1

INSTRUCTIONS.

1st. Murder is the unlawful killing of any person with malice aforethought.

2d. Murder is distinguished by the law of Virginia as murder in the first degree, and as murder in the second degree.

3d. Every homicide in Virginia is presumed in law to be murder in the second degree; in order to elevate the offence to murder in the first degree, the burden of proof is upon the Commonwealth; and to reduce the offence to manslaughter, the burden of proof is upon the prisoner.

4th. To constitute murder in the first degree the prisoner must have been incited to the killing by malice, and the killing must have been a wilful, deliberate and premeditated act on the part of the prisoner; that is to say, he must have willed, deliberated and premeditated that he should kill the deceased or do him some serious bodily injury, the necessary result of which would be his death, and from which he died.

5th. On a charge of murder malice is presumed from the fact of killing. When the killing is proved, and is unaccompanied with circumstances of palliation, the burden of disproving malice is thrown upon the accused.

6th. Whenever the killing is wilful, deliberate and premeditated, the law infers malice from this fact.

7th. The rule of law is that a man shall be taken to intend that which he does, or which is the necessary consequence of his act.

The Court further instructs the jury, as a matter of definition, that every unlawful homicide must be either murder or manslaughter, and whether it be one or the other depends upon the means by which it was accomplished and on whether the party who perpetrated it did it with malice or not. If the act was done with a deadly weapon, or by means likely to produce death or serious bodily harm, and with malice, it is murder. If done in the heat of a sudden passion arising on a sufficient provocation, or in the heat of mutual combat, it is voluntary manslaughter. If it be done in the commission of an unlawful act not felonious, by a means not likely and not intended to cause death or great bodily harm, it is involuntary manslaughter.

A homicide committed in self defense, or in defense of a near relation, under circumstances justifying that plea, is not an unlawful homicide but a justifiable homicide, and the perpetrator of the act is not guilty of any crime.

Murder of the first degree is murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate and premeditated killing, or murder done in the commission of, or attempt to commit arson, rape, robbery or burglary.

All other murder is murder of the second degree.

3

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The court further instructs the jury that to constitute a wilful, deliberate, and premeditated killing it is not necessary that the intention to kill should exist any particular length of time prior to the actual killing. It is only necessary that such intention should come into existence for the first time at the time of killing, or any time previously.

4

The court further instructs the jury that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any provocation, or even with slight provocation, is prima facie, wilful, deliberate, and premeditated killing, and throws upon the prisoner the necessity of showing extenuating circumstances.

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The court instructs the jury that the credibility of witnesses is a question exclusively for the jury, and the law is that where a number of witnesses testify directly opposite to each other, the jury is not bound to regard the weight of the evidence as equally balanced; the jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, and their apparent candor and fairness, their apparent intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly.

The court instructs the jury that to make out a case of self-defense in a case of homicide, the accused must show to the jury that the defense was necessary to protect his own life, or to protect himself against grevious bodily harm;.

The Court further instructs the jury that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty is entitled to the same weight as direct testimony. But where any material fact is dependent on circumstantial evidence it is the duty of the jury to weigh such evidence with the greatest caution.

The Court instructs the jury that a reasonable doubt is such a doubt as may be honestly and reasonably entertained as to some substantial and material fact essential to prove the offence charged. A reasonable doubt must be based upon the evidence or be ~~based~~ such as is suggested by the evidence, or grows out of the evidence itself, or out of the lack of evidence. It must not be arbitrary doubt. It must be serious and substantial in order to warrant an acquittal. It must be a doubt of material fact or facts necessary for the jury to believe to find a verdict of conviction, and not of immaterial and non-essential circumstances.

The court instructed the jury that a reasonable doubt is such a doubt as upon a careful and dispassionate examination of the evidence and the entire absence of any other hypothesis than that of guilt, arises in the mind of a reasonable man, and from the lack of evidence, or from the evidence itself, or from both the lack of evidence and the evidence taken together, it is such a doubt as would cause a reasonable man to hesitate to act upon it in the most important affairs of life. A reasonable doubt must be based upon the evidence adduced. Beyond a reasonable doubt.

The Court instructs the jury that in this case, as in all criminal cases, the accused's plea of not guilty raises a presumption of innocence in his favor and puts on the Commonwealth the burden of proving his guilt beyond reasonable doubt. If therefore, upon a consideration of the whole case, the testimony of the witnesses and the circumstances shown in evidence, there exists in the minds of the jury a reasonable doubt as to the guilt of the accused, they should find him not guilty.

The Court instructs the jury that men, when threatened with danger, must determine from the state of things surrounding them as to the necessity of resorting to self-defense and if they act reasonably and with honest convictions, they will not be held responsible criminally for a mistake as to the extent of the actual danger.

The Court instructs the jury that if they believe from the evidence that, the accused, after he had obtained his traps from the deceased was walking away from the deceased, and, as he did so, saw Frazier raising his gun as if intending to shoot, and the jury believe from the evidence that Frazier's actions were such as were reasonably calculated to excite in the mind of the accused the belief that Frazier intended shooting the accused or his brother and that the accused did so believe and fired the fatal shot under the reasonable belief that it was necessary to shoot to protect himself and his brother from death or serious bodily harm then they should find the accused not guilty, for a man has the right to defend himself or his brother from death or serious bodily harm by such means as may be necessary to that end, even to the taking of the life of the assailant, if that be necessary to an adequate defense.

The Court instructs the jury that, if they believe from the evidence that at the time the deceased received his fatal wound, the accused was under reasonable apprehension from the conduct, words and actions of the deceased, as they appeared to him at the time, that the deceased designed or intended to kill the accused or his brother, or do them some serious bodily harm and was also under a reasonable apprehension that there was immediate danger of the deceased carrying this purpose into execution, you should find the accused not guilty; and the court instructs the jury that if they believe from the evidence the accused acted under reasonable apprehension as aforesaid, you should find him still not guilty, even though you should believe from the evidence that it turned out after the killing that the danger was apparent and not real; in other words, that the appearances were deceptive and there was in fact no purpose on the part of the deceased to kill the accused or his brother, or do them serious bodily harm. The enquiry is not whether the harm apprehended was actually intended by Frazier, but did it appear actual and real to the accused as a reasonable man. ~~(See Campbell case, cited in Stoneman's case, 25 Gratt. Harrigan vs. Thompson, page 285; Parrish case, 81 Va. 15; Wharton, page 460; Parrish case, 81 Va. Drysdale vs. Georgia, 6 L. R. A. 484 and note. Wharton, both rules, 1-455, 459 best rule as amended.)~~

Yet it was just that and nothing more

The Court instructs the jury, that the burden is upon the Commonwealth to prove every fact or circumstance necessary to convict the accused of ~~every~~ any offence whatever, and if they have any reasonable doubt as to any fact or circumstance necessary to convict the accused as aforesaid, they are bound to give him the benefit of such doubt and find him not guilty and the court tells the jury that a reasonable doubt is, "that state of the case, which after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. ~~Kibler's Case, 94 Va. 813.~~

The Court instructs the jury that if they have a reasonable doubt as to the grade of offence of which the prisoner may be guilty, that they shall resolve that doubt in his favor, and find him guilty of the lower grade; to illustrate if they have reasonable doubt as to whether he is guilty of murder in the first degree or the second degree, they should find him guilty in the second degree. If they have reasonable doubt as to whether he is guilty of murder in the second degree or manslaughter, they should find him guilty of manslaughter, and if they have a reasonable doubt as to whether he be guilty at all, they must resolve that doubt in favor of the accused and acquit him. ~~Litter's Case, 101 Va. 850. See Sloots.~~

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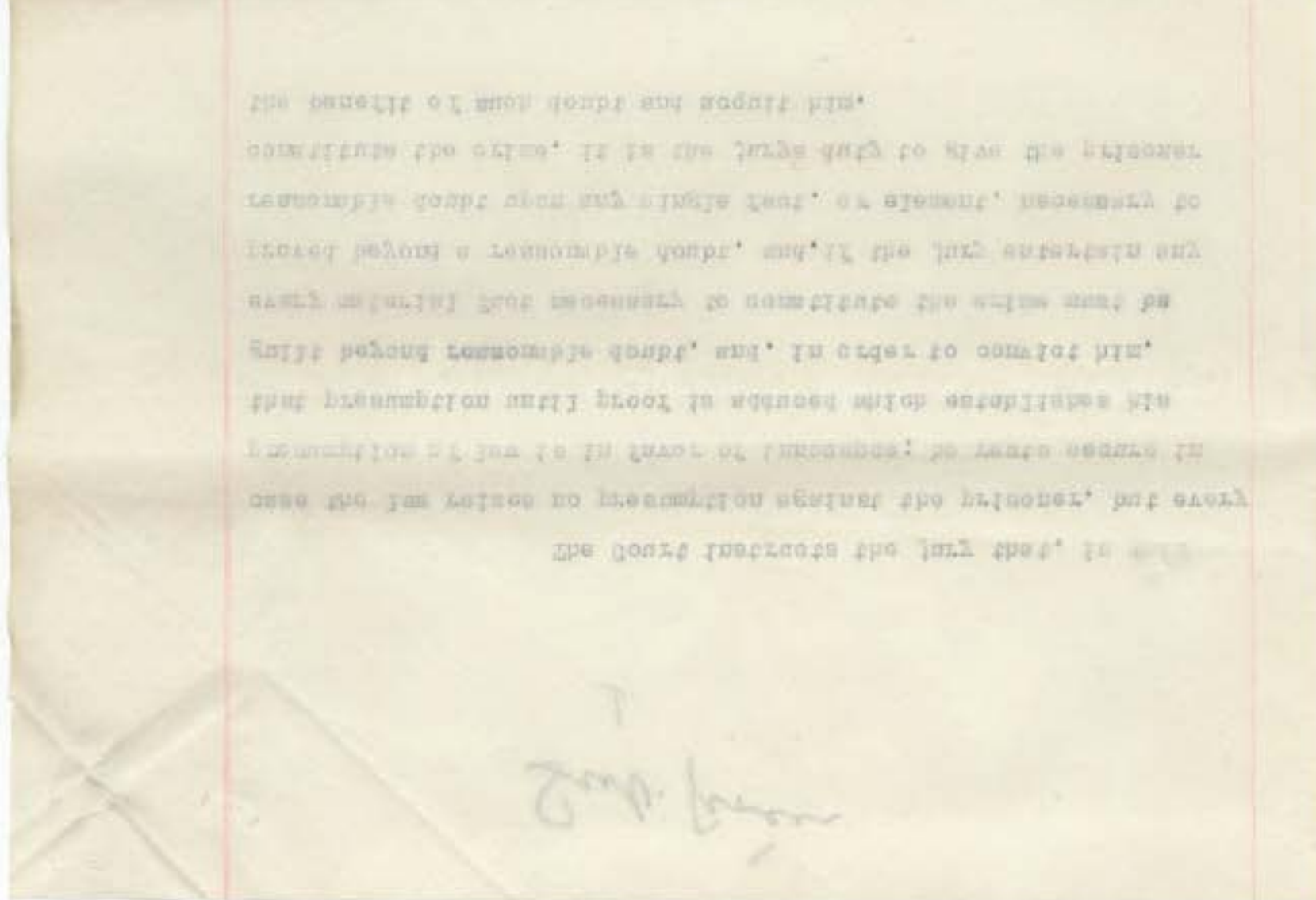
The Court instructs the jury that, in this case the law raises no presumption against the prisoner, but every presumption of law is in favor of innocence; he rests secure in that presumption until proof is adduced which establishes his guilt beyond reasonable doubt, and, in order to convict him, every material fact necessary to constitute the crime must be proved beyond a reasonable doubt, and, if the jury entertain any reasonable doubt upon any single fact, or element, necessary to constitute the crime, it is the jury's duty to give the prisoner the benefit of such doubt and acquit him.



The Court instructs the jury that if they believe from the evidence that, the accused, after he had obtained his traps from the deceased was walking away from the deceased, and, as he did so, saw Frazier raising his gun as if intending to shoot, and Frazier's actions were such as ~~it appeared to~~ the accused that Frazier intended shooting the accused or his brother and ~~kill him or his brother, or do him or his brother serious bodily harm, then the accused, under those circumstances was justified in shooting the deceased and he must be acquitted.~~

Then they should find the accused not guilty, for one has the right to defend himself or his brother from death or dangerous bodily harm by such means as may be necessary to that end, even to the taking of the life of the assailant, if that be necessary to an adequate defence

The Court instructs the jury that men, when threatened with danger, must determine from the state of things surrounding them as to the necessity of resorting to self-defense and if they act reasonably and upon ~~from reasonable and~~ honest convictions, they will not be held responsible criminally for a mistake as to the extent of the actual danger.

Refused

The Court instructs the jury, that in criminal trials, the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law, that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt. Kibler's Case, 94 Va. 813.

Lamiaceae is a large family with about 7000 species and 200 genera. The Lamiaceae are aromatic herbs or shrubs. Many of the species are used as spices, medicinal herbs, or ornamentals. Some of the most important economic species are the culinary herbs such as basil, oregano, rosemary, sage, thyme, and savory, and the popular herbal teas such as peppermint, spearmint, and lemon balm. Many species are also used as ornamentals because of their showy flowers. Lamiaceae are also used in perfumery and aromatherapy because of their aromatic essential oils. Many species are also used in herbal medicine, although their medicinal properties are not well-established. Lamiaceae are also used in cooking as flavorings, and some species are used as vegetables.

Refused

The Court instructs the jury that upon the trial of a criminal case by a jury, the law contemplates a concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Not only is this true with respect to the guilt of the accused, but it is likewise true with respect to the degree of crime. Therefore, although the jury may believe from the evidence, that the accused is guilty of the killing of the deceased, still, if any individual member of the jury, after having duly considered all of the evidence in this case, and after consultation with his fellow jurors, should entertain a reasonable doubt as to the degree of the guilt of the accused, it is his duty not to surrender his own convictions as to such degree of guilt simply because the balance of the jury entertain different convictions with respect to such degree.

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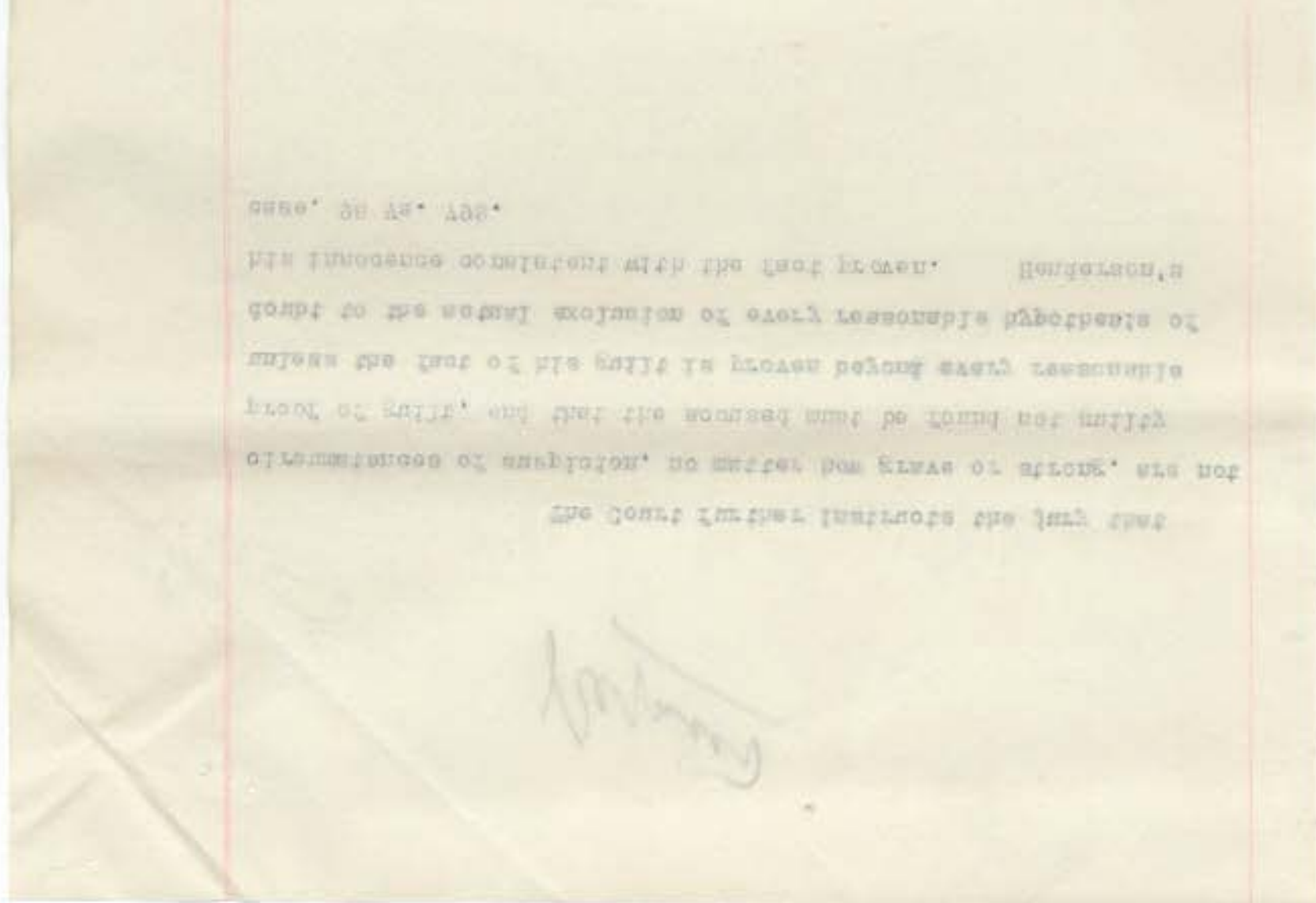
Refused

The Court further instructs the jury that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and that the accused must be found not guilty unless the fact of his guilt is proven beyond every reasonable doubt to the actual exclusion of every reasonable hypothesis of his innocence consistent with the fact proven. Henderson's case, 98 Va. 798.



10

Refused

The Court instructs the jury that though they believe from the evidence that Charles Marshall made threats against Buck Frazier previous to the shooting of Frazier by the accused, yet such threats if made in the absence of the accused and without his knowledge cannot be considered as to the truth of the crime charged against Brainard Marshall.

11

Substitute

Refused

The Court instructs the jury that man slaughter is when a person feloniously, and unlawfully and without malice kills another, and it is divided into two classes;

Voluntary manslaughter is the unlawful killing of another without malice, in a sudden fight and heat of blood.

Involuntary manslaughter is when one in the performance of an unlawful act kills another without design.

12

Refused

The Court instructs the jury that the burden of proof is on the Commonwealth to prove, beyond a reasonable doubt, every essential ingredient necessary to constitute the offence charged in the indictment, and if the jury from the evidence have any doubt as to the guilt of the accused, then evidence of his good reputation may be allowed to resolve the doubt in his favor. See Wadley's Case, 98 Va. 810, and Vaughan's Case, 85 Va. 672.

Court advised Counsel in refusing this instruction that they were at liberty to argue the force of good reputation - That the action of the Court in refusing this instruction was not intended to deny them that privilege - the full extent stated in the instruction -

The court instructed the jury that the burden
of proof is on the commonwealth to prove a homicide
done, every material ingredient necessary to constitute the of-
fence charged in the indictment. And if the jury from the evidence
have a doubt as to the guilt of the accused, then evidence of
his good character may be sufficient to create such a doubt in his
mind. Commonwealth's Case, 38 Ky. 2d. Hamby's Case, 38 Ky. 2d.
.342.

Court refuses, plaintiff not entitled
here instructions not given.

10

Refuse?

The Court instructs the jury that where any fact essential to the conviction of the accused is dependent on circumstantial evidence it is the duty of the jury to act upon such evidence with the utmost caution.

Gen. V. Brannan Marker

Erected by the Gettysburg Memorial Association

Reasonable

The court further instructs the jury that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every hypothesis other than that the defendant is guilty is entitled to the same weight as direct testimony.

substantial and material fact essential to prove the offence charged.

The court instructs the jury that a reasonable doubt is such a doubt as may be honestly and reasonably entertained as to ~~charged~~. A Reasonable doubt must be based upon the evidence, ~~or by substantial and material fact essential to prove the offence or~~ as ~~that~~ is suggested by the evidence, or grows out of the evidence itself. It must not be arbitrary doubt. ~~without evidence to sustain it.~~ It must be serious and substantial in order to warrant an acquittal. It must be a doubt of material fact or facts necessary for the jury to believe to find a verdict of conviction, and not of immaterial and non-essential circumstances.

for want of the lack of ~~proof~~ evidence.

Com. v Marshall

Com's Mandatory Opinion

The court instructs the jury that a reasonable doubt is such a doubt as may be honestly and reasonably entertained as to guilt. A reasonable doubt must be based upon the evidence. It must be generated by the evidence, or grow out of the evidence itself. It must be serious and substantial in order to warrant an acquittal. It must be a doubt of material fact or facts necessary for the jury to believe to find a verdict of guilty, and not of immaterial and non-essential circumstances.

The court instructs the jury that to make out a case of self-defence in a case of homicide, the accused must show to the jury that the defence was necessary to protect his own life, or to protect himself against grevious bodily harm; ~~and that, ith regard to the necessity that will justify the slaying of another in self-defence, the accused must not have wrongfully occasioned the necessity, for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself.~~

Instructions offered
by Com.

INSTRUCTION NO._____

The Court instructs the jury that it is a principle of criminal law that where death ensues on a sudden provocation, or sudden quarrel, without malice prepense, the killing is manslaughter, and in order to reduce the offence to killing in self-defence, the accused must prove two things, viz: (1). That before the mortal blow was given, he declined further combat, and retreated as far as he could with safety; and (2) that he killed the deceased through the necessity of preserving his own life, or that there was reasonable ground to believe that the killing was necessary to preserve his own life, or to save himself from great bodily harm."

Clark's case, 90 Va., 360.

INSTRUCTION NO._____

The Court instructs the jury that if they believe from the evidence that the prisoner assailed the deceased and a combat ensued, and in such combat the prisoner killed the deceased, and if they shall further believe that the first assault was made by the prisoner upon the deceased with a preconceived design to kill or to inflict great bodily harm, then the malice of the first assault, notwithstanding the violence with which it was returned, communicates itself to the last act of the prisoner and the killing is murder.

Jackson's case, 97 Va., 762.

5

Refuse

The court instructs the jury, as a matter of law, in considering the case, the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an acquittal must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond all reasonable doubt. On the other hand, the jury must not go beyond the evidence to hunt up inferences of guilt.

The court instructs the jury that on a charge of murder malice is presumed from the fact of killing. When the killing is proved, and is unaccompanied with circumstances of palliation, the burden of disproving malice is thrown upon the accused.

The court further instructs the jury that in determining the weight to be given the testimony of different witnesses in this case, the jury are authorized to consider the relationship of the witnesses to the parties; ~~to the case to proved~~; their interest, if any, in the result of the case; their temper, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence; their means of information; and to give such credit to the testimony of the witnesses as under all the circumstances ~~such witnesses~~ They seem to be entitled to.

Strike out

The court instructs the jury that whoever kills a human being with malice aforethought is guilty of murder; that a murder which is perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, and premeditated killing is murder in the first degree.

2

The court instructs the jury that murder is distinguished by the law in Virginia as murder in the first degree and murder in the second degree.

The court instructs the jury that the rule of law is that a man shall be taken to intend that which he does, or which is a necessary consequence of his acts.

The court further instructs the jury that whenever the killing is wilful, deliberate, and premeditated, the law infers malice from this fact.

The court instructs the jury that every homicide in Virginia is presumed to be murder in the second degree. In order to elevate the offence to murder in the first degree, the burden of proof is upon the Commonwealth, and to reduce the offence to manslaughter, the burden of proof is upon the prisoner.

Brian Barbel

Cmts from Friedman

Response to Gruen

Re: Re

Rehearsal

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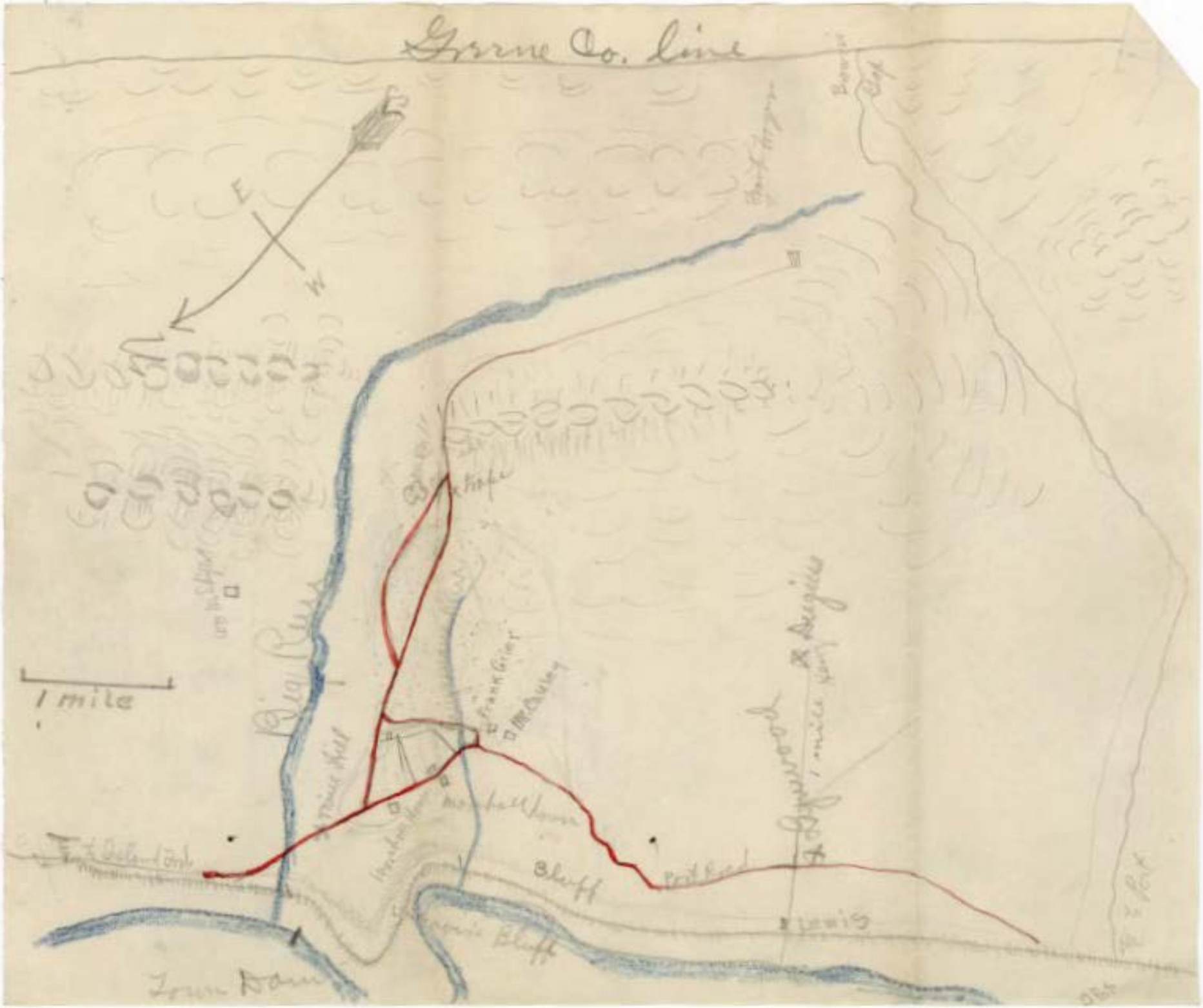
J. L. Leech Foreman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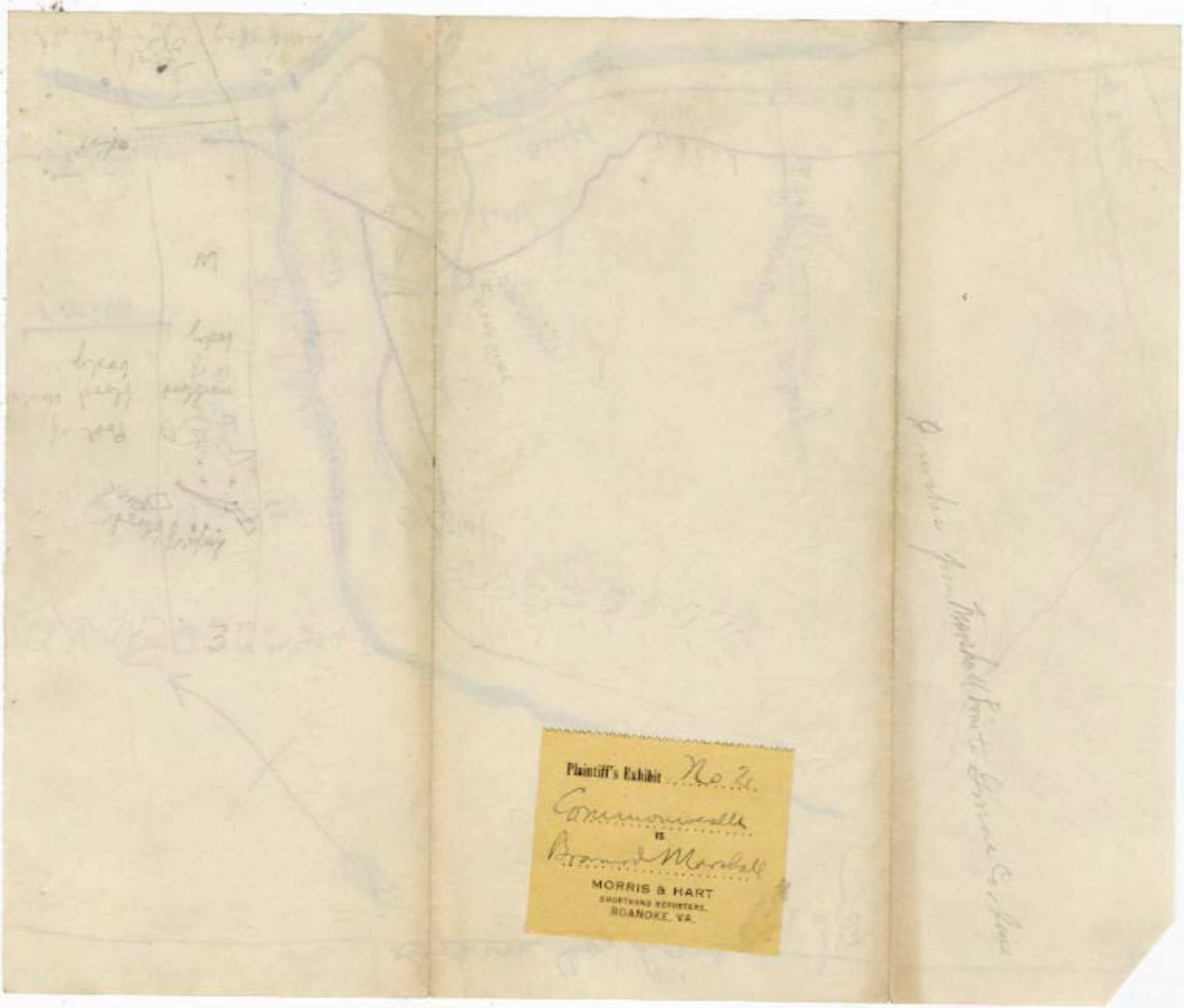
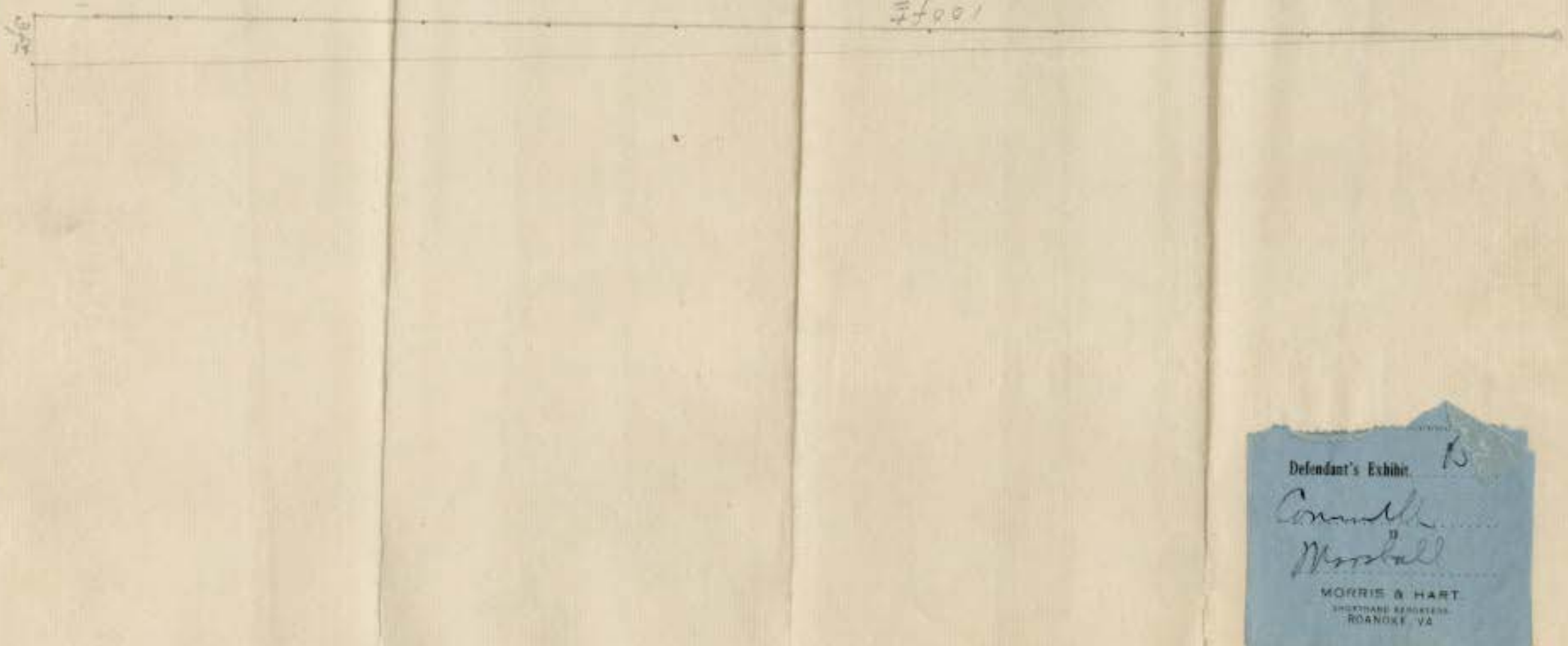
Post Road
Lewis
Iron Bank



Plaintiff's Exhibit No. 2.
Commonwealth
vs.
Bennett Marshall
MORRIS & HART
SHORTHAND REPORTERS,
ROANOKE, VA.


Defendant's Exhibit B
Crandall
vs
Marshall
MORRIS & HART
SHORTHAND REPORTERS
ROANOKE, VA

Commonwealth

vs -

Barnard Marshall

1 D.H. Atchison
2 J.L. Leith
3 J.W.R. Showalter
4 H.C. Rivercomb
5 Chas H. Chandler
6 W.J. Rexrod
7 E.M. Bowman
8 D.H. Litney
9 C.S. Crouch
10 D.H. Forer
11 Geo. W Howe
12 J.T. Hunter

If you find him not guilty you shall say so and no more.

If you find him guilty of murder in the first degree you shall say so and then ascertain his punishment by death or by confinement in the penitentiary for life. ~~[illegible]~~ him ~~[illegible]~~

If you find him guilty of murder in the second degree you shall say so and then ascertain his punishment by confinement in the penitentiary so that such confinement shall not be less than five nor more than eighteen years.

If you find him not guilty of either of the aforesaid felonies but guilty of voluntary manslaughter you shall say so and then ascertain his punishment by confinement in the penitentiary so that such confinement shall not be less than one nor more than five years.

If you find him not guilty of ~~either~~ any of the aforesaid felonies but guilty of involuntary manslaughter you shall say so and then ascertain his punishment by fine or by confinement in jail or by both so that such fine be not less than five dollars.

Ber
vs
Brainard Marshall

COMMONWEALTH OF VIRGINIA,

COUNTY OF ROCKINGHAM, to-wit:

In the Circuit Court of said County:

The Jurors of the Commonwealth of Virginia, in and for the body of the County of Rockingham, and now attending the Circuit Court of said County, at its March term, 1917, upon their oaths present, that Brainard Marshall on the twenty-fifth day of March in the year 1917, in the said County, with force and arms, in and upon the body of one Noah Frazier, in the peace of the said Commonwealth then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Brainard Marshall a certain gun, a Winchester repeating rifle, then and there loaded with gunpowder and leaden bullet, which said gun, he, the said Brainard Marshall in his hands then and there had and held, then and there feloniously, wilfully and of his malice aforethought did shoot off, to, against and upon the said Noah Frazier; and that the said Brainard Marshall with the leaden bullet aforesaid out of the gun by the said Brainard Marshall discharged and shot off as aforesaid then and there feloniously, wilfully and of his malice aforethought did strike, penetrate and wound the said Noah Frazier in and upon the right arm and side; giving to him, the said Noah Frazier then and there with the leaden bullet aforesaid as aforesaid discharged and shot out of the gun aforesaid by the said Brainard Marshall in and upon the right arm and side of him, the said Noah Frazier, one mortal wound; of which mortal wound, he, the said Noah Frazier, shortly thereafter and on the same day died. AND SO THE JURORS AFORESAID upon their oaths aforesaid do say that the said Brainnrd Marshall, him the said Noah Frazier, in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder against the peace and dignity of the Commonwealth of Virginia.

This indictment is found on the testimony of Drs. A. L. Kenner, J. M. Ridley, C. Foy, Marshall, H. G. Crouchon, J. D. Bateman, Vernon Chifflett witnesses sworn in Court and sent before the grand jury to give evidence.

Mar. Term, 1917

Com.
v.
Brainard Marshall

For a Felony

A true Bill

C. L. Strickler
Foreman

Henry Wheeler
Com. Atty.

Commonwealth of Virginia,

County of Rockingham, to-wit:

In the Circuit Court of said County:

Commonwealth of Virginia,

County of Rockingham, to-wit:

In the Circuit Court of said County:

The jurors of the Commonwealth of Virginia, in and for the body of the County of Rockingham, and now attending the Circuit Court of said county, UPON THEIR OATHS PRESENT, that

against the peace and dignity of the Commonwealth of Virginia.

AND THE JURORS AFORESAID, UPON THEIR OATHS AFORESAID, DO FURTHER PRESENT, that

against the peace and dignity of the Commonwealth of Virginia.

This indictment is found on the testimony of_____

_____,

witnesses sworn in Court and sent before the Grand Jury to give evidence.

We the jury find the prisoner ~~guilty~~ Brainard Marshall guilty of voluntary manslaughter as charged in the indictment, and fix his punishment at confinement in the penitentiary for one year

J. L. Leech
Foreman

March term, 1917.

COMMONWEALTH
vs. **Indictment**

Brainard Marshall

For Felony
~~For Misdemeanor~~

A TRUE BILL

L. L. Hedrick
Foreman

Plea of not guilty

Harry M. Strickler
Com. Atty.