STOKES SUCCESSFUL.

The Decision of the Court of Appeals Delivered Yesterday Granting the Slayer of Jim Fisk a Third Trial.

TEXT OF THE DOCUMENT.

A Brief Resume of the Great Cause Celebre.

CRIMINAL GOSSIP IN THE CITY.

Talks with the Prisoner and His Counsel in the Tombs.

THE COMING TRIAL.

A New Battle To Be Fought on the Old Ground.

Yesterday morning the community was startled by the news that Edward S. Stokes had been granted a new trial. The decision of the Court of Appeals was anxiously looked for, but it was generally expected that it would be adverse to the prisoner. Public anxiety might properly have something to do with the matter, as public opinion had set strongly in against the prisoner notwithstanding the clear evidence in his favor. The decision of the Court of Appeals is very gratifying, inasmuch as it shows that the stay of proceedings granted by Judge Davis was entirely legal according to the view of affairs presented to the Court of Appeals. There are many who would have wished that the decision might have been otherwise than what it was, but the Court of Appeals had to decide upon points of law, and private considerations were, for the time being, completely set aside. There is probably no case in the history of criminal jurisprudence which has excited so much interest as that of Edward S. Stokes.

Edward S. Stokes had been the friend of Fisk, and they had had extensive business transactions together; but Fisk got the better of Stokes in those transactions, and took what Stokes alleges to have been a mean advantage of him, and got from him the greater part of his property. Fisk was enamoured of Josie Mansfield—a bold, unprincipled woman. When Stokes discovered that a greater part of his property was gone he determined to have revenge. He was handsome and a man of insinuating address. Fisk, before his rupture with Stokes, introduced the latter to his

FAIR INAMORATA,

and the result was an attachment which soon ripened into a very warm feeling. The affections of Josie were transferred from Fisk to Stokes.

Fisk, however, was not a man to be easily balked. He determined to have vengeance upon her; and in a short time after her desertion of him he had an action for blackmailing and libel brought against Stokes. The immense influence which Fisk possessed at the time operated powerfully in his favor. Public opinion ran high between the contending parties. After a number of desultory skirmishes there was a great field day at the Yorkville Police Court on January 5, 1872. Josie Mansfield, the Cleopatra of the case, appeared in Court, and on both sides there was an array of talent such as is rarely seen. Miss Mansfield was put upon the stand, examined and cross-examined. In her cross-examination, which was conducted by Mr. Beach, the humiliating confession was forced from her that "when Fisk first met her she had but one dress in her possession." The woman who was proof against all accusations against her morality and virtue was so powerfully affected by the insinuation about her wardrobe that she wept bitter tears of rage and shame upon the witness stand.

This was

THE BEGINNING OF THE END.

The next phase culminated in a tragedy, the news of which was flashed all over the city, to the effect that James Fisk, Jr., had fallen by the hand of Edward S. Stokes. New York has rarely been so profoundly agitated as it was upon that memorable Saturday afternoon. The social position of the victim and the relation in which he stood to his slayer riveted public attention, and the community was convulsed with excitement.

Stokes made no effort to escape from justice, but quietly surrendered himself to the police. Party feeling ran high. The dead man, notwithstanding his faults, had many friends; for he had been lavishly generous with his wealth, and had done much to facilitate the comforts of the travelling public, while Edward S. Stokes belonged to a highly respectable family, many of the members of which had long occupied honorable positions in the mercantile circles of New York. The verdict of the Coroner's jury consigned Stokes to the Tombs to await trial. In the latter part of June, 1872, the trial of the alleged murderer was commenced. After a protracted hearing and an immense display of legal talent the jury were discharged, being unable to agree. The disagreement of the jury was generally regarded as

A TRIUMPH FOR STOKES.

His second trial was called on at the close of last year, the same counsel appearing on his behalf who had conducted his case on the previous arraignment, though Judge Boardman officiated in place of Judge Ingraham. The case was ably argued on both sides. In the summing up the charge of the Judge was rather unfavorable to the prisoner, who was found guilty by the jury and sentenced to be hanged on the 28th day of February. His counsel, nowise dismayed, immediately applied for a stay of proceedings, which was unexpectedly granted by Judge Davis. The action of the learned Judge was severely commented upon at the time, and there were many who did not hesitate to say that the stay had been obtained by corrupt measures; but the high integrity and legal ability of Judge Davis proved a sufficient guarantee for the purity of his conduct. The case was then taken before the Supreme Court. The decision of the Court was adverse to the prisoner, and, as a last resource, the case was taken to the Court of Appeals.

Stokes and his friends felt that this was

HIS LAST CHANCE,

and consequently a desperate fight was made to save the convicted man from the gallows. Lyman Tremain made a powerful argument in behalf of the prisoner, and produced convincing arguments upon certain points of law ruled upon by Judge Boardman. District Attorney Phelps replied, and after the argument had been exhausted the Court decided to reserve its decision. There was much speculation as to what the final determination would be. It was most generally believed, notwithstanding the powerful arguments which had been adduced, that it would be detrimental to the prisoner's welfare. The result has considerably astonished the public, although they were not altogether unprepared for it. The Court of Appeals yesterday reversed the decision of the Supreme Court, and yesterday morning the news circulated with rapidity throughout the city that Edward S. Stokes had been granted a new trial.

The Decision of the Court of Appeals.

The following is the text of the decision of the Court:—

JUDGE GROVER'S OPINION.

Edward S. Stokes, plaintiff in error, vs. the People of the State of New York, defendants in error.

Messrs. Lyman Tremain, John R. Dos Passos and Cephas Brainerd, for plaintiff in error.

Messrs. Benjamin K. Phelps, District Attorney, and Wm. Fullerton, for the people, defendants in error.

Having carefully examined the six pleas in abatement, interposed by the plaintiff in error to the indictment, to which the District Attorney demurred, upon which judgment was given sustaining the demurrers, and arriving at the conclusion that there was nothing contained in any of these pleas entitling him to judgment quashing the indictment, or to any other relief, we shall not examine whether these proceedings are before this Court properly for review upon the *certiorari* issued and the return made thereto. The same remark is applicable to the seventh plea upon which an issue of fact was joined by the replication of the District Attorney, which was tried before Mr. Justice Cardozo, upon which he directed a verdict for the people. The testimony disclosed nothing tending to show the invalidity of the indictment, and the plaintiff in error was not injured by the disposition of the matter by the Judge.

Whether the questions thus attempted to be raised are reviewable by this Court, and if so what practice should be adopted in bringing them before the Court, are immaterial in the present case.

The plaintiff in error clearly had no right to interpose these pleas a second time, or others of a similar character, and was properly required by the Court to plead to the indictment, and upon his standing mute the proper course was taken by the Court in ordering the plea of not guilty to be entered for him, and proceeding to the trial of the issue thus joined.

The only questions necessary to examine are those of law arising upon the exceptions taken by the counsel for the accused upon the trial for this issue, and perhaps those upon the errors in fact assigned upon the writ of error upon the judgment. Those arising upon the exceptions taken upon the trial will first be considered. Exceptions were taken to the decisions of the Court upon the challenge by the prisoner of several jurors for principal cause. It was not claimed by the counsel of the accused that any error was committed, if chapter 477 (vol. 2, page 1,150) Laws of 1872 is constitutional. It will be proper first to determine this question, as in case that act be held constitutional and valid, it will be unnecessary to determine whether any error was committed had the law remained as it was at the time of the passage of the act. The position of the counsel for the accused is, that the right of trial by jury is secured to persons accused of felony by the constitution, and that this secures the further right of trial by an impartial jury. We shall assume the correctness of the latter position. Any act of the Legislature providing for the trial otherwise than by a common law jury composed of twelve men would be unconstitutional and void, and any act requiring or authorizing such trial by a jury partial and biassed against either party would be a violation of one of the essential elements of the jury referred to in and secured by the constitution.

The counsel insists that the act in question does compel the accused to be tried by a jury partial and biassed against him. That the common law held that having formed or expressed an opinion conclusively proved a want of impartiality, and for this reason excluded the juror upon a challenge for the principal cause, without inquiry as to whether this would influence his action as a juror.

The authorities upon the question were somewhat conflicting, and the object of the statute was to prescribe a definite rule. The act provides that the previous formations, or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror who may have formed or expressed, or has such an opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the Court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.

It will be seen that the intention of the act was not to place partial jurors upon the panel, but that great care was taken to prevent such a result.

The end sought by the common law was to secure a panel that would impartially hear the evidence and render a verdict thereon uninfluenced by any extraneous considerations whatever. If the person proposed as a juror can, and will do this, the entire purpose is accomplished. To secure this the statute requires that he shall make oath that he can do this, irrespective of any previous or existing opinion or impression. Not satisfied that this may be safely relied upon, on account of the difficulty of determining by a person having an opinion or impression how far he may be unconsciously influenced thereby, the statute goes further and provides that the Court shall be satisfied that the person proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. Surely this latter provision, if rightly and intelligently administered by a competent Court, will afford protection to the accused from injury from a partial jury. But the accused has not only this, but the further protection in his right, after challenge for principal cause has been overruled, again to challenge for favor, and have this tried and determined, uninfluenced by the decision made by the former charge. While the constitution secures the right of trial by an impartial jury, the mode of procuring and empanelling such jury, is regulated by law, either common or statutory, principally the latter, and it is within the power of the Legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury. The opinion of Chief Justice Nicholson in Eason vs. The State of Tennessee is cited in opposition to this view. This opinion was given upon the constitutionality of the statute of Tennessee upon the same subject, but differing from that in this State. By the Tennessee statute it is provided that the juror shall be competent, if he state on oath that upon the law and testimony on trial he believes he can give the accused a fair and impartial trial. This statement is made conclusive of the question.

The counsel for the accused further insists that the offence charged having been perpetrated, if at all, prior to the passage of the act, it is not to be applied in the trial of this case if held constitutional, but only to cases arising thereafter. This position cannot be sustained. While no *ex post facto* law is valid, this has no application to the rules of evidence or the details of the trial. These may be changed as to prior, equally with subsequent offences.

The counsel for the accused offered to prove that the deceased, a short time before the occurrence, had made violent threats against him, such as that he "would beggar him first, and then kill him;" "I go prepared for him all the time; so sure as my name is Jim Fisk I will kill him;" "I would kill him as soon as I would a ferocious dog." This was objected to by the prosecution and rejected by the Court, to which the counsel for the accused excepted.

In determining the competency of this testimony it must be borne in mind that evidence had been given making it a question for the jury whether the case was one of excusable homicide, upon the ground that the act was perpetrated by the accused in defending himself against an attempt by the deceased to murder or inflict some great bodily injury upon him, and the further question whether it was not perpetrated in resisting an attack made upon him by the deceased from which he had reasonable ground to apprehend a design to murder or inflict upon him some great bodily injury.

Evidence of threats made by the deceased, which had been communicated to the accused, was received by the Court.

Proof of the latter facts was competent, as tending to create a belief in the mind of the accused that his life was in danger or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased when in the absence of such threats such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would make an attempt to execute them probable when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability.

But an attempt to execute a threats is equally probable when not communicated to the party threatened as when they are so and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter, the latter being admissible only for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats.

Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has, in fact, committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it.

Had the deceased just previous to his going into the hotel where the transaction occurred declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent upon the question whether he had in fact made the attempt when that question was litigated. And yet there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree.

We are not aware of any decision of the precise question by the Courts of this State, but there have been several in accordance with the above views in other States. (Keever vs. The State, 18 Georgia, 194; Pritchette vs. State, 22 Alabama, 39; Campbell vs. People, 16 Illinois, 17; Cornelius vs. Commonwealth, 15 B. Monroe, 539. In Jewett vs Bunning, 21 N. Y., 27, it was held that in an action for an assault and battery, alleged to have been committed by the defendant upon the plaintiff when no witnesses were present, proof of previous ill will by the defendant against the plaintiff was competent as a circumstance tending to show the commission of the acts charged by the defendant. This accords with the view above taken. I think the testimony offered was competent and the exception to its exclusion well taken. The error was one prejudicial to the accused by depriving him of the right to have competent testimony in his favor considered by the jury, and cannot be overlooked by the Court.

Jennie Turner was introduced as a witness by and gave material testimony for the accused. With a view to impair the credibility of her testimony she was asked by the prosecution, upon cross-examination, whether she had not left Mrs. Morse, by whom she had been employed, without her knowledge or consent, and whether she did not take things not belonging to her when she left.

The prosecution was permitted to prove, by Mrs. Morse, that her testimony in answer to these questions was untrue, to which the counsel of the accused excepted. This was error.

Upon cross-examination the prosecution had the right, for the purpose of impairing the credit of the witnesses, to ask questions as to those collateral matters, but having asked and obtained answers, must abide by the answers given; other witnesses could not be called to prove such answers untrue. (Lawrence vs. Baker, 5 Wend., 301; Howard vs. City Fire Insurance Company, 4 Denio, 502.)

It cannot be said that the accused sustained no injury from this. The direct tendency of the incompetent testimony was to impair the credit given to the testimony of his witness. We think the minutes of the Grand Jury, showing that an indictment had been ordered by that body against the accused upon the complaint of Fisk for blackmailing, were improperly received. There was no proof tending to show that the prisoner had any knowledge of any such action by the Grand Jury. The evidence had therefore no tendency to show a motive of the prisoner for the killing of the deceased. The prisoner had testified that he knew Fisk had been trying to get him indicted for, as he understood, a conspiracy with another to blackmail him; but that, as he understood, he failed to procure one.

The prosecution could not give evidence tending to show that the prisoner had been guilty of any other crime than the one for which he was on trial.

The only effect of the minutes that I can see was to satisfy the jury that there was evidence of his having committed some other crime of such cogency as to induce the Grand Jury to indict him therefor. The prosecution had no right to give such evidence. Had the prisoner known of the action of the Grand Jury it would have been competent to show a motive for killing the deceased, and being proper for any purpose the would have been no error in receiving it.

Numerous other exceptions were taken by the counsel for the prisoner upon the trial to the rulings of the Court upon the admissibility of evidence. We have examined these, and arrive at the conclusion that none of them require discussion. Near the conclusion, the Judge charged the jury as follows:—"The fact of the killing in this case being substantially conceded, it becomes the duty of the prisoner here to satisfy you that it was not murder which the law would imply from the fact of killing under the circumstances, in the absence of explanation that it was manslaughter in the third degree or justifiable homicide, because, as I have said, the fact of killing being conceded, and the law implying motive from the circumstances of the case the prosecutor's case is fully and entirely made out, and therefore you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the case."

To this portion of the charge counsel for the prisoner excepted. We have examined this portion of the charge to determine whether the idea intended to be conveyed to the jury, and which they would derive therefrom, was that the law implied that the act of killing was murder when perpetrated under the circumstances of the present case, or whether such was the legal implication from the proof of killing, in the absence of proof of the circumstances of its perpetration, of which the case of the prosecution was fully and entirely made out, unless the prisoner had satisfied them that it was not murder which the law would imply from the fact of the killing. We think a careful examination of the entire portion of the charge excepted to will show that the latter was the idea intended to be conveyed, and that the jury must have so understood it.

From the opinions delivered it was so understood by the Justices of the Supreme Court at General Term. This view is confirmed by the fact that the circumstances attending the killing in the present case were controverted questions, to be determined by the jury from evidence more or less conflicting, as claimed by the prosecution, such as would fully authorize a finding by the jury of all the facts constituting the crime of murder in the first degree, as claimed by the prisoner, such as would authorize the jury to find homicide excusable.

It can hardly be supposed that, under such proof as to what the circumstances really were, the Judge intended to charge the jury that the law implied the crime of murder from proof of killing under the circumstances of the case, and upon such proof such an instruction would have been erroneous. The instruction in effect was, and the jury must have so understood it, that the law implied motive, and consequently crime of murder in the first degree from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter or excusable homicide.

This is further confirmed by what immediately follows the portion of the charge excepted to. The Judge proceeds to instruct the jury as follows:—"Ordinarily, naturally and properly, in cases of this kind, juries are disposed to and should give the prisoner the benefit of any reasonable doubt that may exist in the case, and I do not know that even this is an exception to that rule. If the evidence shall be doubtful upon that subject, if you shall entertain reasonable doubts, if the evidence is evenly balanced so you do not know where the truth lies, the prisoner would be entitled to the benefit of that doubt."

But for the idea conveyed by the part of the charge excepted to, that the law implied the crime of murder in the first degree from the proof of killing only, unless the prisoner satisfied them it was not murder, the benefit of the doubt to be given to the prisoner would not have been restricted to their finding the evidence evenly balanced, so that they did not know where the truth lay; on the contrary, the instruction would have been not to convict of that crime unless convinced by all the evidence in the case that he was guilty and that if a careful examination of all the evidence left in their minds reasonable doubts of his guilt they should give the prisoner the benefit by an acquittal. This instruction was warranted by the common law of England—1 H. P. C., 445; 1 East P. C., 34; 3 M. & S. 15, Regna vs. Chapman; 2 Eng. R.; 12 Cox Crim. Cases, 4 Commonwealth vs. York; 9 Metcalf, 93.

This rule can be upheld by authority, only as it obviously is in contravention of principle and the analogies of the law. It is a maxim in the law that innocence is presumed until the contrary is proved. How is guilt established by proof only of one of the ingredients essential to constitute crime? To constitute crime there must not only be the act, but also the criminal intention, and these must concur, the latter being equally essential with the former. *Actus non reum facit, nisi mens* is a maxim of the common law. The intention may be inferred from the act, but this in principle is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the Court. But the question in this case is not what was the rule of the common law as to the implication of malice from the act, whether such rule is deduced from authority or principle and legal analogies. The question arises upon the statute of the State by which homicide is made justifiable or excusable, murder in the first or second degree, or manslaughter in one of four degrees determinable by the intention and circumstances of its perpetration. Under the statute it is obvious that mere proof that one has been deprived of life by the act of another utterly fails to show the class of the homicide under the statute.

Section 3 of title 2 of the statute declares in what cases the homicide when perpetrated by an individual shall be justifiable.

Section 2 of title 1, as amended by the act of 1872, provides that such killing, unless it be manslaughter, excusable or justifiable homicide, shall be murder in the first degree in the following cases:—

First—When perpetrated from a premeditated design to effect the death of the person killed or of any human being. It was under this provision that the prosecution sought to convict the prisoner. To justify such conviction it was necessary for the prosecution to prove all the facts bringing the case of the prisoner within it. Mere proof of the killing did not as a legal implication show this. It might still be murder in the second degree, manslaughter in some degree or justifiable or excusable homicide, consistent with such proof.

It was error to instruct the jury that the law implied all these facts from the proof of the killing. The correctness of this has rarely been questioned since the enactment of the statute. Hence there has been but little said by the Courts upon the question, but what has been said sustains it. (People vs. Clark, 7 N. Y., 393; Fitzgerald vs. People, 37 N. Y., 418; People vs. White, 24 Wend., 520; Wilson vs. People, 4 Parker, 619.) The General Term were correct in the conclusion that this part of the charge was erroneous, and in the further conclusion that to obviate the error it was for the people to show that the prisoner was not prejudiced by such error. (Greene vs. White, 37 N. Y., 405; Clark vs. Dutcher, 9 Cow., 674; People vs. Wiley, 3 Hill, 194.)

We have examined the entire charge to determine whether it does so show. We find that the Judge correctly charged the jury as to the facts necessary to constitute the crime of murder in the first degree, and further that he correctly instructed them that the people must prove all these facts to authorize the jury to render a verdict convicting him of that crime.

But how does this cure the error of the instruction that the law implied all the necessary additional facts from the proof of the killing? It was in effect instructing the jury that although the people must prove all these facts, yet they had done so by proving the killing, and by that the case of the prosecution was fully and entirely made out, and that this proof made it the duty of the prisoner to satisfy them that it was not murder which the law would imply from that proof, thus in effect instructing the jury that the proof of the killing casts the burden of proof upon the prisoner to show that it was not murder, but manslaughter or justifiable homicide. No such burden of proof was by that cast upon the prisoner. (Lamb vs. C. and A. R. R. Co., 46 N. Y. 271.)

The further instruction to the jury, to the effect that the law required no particular length of time between forming the design to kill and the act by which the death was effected, had no relation to or bearing upon the point in question. The jury may, as matter of fact, find the design to kill from the act by which death was effected, and all facts, except that of the killing itself, required to constitute murder in the first degree, by proof of circumstances which convince them of the truth of such facts. They are to pass upon the whole case, inferring facts from the proof of other facts which convince their judgment of the truth of the facts inferred, bearing in mind that the burden of proof is upon the prosecution as to all the facts necessary to constitute guilt during the entire trial, and that their verdict should be the conscientious expression of their convictions derived from all the evidence.

It is unnecessary to pass upon any of the questions arising upon the offer of the plaintiff in error to assign error in fact upon the judgment. As to these we will simply remark that we think they were properly disposed of upon the motion for a new trial.

But for errors in rejecting competent evidence offered by the prisoner and in receiving incompetent evidence against him, and in the part of the charges excepted to, the judgment must be reversed and a new trial ordered.

JUDGE RAPALLO'S OPINION.

I am satisfied that the conviction in this case cannot be sustained without the violation of settled principles of law, and it necessarily follows that I must vote for a reversal. While concurring in the reasons assigned by my learned associate for coming to the same conclusion, I will briefly state the considerations which to me seem controlling, independently of the numerous other points which have been discussed. It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor, and that if, upon the whole evidence, including that of the defence as well as of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence of the guilt of the accused, and it is clear error to charge them when the prosecution has made out a *prima facie* case and evidence has been introduced tending to show a defence, that they must convict unless they are satisfied of the truth of the defence. Such a charge throws the burden of proof upon the prisoner and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine, upon the whole evidence, whether his guilt is established beyond a reasonable doubt, it constrains them to convict unless they are fully satisfied that he has proved his innocence.

The charge in this case was, in my judgment, calculated to convey to the jury that erroneous rule for their guidance. They were virtually instructed that, the killing being conceded, they should convict of the crime of murder unless the proofs adduced by the prisoner satisfied them that the circumstances under which the killing took place were such as to justify his act or reduce the grade of his offence. Though upon the whole evidence they might be in doubt as to what the circumstances really were, the killing being conceded, this charge indicated that it was their duty to convict.

The language of the charge to which exception was taken is as follows:—

"The fact of killing in this case being substantially conceded, it becomes the duty of the prisoner here to satisfy you that it was not murder, which the law would imply from the fact of the killing under the circumstances in the absence of explanation that it was manslaughter in the third degree or justifiable homicide; because, as I have said, the fact of killing being conceded, and the law implying malice from the circumstances of the case, the prosecution's case is fully and entirely made out, and, therefore, you can have no reasonable doubt as to that unless the prisoner shall give evidence sufficient to satisfy you that it was justifiable under the circumstances of the case."

Argument seems unnecessary to demonstrate the error of this charge. It was a necessary part of the case of the prosecution to establish that the homicide was perpetrated with a premeditated design to effect the death of the person killed; yet the Court, assuming to determine what the circumstances of the killing were, solemnly instructed the jury that the fact of killing being conceded, the law implied malice from the circumstances of the case, and that the case on the part of the prosecution was fully made out, and that the jury could have no reasonable doubt as to that, unless the evidence on the part of the prisoner satisfied them that the killing was justifiable.

The Supreme Court, in sustaining the judgment of the Court of Oyer and Terminer, do not attempt to defend the legality of this charge. On the contrary, the very able opinion of Judge Fancher conclusively demonstrates upon authority that it is at variance with numerous adjudications and the settled law upon the subject. But it is claimed that the error may be overlooked on the ground that the prisoner was not prejudiced thereby, and cases are cited which decide that where it appears to the Appellate Court that error has been committed, yet that the error could not possibly have prejudiced the party complaining, it will not be made a ground of reversal either in civil or criminal cases.

In all these cases it will be found that the Court has been exceedingly careful so to limit this rule as to render it applicable only where by no possibility could the error have produced injury, and even this was an innovation upon ancient rules under which it was a matter of course to reverse when error appeared without inquiring into its materiality.

That so vital an error as one which should or might mislead the jury on the question as to the party on whom the burden of proof rested could come within the category of those which could not possibly prejudice the determination of the case is utterly inadmissible. Nothing short of an unequivocal retraction of that portion of the charge could have removed from the minds of the jury the impression which it was calculated to produce. It was the concluding portion of the charge, and afforded the jury a simple rule for their guidance in their consultation. The fact of killing was, as they were told, conceded. They were further told that it was the duty of the prisoner to satisfy them that this killing was not murder. That the law implying malice from the circumstances of the case, the prosecution's case was fully and entirely made out, and therefore they could have no reasonable doubt as to that, unless the evidence on the part of the prisoner satisfied them that it was justifiable under the circumstances. Their inquiry was thus reduced to whether they were satisfied of the truth of the allegations on the part of the defence. If they were in doubt whether these were true or not they were bound to convict.

It seems to have struck the mind of the learned Judge at the time that the rule thus laid down by him entrenched somewhat upon the principle that the prisoner was entitled to the benefit of a reasonable doubt, and he immediately followed by stating that ordinarily juries should give the prisoner the benefit of any doubt that may exist in the case, and that he did not know that even this was an exception to that rule, and he proceeded to instruct them generally upon the subject of reasonable doubts.

It is impossible that we should know whether these instructions effectually eradicated from the minds of the jury the erroneous impression calculated to be produced by the previous portion of the charge, and we cannot, therefore, pronounce as a conclusion of law that it had no influence upon the verdict.

Whether under a proper charge the jury would have come to the same result it is not within our province to decide. The determination of the facts rests wholly with the jury. It is for the Court to instruct them as to the law, and these instructions they are bound to follow. If materially erroneous it is the imperative duty of the appellate tribunal to grant a new trial.

All the Judges concur.

Interview with Edward S. Stokes.

Perhaps out of the many thousands who heard of the decision of the Court of Appeals in the case of Edward S. Stokes, the prisoner himself was the least astonished. He is a man of great nerve, and in the darkest stages of his trials has never despaired. As soon as the news arrived in the city that a new trial had been granted, the welcome intelligence was immediately conveyed to Stokes in the Tombs. His aged father was one of the first to hear the good tidings from Albany, and he at once repaired to the prison to congratulate his son. The meeting was a joyful one, though Stokes, with the calmness habitual to his nature, received the intelligence with cool complacency.

About eleven o'clock Mr. Dos Passos, who has been so indefatigable in his loyalty to the prisoner, arrived at the Tombs and confirmed the pleasant news. The prison officials were rejoiced to hear that Stokes was to have another chance for his life, as he has been always quiet and courteous, and all with whom he came in contact sincerely sympathize with him. Warden Johnson said that he was not at all surprised at the news, having always expected it. Yesterday morning, before the decision arrived, the warden had a conversation with the prisoner in his cell.

THE PRISONER'S CONFIDENCE IN HOPE.

Stokes said:—

"Well, Warden, when do you think the decision awarding me a new trial will come? Do you think it will come before Friday?"

"I don't know," replied the Warden, "it may possibly not arrive before September."

Stokes then said:—"Well, it has got to come; they can't do anything else but give me a new trial."

At noon a HERALD reporter called at the Tombs and by the courtesy of the Warden was immediately permitted to see the prisoner. Stokes was in the council room, and with him were his father and Mr. Dos Passos. He did not seem to be unusually elated, but exhibited his usual *sang froid*. He was dressed in a suit of dark Tweed clothes, and had dispensed with a shirt collar on account of the calidity of the atmosphere. He very willingly acceded to the request of the reporter to grant him

A FEW MINUTES' CONVERSATION,

which was as follows:—

REPORTER—You seem to take the decision of the Court of Appeals very quietly, Mr. Stokes?

STOKES—Well, I have expected no other decision for some time; my last trial was notoriously unfair. On many points, which were decidedly in my favor, the Judge ruled against me, and his charge to the jury was more the speech of an advocate than a judge. I always expected that the Court of Appeals would set aside the trial, and I am, therefore, not at all astonished.

REPORTER—Do you intend to fight upon the old ground next time?

A NEW BATTLE ON OLD GROUND.

STOKES—Yes, we will fight upon the old ground, but shall have a much stronger case. Some of the evidence adduced upon the last trial will be omitted and new evidence which has unexpectedly turned up will be substituted in its stead. I am confident that if I have a fair trial I am sure of an acquittal, and I think that the next trial I have will be a fair one.

Mr. Dos Passos, interrupting, said he would do all in his power to make it so.

Stokes continued—"Don't you think they will admit me to bail?"

Mr. Dos Passos—Well, I don't know; but I don't think it is probable.

STOKES—Judge Boardman must feel pretty bad this morning at the decision of the Court of Appeals. He is on the verge of re-election, and that is the reason which made him go so hard against me. I knew all along that Judge Davis was right and that he would be

SUSTAINED IN THE END.

I am satisfied now that I am safe, and that at my next trial justice will be done.

REPORTER—Mr. Stokes, how is your health?

STOKES—I never felt better in my life. I am in perfect health and in good spirits, as I have been all through.

At this stage of the conversation some visitors were announced, and Mr. Stokes, bidding the reporter a cordial "good day," hastened to meet them. His hair has turned very gray since his incarceration; but he is active and cheerful, and his step has lost none of its youthful elasticity.

Interview with Stokes' Counsel.

The reporter subsequently had a conversation with Mr. Dos Passos upon the technical points of the case. That gentleman said:—"Mr. Stokes has never been encouraged by his counsel to consider that the decision of the Court of Appeals would be favorable, though we had the most unbounded confidence in the result. The points of law to which exception were taken were so strongly in our favor that the granting of a new trial was almost a foregone conclusion, and the short time that the Court of Appeals took to decide upon those questions proves that we were right in our surmises. The ruling of Judge Boardman against the prisoner is almost unparalleled in the history of criminal jurisprudence. At the commencement of the trial Judge Boardman was inclined to be very impartial, but when the evidence for the prosecution was all over there was a marked difference in the rulings of the Court. Almost every point was decided against us, and the charge—the most important part of all—had a powerful influence upon the jury. We were, however, convinced that our cause was right, and the decision of the Court of Appeals you see sustains us."

OUTLOOK OF THE NEW TRIAL.

REPORTER—What do you think will be the result of the new trial?

Mr. DOS PASSOS—Well, as Mr. Stokes says, the chances seem decidedly in our favor. You see on the first and second trials public opinion was strongly excited against us, on account of the reports of the murder which were published in the newspapers. Those accounts, though written in all good faith, no doubt, were proved to be incorrect on many points, and the public are now beginning to perceive they were unintentionally misled.

REPORTER—Is there any possibility that the venue will be changed upon the next trial?

Mr. DOS PASSOS.—We don't want to change the venue, and the prosecution has never done so in this State. In the celebrated Polly Bodine case the venue was changed three times by the defence, but I know of no instance in which the prosecution changed it. I don't think that the case will be taken out of this circuit.

REPORTER.—Is it not an unusual thing for the Court of Appeals to set aside a decision of the Supreme Court?

COURT OF APPEALS AND SUPREME COURT.

Mr. DOS PASSOS.—Oh, no. The judges of the Supreme Court are men of ability, integrity and learning, but their judgments have been frequently set aside by the Court of Appeals, for instance, in the Polly Bodine case, which I just now alluded to. There are many other instances in which the Court of Appeals has decided against the Supreme Court.

REPORTER—Don't you think you will have a difficulty in procuring jurors on the new trial?

Mr. DOS PASSOS—No, I don't think so. I am certain that jurors will have less hesitation in serving upon the next trial than heretofore. The excited public feeling which prevailed in this case has toned down, and the same prejudice which prevented jurors from serving on the last trial will not exist on the next one. All things considered, I am confident that the final result will be the acquittal of my client. I have no idea when the case will be called on again, but whenever it comes we are prepared for it, and the new evidence we shall produce will greatly astonish the public. The same counsel who have adhered to Mr. Stokes through the previous trials will appear in the next one.

There was an immense rush of visitors to the Tombs yesterday, and Warden Johnson said he expected the life would be worried out of him for the remainder of the week. He has decided to admit no one without a pass to see Mr. Stokes except near relatives. The reporter, after conversing with Stokes and Mr. Dos Passos, strolled through the prison and conversed with Sharkey, Simmons and King. They are all in high spirits that a new trial has been granted to Stokes. The excitement connected with the late Walworth tragedy was completely obscured by the receipt of the decision of the Court of Appeals in this famous case yesterday.

ALLEGED BRUTAL MURDER AT SEA.

PHILADELPHIA, Pa., June 10, 1873.

A party of police this afternoon boarded the bark J. B. Duffield, of Yarmouth, England, which arrived this afternoon from Liverpool, via Sydney, N. S., and arrested the second mate, named Benjamin Palmer, twenty-eight years of age, charged with killing John McDonnough, a seaman. The affair occurred on Sunday morning last, off Cape May. McDonnough happened to be in the way of the second mate while attending to some duty, and the latter becoming angry, knocked McDonnough down and kicked him in the stomach. McDonnough lingered for half an hour, when he died, and was buried in the ocean the same afternoon.

The second mate and four men were arrested and locked up for a hearing to-morrow. The men are held as witnesses.

The bark came to this port in ballast.

NATIONAL RIFLE ASSOCIATION.

The Opening of the Range on Long Island—Approaching Competition.

The National Rifle Association have decided to invite teams from the detachment of the regular army and the navy (both mariners and sailors) stationed in the vicinity of New York, to participate in the competition at the opening of their range on the 21st instant, and it is understood that the invitation will be accepted. The Engineer Department in particular pride themselves in marksmanship and are desirous of being represented.

The Association are about making arrangements to keep both rifles and ammunition on the ground at all times for the use of their members, the former to be hired out and the latter sold at cost price.

The grounds, both now and upon the day of the match, are open to the public, but no one is allowed to shoot who does not exhibit his ticket as a member or competitor to the range keeper.

The trains to Creedmoor leave Hunter's Point, via Central Railroad of Long Island, at 8, 9:30 and 12 A. M., and 2, 2:30 and 4:05 P. M., connecting with the boats leaving Thirty-fourth street, East River, fifteen minutes, and James slip half an hour previously. Returning, leave Creedmoor at 9:24 A. M. and 1:48, 4:51 and 6:39 P. M.

The running time from Hunter's Point to the range is about half an hour.

THE DUELLO.

Virginia Society Convulsed by the Recent Duel Between McCarty and Mordecai—The Seconds on Trial—Bail Refused—The Death of Mordecai Arousing Public Indignation.

RICHMOND, Va., June 10, 1873.

The recent duel here between McCarty and Mordecai has created much social commotion. After the first excitement following the announcement of the fight had subsided the sudden demise of Mordecai, one of the principals, struck terror into the hearts of the seconds and their friends, while the entire populace spoke out in condemnation of the duello. There was little sympathy expressed for Mordecai, and there is less for McCarty, the survivor. The seconds—Messrs. Royall, Trigg, Meredith and Tabb—have been for some weeks past paying the penalty of their chivalric exercise of friendship in one of the prisons of the city. Of course these gentlemen believe, every one of them, religiously, that they will be acquitted directly they are brought before a Court. Their immediate friends indulge this pleasant expectation also; but there are some who believe that "what is sauce for the goose should be sauce for the gander," and that when the law declares a certain act murder, when its commission is proved, the Courts should ratify the edict. Whether the Court will do so remains to be seen. The Commonwealth's attorney, Captain George D. Wise, has assured the public that he will do his duty, and should he feel so disposed he can be energetic enough to make all the defendants wish they had

NEVER SEEN A FIELD OF HONOR.

The class of society (the *bon ton* of the city) to which they belong, and of whom they are very fair exponents, are unanimously in favor of not only acquitting them, but also of applauding them to the skies for their chivalric action. But this cannot be said of the mass of the people—the bone and sinew—the merchants, the mechanics and others of the community. These latter have an abiding faith in the law of the land, and they wish to see the laws executed; and, moreover, they do not look upon the duelists through the most favorable spectacles. "If it were one of us," they say, "how quick he would be punished; but because these are 'bloods' they must be let off." This is the sentiment in the city.

THE SECONDS REFUSED BAIL.

To-day was set down for the appearance again of the seconds in Court, and, agreeable to the continuance, they were brought before Police Justice White at about ten o'clock.

Dr. J. S. Cullen made oath that Mr. McCarty, the surviving principal, was unable to appear because of his wounds, upon which, by agreement of counsel, the case was further continued until the 15th of July.

Justice White was then about to recommit the seconds to jail, when the counsel for the defence, who were reinforced by Henry A. Wise and others, moved that the seconds be allowed bail. This motion was refused by the Police Justice on the ground that he had not heard the evidence in the case; but, he added, he would go into an examination of the witnesses. Several of the witnesses were then examined, the testimony being substantially the same as heretofore reported—that a duel had been fought between Messrs. Mordecai and McCarty; that Messrs. Royall, Trigg, Tabb and Meredith were the seconds; that Mordecai was since deceased and McCarty was lying at his residence dangerously wounded.

The Court was thronged by the friends of the seconds, who were allowed the privilege of shaking hands and conversing freely with them.

The Commonwealth's Attorney, Colonel George D. Wise, opposed the motion to bail in a most forcible, logical speech. The array of counsel for the accused made eloquent appeals to the Justice in behalf of their motion. At seven o'clock the examination closed, when the Justice announced he would reserve his decision until to-morrow morning. It is now the opinion that the seconds will be bailed.

McCarty still remains at his mother's residence, and, though daily improving in health, is yet unable to walk a step, and may not be able to appear in public for months. It is hardly probable that he will be present at any time during the promised trial. The young friends who volunteered to keep him constructively a prisoner and were sworn in as special constables for that purpose have given away to a grum policeman, who is regularly relieved, and maintains his watch and ward with mathematical precision.

THE NEWBURG FIRE.

The Full Extent of the Loss—The Insurance Deficient $100,000—The Principal Sufferers By the Disaster.

NEWBURG, N. Y., June 10, 1873.

The loss by the fire last night will not fall below a quarter of a million. The principal loser is William O'Mallor, who owned most of the buildings burned and the barge Newburg. His loss, it is estimated, exceeds $125,000; he has insurance amounting to $100,000. The barge Newburg was valued at $25,000, and her cargo was insured for $30,000 more. It is now stated that the fire was caused by a man who was seen lighting his pipe among the hay, but he is not known.

Two firemen, William C. Goodrich and Daniel McMillian, fell with a cornice from the roof of one of the burning buildings this morning, a distance of forty feet, and sustained severe injuries. The latter had his knee cap broken into small pieces, and may lose his leg; he was also injured about the head. The former is doing well.

The entire amount of insurance on the property burned is $150,000, leaving about $100,000 loss. In addition to this amount James W. Taylor lost about $20,000, he being insured for $11,000; Robert A. Forsyth loses $9,000; insured for $8,000. D. S. Waring and the Newburg Plaster and Cement Company lose each $5,000; the former is insured for $1,000, the latter is insured in full. Quassick Woollen Mill Company lose $7,500; partially insured. The remaining losses are divided among a large number of owners, ranging from $3,000 down to $100, each partially insured.

The fire was one of the heaviest that has visited the city in many years. Mayor Shute has forwarded thanks on behalf of Newburg to Mayor Eastman, of Poughkeepsie, for his prompt response to the call for aid.

COTTON MILL ON FIRE IN LOWELL.

LOWELL, Mass., June 10, 1873.

About eight o'clock this morning a fire broke out in the attic picker rooms in the mill of the Lowell Corporation. The fire was first discovered in the bin in the rear of the picker, and the oily materials in the room contributed to the rapid spread of the flames. The mill is 260 feet long, five stories high and is provided with water pipe perforated for sprinklers in each story and attic. The water was immediately let in and quickly checked the fire.

The mill was completely deluged by water and the damage to the machinery in the carding and spinning department is quite large. The damage by fire is slight.

Mr. Ross, who was employed in the picker room, was badly burned.

THE MURDERER WAGNER.

ALFRED, Me., June 10, 1873.

At nine o'clock this morning County Attorney George C. Yeaton opened the case for the government in the Wagner trial. He made a lengthy address to the jury, giving the minutest details of the murders, and dwelling at length upon the jurisdiction of the Court, explaining the boundaries of the county, and proving by old records that the case can legally be tried in this county (York). The witnesses on both sides were excluded from the Court, and will not be allowed in until called upon to testify.

The prisoner manifested no emotion. Even while the County Attorney recited the details of the terrible act his countenance remained unchanged and wore an incredulous smile. The court room was crowded to suffocation and the excitement hourly increases. Large numbers of people are arriving by every train from Portsmouth and vicinity.

THE ACCIDENT AT NORWALK, CONN.

NEW YORK, June 10, 1873.

TO THE EDITOR OF THE HERALD:—

The article signed Captain N. Gorham in your issue of this day, does great injustice to Mr. Farnham, the Vice Principal, and reflects on Rev. Charles Selleck, Principal of the school for boys at Norwalk, in trusting the youth placed in his charge with one whom Captain Gorham would have others think as incompetent. I reached Norwalk Saturday evening, after the accident. I have heard many reports and versions of it, and yesterday listened to Rev. Messrs. Mallard and Taylor, of the Baptist Church, refer to it at the funeral of an old resident of Norwalk, but in no instance except this article signed "Captain Gorham" have I heard either Rev. Mr. Selleck or Mr. Farnham blamed. On the contrary, all who have and had boys at the school speak of the parental care exercised by Mr. Selleck in looking after the great charge reposed in him. It is well known that Mr. Selleck, in affording his boys the pleasure of a row, always placed them in the care of his most experienced assistants, and with the younger had, in this instance, his Vice Principal Farnham, and young Morris, the best swimmer of the school. I would suggest a suspension of public opinion until the matter is fully investigated by the proper authorities, and then ask judgment on Mr. Farnham (whom I have never seen), who held two boys above water until himself exhausted, and the conduct of the "many old steamboat commanders" who "Captain Gorham" says were on the Americus, and who certainly kept their jackets dry by staying there. Very truly,

S. LENOX TREADWELL.

MR. PRICE'S CAPTIVITY.

What the Action of the Government Has Been in the Case.

A Protest Against Trial by Court Martial.

Secretary Fish on Spanish Animus Against the Herald.

Interview of Mr. Price, Senior, with the Secretary of State.

WASHINGTON, June 10, 1873.

This morning Mr. A. L. Price, of New York, father of L. A. Price, the HERALD correspondent imprisoned in Havana, called on Secretary Fish, at the State Department, to ascertain what the prospect was for the release of his son. Price was arrested about four weeks ago, and when Consul General Torbert, at Havana, informed the State Department of the outrage Bancroft Davis was Acting Secretary, Mr. Fish then being absent in New York. Mr. Davis instructed Mr. Torbert to

ASK FOR THE IMMEDIATE RELEASE

of Price, but from that day to the present it appears that his official actions have not liberated Mr. Price. The State Department has a good appreciation of Consul General Torbert's ability, but is of opinion that the success he aims to achieve is retarded by his great zeal and patriotic energy, whereas a cringing policy would be more successful in dealing with the heartless Spaniards. This much, by way of introduction, for when Mr. Price was received by the Secretary he requested Mr. Davis to be present, as the latter had more knowledge of the facts. Mr. Price was informed that yesterday a telegram was received from General Torbert to the effect that Leopold A. Price, HERALD correspondent, was

TO BE TRIED BY COURT MARTIAL,

but upon what charges he had not been able to ascertain.

Secretary Fish promptly instructed Consul-General Torbert to remonstrate, in the name of his government, against any such proceeding,

AS THE UNITED STATES WOULD NOT TOLERATE

the trial of one of its citizens by the court martial of a foreign Power. To this no answer had been received. The Consul General had been promised a copy of the charges on which Mr. Price was to be tried, but no advices had been received of their tenor up to the closing of the Department to-day. The Secretary assured Mr. Price that

EVERYTHING A GOVERNMENT COULD DO

would be done, but diplomatic intercourse was not like matters referred to the arbitrament of the sword. Much time was necessarily lost on correspondence, whether by cable or letter, and in the latter case weeks elapsed sometimes before answers were read to letters sent from the State Department to Havana. This had been so on effecting the release of Santa Rosa, also a citizen of New York, from whose father he had just received a letter thanking the Department for its persistent and firm efforts on behalf of his release. The Secretary was of opinion that the outrage in this instance was

DIRECTED AGAINST THE NEW YORK HERALD

and not against Mr. Price, the same as in the case of Mr. O'Kelly, who, not being an American citizen, the government could do no more than tender its friendly offices. In the absence of definite charges, he could only conjecture the cause of the arrest of Mr. Price. He thought the Cuban authorities were afraid that he had been in communication with Mr. O'Kelly, and would transmit such news as he had received from the latter to the HERALD, and that was what the Cuban authorities, he had no doubt, were determined to stop by every precaution or embarrassment they could take or make.

BEYOND IMPRISONMENT, HE HAD NO APPREHENSION

that any wrong would be done to the HERALD correspondent—that it might be some time before he would be released, but that was a penalty which all commissioners sent out by the HERALD appeared doomed to suffer. One cannot wonder, contended the Secretary, that the Cuban authorities should hate with all the malice of Spanish hatred a journal which has so fearlessly invaded its territory, defied, as it were, its officials by the presence of its correspondents, and sought to reveal to the world what the Spaniards are

MOST ANXIOUS TO CONCEAL—

the true condition of affairs in the insurrectionary district. Of course the authorities claimed the right to make such restrictions as would subserve their own ends, while the fearlessness of the HERALD, in exposing the conduct of the Spaniards made them only too glad to oppress its correspondents on every occasion. He did not mean to disparage the enterprise of the greatest of newspapers, for the NEW YORK HERALD was a greater power than England, and almost as great as the United States. It was

A GOVERNMENT UNTO ITSELF

sending to all parts of the world ambassadors and accredited agents.

Mr. Price was highly delighted with the manner in which he was received by both Secretary Fish and Assistant Secretary Davis. He left for New York this evening, fully satisfied that whatever was possible would be done to effect the speedy release of his son.