril. But I have still an abiding faith. The same almighty Power that has watched this nation in its course, watches it still; and when for its iniquities the chastisement has been sufficient, perfect peace and constitutional liberty will be restored; and though you and I, gentlemen, in our day and generation, may suffer and grieve and be pained, our children will inherit a country proud as that which we inherited, and which we may rejoice to know they will live in and honor and redeem. Bad men cannot have permanent triumph; but, in order that their defeat may be hastened, let us abandon this habit of crimination and recrimination; let us condemn this vengeful spirit of hostility, which would have us believe that southern men cannot tell the truth; that a man with southern sympathies must be presumed to lie and cannot be trusted. Such opinions are unpatriotic, unchristian, unbecoming, and unfounded.

If Surratt was in any conspiracy, it was abandoned on the 16th of March. That is the proof. Now, gentlemen, let us recur and see what their proof is. They tell us there was a conspiracy to murder; and, says Mr. CARRINGTON, scene first is laid on Pennsylvania avenue,

in 1864. Mrs. McClermont sees at that time two or three gentlemen talking there. She hears them speak the name of "the President;" "telescopic rifle;"—ominous words!—"but his family will be along;" "they can be gotten rid of." Says the gentleman, that is the first scene in this conspiracy to murder. One of these men was Booth. Why, gentlemen, it seems to me, that whatever the counsel on the other side looks at takes the color of his disordered imagination. Small circumstances that amount to nothing grow in his eyes as large as mountains. Then what Mrs. Hudspeth saw. These circumstances gathered together show a conspiracy to murder at this very time. The letter which Mrs. Hudspeth picked up speaks of poison: and ah! at that very time, he exclaims, Herold was an apothecary's clerk. Wonderful. He was an apothecary's clerk, and, according to the testimony of his employer, he had never put up but one prescription, which was a dose of castor oil.

Mr. BRADLEY. Not at that time.

Mr. MERRICK. No; it was not at that time, for Herold left the apothecary store in July, 1863. All this time, too, you will bear in mind, Surratt did not know Booth. He is one of the conspirators, and yet he is not acquainted with Booth. He first became acquainted with him in December, 1864. Miss Fitzpatrick was a boarder at the house from the first of November, 1864. This house is represented as the rendezvous of the traitors during one or two years of the conspiracy, and yet the head traitor and conspirator was not at the house. Weichman says that Dr. Mudd introduced him and Surratt to Booth in December, 1864, or January, 1865. That is Surratt's first acquaintance with Booth. There is no proof in the case, not one particle, that Surratt had ever seen Booth before that day, Weichmann testifies that on the 16th of March, 1865, Booth, Payne, and Surratt came in very much excited, and strutted about the room; that Surratt said: "My prospects are ruined, cannot you get me a clerkship?" The whole thing, whatever it was, was evidently broken up then and there; and they were never seen together after that day. The next we hear of Surratt is that he is off with some lady towards Richmond, and then in Canada. For what purpose he was in Canada the court would not let us prove, or we could have shown why he went to Canada.

They say Surratt furnished the arms, put them at T. B., and then concealed them at Surrattsville; that they were there for the purpose of this conspiracy; and that he owned certain horses also designed for this purpose.

Well, now, what is the plain common sense course of reasoning with regard to all this business. Here were a parcel of young men, with their minds inflamed upon political topics, sympathizing earnestly with the South, as a great many of our Maryland young men did, desirous of rendering it such assistance as they could, probably helping persons to cross the river, carrying dispatches between the United States and the Confederate States, and having arms for the purpose of their common protection; and further than that, it is not improbable that there may have been some idea of abducting the President as a measure of war; a thing which was unjustifiable, and for which they might have been taken and executed. It is not improbable, I say, for the reason that there were at that time, as you will recollect, a great many confederate prisoners in the North and a large number of federal prisoners in the South; and it has passed into history that the Federal Government refused to make those exchanges which were demanded by the rules of war and the laws of humanity. It has passed into history that the Confederate States at that time offered to surrender up to the Federal Government from ten to twenty thousand prisoners if the United States would send transportation to Savannah to take them.

Mr. BRADLEY. And without any exchange.

Mr. MERRICK. Yes, and without any exchange. They said, "We are exhausted; our resources are gone; our food is gone; we starve; your prisoners starve; come and take them, for we are unable to do that justice by them which the law of war requires." Said the United States, "You shall keep them." For the starvation of these prisoners I hold the United States responsible, and not the South. Her own men starved; her own people had no food; her supplies were exhausted. Children fell from the mother's breast, and mothers withered and died for food. Soldiers fell by the wayside, emaciated and worn out, for the want of physical sustenance. Their own people suffered with the prisoners, and they asked the United States to take them, that they might live, for they could not feed them; and they refused to do it. That has gone into history, gentlemen. It is a matter now uncontroverted, undisputed. At the time of which I have been speaking it is not at all impossible that there may have been some scheme to take Mr. Lincoln to the South, in order to accomplish an exchange of prisoners, but not to kill him, for that would have defeated the object. Mr. Lincoln was not to blame for this condition of things; I do not blame him; I can pass upon him as high a eulogium as my learned friend did, although not in as eloquent a manner, for I cannot attain the height of his eloquence. I hold Mr. Lincoln blameless for many of the errors of his administration, for he was dominated over by those men who still dominate in high places, from which they should be driven. There may have been among these young men some such wild scheme, but that it was broken up is conclusively established by Weichmann's testimony.

But, says my learned brother upon the other side, one of these horses belonged to Surratt, and he bought the horses, and he bought the guns. What became of those horses? I know that Judge PIERREPONT, who is to close this case, will make those horses to caper and prance before you; but what is the fact about the horses? Cleaver says that Booth brought the horses to his stable; Stabler says that Surratt boarded his horse at his stable and paid their livery; that after Surratt had paid for their livery for a certain time, Booth paid for their livery. Surratt told Stabler that they were Booth's horses, and he would pay for them. Booth says to Weichmann, on the 10th of April, "The horses are not John Surratt's, they are mine." Booth then says that these horses, although they may have been Surratt's, had become his. What is the conclusion? That, if Surratt had ever owned these horses and had been in this conspiracy to abduct, he had got weary, tired of the thing and thrown it up; he had passed away from it and gone to other matters to which he was devoting his attention; but Booth, more ardent and resolved and determined, still clung to it; had bought and kept the property; and, if he wrote Surratt any letter at all, it was in the hope of inducing him to come again under the control of his fascinating and superior mind. It was not to change a conspiracy in which Surratt already was, but it was to form a new conspiracy, namely: a conspiracy to kill.

But, gentlemen, this whole matter is definitively concluded by the diary of John Wilkes Booth. If there was this conspiracy, the question now is, When was it formed? You see from McMillan's testimony that Booth wrote that the plan was to be changed. When was the conspiracy to kill formed? Admitting all their suspicious circumstances, with all their weight, to show some conspiracy, when was the conspiracy organized? We say it was organized on the day upon which its guilty object was accomplished. You will remember, gentlemen, that Richmond fell about the 1st or the 3d of April; that Lee surrendered on the 9th of April; the Confederacy was passing away; the forces of the Union were advancing upon them, and no one who saw from a distance, and was not influenced by feelings, believed the Confederacy could long survive. When Booth saw what had occurred; that Lee had surrendered; that all hope for the Southern Confederacy was gone; that there was no longer expectation that it could live, his heart,

inflamed and maddened by the reflection that that which he had loved and supported was destroyed; his mind, impressed with the conviction, from unfortunate teachings, that Brutus was great because he had slain the mighty Cæsar in his capitol, and believing and trusting that he could do something great like unto Brutus that would immortalize his name, on the 14th of April organized this conspiracy for the purpose of doing the bloody deed. What does he say in his diary:

"APRIL 13, 14—Friday, the Ides.

"Until to-day, nothing was ever thought of sacrificing to our country's wrongs. For six months we had worked to capture."

Mark the expression. Not "We *have* worked," but "We *had* worked." Between the expiration of that six months and the present time there has been an interval. "For six months we *had* worked to capture."

"But, our cause being almost lost, something decisive and great must be done. But its failure was owing to others, who did not strike for their country with a heart. I struck boldly, and not as the papers say."

When was that conspiracy formed? "Until to-day nothing was ever thought of sacrificing to our country's wrongs. For six months we had worked to capture." They have introduced this diary. It is their evidence. It is the only evidence in the case as to the time of the conspiracy; and I challenge any man, with this diary in his hand, to tell me that the conspiracy was formed one hour before the 14th day of April, 1865. It comes in sanctioned by the Government, for they introduce it; and surely they did not introduce it to discredit it. No; they introduced it to make it substantial evidence. They introduced it that you might believe it. They give it the credit of their word, and they cannot escape the consequences. I know that the gentleman who is to close will attempt to deny this position, and attempt to get rid of the obligation in which he stands to respect as true the statements of the diary, but he cannot get rid of it. He has offered the diary to you for no other purpose. It is evidence for nothing else, for it bears upon no other point, and you must take what is written as the evidence of the only man that knew—John Wilkes Booth.

"This forced Union is not what I have loved. I care not what becomes of me. I have no desire to outlive my country. This night, before the deed, I wrote an article and left it for one of the editors of the *National Intelligencer*, in which I fully set forth our reasons for our proceeding."

Where is that article? That would disclose the date and confirm the diary. That would tell the whole story. The court excluded it; and why? Because we could not give in evidence Booth's declarations. I differed from the court upon the question, but with great modesty, for although I saw many reasons to believe that this should be an exceptional case, still I appreciated the rule of law. But the counsel on the other side could have let it in without objection. That would have cleared up all obscurity in the diary. What motive could Booth have in telling a lie on this subject? What motive could he have in writing a falsehood that was to live after him? He is fleeing; he has done the deed; the thing is accomplished. History's muse must take up the circumstances and keep the memorial. Why should he, under these circumstances, seek to leave behind a falsehood that could in no manner benefit him or others? "Until to-day nothing was ever thought of sacrificing to our country's wrongs." The surrounding circumstances all show that until that day he probably had no such thought; but then was the fatal hour that tried the souls of men who desired the success of the Southern Confederacy; for it was at that time they first saw the fatal promise of its ultimate and entire destruction.

Gentlemen, there is no evidence in the case other than this diary as to the time when that conspiracy was formed. You must take the diary. If you believe the diary to be true, this case is at an end, even though you should get Surratt from Montreal to Washington city before he could get to New York. This diary makes the case too plain to resist. But they still claim a verdict! Who claims a verdict? As I have stated to you, gentlemen, in the large array of counsel in this case—I may be wrong—I think I notice two distinct representatives. One is the Government of the United States, represented by the district attorney. Whatever else outside of the district attorney there is in the executive department of judicial duty appertaining to the enforcement of the laws against criminals belongs to the office of the Attorney General. He represents the judicial authority of the Federal Government in the executive department. I ask, is the assistant attorney here by appointment of the Attorney General of the United States?

Mr. PIERREPONT. If you want the answer, I will give it.

Mr. MERRICK. Certainly, sir.

Mr. PIERREPONT. I am.

Mr. MERRICK. I had not supposed such was the case.

Mr. PIERREPONT. It is.

Mr. MERRICK. I had believed it was not the case, and I had good reason for my belief; but the attorney says I am mistaken, and I will not controvert his statement. But why has the Attorney General deemed it expedient? Did he feel the necessity that public justice demanded that he should employ assistant counsel in this case, or is there somebody else behind, gentlemen of the jury? Are there any other officers of the Federal Government that have purposes to accomplish in this cause? Let us see. Says the learned attorney upon the other side, (Mr. PIERREPONT,) in a speech delivered, I think, before you were empanneled:

"It has likewise been circulated through all the public journals that after the former convictions, when an effort was made to go to the President for pardon, men active here in the interest of the Government prevented any effort being made, or the President even being reached, for the purpose of seeing whether he would not exercise clemency; whereas the truth is—and the truth of record, which will be presented in this court—that all that was brought before the President and full Cabinet and fully discussed, and that condemnation and execution received the sanction of the President and every member of his Cabinet. These and a thousand other false stories will be all set forever at rest in the progress of this trial; and the gentlemen may be assured that not only are we ready, but we are desirous to proceed, and now."

If this declaration of my learned brother upon the other side is correct, this trial was not a trial to try Surratt alone; it was not urged on because public justice demanded his arraignment before you, gentlemen; but it was urged on that a thousand false stories about men high in office might be settled at his expense. Although my learned brother is here under appointment by the Attorney General of the United States, it is an appointment which probably had its origin in the stimulus of some private feeling lying behind. He comes here, not to try this case alone, but he comes here to set at rest certain false stories. Has he done it? He said it had been charged that—

"Men active here in the interest of the Government prevented any effort being made, or the President even being reached, for the purpose of seeing whether he would not exercise clemency; whereas the truth is—the truth of record, which will be presented to this court—that all that was brought before the President and full Cabinet and fully discussed, and that condemnation and execution received the sanction of the President and every member of his Cabinet."

Where is your "record?" Why did you not bring it in? Did you find at the end of the record a recommendation to mercy in the case of Mrs. Surratt that the President never saw? You had the record here incourt.

Mr. BRADLEY. And offered it once and withdrew it.

Mr. MERRICK. Yes, sir; offered it and then withdrew it. Did you find any thing at the close of it that you did not like? Why did you not put that record in evidence, and let us have it here? We were not going to quarrel with it; we would like to know all we can about the dark secrets of those chambers whose doors are closed, but through which light enough creeps to make us curious to see more. We only know enough to make us curious; but that is enough to make us feel. You promised to show, too, that nobody prevented access to the President on the part of those who were seeking executive clemency. Why did you not do it? Gentlemen of the jury, I should have been glad to have heard that proof. They have brought these charges into the case, and I must meet

them as part of the case. I should have been glad to have heard that proof. Who of you is there who was in the city of Washington that will ever forget that fatal day when the tolling of the bells reminded you of the sad fact that the hour had come when those people were to be hung? Your honor, [referring to Justice Wylie, who was at the time sitting by the side of Judge FISHER on the bench,] and in your praise be it said, raised your judicial hand to prevent that murder, but it was too weak. The storm beat against your arm, and it fell powerless in the tempest. You remember that day, gentlemen. Twenty-four hours for preparation! The echoes of the announcement of impending death scarcely dying away before the tramp of the approaching guard was heard leading to the gallows! Priest and friend, philanthropist and clergymen, went to the Executive Mansion to get access to the President, to implore for that poor woman three days' respite, to prepare her soul to meet her God; and yet no access. A heart-broken child, a poor daughter, went there crazed; stretched upon the steps that lead to the executive chamber, she raised her hands in agony and prayed to every one that came, "Oh, God! let me have access, that I may ask for but one day for my poor mother—just one day!" Did she get there? No. And yet, says the counsel, there was no one to prevent access being had. Why did you not prove it? Oh, God! If it could be proved, I would rejoice in the fact; for, when reflecting upon that sad, unfortunate, wretched hour in the history of my country—an hour when I feel she was so much degraded—I could weep; yes, I could weep tears of blood, of sorrow, and of shame. Who stood between her and the seat of mercy? Does conscience lash the chief of the Bureau of Military Justice? Does memory haunt the Secretary of War? Or is it true that one who stood between her and executive clemency went to his last sleep in the dark waters of the Hudson, whilst another "died the death" by his own violent hand in Kansas?

The learned gentleman is right; he came here to put these things at rest, or to endeavor to put them at rest; but he could not do it. What else is there in this case to show a feeling behind, besides public justice, impelling to conviction. Gentlemen of the jury, as the counsel has stated in this speech, public rumors had gone abroad, and certain grave charges had been made. You know that political accusations had been brought against Judge Holt, Mr. Bingham, and the Secretary of War, in the House of Representatives, and that it had become somewhat a political matter. These were parts of those accusations that the learned counsel was going to put at rest. Where is the proof? The proof is in this; follow me for a moment; I said I would show conspiracy on conspiracy. What has the chief of the Bureau of Military Justice to do with this case? Does not your honor hold an independent court? Are not the judicial tribunals of the land separate from and independent of the executive? Is it not a fundamental principle of American constitutional law that the executive and judicial departments shall be distinct and separate. The Bureau of Military Justice is a part of the executive department. What has its chief to do with this case? "Nothing," says the counsel. "Is he counsel," we ask. "No," say they. Why then is he manipulating their witnesses in the case? Smoot, one of their witnesses, tells you that he is called up before Judge Holt, with ten others, examined, and his examination taken down in writing. The day after giving his testimony, he comes back and says that it was not Judge Holt that examined him, but it was somebody else. I pressed him; pressed him hard as to place and time. He then recollected it was in the Winder Building, opposite the War Department; and, when I pressed him still further, he had to say that the office in which he was examined had written over the door "Judge Advocate General's Office." Again, I ask, What had the Judge Advocate General to do with this case? Not only was Smoot there, but Norton was there, and God only knows how many more. It is apparent, then, that he has taken a deep interest in this case. Why is he taking such an interest? It certainly is indiscreet. He has lost his prudence and he has lost his discretion; he has lost his judgment thus to expose himself and his office. My learned brother the district attorney read from the speech of Daniel Webster in the case of Knapp a paragraph to affect your minds in reference to what he alleged are the confessions of John H. Surratt. I will again present it before you:

"The secret which the murderer possesses soon comes to possess him; and like the evil spirit of which we read, it overcomes him and leads him whithersoever it will. He feels it beating at his heart, rising to his throat, and demanding disclosure. He thinks the whole world sees it in his face, reads it in his eyes, and almost hears its workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence."

Mr. District Attorney, "gird up your loins," and answer me. Whose discretion is broken down? Whose prudence is betrayed? Is there anybody's heart at which a vulture gnaws? Is there any high official who is forgetting the dignity of his office and the duties of manhood so far as to descend to the preparation of witnesses in a case with which he has nothing to do, in order to satiate his appetite with the blood of an innocent being? All these facts that I have mentioned to you—Conover's character, Susan Ann Jackson's testimony, and the story of the handkerchief—were known to the Judge Advocate General.

Mr. BRADLEY. And known to the prosecution.

Mr. MERRICK. Yes, and known to the prosecution; but I am now speaking of the Chief of the Bureau of Military Justice. He has furnished the evidence in this case. A word, and a word only, with regard to the handkerchief story. You will recollect that we brought the man here who lost the handkerchief. But, oh! say they, another handkerchief was lost two days before. Extraordinary coincidence! How many strange coincidences have happened in this case? Gentlemen, when they unfurled that banner in this court of justice, they knew it was not the banner of truth, but of falsehood, for they knew all the circumstances of the loss. They knew that one of Baker's detectives had got hold of it, and that it had been reported to the Government. "*Prudence has been betrayed;*" "*discretion has been broken down;*" "*courage has been conquered.*" Following on Judge PIERREPONT'S declaration, which I have read to you, and these circumstances, comes Mr. CARRINGTON, as I said this morning, breaking the cerements of the tomb, and demanding your verdict against Mrs. Surratt. In God's name, is it not enough to try the living? Will you play the ghoul, and bring her from the cold, cold earth, and hang her corpse? You have brought her in and she is here. We have felt our blood run cold as the rustling of the garments from the grave swept by us. Her spirit is around and about us in this court-room, and walks beside those who did her wrong. The Judge Advocate General will hereafter learn that it is the eternal law of God, that "where guilt is sorrow shall answer it;" and that to shed innocent blood, through the forms of law, though it may *apparently* vindicate the guilty for innocent blood with which the hand is already dyed, cannot ease the burdened conscience. The spirit will still walk beside him, and *will not be at rest.* He may shudder before her—for she is with him by day and by night; and he may say to her

"Avaunt! and quit my sight! Let the earth hide thee;
Thy bones are marrowless; thy blood is cold,"

But the marrowless bones and bloodless form are still beside him, and her whisperings are ever sounding in his ear, telling of that great Judgment Day to come, when all men shall stand equal before the eternal throne, and Mrs. Surratt be called to testify against Joseph Holt for

"the deep damnation of her taking off."

Gentlemen of the jury, if my learned brothers propose to try her on this case, why not give us the bene-

fit of her dying declarations? Mr. CARRINGTON, your honor, has gone outside of this record, and I must follow him to some extent, at least. He has gone outside of it in speaking of the military commission, defending the major generals and others. I am glad I recurred to it, for it reminds me of a statement of his that I desire to correct. He says we accused those honorable men of murder. No; I refrain from any expression of opinion on that subject. It is true that the most exalted judicial tribunal in the world, vindicating the liberty of American citizens and their constitutional rights against military authority and the supremacy of tyranny, have pronounced that and all other commissions similarly constituted to be illegal and unauthorized. What I denounce here is not the men who in judgment sat there, but the men conducting the trial, and who, with this diary of Booth in their hands, which would have proved Mrs. Surratt's innocence by showing this conspiracy to have been organized on the 14th day of April, proved the toothpicks and the penknife found on Booth, and yet never disclosed the fact that such a diary existed; suppressed it, never made it known to those men or to the country. But to recur. If you propose to try Mrs. Surratt, will you not give her the benefit of her dying declarations? I put a witness on that stand, and asked him, "Did you administer the consolations of religion to Mrs. Surratt?" "I did. I gave her communion on Thursday and prepared her for death." I asked him, "Did she tell you, as she was marching to the scaffold, that she was an innocent woman?" He nodded his head, but he did not answer the question, because the other side objected, and your honor sustained the objection. If you propose to try that woman, who is dead and not here to defend herself, can you not at least have charity enough to let her last words come in in her defense? Will you try one who is not only absent from the court, but who is dead—deny to her on her trial the poor privilege of having the last word she uttered on earth spoken in her vindication? Were you afraid of it? Did you feel that the words would sink deep into the heart of every man in this room, and in the United States, and cause to well up from that heart a fountain of mercy, rich and pure and crystal as the waters that sprang from the rock at the bidding of the sacred rod? Shame on you! Prepared for the world to come, and marching to the scaffold tottering between two soldiers, with her God before and the world behind her, her load of sin laid at the feet of her Saviour, and no hope but in that eternal mercy upon which we must all rely, I ask whether she cannot at such an hour speak for herself. "No," you answer. Why not? Is it likely she would lie? No, gentlemen, they will not say that. Then why is it? They did not want to hear her voice. They feared to hear it. They will not hear it, for they are hardened of heart, reckless of guilt, and indifferent to justice. But, although they will not let it be heard here, it still speaks and is heard; it descends upon the head of that boy, and breathes upon each of your hearts. Yes, gentlemen, that woman in the nameless grave, the cerements of which have been broken by the Government, comes here to vindicate her child. "A nameless grave," did I say? Yes, alas! too true. It would seem as if the ordinary feelings of humanity and common respect for the dead, to say nothing of regard for the honor of our country and sympathy for the sufferings of a distracted and loving daughter, would suggest to those pressing this prosecution to allow this girl the poor privilege of paying a simple tribute to a mother by having her remains removed from a felon's grave. Yes! that mother lies in a nameless grave, on which no flower is allowed to be strewn by that heart-broken daughter, who for the past two years has been earnestly pleading that she might have the privilege of placing those to her sacred remains where filial love might weep the prayerful tear, and a filial hand plant a flower on the tomb. I cannot pursue this subject further. My feelings choke my utterance.

Says the district attorney, Surratt has confessed his guilt by flight—flight from a mother over whose head was impending such a sad fate. Gentlemen of the jury, he knew not of her condition until she was executed or about that time; and when he received the information he was restrained by force from coming. This we were ready to prove. Fly! What else could he do? Suspicion of guilt in that day was certainty of conviction. Military commissions were organized, not to try, but to convict. Who of you would not have fled if a reward had been offered for your head. He saw his name in the papers while in Canada, and he fled. Of course he fled. He fled from a blazing country. He fled not from justice, but from lawlessness. He fled not from trial, but from conviction and oppression. Suppose he had been here, could he have had a trial? Guilty or innocent, he would have been hung. Law was dead in the country. The iron hand of power had suppressed judicial authority. Forts in New York and Massachusetts, perpetuating by their own the names of the great advocates and soldiers of freedom, had been crowded with the victims of a despotism that disgraced the sacred liberty of America which a Warren and LaFayette had battled to achieve. Tyranny ran wild in the land. No man was safe. To tell me that under such circumstances the flight of a man with a price set on his head was confession is to tell me that which is too absurd to merit the dignity of reply.

Gentlemen, something was said in the earlier part of this case with regard to the Catholic Church and her connection with the prisoner at the bar and the Southern Confederacy. She needs no vindication from me. There she stands, and there is her history—whether, as her children believe, the Church of God, or, as other men believe, the device of man, she there stands, one of the grandest institutions that the world has ever beheld. She guided men from darkness to light and from barbarism to civilization, and through the whole period of despotic authority in Europe she has been upon the side of the people as against the monarch. From the first beginning of her power she has upheld the rights of the people wherever oppression has attempted to violate them; and wherever the people have been turbulent in their resistance to legitimate authority she has restrained them by the mandate of her spiritual power to respect the law and obey the constituted authorities of their country. And in our late rebellion she said to all the people, North and South, "Obey the law, and respect the Constitution of your country. I speak not politics," says she, "in my Church. The banner which is floating from this Church is the banner of the Cross—I know no other standard; and as the follower of the Cross, I teach all people to obey the law." Such stands forth to her eternal credit as her history from the beginning; and throughout that history, even to those who question the divinity of her origin, there is much too great for the machination of man, and they stand almost confessing what their judgments and feelings question.

But I would not have you suppose, gentlemen, from the reverential honor I pay to her, that I depreciate the sanctity or would detract from the honor due to other Christian churches. I thank God there is no sentiment of intolerant prejudice in my heart. The true and conscientious Christian in one church serves his God, if his conviction be clear and firm and the result of full and candid examination, as faithfully in one church as he does in another. To illustrate my view: You see before you different branches of a stream, and find the same water in all the branches. He that drinks from one branch, though perhaps in color something different from another, yet drinks substantially the same water that quenches his thirst; and so with these various churches. They are but the different branches of one great stream, whose source is in Calvary, at the foot of the cross. To the honor of the Catholic Church be it said, that when this young man was accused of crime in the Papal dominions, and there was no extra-

dition treaty between this country and that, and no power to compel the Pope to surrender him, the Pope and Cardinal Antonelli voluntarily and without hesitation gave him up. They said, "Take him back to America and try him; if guilty, execute him." The Catholic Church is on the side of justice and of mercy. She protects the fleeing criminal when she believes him to be innocent, but when the hand of right and justice says, "he *is* guilty, give him to me," she gives him up without a word.

Gentlemen of the jury, the district attorney has invoked your loyalty, and asks a verdict of guilty in order to show that the people of this District are loyal! I cannot follow him through his long tirade about the glory of the District volunteers, for I neither envy his achievements in that regard, nor am disposed to waste time in pursuing such an argument. But I, too, invoke your loyalty. Loyalty is a word that does not properly belong to the lexicon of republics, but if it does belong to the lexicon of republics, it means the faith of the citizen to the supreme power of the republic. What is the supreme power of the Republic? The Constitution of the United States, and the laws made in pursuance of that Constitution. The loyalty of the Austrian is due to the successors of the Cæsars; the loyalty of the Englishman is due to the Queen; the loyalty of the Frenchman is due to Napoleon; but the loyalty of the American citizen is due to no mortal man, but due to the spirit of human liberty, incarnate in the Constitution of the United States. Be loyal to that; be loyal to the law; above all things be loyal to yourselves, and do your duty. A feeling of duty performed will follow you through the world with the pleasant commendation of a satisfied conscience; but a feeling of duty unperformed will pursue you with the lash of chastisement wherever you may go. All evils that are physical can be avoided; but evil that comes from the conscience, when it arraigns us day by day, cannot be fled from. "You may take up the wings of the morning, and flee to the uttermost parts of the earth," but there is neither nook nor corner in which you can hide yourselves from it. Go forth, then, gentlemen, from your jury-box with a conscience free and unembarrassed; a conscience that will say to you in all time to come, "You have done your duty."

Gentlemen of the jury, I invoke for the prisoner not your mercy, but your most deliberate judgment. There has been blood enough in expiation of this fearful crime. No man can measure with larger dimensions than myself the enormity of the crime which was consummated in the murder of Abraham Lincoln. Already four have been hung, and others suffer punishment—some for a term of years and some for life. There has been blood enough. Think, gentlemen, of what disasters have fallen upon this young man. Three years ago, within the limits of this city, there was a quiet and happy home. Around the hearth was gathered a happy family. A mother blessed it with a mother's love: a gentle daughter, budding into womanhood, gave to the scene the sweet hues of her devoted smile. Beside her sat a brother, just bursting into the promise of the man. Think, gentlemen, what has transpired since that time. The bright fire is quenched and gone, the hearth is desolate, the mother sleeps in a nameless felon's grave, the daughter drags out a weary life under the burden of a broken heart, the son is before you pleading for his life. But, gentlemen, as I have said, duty performed must be with you ever. If he is guilty, convict him; if he is innocent, acquit him; and may the eternal God so guide your judgments and enlighten your consciences that the remembrance of the day of your verdict may hereafter and forever be a sweet and pleasant recollection.

The court took a recess until to-morrow at ten o'clock a. m.

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