

of facts the circuit attorney frankly admitted to Court and jury the offense would only be murder in the second degree, and he relied upon the subsequent flight of Jackson (who did fly and was arrested some months after in Iowa), and a former grudge, as evidence to lift the case up to the grade of murder in the first degree. He put the case to the jury on the ground, frankly and properly conceded, that a killing, under unknown circumstances, was only murder in the second degree, under our statute. In other words, a killing, under unknown circumstances, renders express malice impossible in proof. In such case there is nothing left but malice implied out of which to make murder at all; and implied malice cannot, as I have shown, make murder in the first degree.

In this case, the attempt will scarcely be to rely on flight, nor on a previous grudge. If the concealment of the body be urged to elevate the killing to murder in the first degree, I reply that our Supreme Court has declared in the case, in the eighteenth volume, before cited, that neither the secreting the body after the killing, nor the steps which may be taken by the offender to elude justice, are evidence of murder in the first degree. All such measures, taken after the deed, spring from fear of punishment, and from no criterion of the grade of the offense. The man who commits manslaughter may, from the same motive, take the same measures to avoid punishment.

The learned counsel was chary in laying before you the law of murder in this state. He did not even glance at the important distinction between its degrees—a distinction fraught with so much consequence. He did not run the line or mark the boundary; or if he did, he only confused the survey. The Supreme Court of Tennessee reversed a judgment of death in a case for no other reason than that the court below failed to tell the jury what was the distinction between murder in the first and second degree! That tribunal said a man's life might hang upon the failure. That was an omission; the court below forgot to run the line; but the court above said the forgetfulness was fatal to judgment.

The Deity gives life, but I agree, the government can take