pany with Mr. Ed Norman, went to the residence of Commissioner Girand, at night, after Mr. Girand had gone to bed, and got him up, and expressed to him the fear that the prisoners might be attacked in the jail, and desired him to advise the deputy-marshal, so that proper precautions might be taken. The only cause known to any of these witnesses for these rumors and apprehensions of a mob was the shooting and death of the sheriff, Wallace. It is shown that the defendant Marion Wallace is a nephew of the said sheriff, Wallace; that before Sheriff Wallace was shot the defendant Marion Wallace lived on his said uncle's farm, near Belknap; that after the death of Sheriff Wallace and the appointment of Tom Collier as sheriff, Collier appointed Marion Wallace deputy-sheriff, and he was much about the jail, and acting as such deputy-sheriff about the jail in relation to the custody of the Marlows and other prisoners. It is shown that John Levell had been Sheriff Wallace's office man and collector of taxes for several years, (the sheriff being *ex officio* collector of taxes,) and was continued in the same office by Tom Collier when he became sheriff; that John Levell and Marion Wallace both boarded at the house of Mrs. Wallace, widow of Sheriff Wallace. Mrs. Rickman testifies to the solicitude Mrs. Wallace expressed about Marion, (meaning the defendant Marion Wallace,) and her repeated requests to Tom Collier on that evening to go to the jail and see about Marion. The witnesses Burns, Spears, Charles Marlow, and George Marlow substantially agree in their testimony that on the night of the 17th January, when the mob entered the jail, and first came up-stairs where the cages were placed, John Levell came first with the keys to the cage door, and opened the doors, and called Charles Marlow, and told him to come out, that there was a man there who wanted to see him; and when Charles Marlow answered, "Who is it, and what does he want with me?" Levell replied, "I do not know, but come on out." That just then Spears told Charles not to go; that it was a mob; and George Marlow told John Levell, "I did not think you would do this way. I have laid here and begged you for water until ten o'clock at night, and you said the keys were at the office, but now you can open the cage for these fellows to kill us;" to all of which John Levell said nothing, but Logan said: "Shut up; John Levell is under arrest." That when one of the mob, not recognized by any of the witnesses, had stepped into the door of the cage, and been knocked down by Charlie Marlow with his fist, and had said to his fellows, "You must take me down from here. I am bleeding to death,"—some of the crowd pulled him out of the door, and they all disappeared from the cage, and from the sound of their steps on the stairway these witnesses knew that some of the crowd, and possibly all of it, went down-stairs. That very soon the mob came back up-stairs, and this time with Marion Wallace in the lead. That all the prisoners except the four Marlow brothers were called out of the north cage, where they had been all confined together, and placed in the other cage. That Logan then told Marion Wallace to go to the north cage, and bring Charlie Marlow out; and that Marion Wallace advanced to the door of the cage, but when he saw that Alford had the

piece of water-pipe in his hand he stopped and said, "I am not going in there to be killed." These witnesses all testify that no violence was offered by any person in the mob to either John Levell or Marion Wallace, and no threatening language was used to either of them; but both John Levell and Marion Wallace seemed to these witnesses to be acting with the mob, and all one with it. Burns and Spears both testify that they were in the jail when Sheriff Wallace was shot, and saw John Levell bring Lewellin or Eph Marlow to the jail on that day; that Eph objected to being put in the cage without anything to sleep on or be on, and that John Levell, cursing him as he put him in the cage, said to Eph: "You don't need nothing. Go in there, and we will go and mob the rest of them;" and Burns says he saw Levell kick him as he put him in. The witness Moore testifies that in 1888 and 1889 he was sheriff of Jack county, and that on the night of the fight at Dry creek Marion Wallace and another man came to Jacksboro to get him to aid the officers of this county with a *posse* from Jack county; that he had no communication with the other man, but received the request and all his information on the subject from Marion Wallace, and the impression he received, and on which he summoned his *posse* and brought it into Young county, was that the mob were friends of the Marlows, and that all the men who were killed except the two Marlows were guards, and that he remained under this impression until after his arrival with his *posse* at the Denson farm, when Jim Duty informed him of the real situation, and he took his *posse* back to Jack county. Charles Auberg testifies that in January, 1889, he was a commissioned member of the state police, and that on Sunday, the day after the Dry creek fight, he saw Marion Wallace at the Denson farm; that said Wallace said he was going to take the Marlows out of their cabin; that witness remonstrated with him, stating the situation fully, and forbade it, saying to Wallace, "I have the right to forbid it, and you know it;" that Wallace was intensely excited, and said that Charlie Marlow had killed his uncle, and that he was determined to have revenge, and would take them out; when the witness told him that he would have to kill him before he took the Marlows out. The witness Perry Harmeson says that he is the father of Frank Harmeson, who was killed in the Dry creek fight; that he was in Jacksboro the night of the Dry creek fight, and early the next morning he learned from Marion Wallace that his son Frank was killed, and the names of the others who were killed, and that Marion Wallace told him that his son and Bruce Wheeler and Sam Criswell were all guards, and were attacked and slain by the mob; that he came at once to Graham, and was greatly excited and highly indignant at the suddenness and manner of his son's death, having left him in health at his (Frank's) house Saturday morning; that witness said publicly and repeatedly on his arrival at Graham that he had $1,000 or $10,000 that he would give for the capture of those who killed his son; and that he continued talking that way, and feeling and thinking that way, until some one, he thinks E. S. Graham, spoke to him, and let him know how it was. The witness A. B. Gant testifies that he was in Levell's office Monday after the Dry creek fight, and made some remark

to Levell about it that day, and Levell cursed and swore about it, and said that all he regretted about it was that they did not kill every one of the Marlows, and said the Marlows had threatened him and Tom Collier. Witness heard Levell say that they could not convict Charles Marlow on the proof that they had, and that, if they did convict him, the court of appeals would reverse it, and instanced a case in Stephens county, where a boy was convicted for killing his father and the court of appeals reversed it. Witness heard this, when the mob was talked of, as reasons for the mob. The witness Lovejoy testifies that at sundown on the evening of January 19, 1889, he went into the sheriff's office, where John Levell was in the habit of receiving taxes, to pay his tax. That he found quite a crowd—10 or 15, may be 18, men—in there. Of this crowd he knew John Levell, Robert Holman, O. E. Finlay, and Frank Harmeson. The crowd were talking in a general way. Witness did not gather what they were talking about, but knew there was whisky there from the appearance of things, and some of them pretty well filled up with whisky when witness went in there; and witness, as he stepped up to pay his taxes, said to the crowd, "Who was the man that paid for the whisky?" when Frank Harmeson said to him, "You can have some whisky if you want any. There is no trouble about that." Witness had no personal acquaintance with Frank Harmeson; only knew him by sight. And a few minutes after this Mr. Finlay said to witness, while still there in the room with the crowd, "You will hear something before morning;" and witness left in a few minutes. This was the last day for paying taxes without a penalty. Levell was representing the sheriff as tax collector. He had a desk there. He received witness' tax. Witness did not see him receive any other tax while there. He looked over the books and tax-rolls, and gave witness his receipt. When Finlay said to witness, "You will hear something before morning," he spoke so no one else heard it.

A great number of witnesses have testified for the defendants, but their testimony has been chiefly of an impeaching character, and I deem it impracticable and unnecessary for me to tax myself or you with an attempted summing up of this mass of that character of testimony. It has been fully presented to you by the very able counsel representing the defendants, and will doubtless substantially all recur to you in your consideration of the testimony of the witnesses for the government, whose credit, or the weight of whose testimony, this testimony of the defendants is offered to attack and destroy. And I again repeat that all the testimony you have received during this trial is to be considered by you, and you are to rely upon your own recollections and impressions of the testimony, and to act on your own judgment of the proof as to all questions of fact involved in this trial.

2. When a citizen of the United States is committed to the custody of the United States marshal or to a state jail by process issuing from one of the courts of the United States, to be held, in default of bail, to await his trial, on a criminal charge, within the exclusive jurisdiction of the national courts, such citizen has a right, under the constitution and laws

of the United States, to a speedy and public trial by an impartial jury; and, until tried or discharged by due process of law, has the right under said constitution and laws to be treated with humanity, and to be protected against all unlawful violence, while he is deprived of the ordinary means of defending and protecting himself.

3. The laws of the United States provide that if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States they are guilty of an offense; and if, in the prosecution of any such conspiracy, any murder be committed, the offenders shall be punished (in the United States courts) for such murder with such punishment as is attached to the offense of murder by the laws of the state in which the offense is committed. By "conspire," as used in the law just given you, is meant to agree with one another to effect the unlawful object; to combine and confederate together to encourage, assist, and support each other in effecting said unlawful object. This agreement need not, and often is not, expressed in words, but is to be gathered from the conduct of the parties to it. The offense of murder referred to is: "Where a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the United States, with malice aforethought, either express or implied." Malice aforethought is a deliberate intent to kill another unlawfully, and where the unlawful killing is done by the use of deadly weapons the law implies malice, and where lying in wait or the existence of antecedent grudges is shown, the presence of either of these ingredients, accompanying such unlawful killing, manifests that the law pronounces "express malice." By the laws of Texas, all murder committed with express malice is murder in the first degree, and all murder not of the first degree is murder of the second degree; and if the jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree.

4. The proof in this case all goes to show beyond any doubt whatever that there were more than two persons who assailed the prisoners at Dry creek on the night of January 19, 1889, and that said assailants had lain in wait on the highway for the hack containing said prisoners, and that the killing of Alf and Eph Marlow, under the undisputed circumstances leading up to and attending their killing, was a cruel assassination, and murder in the first degree. And the proof all shows with equal clearness that the persons stopping said hack and assailing said prisoners with drawn weapons had combined together to injure, oppress, threaten, and intimidate said prisoners, and to deprive them or some one of said prisoners of the right secured to them by the constitution and laws of the United States,—to a speedy public trial by an impartial jury, and to be protected from unlawful assault or violence while in the custody of the deputy United States marshal, under lawful process of the courts of the United States.

5. The spirit of our laws is such that each particular one of these defendants is presumed to be innocent until his guilt is established by proof

that shall satisfy your minds beyond a reasonable doubt; and the certainty that a great crime has been committed by some persons, and the circumstances of horror attending its commission, must not be permitted to bias your minds in weighing the proof which you are now to consider in order to determine whether these defendants, or either of them, were parties, or was a party, to said conspiracy.

6. Each person who joins a conspiracy at any time, whether at its inception or after its inception, becomes a conspirator, and liable for all that is done at any time in the prosecution of the conspiracy to effect its unlawful object. Each co-conspirator is liable for the acts, and is bound by the declarations, of each of his co-conspirators, done and said during the continuance of the conspiracy, touching the object and conduct of the conspiracy. It is immaterial at what time he became connected with it,—whether at its inception or at the very instant before the full accomplishment of the purpose of the conspiracy, or just before its final abandonment, or at any intermediate time; his connection with it at any time makes him liable for all that has been done by any of his co-conspirators in pursuance of the conspiracy.

7. But to establish the connection of either of the defendants now on trial with the conspiracy charged in this case such connection must be shown by other proof than the declarations of others made out of the witness-box, and not in the presence of the defendant charged; and this applies as well to the declarations of any one of the defendants, made not in the presence of the one whose connection or not with the conspiracy is being considered. Each defendant's own declarations, made at any time, and the declarations of any other persons, made in his presence, are competent to be considered in passing on the question as to whether said defendant was connected with said conspiracy.

8. To establish the connection of a particular defendant with the conspiracy it is not necessary that there should ever have been an explicit agreement by him to form the conspiracy, or to join it; nor is it essential, or often possible, that direct proof should be made of his connection with it. In cases like this—prosecution for criminal conspiracy—the connection of particular individuals with the conspiracy must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. It is as competent to prove such connection by circumstances as by direct evidence. But these circumstances must each be proved to your satisfaction beyond a reasonable doubt, and the circumstances thus proved must be such that, when they are all considered together, they satisfy your mind beyond a reasonable doubt that the said defendant co-operated with said conspiracy.

9. You are the exclusive judges of the credit to be given to each witness, and of the weight of his or her testimony. The government has introduced two witnesses who are shown to have been heretofore convicted of offenses, and punished by imprisonment,—one in the county jail for six months, and the other in the state penitentiary for two terms of two years each. They are competent witnesses, but the matter of their respective convictions and sentence is to be considered by you in

determining what credit you should give them as witnesses, and what weight you will allow to their testimony.

10. There is proof tending to show that two of the witnesses for the government, P. A. Martin and E. W. Johnson, were connected with the said conspiracy; and if you believe from the proof that either of them was a member of the conspiracy you should receive his testimony with great caution, and should not convict either of the defendants on his unsupported testimony,—that is, unless you believe, that as to said defendants' connection with the conspiracy said testimony is corroborated by other evidence in the case. They cannot for this purpose be considered to corroborate each other.

11. There is a direct and sharp conflict of testimony in this case, and much proof has been given you which could not be embraced in my summing up, offered by each side,—the government's and the defendants',—tending to discredit the witnesses offered by the opposing side, all of which you are to consider in weighing the evidence of the witnesses attacked, and give such weight to it as in your judgment it should receive. Like as all reasonable men in the ordinary walks of life do, you should in this case judge of the testimony of each witness by the manner in which it is given; the opportunity of the witness to know the matters to which he deposes; the consistency of his testimony with itself and with all the known or otherwise fully proved facts of the case; the manner in which he stands the crucial test of cross-examination; his relation to this case as a party defendant, or his relation to any of the defendants, or to any of the witnesses, or to the transaction out of which this case grew, as well as the evidence as to his general character and standing; and thus determine for yourselves as to each of the witnesses the extent of the credit you should give to his testimony.

12. If, from a consideration of the whole proof in this case, you are satisfied beyond a reasonable doubt that such a conspiracy as is charged in the indictments did exist, and that in the prosecution of said conspiracy the conspirators, or a part of them, in pursuance of said conspiracy lay in wait for said prisoners, and assaulted them by presenting against said prisoners deadly weapons, and that said assault resulted in the death of Alf and Eph Marlow, as charged in said indictment; and you further, from the proof, believe beyond a reasonable doubt that either one of the defendants now on trial was connected with the said conspiracy,—you should find that one guilty of conspiracy as charged in the indictment, and of murder committed in the prosecution of said conspiracy. If the proof so satisfies you that two or more of the defendants now on trial were connected with said conspiracy, you should find said two or more guilty. And if it so satisfies you as to each of the defendants now on trial, you should find all of said defendants guilty as charged. If you are not satisfied from the proof beyond a reasonable doubt as to any certain one of the defendants being connected with said conspiracy, you must acquit that certain one. If you are not satisfied beyond a reasonable doubt that any certain two or more of the defendants now on trial were connected with said conspiracy, you must acquit said two or more

of the defendants. And if you are not satisfied beyond a reasonable doubt that either one of the defendants now on trial was connected with said conspiracy you must acquit all of them.

13. If, from the proof, you believe beyond a reasonable doubt that the defendant Eugene Logan was at any time connected with said conspiracy, or, knowing that said conspiracy existed, acted with the conspirators, or gave to any of them information, or counsel, or advice, or encouragement, or assistance connected with the said conspiracy, the fact (if it be the fact) that he accepted the position of a guard would not lessen his liability or his guilt.

14. If from the proof you believe beyond a reasonable doubt that either of the defendants Marion Wallace or Sam Waggoner or Will Hollis was at any time connected with said conspiracy, or, knowing that said conspiracy existed, acted with the conspirators, or gave to any of them information, or counsel, or advice, or encouragement, or assistance connected with said conspiracy, the fact that he went with said prisoners as a guard would not lessen his guilt or his liability to punishment.

15. If from the proof you believe beyond a reasonable doubt that the defendant E. W. Johnson was connected with said conspiracy, or, knowing that it existed, colluded with the conspirators, or gave to any of them information, or counsel, or advice, or encouragement, or assistance of any kind in the prosecution of said conspiracy, the fact that he was a duly-authorized deputy United States marshal at the time, and as such had said prisoners in his custody under lawful process, would not lessen his guilt or his liability to punishment, or lessen the guilt and liability to punishment of any other party to the conspiracy.

16. The rule of law which clothes every person accused of crime with the presumption of innocence, and imposes on the government the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. And you are instructed as a matter of law that in considering this case you are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, 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 you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt. It is the law that the doubt which the juror is allowed to retain on his mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful supposi-

tions and remote conjectures as to possible states of fact differing from that established by the evidence. You are not at liberty to disbelieve or doubt as jurors, if from the evidence you believe as men. Your oath imposes on you no obligation to doubt when no doubt would exist if no oath had been administered; but, on the contrary, your oath does impose on you an obligation not to doubt whenever no doubt would exist had no oath been administered.

17. There are in this case five different indictments, each containing more than one count, and some of them containing numerous counts, but, taken all together, they charge substantially only two offenses: *First.* That the defendants now on trial, with certain others named in the indictments, and still others to the grand jurors unknown, conspired to injure, oppress, threaten, and intimidate the citizens of the United States named in said indictments in the free exercise and enjoyment of the right secured to them by the constitution and laws of the United States to be protected from all unlawful violence while in the lawful custody of the officers of the United States on a criminal charge, and to have the benefit of a speedy public trial by an impartial jury. *Second.* That in the act of carrying out said conspiracy, said conspirators committed the capital felony of murder, as charged in the indictments. The defendants may be found guilty of the first of the above charges, and not guilty of the second, or they may be found guilty of both, or not guilty of either, according to your view of the proof. But they cannot be found guilty of the charge of murder unless the proof shows they were parties to the conspiracy. It is entirely immaterial and wholly unnecessary for you to know or find what one or ones of the conspirators fired the fatal shots that killed Alf Marlow and Eph Marlow. Each person shown by the proof beyond a reasonable doubt to have been connected with said conspiracy is guilty of their murder, whether such person was at the Dry creek fight or not. You will be careful to so frame your verdict as to show clearly what you find in reference to each one of the defendants now on trial, naming each one of said defendants in your verdict. In this court the jury do not assess the punishment, the law devolving that duty on the trial judge in every case of conviction; the office of the jury being only to find and show by their verdict whether the defendants on trial are guilty or not, and, if guilty in this case of the charge of murder, to show by their verdict the degree of the murder. If you find the defendants now on trial, or either of them, guilty only of conspiracy, as charged in the indictments, your verdict as to such defendants or defendant should be substantially in this form:

"We, the jury, in consolidated case number 34, the United States against Eugene Logan and others, find the defendants (naming each so found) guilty of the conspiracy as charged in the indictments. And we further find said defendant not guilty of the murder charged in said indictments."

If you find the defendants now on trial, or either of them, guilty both of the conspiracy and of the murder charged in said indictments, the form of your verdict should be, in substance:

"We, the jury, in consolidated case number 34, the United States against Eugene Logan and others, find the defendants or defendant (naming each so found) guilty of the conspiracy as charged in the indictments and of murder in the ——— degree, (naming the first or second degree as you may find it to be,) as charged in the indictments."

You perceive that you may find separate and distinct verdicts as to each of the defendants now on trial. If you acquit the defendants, or either of them, of both charges, your verdict as to such defendants or defendant should be:

"We, the jury, find the defendants (naming each) not guilty."

Verdict: "Guilty of conspiracy, as charged, as to Eugene Logan, Sam Waggoner, and Marion Wallace; not guilty as to others on trial."

SOUTHWESTERN BRUSH ELECTRIC LIGHT & POWER CO. *v.* LOUISIANA ELECTRIC LIGHT CO. *et al.*

(*Circuit Court, E. D. Louisiana.* April 18, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—WHEN DENIED.

A preliminary injunction will not be granted *pendente lite* to restrain an electric light company, which is extensively engaged in the business of lighting the streets and other public and private places in a large city, from using certain patented lamps, when it appears that complainant is insolvent, without any plant or property of any sort, and unable itself to conduct the business of lighting, so that the injunction would greatly inconvenience the public, and seriously injure defendant, which would have to take out the lamps and substitute others, not so well adapted to the purpose, while it would be of no benefit to complainant, which is protected by defendant's ability to respond in damages should the infringement be established at the final hearing.

In Equity.

J. R. Beckwith, *H. L. Lazarus*, and *Kerr & Curtis*, for complainant.

R. S. Taylor and *Farrar*, *Jonas & Kruttschnitt*, for defendants.

Before PARDEE, Circuit Judge, and BILLINGS, District Judge.

PER CURIAM. The complainant has brought suit against the Louisiana Electric Light Company for infringement of patent 219,208, which was granted to Charles F. Brush, September 2, 1879, for certain new and useful improvements in electric lamps; the improvements consisting in a device for burning two pairs of carbons successively in one lamp by automatically transferring the luminous arc from the pair first lighted when burned out to a second and fresh pair. The lamp, with the improvement, is known as the "Double Carbon Lamp," and is in nearly universal use for all-night lighting of streets and public places. A single pair of carbons will last only about seven hours. By the use of the patented improvement light is maintained throughout the night without renewing the carbons, as would otherwise be necessary. The case now comes before the court in a motion for preliminary injunction, and shows