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Title: Jacob Smith Boreman papers, 1857-1912.

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Author: Boreman, Jacob S. (Jacob Smith), 1831-1913.

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Special Request: HM 16912 ("Sentence of John D. Lee" 10/10/1876) and HM 16906 (Jacob S. Boreman "Charge to the Jury" 8/3/1875).

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Utah. (Court.) District Court
2nd Judicial Court

HM 16906

Box 1 (23)

Note: In the handwriting of
Jacob Smith Boreman

The People vs. John D. Lee
Charge of the Court to the jury, Jacob Smith
Boreman, Judge [first trial]

1875
[Aug.]
Beaver City, Utah

6 p.

In the district court of the Second Judicial
District of the Territory of Utah: County of Beaver.

The People etc.	} Change of the Court to the jury - 1875.
vs.	
John D. Lee, impleaded with others.	
	} Just S. Boreman, Judge.

Gentlemen of the Jury:—

The introduction of testimony for both the prosecution and defense being now at an end, the duty devolves upon me in order to aid you in arriving at a correct conclusion in your verdict, to instruct you upon the law applicable to the case and to give you such suggestions and advice as the necessities of the case seem to require. Whatever I say upon questions of law, is obligatory upon you, but that which I state respecting the facts, is not obligatory upon you. The Court is the sole judge of the law of the case, but you are the sole judges of the facts, and also of the credibility of the witnesses.

The Mountain Meadows Massacre, which this case has ^{caused} for the first time to be investigated, was a crime of appalling magnitude and planned and carried out with a demon-like ferocity, unparalleled in modern times or among civilized people, and it is of wide-spread

interest, by reason of its enormity and its long concealment. There is no dispute as to the fact as to the fact of the massacre at the time and place specified. It is charged, however, that this defendant was a ~~leader~~ participant and leader in this bloody work, and upon this charge he is now upon his trial before you. The prisoner at the bar, John D. Lee, is charged with the crime jointly with W. H. Dame, Isaac C. Haight, John M. Higbee, George Adair Jr., Elliott Wilder, Samuel Jones, Philip K. Smith, and W. C. Stewart, but only the defendant Lee is now upon trial, and it is no concern of this jury whether any or all of the other defendants be arrested and tried or not. But it is only reasonable to suppose that others will be arrested and tried as speedily as it is possible to be done. You have only to do with the guilt or innocence of this defendant. In order to reach the truth in regard to the prisoner's guilt or innocence, it is perhaps the most natural, the massacre itself not being disputed, to inquire first as to whether there was any combination of parties in planning and executing this horrible deed, and if there was such combination and joint action, then whether the parties or any of them indicted with the prisoner were in this combination, and if so, then was the defendant also a party to such

Combination. If from the evidence you find that there was such ~~combination~~ concert of action and co-operation among the parties charged or a number of them, and that the prisoner was jointly acting with them, he is guilty, even though it might not appear that he, with his own hands, did any of the killing. If only those were guilty who did the shooting and killing with their own hands, then in but a few cases of this kind could the leaders be reached, the rank and file alone would suffer.

It is not necessary to be shown that the defendant did with his own hands any of the killing; but if the killing were done by those with whom he was co-operating, though his part was not to do any of the killing, he is guilty; and if it has been in your opinion shown by the evidence, that he actually did any of the killing that fact will be taken into consideration. If, however, you find from the evidence that there was no combination, no agreement, no joint action then no act of any of the other parties would bind the defendant unless it was done by his own direction or consent.

In ascertaining whether such combination existed, it is not necessary that the evidence should show any express agreement; it is sufficient if the facts,

course and conduct of the parties charged ~~showed~~ showed that an understanding existed, and that they were operating jointly for the accomplishment of the same end. And if the evidence, in your judgment, shows that others than those charged, acted and co-operated with these, then the prisoner would be held responsible for their acts as they would be for his acts in pursuance of their common purpose, - the work of any was the work of all - and if the parties engaged were allotted to different parts in the accomplishment of the joint purpose - some to do one thing and some to do another - some to stand guard, some to drive wagons, some to kill and some to do other parts of the common work, all are guilty. They all operated to secure one end - the slaughter of a number of human beings - men, women and children. If you believe from the evidence that the prisoner was at the massacre, then the question arises, was he there for an innocent purpose, and why did he go there? And if you believe from the evidence that he participated to any extent in the accomplishment of the common object, it is for you to say from the evidence why he so participated.

It is claimed for the defendant that the Indians were very much incensed at those emigrants who were killed at Mountain Meadows. Of this he is true, and that a great number of Indians were

(2nd sheet of
charge to jury
in case of
People etc., agt.
John D. Lee
- 1875.)

engaged with the whites in the massacre (and there is no doubt that very many Indians did participate) it is no defense to the whites for their participation. There is no evidence that any force was used to compel any white man to join in the murders; nor is it shown that any white man had any just cause for engaging in these murders, and the only pretended reason is, that the Indians were greatly incensed at the emigrants. But that is no valid reason for the whites engaging in the massacre, nor does the evidence show any good ground for the Indians engaging in the massacre. But as to that question, you are not called upon to decide. If from the evidence you believe ^{that} ~~that~~ the Indians were co-operating and acting in concert with the whites in the accomplishment of the destruction of the emigrants, it but makes a more vivid picture of the enormity and brutality of the inhuman work. The charge in this case is murder, but it is not every killing of a human being that is murder. Besides the two degrees of murder, there is manslaughter and also justifiable or excusable homicide. Murder is the killing of any human being with malice aforethought either express or implied. Malice is a wrongful act done ~~done~~ intentionally and without good cause or excuse. If therefore, you believe from the evidence that the killing in this instance was

wilful, deliberate and premeditated, and with malice aforethought, and that such Killing was in pursuance of a common design or purpose, to which common purpose the defendant was a party, he is guilty of Murder in the first degree and you will so find.

Malice is an essential element in the Killing to constitute the crime of murder, but it need not be express, but may be implied from ^{the} facts, course and conduct of the parties. In most cases malice is not susceptible of direct proof, but may be established by inferences, more or less strong, to be drawn from the facts and circumstances connected with the Killing, and which indicate the disposition or state of mind with which the Killing is done. If, however, you ~~should~~ ^{could} find from the evidence that the Killing was with malice aforethought either express or implied, but was not wilful, deliberate and premeditated, it would be murder in the second degree; and if the Killing was unlawful but you could find from the evidence that there was no malice, the crime would be manslaughter. If you believe from ^{the evidence} that there was malice, the offense is of a higher grade than manslaughter, and if there was malice and the act was wilful, deliberate and premeditated, it cannot be murder in the second degree but is of a higher grade still, and is murder in the first

degree. Then, in that case, it is murder in the first degree or nothing; that is, if it be not murder in the first degree, it can only be justifiable homicide or excusable homicide. To be justifiable homicide it must have first arisen from unavoidable necessity without any will, intention or desire, and without any inadvertence in the party killing, and therefore without blame, as for example, the execution according to law, of a criminal who has been lawfully sentenced to be hanged; or, second, it must have been committed for the advancement of public justice, - for example, if an officer in the discharge of his duties, is assaulted and resisted and should kill his assailant. There is no evidence which could be classed under either of these heads of justifiable homicide. Then, was it excusable homicide? A homicide can be excused only in two ways: First, when the act was what is called misadventure, that is, where in doing a lawful act, the party without any intent to hurt, unfortunately kills another; and second, when a party acting in self defence kills another person. There is no evidence that these persons were killed whilst their assailants were doing a lawful act, nor is there any evidence that those who did the killing were acting in self-defence or in defence of their families or property. If therefore, as I have stated,

you find from the evidence that the killing was done wilfully, deliberately and premeditatedly and with malice aforethought, you will find the defendant guilty. But if you find from the evidence that it was not done wilfully, ~~deliberately~~ deliberately and premeditatedly and with malice aforethought, you will acquit the prisoner.

The burden of proof of defendant's guilt rests upon the prosecution, and it is for you to say whether they have made out a case or not. And in reaching a conclusion as to the prisoner's guilt or innocence, it is not necessary that it be shown that all or a great number of persons were killed, but it is sufficient, if from the evidence you find that one human being was killed provided the killing shall have been done by combination of parties, as I have before stated, and provided the prisoner was a party to the combination. Nor is it necessary that the name or names of those killed should be shown, but if any of them were killed in the manner and form as charged, it is sufficient. Before you can find the prisoner guilty, you must from the evidence believe beyond a reasonable doubt that the prisoner is guilty, and taking the whole evidence together, it must exclude every other hypothesis but the guilt of the prisoner.

A reasonable doubt is only such an one as

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would arise in the minds of reasonable men, such as you are, who are selected because it is supposed and expected that you are reasonable men and competent to try such a question.

Proof beyond the possibility of a doubt is not required, because such proof can never be made. It is not necessary to show you that it is not possible that the prisoner is innocent; to show beyond the possibility of a doubt that he is guilty. But it is required that the prosecution produce such evidence that when you look it over as reasonable men, you do not doubt the prisoner's guilt; that the evidence produces in your minds an abiding conviction to a moral certainty of the guilt of the defendant. Proof beyond a reasonable doubt is something more than the preponderance of evidence. A preponderance of evidence will do to support a verdict in a civil case, but not in a criminal case. You must be satisfied from the evidence beyond any fair reasonable doubt of the defendant's guilt. You must have an abiding conviction to a moral certainty of his guilt, or you should acquit him. But absolute certainty of guilt is not necessary; moral certainty is sufficient.

The jurors are, as I have before stated, sole judges of the credibility of the witnesses, and it is for you to say upon your oaths what degree of credit is

due the testimony of such witnesses; and it is for you to say upon your oaths whether you deem the testimony of any witness unworthy of belief. In order the more specifically to give the law to you I will read the instructions given.

First - Such instructions as are asked by the prosecution and as I have allowed:

1st To authorize the jury to find the prisoner guilty, his guilt must be proved beyond a reasonable doubt and by proof which convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it, - is proof beyond a reasonable doubt if it leaves in the mind an abiding conviction to a moral certainty of the truth of the charge.

The other instructions we condescend as follows: 2^a.

That a mere possible doubt is not a reasonable doubt. 3^a. That it is not necessary to prove

that Lee actually killed any one of the emigrants with his own hand, but if he was present and aided and abetted the killing, it is sufficient.

4th The jury must utterly disregard the ruled out testimony. 5th It is not necessary to prove that a person named Joel Smith was killed at the massacre in order to convict Lee, if the jury believes there was one or more of the emigrants killed by Lee or that he aided and abetted in the killing of emigrants whose names are unknown.

Substance
of charge -
not exact
words

Substance
only

6th One may be principal in a murder without doing the deed with his own hands. It is enough if he aided and abetted the act. So if the jury believes beyond a reasonable doubt that either Lee or any of the defendants acted jointly and with malice aforethought, then the jury must find a verdict of murder in the first degree.

The burden of proving that the killing was wilful, rests upon the prosecution, which it must show beyond a reasonable doubt. In determining these facts the jury should look to the facts of the killing in connection with the attending facts as shown by the evidence.

(The cases heretofore for separate)