No. 8472

Supreme Court of Illinois

Robert Davis

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vs.

People

State of Illinois }ss
Hardin County }

Pleas before the Honorable Wesley Sloan Judge of the Eleventh Court in and for the County of Hardin and State of Illinois. Wherein James M. Harlan is Clerk and John W. Ralph is Sheriff in the case of the People of the State of Illinois against Robert Davis Indicted for Murder. the following proceedings were had "to wit"

Copy of the Indictment.

The following is a copy of the Indictment"

State of Illinois }ss
Hardin County }

Of the May Term of the Hardin Circuit Court in the year of our Lord One thousand Eight hundred and fifty Seven.

The Grand Jurors Chosen selected and sworn in and for the County of Hardin in the name and by the authority of the people of the State of Illinois upon their oaths present. That Robert Davis late of the County aforesaid not having the fear of God before his Eyes but being moved and seduced by the instigation of the devil. on the fifth day

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2nd of September in the year of our Lord one thousand eight hundred and fifty six with force and arms at the County of Hardin and State of Illinois in and upon one Seth Taylor in the Peace of God and the people of aforesaid then and there being feloniously wilfully and of his malice aforethought did make an assault and the said Robert Davis with a certain large Stick which he the said Robert Davis then and there in both his hands had and held the said Seth Taylor in and upon the head of him the said Seth Taylor then and there unlawfully feloniously wilfully and of his malice aforethought did strike and thrust giving to the said Seth Taylor one mortal wound in and upon the head of him the said Seth Taylor of which said mortal wound the said Seth Taylor from the said fifth day of September in the year aforesaid until the seventh day of the same month of September in the year aforesaid at the County aforesaid and State aforesaid did languish and languishing did live on which said seventh day of September in the year aforesaid the said Seth Taylor at

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the County of Hardin aforesaid and State of Illinois aforesaid of the said mortal wound dide. And so the Jurors aforesaid in the name and by the authority aforesaid upon their oathes aforesaid do say that the said Robert. Davis the said Seth Taylor. in manner and form aforesaid. unlawfully. feloniously wilfully and of his malice aforethought him did kill and murder."

Contray to the form of the Statute in such case made and provided and against the peace and dignity of the People of the State of Illinois.

Thos. H. Smith.
States atty.

Endorsemts on Indictment

Endorsed as follows "to wit"
A True Bill.
Asbury. W. Wright.
Foreman.

Marked Filed"
Filed May 15th 1857
Dan'l. W. Talan. Clk.

Copy of the Capias

The following is a copy of the Capias"

State of Illinois }
Hardin County. }

[947208]

4.

The People of the State of Illinois. to the Sheriff of Pulaski County "Greeting"

WE Command you to take the body of Robert Davis if to be found in your County And him safely keep so that you have him before the Circuit Court on the 1st day of the next term thereof to be commenced and holden at the Court House in Elizabeth town in said County on the 1st Monday of October next. then and there to answer an indictment preferred against him by the Grand Jury of said County for Murder and have of make due return to our said Court as the law directs.

Witness James McFarlan Clerk of our said Court and the Judicial Seal thereof at Elizabeth town this 10th day of June A.D. 1857.

Seal of Court

J. McFarlan, Clk

Endorsed: People &c.
vs
Robert Davis } Capias,

Sylvester Turner.
Called & sworn &
Challenged by
defft.

The following is a Copy of the Bill of Exceptions,

The People of the State of Illinois
vs
Caleb Davis.

State of Illinois,
Hancock County.
In the Circuit Court
of said County,
On an Indictment for Murder.

Be it remembered that on the trial of this Cause, Sylvester Turner was called

6. and sworn. and being examined touching his competency as a juror in this cause. Said. when examined as to whether he would convict a person charged with murder. upon circumstantial evidence, that he would convict ~~convict~~ upon circumstantial evidence if the evidence was strong enough. and the said Turner then supposed a case as follows — That if two men were confined in a room & could not get out and no one could get into them. and after being in there for some time. the door should be opened and one of the men was found dead with every appearance of having been murdered. and the other man being upon his Trial for the Murder. and such was the proof Made. He thought on such evidence he might convict. but said there might even then be a doubt in such a case. for the dead man might have killed himself. and that circumstantial evidence would have to be very strong. Then upon the defendants Counsil asked said Turner what he would do in case of such a doubt. And said Turner. not seeming to understand the question. the defendants Counsil then propounded to said Turner the following question "Suppose you should see

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sworn upon this Jury & the evidence should see of such a character as to lead you to believe as a man. that the defendant was guilty. or such as that a by stander would believe he was guilty. Ich you as a sworn Juror. in sifting over the whole Evidence should find a reasonable doubt as to whither the defendant was actually guilty. would you give him the benefit of such a doubt. and turn him loose." To which question the said Turner answered" I dont think I would" And thereupon the question of the competency of said Turner as a Juror in this cause was submitted for decision and the Court to the Court, believing that the Juror did not understand the full import of the question. decided that the said Turner was competent to sit as a Juror in this cause. And the said defendant by his counsel then & there excepted to the opinion of the Court in decideing the said Turner competent to sit as a Juror in this cause — and thereupon the said defendant by his counsel peremptorily challenged the said Turner And he was set aside —.

John Miller. a Juror. Excepted too.

And also came John Miller. and was sworn. and being Examined touching his competency as Juror herein stated that he was Sixty two years of age. The Court

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Thereupon informed the said Miller that he was at liberty to serve or not upon the Jury. that being over Sixty years of age he was not compelled to serve on a Jury". And the said Miller said that he had no objections to serving upon the jury. The Court thereupon decided the said Miller to be competent to sit as a juror in this cause. and the prosecuting attorney then tendered said Miller to the counsil for the defence to be challanged or accepted. And the Counsil for the defence thereupon accepted said Miller as a juror the said defendants being present and aiding & assisting his counsil in so doing or to try this cause. and he. said Miller, was accordingly sworn upon the jury herein. Twelve jurors. of whom said John Miller was one. being now sworn,

Evidence of Saml. Lyons.

Samuel Lyons a witness on behalf of the Prosecution. being called and duly sworn. Stated as follows.

That Thomas Austin Lon Norris Taylor. William Davidson. & Bob Davis. were comming from Caseyville or Ballen Rock. and got opposite to the Ballen Rock School House. When the Bottom of Waggon bed got loose & Taylor stopped and requested me to fix the Sacks & Waggon Bottom

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& while I was in the waggon fixing the Sacks & bottom. Bob Davis came up behind the waggon & said he was going to ride. Taylor told him that he could not ride. that the Oxen were give out. and Bob repeated that he was going to ride. Taylor told him that he could not [illegible] him ride & that if he got in he would be under obligations to help him out" Bob then said I will whip you. you damned old Son of a bitch. and Bob then picked up a Stick and Struck Taylor with the stick on the right side of the head, Taylor then pickud up something I thought it was his handkerchief & drove on about half a mile." From the crak and then gave up the team to Tom Gusten & walkud to Halls. Taylor drove between a quarter & half a mile from the place Bob Struck him & then walkud behind the waggo n "He made right smart fuss" He rode two hundred yards. and then got out and walkud. He wantud to go into the Mormy Meeting House. Tom Gusten took him to Halls. I saw him the next day and he was trying to get breath. I observed him on the bed he never moved hand or foot after I was there. & he did not Speak a word" It was last September a year ago in the forepart of the month. He was

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in Hardin County Ills & this defendant is the one who Struck Taylor." (The States atty wished Syms to repeat the Matter)

Sand Syms repeats at States attys request

Lon Norris Tom Gusten Bob Davis Billy Dovidson. Taylor and myself. was comming out from Caseyville the bottom of the waggon became loose & Taylor wanted me to help him fix it. & got in the waggon, & Bob Davis said he was going to ride - Taylor ~~Taylor~~ said that if he got in. that he. I. would have to help him out. Bob Davis said that he would see god damned if he would and Wh- ip the old Son of a bitch. & picked up a stick and came up and Struck Taylor with it. He Struck him a violent blow. I was in the waggon & told Norris not to let Bob Strike Taylor, but Bob knocked him down. Taylor got up and put his hat on and drive the Team ½ mile. The Stick was 4 or 6 feet long and the Size of my Risk 2½ inches. an oak limb: White oak: Bob came home with us. Bob Struck or- ehanded thib Taylor on the right hand side of his head about an inch above the eye. It was a Sound Stick I put my foot on it & tried to break it. but it would not break. Bob said he would

gave him a whipping the damned old
son of a bitch. That is all I know.

Saml Lyons Cross Examind by Defts

Mr Lyons was then Crossexamined by Defts atty.

Morris, Taylor, Davidson, Myself & Bob, had been to Caseyville. We went in the forepart of the day. the Stears gave out & we got over to Caseyville about middle of the afternoon. We came over the river in Richard McConnells Skiff Mr McConnells Boys went over with us. I do not know which end of the Skiff I sat. We all came over together. Taylor didnt go over the river. we did not all start together: some were measuring potatoes The waggon was half a mile ahead & Davis & Davidson were with the waggon & I came up afterwards. the School house is about one mile from the river & some four or five miles from Mr Halls. I was in the waggon when Bob struck Taylor. & Taylor was standing by the oxen & Bob was behind the waggon when he went to get in. but afterwards came along by the hind Wheel. Tom Austin & Billy Davidson were just under the hill coming up* & I was standing in the waggon

* Bob came up by the waggon close to hind wheel. Taylor was standing by the oxen, near the shoulders when Bob came up

ah the back end. and Bob. head just pass
ed the middle of the hind Wheel" Bob Struck
Taylor overhanded. the Stick was drawn
up over the right Shoulder back of
the head. I do not know whither it was
slightly back of the head or not. The wound
looked like a Mashed or bruised Spot. It
was Black below the eye. Bob was
walking up & Taylor was Standing
Still & facing Bob exactly ah the time
the blow was Struck. Mr Norris could
not have been further away from the
parties than from you to me. they were
all on the right of the waggon and near
together. Mr Norris was about two or
three Steps from Bob & back of the
waggon. Norris was looking ah them
ah the time. Taylor stood in back of Bob
ah the same time. I jumped over the
side of the waggon & caught the Stick.
I was Standing about the middle of the
waggon, and Taylor stood about as
far from Bob as the oxen's Shoulders to
the middle of the waggon" The Stick was
a limb that had fallen off of a tree
& was the same thickness all the way. without
any knots or limbs on it. I cannot
tell where the Stick struck. Taylor. Taylor

fell on his hands and knees. He pitched down hill when he fell. The School house stands up the hill path way 200 yards from the brow of the hill. Taylor got up immediately. I think he start down until I got out of the waggon and caught the stick & jerked it out of Bob's hands. I caught the stick with both hands. I hit down close to Bob & caught the stick between his hands. I do not know whether he could have struck him again or not. Taylor stood by the oxen & said he would be under obligations to help him out of the waggon. When Bob picked up the stick and went towards Taylor (the Taylor) said "Bob! don't strike me with that stick."

I start there until Tom Gustin & Davidson came up & took the stick with my foot" I did not leave the stick there. It was two to four minutes before Gustin & Davidson came up. Taylor drove on and Bob got into the waggon & rode.

Taylor & Gustin came along where I was at work & wanted me to go to Caseyville with them. My little Boy was with me & I took him home & then went along. & Bob & Davidson caught

up with us. Bob was at Mr Lackeys & came out & went with me.

I cared not have reached Bob from where I stood. He drew the stick up again.

Bob struck Taylor no matter where he struck him!

2nd day.

Well sir!. When I got up into the waggon to fix the Bottom Taylor stood by the oxen And Bob said he was going to ride. Taylor said that if he Bob got into ride. He would have to help him out. Bob then got the stick & said "god damned old Son of a bitch. I will give you a whipping" At that time we were nearly opposite to the School house. I never measured the distance. But think it is a mile to the river" I was not drunk. nor was there any whisky along to my knowledge. I have nothing against Bob Davis. I cannot say that I want him punished" I might have told John Mason & Wm Hensley that I wanted Bob hung. Hensley was there might before last. Mason was there at the same time I think. I never said to Mason or Hensley that if Bob was cleared I would kill three or four & leave the country.

I said ah Amariah Justus.—
the night after the difficulty. I dident
see Mrs Lackey the night of the diffic-
ulty: nor did I say ah any time that
I wished I had not told Bob to
strike Taylor.

Probibly we stopped at Lackeys
to get a drink of water that night.
I have no knowledge of seeing either
Mrs or Miss Lackey that night.

Morris was with me at Lackeys.
I do not think I spoke to Mrs Lackey
that night. I never said to any per-
son or any where that I could have
stopped the kicks by raising my—
hand. I had nothing against
Taylor. I have seen persons I liked
better. I never told any person
that I owed borrow 5$ or 10$ of
Eliza Mason for Bob to leave with +
that Bob must go away from this
Country. I never told Bob to leave
When he was at Mr Lackeys.

I did not do anything with the
kicks at the time the fuss happened
but I took it to John Rickets's
a day or two afterwards. It was
not cut off at either end. And was

an oak Stick. It was close to the track. I threw it down where I found it. The bark was mostly off of the stick. Austin & Davison were coming up the road & I was standing there alone. I stood there till they came up.

I do not know whether Sam Crider said the Shots or not. He might have seen ~~the Shots~~ it. I said nothing to Norris about how to swear" & that if he did not swear Struck out I would have to leave the country.

I have had no conversation with Norris about the case. He knows as much about it as I did. I have seen frequently at his house since it occurred. But have not spoken to him about it since Court commenced. As to the coat. I saw Bob have a coat on his arm on the Wharf boat at Caseyville. & Bob didn't have the coat when he went from home. I might have been with Norris the next day. I was not with Norris at Lackey's.

I never said that I must swear the warrant out & to save myself.

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Norris & Myself both swore the writ out against Bob. I told Norris he had better go down and swear out the writ". the Esqr wanted him to".

I never told Mr Norris that he must go and swear the writ out.

We never met there" that is all the questions" I went there first and he afterwards. I did not see Norris."

It was an hour in the night when we got to Hall's. Bob got in the waggon with me when I got in to take Taylor to Hall's.

Taylor rode two or three hundred yards between Robert Sheroden & the creek. I walked the rest of the way. It was an oak limb and not a black jack that Bob used on Taylor. Taylor walked behind the waggon all of the time after the difficulty. And was not ahead of the waggon of Robert Sherodens.

I cannot say that I was not hostile towards Taylor.

I never said at Jackson that if Bob had not struck Taylor that in my opinion Taylor would have killed Bob.

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I never told the Old Lady that Taylor Struck Bob on the Shoulder. I was not at Mr Davis's the next morning & did not see the Old Lady or Bob there.

I never spoke to Norris about the Stick at any time. I am frequently at Norrises! I have not been at Norrises since Court!

I never had anything against Bob in my life.

Sand. Lyons. Recalled by Prosecuting Atty.

Re examination by Pros[r]

As I said, the Waggon bottom got loose & the Slats were about falling through & I got up to fix them &c.

Bob Struck with both hands. The wound was on the right side of the head! and was not cut any. The eye was very black & swolen: I was at Hall's & that was the appearance of the wound at the time Taylor died.

I was acquainted with both parties at the time. Taylor was stouter than Bob. I do Should think that Bob was as stout as common young men in good health. He

had the agree!

Evidence of Thos. Griffin.

The next witness offered by the State was Thomas Griffin who stated as follows: "Tomb"

I do not mind all that occured during the trip to Cassville" but the persons that were mentioned by Mr Lyons" were all the party. And as I came up with those that had gone along I saw Taylor & Bob going along, Taylor driving. It was done 20 yards from the school house when I came up with them. Taylor drove about ½ mile, and at last I went to Geo H. all's with him. He rode about a fourth of a mile" Taylor was bad off. He complained very much. I took him to the door of Mr Hall's and left him. he dident talk any along the road, at the summer meeting house, he would sometimes kneel down on the ground & groan & put his head on the ground and groan & moan. & then get up and make a few steps and kneel down again. & seemed in considerable pain. He had a wound over his

right Eye. I dident See it that night but on the next morning it looked like a bruse. I did not Examine it at all. I was at Mr Hall's when Dayler died. And helped bury him which was about 12 o'clock next day.

The scar was 1 inch above the right Eye" I left Dayler with Hall Bob Davis went home with the rest of us. There was not much difference between Bob & Dayler in point of Strength. Dayler was 45 years old. was a large man but his age had not lessened his strength."

I Came with Billy Dawson from the river. I do not know whither the wound bled or not" He bled out of his ears when he died not much however. & no blood came out of his nose or eyes. I did not see the Stroke. It was a common two horse waggon with a Shackely bed that we had along that day. The oxen were four & five years old.

I know of nothing more. I left Dayler in the care of Mr Hall till Monday. He is four miles from the School House to Mr Halls. There is one School

& one Meetinghouse on the road.

I wanted Bob to go for the Dr as he was riding by the next morning, & he said he couldn't go". Bob never said anything about Saylor. It was 8 or 9 o'clock next morning when I went to Halls. I went in and found him almost dead. I went for Dr Dunn & he drew only 5 or 6 breaths after I got back" He died easy." Sam Lyons, Dr Dunn, Josiah Gustin & Mr Halls family were there when he Saylor died.

Cross Examination by Defts.

Cross Examination of Gustin by Defts Counsel

It was 40 or 50 yards of the Schoolhouse where I overtook the waggon "that is on the otherside next to the river". Lyons was there with the rest Bob & Saylor with the waggon & Morris Lyons a little behind say 10 or 15 steps behind the waggon. The last two stood talking to George Lacy. Saylor was by the team. Bob was behind the waggon. Saylor drove to the Creek & then I drove to Sherodens. It is 1/2 or 3/4 of a mile from the Schoolhouse to the Creek. Saylor went a head of us and we caught up with him at Robert Sherods (ens)

(647-10)

He was sitting on a sled by the side of the road. Taylor got in and rode a little ways this side of Sherrods than Lyons drove the team!

I cannot say what time of night it was when we got to Hall's It was after sundown when we were at the school House. When I came up with the waggon we all went on & George Lacy went the other way.

It is about ½ mile from Hall's to where Bob Davis lives. on the direct road to Mr Gustins. It is 5 miles to the river from Hall's.

All went over together and came back together from Caseyville"

Lyons did not have a stick in his hand when Davison & myself came at the schoolhouse. It was for by or fifty yards the otherside of the schoolhouse "river side" Lyons. Davis & Lacy were standing there & had no stick. Taylor drove to the creek then I drove a little ways & then Lyons drove. Bob Davis got in the waggon at the creek. He dident say anything. Taylor & Bob did not speak.

Mr Lackey lives ¼ of a mile this side

of Mr Halls We all Stopped at Lackys to get a drink & Some words passed. the Well is at the End of the House. I forget Whither the party went in the house or not. or whither there was much conversation between the Co. & Lackys Family. Mr Lacky came to the door. I saw Mr Lacky but do not remember of seeing the women folks."

Bob Davis was going by Halls & I asked to go for the Dr. He said he dident like to go.

Bob Davis was in the waggon when we got to Lackys "He was a sleep." I do not know whither we got the water or not. I never touched the wound on Taylors head. Taylor died on Saturday.

Cr Cross Examination by Prostn

Re Examined by Prosecution. Sam Lyons was driving the team when we found Taylor Sitting on the sled. Taylor went ahead of the waggon most of the way.

I am satisfied that the waggon was 40 or 50 yards the other side

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of the School House. When we over
=took him.

Geo Hall's Evidence

The next witness for the State was Mr Geo Hall. Who stated as follows ——

It was nine o'clock in the night when Mr Thomas Gusten and Taylor came to my house. & Taylor wanted to stay all night." He was back for about an hour & then got easy" He was in deep position & quite restless. I could hardly keep him in bed. the 1st time.

I did not discover any bruise at all. I did not examine his head. I saw no bruise. his face was very red. no Dr was comon ent to get that night. He died at 12 o'clock the next day. and we buried him the following day which was sunday." He only spoke one word" I cannot say whether he was in pain or not. While he would exhaust his strength he felt easy or acted so. I could not get any thing out of him. I could not arouse him after he got easy.

25.

I thought he was asleep. He came in with hat in hand and fell into the bed and never got out again.

I was not acquainted with Mr Taylor. I knew the man when I saw him. I partially knew Bob Davis. I knew him when I saw him.

Not Cross Examined by Defts

The State's attorney then offered as expert or medical witness Dr. S. F. Young, who stated as follows.

I have practiced for five years or more. I heard the description of the wound by the witnesses. Gentlemen of the jury, two of the witnesses who testified, said that they saw the wound, but the other who had been with Mr. Taylor all night, said that he examined his head and discovered no wound or bruise at all. I could not say professionally that the blow caused his death. I cannot say professionally, from the evidence, that I think the lick from Bob Davis caused the death of Mr. Taylor, nor can I say that I believe, as a professional man that the blow caused his death.

Dr. Dunn was examined.

I was at Hall's when Taylor died. I did not hear all of the evidence. I have practiced for thirty years or more. It was a lacerated wound. If the jury do not understand what that means – it was a lacerated or bruised wound, and might have been done with a brickbat, or rough substance – it was on the left side of his head. I did not examine it – do not

know the extent of the same, do not know that he died from the effects of the wound.

Sam. Rider's Evidence.

The defence then offered the following testimony as impeaching witnesses.

Samuel Crider stated that Sam. Lyons brought a stick to his house a few days after he had heard of Taylor's death, say two or three days after, and had a stick with him, and asked him if he wanted to see the stick that Taylor was killed with. The stick was a black jack, between six & eight feet long, cut off at each end, and had a considerable knot on it - the bark was off in places, it was three inches at the largest end and two inches at the small end, as near as I can recollect.

Cross-examination by States' atty.

It was two or three days after the death of Mr. Taylor, I heard of Taylor's death. I have seen the timber around the school house a great many times, and do not think there were any black jacks around there that was large - I have traveled the road an hundred times - I lived close to the school house for several years - the timber is very thin close to the school house.

Jane Lackey's Evidence.

Miss Jane Lackey being sworn stated in behalf of the defence, that she heard about the time that Taylor died. She heard Samuel Lyons say that he wished he had never told Bob to strike Taylor, and that he, Lyons, could have stoped the blow by raising his arm. He, Lyons, told Bob, that he, Bob, the defendant, must leave the country and that he, Lyons, could borrow the money of Elijah Mason, for him, Bob, to leave with. Bob told Lyons that he had nothing to leave for, and should'nt leave. He seemed to be very anxious about Bob leaving, but did not say what for. Lyons said that Taylor struck Bob on the shoulder, or something like it. Lyons said he only swore the writ out to save himself.

Cross examination by prosecution.

It was the next day after the difficulty was said to have happened between defendant and Taylor, the deceased, that Lyons was at Mr. Lackey's and at old Mr. Davis'. Bob had left that morning or forenoon when Lyons was at Mr. Lackey's, but was at home (old Mr. Davis') at the same time that Lyons was there, when Lyons came there and told him that he must leave, and Bob, the

defendant, told him that he had done nothing to leave for, and that he should not leave. Mr. Lyons did not say to us that he would have stopped the lick, if he had not thought Norris would have done so. This conversation at Lackey's took place while Lyons stood on the outside of the fence and the women on the inside of the yard fence.

Mary J. Davis's Evidence

The next witness for defence - Mrs. Mary Jane Davis, stated that she was at Mr. Lackey's when Lyons said that he was sorry that he, Lyons, told Bob to strike Taylor. I heard Mr. Lyons say that — and that he or Mr. Norris could have stopped the lick — he, by raising his hand, and Norris, by risking the fiddle which he had in his hands, and which belonged to Bob.

Cr's - Examination

This conversation took place in the house at Lackey's.

Arch. Lackey's Evidence.

Mr. Archibald Lackey being called and sworn, stated in behalf of defendant, that he, in company with Mr. Norris, went to Caseyville early next morning after the difficulty between defendant and Taylor, and when they got near the school house, Norris

said that was the place the fuss took place, and they looked along the road for the stick and could find none at all of any size - there was no stick to be seen there.

Cross-examination.

I do not remember of seeing any black jack tree around the school house - there might have been one, but do not believe there was: we did not stop to look, but looked as we walked along the road.

Jno. Mason's Evidence.

John Mason was then called & being sworn, stated that he was at Dr. Ledbetter's night before last - Mr. Lyons was there - I heard Lyons say, that if Bob Davis was cleared he intended to kill three or four and leave this country - he spoke of going to Ohio or Indiana where he had lived before - I think Sam Lyons had been drinking - I was not drinking, nor drunk - I believe Mr. Hensley was there that night.

Wm H Ensley's Evidence.

Wm Hensley being called and sworn, stated, that he was at Dr. Ledbetters one night this week and saw Mr. John Mason there, and also Lyons - heard Sam Lyons say that if Bob Davis was cleared, a man

might kill as many as he pleased – did not hear him say that he would kill any one and leave the country – he might have said so to Mason.

Nancy Davis' Evidence.

Mrs. Nancy Davis called and being sworn, stated, that she was the mother of Robert Davis, the defendant, and that on the next day after the difficulty happened, ~~Sparks~~ Mr. Lyons came to their house and told Bob, the defendant, that he must leave the country – that he, Lyons, could borrow five or ten dollars of Elijah Mason for him to leave with – He further said that Bob went to get into the waggon and that Taylor pushed him away – that Bob tried the second time to get into the waggon and that Taylor struck Bob on the shoulder and then Bob got the stick and struck him, Taylor. I suppose the girls have told you all the rest that Lyons said, I have got a chill on me now – we have talked the matter over in the family

S. F. Young's Evidence.

Stephen F. Young stated that he had known Lyons for several years, and that his general character for truth & veracity was bad, and had been for a long time,

but said witness being asked whether he would believe Lyons on oath, said he could not say that he would not believe him on oath.

Cross-examination.

I do not think I am generally acquainted in the neighborhood Lyons lives at this time – he has just recently moved to this new neighborhood – I cannot say whether I would take him on oath or not – owing to circumstances.

Counsel for defendant asked Commodor Miller, a witness, if Lyons had not proposed to swear in a certain suit between witness and John Mitchell, any thing that he, Miller, wanted him to – that he disliked Mitchell and wanted to see him beat – to the answering of which question the prosecuting attorney objected, and the Court then and there sustained the said objection so made, to which opinion of the court in not allowing the said witness to answer the said question so propounded by the defendants counsel, and in sustaining the said objection so made by the prosecuting attorney, the defendant then and there excepted —

The prosecution then offered witnesses as rebutting testimony.

E. C. Wingate's Evidence. E. C. Wingate being called and sworn stated that he lived close to Mr. Lyons and was somewhat acquainted with him. that Lyon's character in the neighborhood was tolerably good, so far as he knew- witness lives in sight of Lyon's residence.

Dan'l Hall's Evidence. Daniel Hall stated that he had dealings with Lyons - lived 2 or 3 miles from Lyons. and was acquainted in the neighborhood - thought that Lyon's character was good in the neighborhood, for truth and veracity -

Jas. Ralph. James Ralph did not know any thing about his character,

D. Oldham. Daniel Oldham stated that he lived in the neighborhood of Lyons, and knew Lyons - but that he could not say any- thing about his character.

This was all the Evidence introduced in this cause by the People or the defendant.

The evidence in the cause being closed the Prosecuting atty. asked the Court to give to the Jury, on behalf of the prosecution, the following twelve instructions - to wit;

1st Instruction for Prosecution.

1. The Court instructs the jury that murder is the unlawful killing of a human being in the peace of the people, with malice aforethought either express or implied -

2nd 2. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof -

3rd 3. Implied malice is where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart.

4th 4. The court further instructs you that if you believe from the evidence that the defendant killed the deceased in manner and form as charged in the indictment, you should find him guilty of murder -

5th 5 If you believe from the Evidence that the defendant killed the deceased by striking him on the head with a stick, that the size of the stick was such, that (in the hands of a man of ordinary strength striking a violent blow with it on the

head) it was a dangerous weapon, and that the necessary consequence of the blow struck by the defendant with such a stick upon the head of deceased was to destroy his life, and that his death was caused by such blow, you should find defendant guilty of murder.

6th 6. If you believe from the evidence that defendant killed deceased by striking him on the head with a stick as charged in the indictment you should find him guilty of murder. Given.

7th 7. If you believe from the evidence that the defendant killed the deceased with a stick, but when he struck the blow, if the evidence satisfies your mind that it was not his intention to kill him but only to chastise him, you should find him guilty of manslaughter, and fix his time of confinement in the penetentiary for any period not exceeding eight years.

Given

8th 8. Before you convict for either murder or manslaughter, you must be satisfied from the evidence that deceased's death was occasioned by the blow on his head struck by defendant: you are to judge from the whole evidence - and if your minds are

satisfied beyond a reasonable doubt that the death of deceased resulted from such blow, you should find him guilty.

Given.

9th 9. But if you entertain a reasonable doubt as to whether the death of deceased resulted from the stroke given him by defendant; you should find him not guilty.

Given -

10th 10. If you believe from the evidence that the stick in question was a large one and that the necessary consequence of a violent blow with it on the head by a man of ordinary strength, would be to destroy human life, the law regards such a stick, when used in striking a fellow creature, as a deadly weapon - and if you further believe from the evidence that defendant struck deceased with such a stick, upon the head, and thereby caused his death, he is guilty of murder -

Given -

11th 11. The court further instructs you that although you may believe that the character of Lyons, one of the prosecuting witnesses, has been impeached to a greater or less extent, yet if you believe he has sworn the truth in the material parts

of his evidence, you are not bound to throw his evidence aside because it may not be corroborated in some particulars of minor importance — If you believe his evidence in the material parts of it to be true, and from the whole evidence if you believe the defendant is guilty of murder or manslaughter, you should find accordingly -

Given -

12th 12. If the jury believe from the evidence that the defendant struck the deceased with a stick - and that the said stick was a large one, and that its necessary consequence in the hands of an ordinary man, when striking a human creature upon the head with it, would be to destroy human life, the law considers such a stick to be a deadly weapon. Therefore, if you believe from the Evidence that the defendant struck the deceased with such a stick on the head - that the violence of the blow knocked him down and produced insensibility, speechlessness and other symptoms of a fatal character, and that suffering great agony, he died, within the space of ~~from~~ 20 hours or thereabouts after the wound was given, these are all circumstances which you should take into consideration in coming to a conclusion as to whether the blow occasioned

the death of deceased - Given.

And then and there the Counsel for the defendant objected to the giving of the said instructions which are numbered five, six, seven, eight, ten, Eleven and twelve, and the Court overruled the said defendant's objections to the said several instructions so objected to as aforesaid — and the Court thereupon gave all of the said twelve instructions to the jury - to which opinion of the Court in overruling his said objections to the said several instructions numbered five, six, seven, eight, ten, eleven and twelve - and in giving each and every of the said last-mentioned instructions as aforesaid to the jury, the said defendant by his Counsel then and there excepted.

The defendant then and there asked the Court to give the following instructions on his behalf to the jury - to wit -

1st Instruction for dft -

The Court instructs the jury for the defendant that unless the prosecution has proven every material allegation in the indictment, they must acquit the defendant.

Given -

2nd 2. The material allegations in the indictment are

1st that the defendant inflicted a blow upon the deceased -

2nd That Seth Taylor is dead -

3rd That the blow inflicted by the defendant caused such death.

4th That the killing was done with malice aforethought -

5th That the killing was done in this county.

If the prosecution has failed to prove any one of those allegations the defendant must be acquitted upon the charge of murder - Given -

3rd 3. If the prosecution has failed to prove by evidence, that the blow given by the defendant was the cause of Taylor's death, the defendant cannot be convicted even of manslaughter, but must be entirely acquitted - Given.

4th 4. The evidence must show that the death was caused by the particular blow described and proved, and if that is not proven beyond a reasonable doubt, the jury must acquit the defendant both of murder and manslaughter - "American Law of Homicide" page 262 - Wharton's American Criminal Law page 425 - Given -

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5th 5. although it is true that the jury are to determine, from the Evidence, whether the blow charged to have been given by the defendant was the cause of Taylor's death - yet, it is by medical testimony alone that the agency of the alleged violence, as a cause of death, is to be determined. That is, in determining whether Taylor's death was caused by the blow alleged, the jury must look alone to the evidence given by the physicians, and unless it is proven by such Evidence that Taylor's death was caused by the blow alleged, the jury must find the defendant not guilty. Whartons Medical jurisprudence § 1140.

Refused.

6th 6. If the jury have a reasonable doubt, upon the evidence, as to the defendant's guilt, they must find him not guilty.

Given -

7th 7. If the jury, in considering what credit they will give to the testimony of Samuel Lyons, have a reasonable doubt as to whether the defendant struck Taylor at all, they must find the defendant not guilty.

Given -

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8th 8. The jury are to judge from all the evidence what credit they will give to the testimony of Lyons, and in determining what credit is due to his testimony, they should look to his feelings and interest in the case, and to his contradictory statements, and to the facts as sworn to by him, being different from the statements made by him to others, if any such are shown by the evidence - Given.

9th 9. The jury should not convict the defendant upon suppositions or probabilities, but if they convict at all it must be upon the proof - and if the jury have a reasonable doubt, upon the proofs, whether the blow charged was the actual cause of Taylor's death, they must find the defendant not guilty - Given -

10th 10. It devolves upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt, before he can be convicted, - it does not devolve upon the defendant to prove his innocense - for the law presumes every man to be innocent, until he is proven guilty beyond a reasonable doubt - and if this is not done, the jury must acquit him - Given

11th 11. The Court further instructs the jury for the defendant that if they believe from the evidence that Lyons has wilfully sworn falsely as to any one fact, they are at liberty to throw aside his evidence entirely – unless you believe he swore the truth as to the material parts of his evidence.

12th 12. The Court further instructs the jury for the defendant that the opinions of physicians as to a cause of death are entitled to great weight – and if the physicians refused to give it as their opinion that Taylor's death was caused by the blow charged, such refusal should be attentively considered by the jury –

13th 13. The jury are not to consider whether the Court has the power to set aside their verdict – Given

In this case the jury cannot weigh the evidence – Given –

And the Court gave all of the instructions so asked for by the said defendant except instruction numbered five, which the Court wholly refused to give – and except also instruction numbered twelve, which

the Court refused to give as asked by the defendant, and above set forth, but modified the same by adding the following words - to wit:

"unless the refusal was in consequence of the meagre and imperfect description of the wound as given by the witnesses"

then the Court gave the said instruction numbered 12 so modified as aforesaid to the jury - to which said opining of the Court in refusing to give the said instruction numbered five, to the jury - and in refusing to give the said instruction numbered 12 as asked for by the defendant - and in giving the said instruction numbered 12 modified as aforesaid to the jury - the said defendant then and there excepted -

After which the Jury retired to consider their verdict - and after deliberation returned into Court the following verdict - to wit -

We the Jury find the defendant guilty of manslaughter & fix the time of his confinement in the penitentiary for seven years. for to be confined in the State prison for the said term of seven years.

Thomas H. Mace, Foreman.

And thereupon, the said defendant by his counsel enters a motion for a new trial and in arrest of judgment herein which said motion was based upon the following grounds - to wit-

Grounds for New trial.

1st Because the verdict was contrary to law-

2nd Because the verdict was contrary to Evidence -

3rd Because the Court erred in deciding Sylvester Turner to be a competent juror in this cause.

4th Because the Court erred in deciding that John Miller was a competent juror and allowing him to sit as such.

5th Because the Court erred in giving to the Jury on behalf of the prosecution, instructions numbered 5, 6, 7, 8, 10, 11 & 12 respectively-

6th Because the Court erred in refusing to give instruction number 5 for the defendant-

7th Because the Court erred in refusing to give instruction number 12 as asked for by the deft: and in giving to the jury the said instruction number 12 as modified by the Court:

8th Because a portion of the jurors acted improperly and irregularly in drinking spirituous liquors in company with persons not belonging to said jury at a public

grocery, after they, the said jurors had been sworn upon this case.

9th Because it is uncertain from the face of the indictment whether deceased, Taylor, died in the year 1856, or in the year 1857.

And at the time of the giving to the Court the said grounds for a new trial and in arrest of judgment the said defendant filed the following affidavit—

Affidavit of Defl.

Robert Davis
at
The People of
the State of Illinois

In the Hardin Circuit Court Illinois.
On indictment for murder—

Robert Davis, the said defl. states upon oath that during the present term of said Court, after several of the jurors in the above entitled cause were sworn upon the jury in this case, and before the entire panel of twelve jurors was sworn, those of said jury who had been thus sworn were in company with other persons who were not sworn upon said jury, in the grocery of James Ralph in the town of Elizabethtown in said County of Hardin — and then and there the said jurors thus sworn as aforesaid, drank

spirituous liquors in company with other persons who were not sworn upon said jury, as this affiant is informed and verily believes

Sworn to & signed before me this 17 Oct 1857
Jas McFarlan clk

Robert A Davis

Upon which said affidavit is the following endorsement - to wit -
"Filed October 17th 1857 -
"Jas McFarlan clk"

and the court overruled the said motion for a new trial and in arrest of judgment and entered the following judgment and sentence - to wit -

The People of the State of Illinois, as Indicted for Murder, Caleb, David, } Plaintiff - Defendant

And on this day came the said People by Smith their attorney as well also the said Defendant in his own proper person and by Allen, Turner & Freeman his attornies. And for plea says that he is not guilty in manner and form as charged in the Indictment,

Issue being Joined, Whereupon came a Jury
thereupon Came a Jury to wit
Jefferson Hobbs 1. Lyman Foster 2
Green Gibbs 3. Joseph Norgill 4.
Thomas Williams 5. Riley Norgill 6.
Ford Hammons 7. John Miller 8.
John Lindsey 9. Alex Rayan 10.
Thos. H. Reaves 11. Horace Foster 12.
Who being Chosen selected & sworn.
the truth to Speak upon the Issue joined
upon their oaths do say. We the Jury
do find the Defendant guilty of
Manslaughter. And fix the time of
his Confinement in the Pen-
itentiary of this State at Seven years.
It is therefore Ordered by the
Court that the said defendant be and
he is hereby sentenced in accordance
with said verdict. with one months of
which time to be Solitary Confinement.
And it is further ordered by
the Court that the said Plaintiffs recover
of the said Defendant all their
Costs & Charges in and about this
said Cause in that behalf Expended
And the said defendant in
Mercy &c.

To which opinion of the Court in overruling the said motion for a new trial and in arrest of judgment and in entering the judgment and sentence aforesaid the said defendant then and there by his counsel excepted, and the said defendant prays that this his bill of Exceptions may be signed and sealed by the Court and made a part of the record which is accordingly done at the same time in open Court.

Signed and sealed by me

Wesley Sloan. (Seal)

State of Illinois }
Hardin County } ss. I, James McFarlan, clerk of the Circuit Court in and for said County do hereby certify that the foregoing forty Eight pages constitute and comprise a full, true, perfect and complete Copy and record of all the proceedings had in the cause therein named, wherein The People of the State of Illinois were plaintiffs and Robert Davis was defendant as appears by the records and files of my office.

Given under my hand and the Seal of said Court at Elizabethtown this 11th day of November 1857.

James McFarlan clerk
Circuit Court.

[84472-24]

State of Illinois, }
Hardin County. } ss

I James McFarlan Clerk of the circuit court in & for said County of Hardin do hereby certify that the following interlineations made on the different pages of the foregoing record were made before the Executing & Signing of the same "towit" on the 2nd Page & 9th line the word "that".

"	"	"	"	"	23	"	"	"	"Same".
"	"	7th	"	"	1st	"	"	"	"Should"
"	"	"	"	"	14th	"	"	words	For decision of the court.
"	"	"	"	"	18	"	"	"	by his counsel".
"	"	8th	"	"	3	"	"	"	"over."
"	"	"			8	"		"	"as a Juror."
"	"	"	"	"	14	"	"	"	The said defendant

being present and aiding & assisting his counsel in selecting a Jury on Page 9th - 4th line words. "told"

"	"	"	12	"	"	"with the stick on the right side of the head"
"	"	"	23	"	"	"He" } (on the margin).
"	"	10	11	"	"	"that" }
"	"	"	1/2	"	"	"But" } last line of the
"	"	"		"	"	"which" }
	"	11	27th	"		words." Bob came up by the waggon

Close behind wheel. Taylor was standing by the oxen near the shoulders when Bob came up!

on	12	Page	26 line	words		"Same".
"	13	"	6	"	"	"of the waggon"
"	13	"	17	"	"	"there"
"	14	"	18	"	"	"along"

In Witness whereof I have set my hand & seal of office at Elizabethtown this 11th day of Nov 1857.

James McFarlan
Circuit Clerk

State of Illinois

Robert Davis, Plff. in Error — In the Supreme Court — 1st Grand Division — No. Nov. Term 1857

vs.

The People of the State of Illinois — Defts in Error

The said Plaintiff in Error, comes by N. L. Freeman, his attorney, and says there is manifest error in the record and proceedings in this cause, and assigns for Error the following —

1st The Court below erred in refusing to grant a new trial herein, and to arrest the judgment —

2nd Because the verdict was contrary to law.

3rd Because the verdict was contrary to Evidence.

4th Because the Court erred in deciding Sylvester Turner to be a competent juror in this cause.

5th Because the Court erred in deciding that John Miller was a competent juror, and allowing him to sit as such.

6th Because the Court erred in giving to the jury on behalf of the prosecution.

(8472-25)

instructions numbered 5- 6- 7- 8- 10- 11 and 12, respectively.

7th Because the Court erred in refusing to give instruction number 5 for defendant below.

8th Because the Court erred in refusing to give instruction number 12 as asked for by the defendant below, and in giving said instruction as modified by the Court.

9th Because a portion of the jurors acted improperly and irregularly in drinking spirituous liquors in company with persons not belonging to the jury, at a public grocery, after such jurors had been sworn.

10th Because it is uncertain from the face of the indictment whether the deceased died in the year 1856, or in the year 1857.

11th The Court erred in refusing to allow Commodore Miller to answer the question propounded to him.

Wherefore the said plaintiff in error prays that the said judgment may be reversed &c.

A. L. Freeman atty for plff in Error

Sinder in Error

J. S. Robinson

State Attorney

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Robert Davis

vs.

The People of the
State of Illinois

Filed 27. Nov. 1857.
N. Johnston Clk

Paid $5.00. by
N. L. Kennedy
Prepaid

State of Illinois - In the Supreme Court -
1st Grand Division - Nov. Term 1857

Robert Davis
vs.
The People of the
State of Illinois

} Error to Hardin -

} Brief of Plff. in Error -

The 4th assignment of Error questions the propriety of the ruling of the Court below in deciding Sylvester Turner to be a competent juror, and thus compelling the defendant to challenge him. Turner, upon his examination said that he would not acquit the defendant upon a reasonable doubt as to his guilt.

The law is clear that if there be a reasonable doubt as to the defendants guilt, when charged with a crime, it is the duty of the jury to acquit. Am. Crim. Law, (Wharton) 327; Sumner v. The State - 5 Blackf. 580.

And it must follow that if a juror admit that he would not give the prisoner the benefit of such a doubt, he is incompetent — he thereby admits that he would not decide the case according to law.

[8472-27]

The reason given by the Court below for the decission was, at least, exceedingly novel, for if the juror could not understand the question propounded to him, it might well be doubted whether he possessed that sound mind and discretion necessary to constitute him a competent juror.

The fifth assignment of error, presents two questions.

1st Whether a person over sixty years of age is a competent juror.

2nd If incompetent, whether his being accepted by the defendant's Counsel waived his incompetency.

Upon the 1st point see Purple's Stat. part 1, page 654, § 1; Gay Sowski vs The People, 1 Scam. 476; Sutton vs Petty, 2 Southards reps 504, cited in 2 Graham & Waterman's on New Trials 276. For statute of New Jersey see 2 Graham & Wat. on New Trials 214.

See also Maguire vs Brigham 19 Pick. 368.

The deft. will not be presumed to waive any thing - see State vs Babcock - 1 Conn. 401.

Upon the 2nd point see the two cases above cited.

[8472-28]

The 3rd assignment of Error presents the question whether the verdict was contrary to the Evidence -

If the Evidence of Saml Lyons had been disregarded, there was no Evidence to justify a Conviction. as he is the only one who swears to the blow, and his evidence should have been wholly disregarded, because he was plainly impeached - see Dunlop v Patterson, 5 Lowen 243; 3 Graham & Waterman on New Trials, 1215, note -

Newell v Wright - 8 Conn. 323,

The same authorities apply to the 11th instruction given for the prosecution.

The 6th assignment of Error questions the instructions given for the prosecution -

Each instruction should be clear & explicit 3 Gilm. 381. Baxter vs People — see also Breese 270.

The 5th instruction is clearly not the law - it merely tells the jury that if one man kills another, he is guilty of murder - it assumes that certain things make the defendant guilty of murder, when those things do not constitute that crime -

It will not do to say that the Court had given the law correctly in a former instruction. Denman vs Bloomer - 11 Ills. 193 -

The 6th 8th & 10th instructions given for the prosecution are liable to the same objection.

The same principle will apply to the 7th instruction -

[P473-97]

The 5th instruction asked for by the defendant below, and refused, presents the question whether the agency of the alleged cause of death, can be determined upon any other than medical testimony - Wharton & Stille's Med. Jur. § 1140 -
and if that contain the law, then the 12th instruction given for the prosecution is bad.

The 12th instruction asked by the deft should have been given - it only said to the jury that if the physicians refused to give the opinion that the blow charged caused the death of Taylor, they must give to such refusal an attentive consideration -

The modification by the Court -, in effect, says to the jury that if such refusal were based upon the imperfect character of the evidence then they should not give that refusal an attentive consideration -

The 9th assignment questions the propriety of a part of the jurors, after being sworn, going to a public grocery in company with others not upon the jury, and drinking spirituous liquors.

There are two New York cases which hold that the mere drinking of spirituous liquors by the jury, during the progress of a cause, will vitiate the verdict. The People vs Douglass 4 Cowen ; Brant vs Fowler, 7 Cowen 562.

But these two cases are disapproved in Wilson vs Abrahams. 1 Hills N. Y. rep. 207. and it seems to be held in other cases that there must appear to have been gross excess, or some probable injury to the party complaining. Purinton vs Humphreys. 6 Greenlf. Rep. 379

Rowe vs. The State. 11 Humph. 491.

Thompson's case. 8 Grattan 637.

Cited in Graham & Waterman on New trials. vol. 2. p. 564.

[0472-3]

The 10th assignment presents the questions whether from the face of the indictment it can be ascertained whether Taylor died in Sept. 1856, or Sept. 1857.

If he died in Sept. 1857 then more than a year Elapsed after the blow before he died - and also, he did not die in that case, until after the indictment was found - Markly vs The State - 10 Mis. 291. cited in Wheaton's Am. Crim. Law 165.

The caption states that the indictment was found at the May Term 1857. The body of the indictment alleges that the blow was struck in Sept. 1856, and that Taylor died on the said 7th of Sept in the year aforesaid.

Now it is uncertain whether the year aforesaid means 1856. or 1857 in the caption.

But it may be said the caption is no part of the indictment; and therfore the year aforesaid could not refer to the year mentioned in the caption.

Even if the caption be no part of the indictment, yet if there be one and it states the year in which it is found, that year may be referred to in the body of the indictment, as the year aforesaid, if the offence be charged to have been committed in that year - without again repeating the year - as in Pennsylvania it has been determined that where the Commencement of the indictment was "December sessions, 1818", and the offence was

[3472-32]

charges to have been committed on the 12th day of August in the year aforesaid, the time was sufficiently expressed - Jacobs v Com. & Serg. & Rawle, 315 -

It is decided in the case of Jane (a slave) v. The State, 3 Missouri 46 - that if the facts be stated as to time or place with repugnancy or uncertainty, the indictment will be bad, and if two times or places have been previously mentioned & afterwards a part only is laid "then & there", the indictment is defective because it is uncertain to which it refers - it is no answer to the objection to say that "then and there" will refer grammatically to the last antecedent time & place - it must be certain to every intent, especially in capital cases.

And this was good in arrest of judgment in Jane vs The State - which was for larceny -

[8472-38]

The 11th assignment presents the question whether the question propounded to Commodore Miller, was proper

N. L. Freeman Atty
for plff in Error

{9472-94}

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND DIVISION—OF THE NOVEMBER TERM, 1857.

ROBERT DAVIS, Plaintiff in Error,
vs. } Error to Hardin.
The People of the State of Illinois, Defendants in Error.

Pages of Record.

ABSTRACT.

This was an indictment, found by the grand jury, at the May Term, 1857, of the Circuit Court of Hardin County, charging ROBERT DAVIS, the Plaintiff in Error, with the murder of Seth Taylor.

1–2–3. The commencement of the indictment is, in the usual form, as follows: "State of Illinois, } ss. of the May Term of the Hardin Circuit Court, in "Hardin County, } the year of our Lord one thousand eight hundred and fifty seven.

The indictment then alleges, in substance, that ROBERT DAVIS, on the fifth day of September, in the year 1856, struck SETH TAYLOR upon his head, with a large stick, thereby inflicting upon said TAYLOR a mortal wound, "of which said mortal wound the said Seth Taylor from the said fifth day of "September IN THE YEAR AFORESAID until the seventh day of the same month "of September IN THE YEAR AFORESAID, at the County aforesaid and State "aforesaid, did languish and languishing did live, on which said seventh day "of September IN THE YEAR AFORESAID the said Seth Taylor of the said "mortal wound, died," &c.

46–7. At the October Term, 1857, of the Hardin Circuit Court, the defendant, Davis, pleaded not guilty—a trial was had, and the jury found him guilty of manslaughter and fixed his term of confinement in the penitentiary at seven years.

5–6–7. The bill of exceptions shows that Sylvester Turner was sworn and examined as to his competency as a juror. Turner stated that he would convict upon circumstantial evidence if it was strong enough, and supposed a case in which the circumstances might induce him to convict, but said even upon his supposed case there might be a doubt. The counsel for the defence then asked Turner what he would do in case of such a doubt, and the question not seeming to be understood, the counsel for the defence propounded to Turner this question:

"Suppose you should be sworn upon this jury, and the evidence should "be of such a character as to lead you to believe, as a man, that the "defendant was guilty, or such that a bystander would believe he was guilty "—yet you, as a sworn juror, in sifting over the whole evidence, should find "a reasonable doubt as to whether the defendant was actually guilty—would "you give him the benefit of such a doubt and turn him loose?" Turner answered, "I don't think I would." The court thereupon decided Turner to be a competent juror, upon the ground that he did not believe the juror understood the full import of the question. The defendant Davis, excepted, and peremptorily challenged the juror.

7–8. John Miller, being sworn and examined touching his competency as a juror, stated that he was sixty-two years of age. The court informed Miller that his being over sixty years of age exempted him from serving. Miller said he was willing to serve—the court decided him competent—the prosecuting attorney tendered him to the defendant—the counsel for the defence accepted him, and he was sworn upon the jury, the defendant being present aiding and assisting his counsel in selecting the jury.

8. A jury of twelve being sworn, the prosecution introduced Samuel Lyons as a witness.

Lyons testified that in the early part of September, 1856, Thomas Gustin, Lou. Norris, Taylor, William Davidson and Bob Davis were coming from Caseyville, and, when opposite a school house, about a mile from the Ohio river, the bottom of Taylor's wagon bed got loose and Taylor stopped and requested witness to fix it. While witness was in the wagon fixing the bottom, Bob Davis came up behind the wagon and said he was going to
9. ride. Taylor told him he could not ride, that the oxen were "give" out.—Bob repeated that he was going to ride, when Taylor again told him that he could not ride, and that if he got in he would be under obligations to help him out. Bob then said "I will whip you, you damned old son of a bitch," and picking up a stick, struck Taylor a violent blow with it on the right side of his head. Taylor then drove on about half a mile, when he gave up the team to Tom Gustin and walked along behind the wagon. Taylor walked all the way from the school house to Hall's, except about two hundred yards which he rode. He wanted to go into the Smyrna meeting house, but Tom Gustin took him on to Hall's.

Witness saw Taylor the next day, when he was trying to get his breath, but did not move or speak.

10. The stick with which Davis struck Taylor was four or six feet long and two and a half inches through—it was a white oak limb, and was sound. Witness put his foot on it and tried to break it, but it would not break. It was not a black-jack.

17. Bob struck overhanded and hit Taylor on the right hand side of the head, about an inch above the eye.

11. Upon cross examination, Lyons stated that Taylor did not go over the river to Caseyville, and that all the company did not start from the river together—that the wagon was half a mile ahead, Davis and Davidson being with the wagon, and witness came up afterwards—that the school house was a mile from the river and four or five miles from Hall's—witness was in the wagon when Bob struck Taylor, and Taylor was standing by the oxen, and Bob was behind the wagon when he went to get in, but afterwards came along by the hind wheel—Tom Gustin and Billy Davidson were just under the hill coming up. Taylor was standing near the shoulders of the oxen when Bob came up by the wagon close to the hind wheel—witness was
12. standing in the wagon at the back end, and Bob had just passed the middle of the hind wheel. Taylor was standing still, a facing Bob exactly, when the blow was struck—Bob struck overhanded, the stick was drawn up over the right shoulder, back of the head. Norris was about two or three steps from Bob and back of the wagon—Norris was not far from the parties—they were near together, all on the right of the wagon—Taylor stood in reach of Bob at the same time.

Taylor stood about as far from Bob as the oxen's shoulders to the middle of the wagon—witness was standing about the middle of the wagon, and jumped out over the side of the wagon after Bob had struck Taylor,
13. and caught the stick with both hands between Bob's hands—when witness jumped out of the wagon, he "lit" on the ground close to Bob.

12. The stick was a limb that had fallen off a tree—it was the same thick-
15. ness all the way, without any knots or limbs on it. It was not cut off at either end.

Witness does not know where the stick struck Taylor.

13. Witness remained at the place until Tom Gustin and Davidson came up, which was within two to four minutes. Taylor drove on and Bob got into the wagon and rode. Witness did not leave the stick there.

14. Witness said he could not have reached Bob from where he stood.

Bob struck Taylor, no matter where. At the time of the difficulty the parties were nearly opposite to the school house.

Witness had nothing against Bob Davis—could not say that he wanted him punished.

He might have told John Mason that he wanted Bob hung, but he never said to Mason or Hensley that if Bob was cleared, he, witness, would kill three or four and leave the country.

15. Witness said that he did not, at any time, say that he wished he had not told Bob to strike Taylor.

Nor did he say to any person, nor any where, that he could have stopped the lick by raising his hand.

Witness had nothing against Taylor, but had seen persons he liked better.

He never told any person that he could borrow $5 or $10 of Elijah Mason for Bob to leave with, and that Bob must go away.

15. Witness did not do anything with the stick at the time of the difficulty,
16. but took it to John Ricketts' a day or two afterwards. The stick was close to the track, and he threw it down where he found it. The bark was mostly off the stick.

16. Witness stood at the place alone until Gustin and Davidson came up.

He does not know whether Sam. Crider saw the stick or not—he might.

17. He never said he must swear the warrant out to save himself. Norris and himself swore out the writ against Bob—witness told Norris he had better go down and swear out the writ, the Squire wanted him to.

Witness and Norris did not meet at the justice's—witness went there first, and Norris afterwards.

It was an hour in the night when they got to Hall's. Bob was in the wagon with witness when Gustin took Taylor to Hall's.

Taylor walked behind the wagon all of the time after the difficulty, and was not ahead of the wagon at Sheridan's.

Witness could not say that he was not hostile towards Taylor.

18. Witness said he never told old Mrs. Davis that Taylor struck Bob on the shoulder. He was not at Mr. Davis' the next morning, and did not see the old lady or Bob there.

Upon re-examination by the prosecution—Lyons said that the wound was on the right side of the head and was not cut any. He was at Hall's when Taylor died, and then Taylor's eye was very black and swolen.

Taylor was stouter than Bob—Bob was as stout as common young men in good health—he had the ague.

19. Thomas Gustin, sworn on behalf of the prosecution, stated, that the persons mentioned by Lyons were all the company, and as witness came up with those that had gone along, he saw Bob and Taylor going along—Taylor driving.

It was some fifty yards from the school house when witness came up with them.

Taylor drove about half a mile, and at last witness went to Geo. Hall's with him. Taylor rode about a fourth of a mile—he was bad off, and complained very much; he did not talk any along the road. He would some-

times kneel down on the ground and groan, and put his head on the ground and groan and moan, and then get up and make a few steps and kneel down again, and seemed in considerable pain.

20. He had a wound over his right eye—witness did not see it that night, but on the next morning—it looked like a bruise; did not examine it at all.

Witness was at Hall's when Taylor died, which was about 12 o'clock next day.

There was not much difference in the strength of Bob and Taylor—Taylor was 45 years old—but his age had not lessened his strength—he was a large man.

Witness came with Billy Davidson from the river—he does not know whether the wound bled—Taylor bled out of his ears when he died, but not much.

He did not see the stick.

21. Upon cross-examination, Gustin said it was forty or fifty yards towards the river, from the school house, when he overtook the wagon. Bob and Taylor were with the wagon, Taylor by the steers, and Bob behind the wagon. Lyons and Norris were standing about ten or fifteen steps behind the wagon, talking with George Lacy.

Taylor drove to the creek, which is about a half or three quarters of a mile from the school house, and then witness, Gustin, drove to Sheridan's. Taylor went on ahead, and the team caught up with him at Sheridan's,

22. where he was sitting on a sled by the side of the road. Taylor then got in the wagon and rode a little ways—then Lyons drove the team.

It was after sun down when they were at the school house. When witness came up with the wagon, they all went on, and Lacy went the other way.

It is five miles from Hall's to the river.

All went over together and came back together from Caseyville.

Lyons did not have a stick in his hand when Davidson and witness came up at the school house. It was forty or fifty yards from the school house, towards the river, where Lyons, Norris and Lacy were standing when witness came up.

Taylor drove to the creek, and Bob Davis got into the wagon at the creek.

23. Lackey lives about a quarter of a mile from Hall's. Bob Davis was in the wagon when they got to Lackey's and was asleep.

Lyons was driving the team when they found Taylor sitting on the sled.

24. George Hall being sworn on behalf of the prosecution, stated that at nine o'clock at night, Thomas Gustin and Taylor came to his house, and Taylor wanted to stay all night. He was bad for about an hour and then got easy. He was in every position, and quite restless. Witness could hardly keep him in bed the first hour. Witness did not discover any bruise at all—did not examine Taylor's head—his face was very red. He died the next day—he only spoke one word.

26. Dr. S. T. Young, a physician, sworn on behalf of the prosecution, stated that he had practiced five years or more—he heard the description of the wound by the witnesses, and could not say professionally the blow from Bob Davis caused the death of Taylor—nor could he say that he believed as a professional man, that the blow caused his death.

26. Dr. Dunn, stated that he was at Hall's when Taylor died—has practiced thirty years. The wound was a lacerated or bruised wound, and might

have been done with a brickbat or rough substance. The wound was on the left side of the head. Did not examine it, and did not know that Taylor died from the effects of the wound.

27. The defence then introduced Samuel Crider, who stated that Sam. Lyons brought a stick to his house two or three days after he had heard of Taylor's death, and asked witness if he wanted to see the stick that Taylor was killed with. The stick was a black-jack, between six and eight feet long, cut off at each end, and had a considerable knot on it—the bark was off in places—it was three inches at the large end and two inches at the small end.

28. Miss Jane Lackey, sworn on behalf of the defence, stated that she heard about the time Taylor died.

She heard Samuel Lyons say that he wished he had never told Bob to strike Taylor, and that he, Lyons, could have stopped the blow by raising his hand. Lyons told Bob, the defendant, that he, Bob, must leave the country, and he, Lyons, could borrow the money of Elijah Mason for him to leave with; Bob said he had nothing to leave for, and should not leave. Lyons seemed very anxious about Bob's leaving, but did not say what for. Lyons said that Taylor struck Bob on the shoulder, or something like it.

Lyons also said he only swore the writ out to save himself.

On cross-examination Miss Lackey stated that it was the next day after the difficulty that Lyons was at Lackey's and at old Mr. Davis'; Bob was at home at old Mr. Davis' at the same time Lyons was there, when Lyons told Bob he must leave.

29. Mrs. Mary Jane Davis testified for the defence that she was at Mr. Lackey's when Lyons said he was sorry he had told Bob to strike Taylor—she heard Lyons say that—and that he or Norris could have stopped the blow—he, by raising his hand, and Norris by risking a fiddle which he had in his hands.

29–30. Mr. Archibald Lackey testified for the defence, that he, in company with Norris, went to Caseyville early the next morning after the difficulty, and, when near the school house, Norris said that was the place where the fuss happened; they looked along the road for the stick and could find none at all of any size—there was no stick to be seen there.

30. John Mason testified for the defence that only two days before he heard Lyons say that if Bob Davis was cleared he intended to kill three or four and leave the country, he spoke of going to Ohio or Indiana where he had lived before.

30–31. William Hensley testified for the defence that he saw John Mason and Lyons at the time and place mentioned by Mason, and heard Lyons say that if Bob Davis was cleared, a man might kill as many as he pleased—did not hear him say that he would kill any one and leave the country—he might have said so to Mason.

31. Mrs. Nancy Davis testified that she was the mother of Robert Davis, the defendant, and that, on the day after the difficulty, Mr. Lyons came to their house and told the defendant that he must leave the country—that he, Lyons, could borrow five or ten dollars of Elijah Mason for him to leave with.

He further said that Bob went to get into the wagon and Taylor pushed him away—that Bob tried a second time to get into the wagon, and then Taylor struck him on the shoulder, and then Bob got the stick and struck Taylor.

31–2. Stephen F. Young testified that Lyons' general character for truth and

veracity was bad, and had been for a long time—he could not say whether he would believe him under oath—owing to circumstances.

32. Commodore Miller, being sworn, was asked, by defendant's counsel, if Lyons had not proposed to swear in a certain suit between witness and John Mitchell, anything he, Miller, wanted him to—that he disliked Mitchell and wanted to see him beat. The court refused to allow the question to be answered, and the defendant excepted.

33. E. C. Wingate testified for the prosecution that he lived near Mr. Lyons, and was somewhat acquainted with him, and that his character in the neighborhood was tolerably good.

33. Daniel Hale testified that he had dealings with Lyons, lived two or three miles from him, and was acquainted in the neighborhood—thought Lyons' character for truth and veracity, in the neighborhood, was good.

James Ralph did not know anything about his character.

Daniel Oldham lived in Lyons' neighborhood, but knew nothing of his character.

This was all the evidence in the case.

The fifth instruction given by the court to the jury, for the prosecution, was as follows:

34. "If you believe, from the evidence, that the defendant killed the "deceased, by striking him on the head with a stick, that the size of the "stick was such, that in the hands of a man of ordinary strength, striking a "violent blow with it on the head, it was a dangerous weapon, and that the "necessary consequence of the blow struck by the defendant, with such a "stick, upon the head of deceased, was to destroy his life, and that his death "was caused by such blow, you should find defendant guilty of murder."—Defendant excepted.

The sixth instruction was as follows:

35. "If you believe, from the evidence, that defendant killed deceased, by "striking him on the head with a stick, as charged in the indictment, you "should find him guilty of murder." Defendant excepted.

SEVENTH INSTRUCTION:

"If you believe, from the evidence, that the defendant killed the "deceased with a stick, but when he struck the blow, if the evidence satis- "fies your mind that it was not his intention to kill him, but only to chastise "him, you should find him guilty of manslaughter, and fix his time of con- "finement in the penitentiary for any period not exceeding eight years."—Defendant excepted.

EIGHTH INSTRUCTION:

35–6. "Before you convict, for either murder or manslaughter, you must be "satisfied, from the evidence, that deceased's death was occasioned by the "blow on his head, struck by defendant, you are to judge from the whole "evidence, and if your minds are satisfied, beyond a reasonable doubt, that "the death of deceased resulted from such blow, you should find him "guilty." Defendant excepted.

TENTH INSTRUCTION:

36. "If you believe, from the evidence, that the stick in question was a "large one, and that the necessary consequence of a violent blow with it on "the head, by a man of ordinary strength, would be to destroy human life, "the law regards such a stick, when used in striking a fellow-creature, as a "deadly weapon—and if you further believe, from the evidence, that de-

"fendant struck deceased with such a stick, upon the head, and thereby "caused his death, he is guilty of murder." Defendant excepted.

ELEVENTH INSTRUCTION:

36–7. "The court further instructs you that although you may believe that "the character of Lyons, one of the prosecuting witnesses, has been im- "peached to a greater or less extent, yet if you believe he has sworn the "truth in the material parts of his evidence, you are not bound to throw his "evidence aside because it may not be corroborated in some particulars of "minor importance—if you believe his evidence in the material parts of it "to be true, and from the whole evidence, if you believe the defendant is "guilty of murder or manslaughter, you should find accordingly." De- fendant excepted.

TWELFTH INSTRUCTION:

37. "If the jury believe, from the evidence, that the defendant struck the "deceased with a stick—and that the said stick was a large one, and that its "necessary consequence, in the hands of an ordinary man, when striking a "human creature on the head with it, would be to destroy human life, the "law considers such a stick to be a deadly weapon. Therefore, if you be- "lieve, from the evidence, that the defendant struck the deceased with such "a stick on the head, that the violence of the blow knocked him down and "produced insensibility, speechlessness, and other symptoms of a fatal char- "acter, and that, suffering great agony, he died within the space of twenty "hours or thereabouts, after the wound was given—these are all circum- "stances which you should take into consideration, in coming to a conclusion "as to whether the blow occasioned the death of deceased." Defendant excepted.

40. Fifth instruction asked for by the defendant:

"Although it is true that the jury are to determine, from the evidence, "whether the blow, charged to have been given by the defendant, was the "cause of Taylor's death, yet, it is by medical testimony alone that the "agency of the alleged violence, as a cause of death, is to be determined. "That is, in determining whether Taylor's death was caused by the blow "alleged, the jury must look alone to the evidence given by the physicians, "and, unless it is proven by such evidence that Taylor's death was caused "by the blow alleged, the jury must find the defendant not guilty."— [Whar. Med. Jur. § 1140.

This instruction the court refused to give, and the defendant excepted.

42. Twelfth instruction asked for by the defendant:

"The court further instructs the jury for the defendant that the opinions "of physicians, as to a cause of death, are entitled to great weight—and if "the physicians refused to give it as their opinion that Taylor's death was "caused by the blow charged, such refusal should be attentively considered "by the jury."

The court refused to give this instruction, as asked, but gave it with the following modification:

43. "UNLESS THE REFUSAL WAS IN CONSEQUENCE OF THE MEAGRE AND IMPERFECT "DESCRIPTION OF THE WOUND, AS GIVEN BY THE WITNESSES." Defendant excepted.

The jury thereupon returned a verdict, finding the defendant guilty of manslaughter, and fixing his term of confinement in the penitentiary at seven years.

44. The defendant moved for a new trial, and in arrest of judgment, upon the following grounds:

1st, Because the verdict was contrary to law.

2nd, Because the verdict was contrary to evidence.

3rd, Because the court erred in deciding Sylvester Turner to be a competent juror in this cause.

4th, Because the court erred in deciding that John Miller was a competent juror, and allowing him to sit as such.

5th, Because the court erred in giving to the jury, on behalf of the prosecution, instructions numbered 5, 6, 7, 8, 10, 11, and 12, respectively.

6th, Because the court erred in refusing to give instruction number 5 for defendant.

7th, Because the court erred in refusing to give instruction number 12 as asked for by the defendant, and in giving said instruction as modified by the court.

8th, Because a portion of the jurors acted improperly and irregularly, in drinking spirituous liquors in company with persons not belonging to the jury, at a public grocery, after they had been sworn.

45. 9th, Because it is uncertain, from the face of the indictment, whether the deceased died in the year 1856, or in the year 1857.

The eighth ground was based on an affidavit of the defendant, that a portion of the jurors, after they were sworn, and before the entire panel was made up, went, in company with other persons, not of the jury, to a public grocery, and drank spirituous liquors.

46. The motion for a new trial and in arrest of judgment was overruled, and judgment and sentence entered in accordance with the verdict—and

48. the defendant excepted.

N. L. FREEMAN, Attorney
for plaintiff in error.

J. W. EDWARDS, PRINTER, SHAWNEETOWN.

Robert Davis

vs. } Abstract

The People

Error to Hardin

The People
vs- } Murder-
Robert Davis

1st Assignment of Error Sylvester Turner decided to be a competent juror. Said that he would not acquit upon a reasonable doubt-

See Wharton American Crim law page 327. Which says where a juror entertains a reasonable doubt must acquit. See Whole testimony record pages 5-6-7-
Quere was such a question proper? 5 Black 580- 1 Starkie Evidence 577-

5th Whether Jno Miller a juror over 60 years old was a competent juror-
Guykowski vs The People 1 Scam 476-
Greenup vs Stoker 3d Gilman 220-
Hollingsworth vs Duane 4th Dallas 354
Bacons Abridgements 5th 357-
Breeding vs State 11th Texas 257- also
Graham & Waterman on New Trials 276-7-
3 Blackstone Com. 364-

The Exception can only be taken advantage of by the Juror himself

3rd Assignment. Verdict contrary to Evidence. and insisted upon by Pltff that Samuel Lyons had been impeached.

The Jury are peculiarly the Judges of the weight & credit due to the testimony of each witness.

Mc Affee v Ryan 11 Mississippi 384.

3d Graham & Patterson N. J. 1215.

1st Greenleaf page 375.

Witness not impeached as to material point except by Mrs Davis Mother of Pltff & Miss Lucky a Mrs M J D & Miss Lucky differ as to place of conversation. Jane Lyons conversation took place outside of fence, Miss outside of fence & Woman inside, Mrs Mary J Davis says conversation took place in the House. It does not appear from record that the questions were propounded to Lyons in a proper manner, that the time & place were particularized.

5th Assignment Questions all the instructions given for the Pltff particularly 5th instruction. The instructions must all be taken together, and when such is done they contain the Law.

[8472-42]

7th Assignment assigns for Error the refusal of the Judge to give the 8th instruction for Defendant. Which instruction looks alone to medical testimony for cause of death

Greenleaf 332.

12th instruction modified by Court.

9th assignment- Effectually abandoned by Plff. Authorities conflicting.
(Omitting by jury)

10th Assignment Whether from face of Indictment it can be ascertained whether Taylor died in Sept 1836 or 1837.

See Archbold Crim pleading prac. 482. also page 80.

11th assignment- presents the question as to whether Question to Comadue Miller was proper

See 1st Greenleaf page 375. and Authorities there cited.

[8472-43]

Robt Davis —

Error to

U — D Harris

The People

Brief of

J. C. Robinson

Robert Davis - Plaintiff in Error

vs.

The People of the State of Illinois - Defendants in Error

In the Supreme Court of the State of Illinois - 1st Grand Division - Nov. Term 1857 - On indictment for Murder - Error to Hardin Co -

Will the clerk please issue a writ of Error and scire facias in the above Entitled Cause -

N. L. Freeman atty for plff in Error

[8472-47]

45

Robert Davis - Pltff
in Error

vs

The People of the State
of Illinois, Defts in
Error.

Filed Nov. 10. 1857
N. Johnston Clk

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND DIVISION—OF THE NOVEMBER TERM, 1857.

ROBERT DAVIS, Plaintiff in Error,
vs.
The People of the State of Illinois, Defendants in Error. } Error to Hardin.

ABSTRACT.

Pages of Record.

This was an indictment, found by the grand jury, at the May Term, 1857, of the Circuit Court of Hardin County, charging ROBERT DAVIS, the Plaintiff in Error, with the murder of Seth Taylor.

1–2–3. The commencement of the indictment is, in the usual form, as follows: "State of Illinois, } ss. of the May Term of the Hardin Circuit Court, in "Hardin County, } the year of our Lord one thousand eight hundred and fifty seven.

The indictment then alleges, in substance, that ROBERT DAVIS, on the fifth day of September, in the year 1856, struck SETH TAYLOR upon his head, with a large stick, thereby inflicting upon said TAYLOR a mortal wound, "of which said mortal wound the said Seth Taylor from the said fifth day of "September IN THE YEAR AFORESAID until the seventh day of the same month "of September IN THE YEAR AFORESAID, at the County aforesaid and State "aforesaid, did languish and languishing did live, on which said seventh day "of September IN THE YEAR AFORESAID the said Seth Taylor of the said "mortal wound, died," &c.

46–7. At the October Term, 1857, of the Hardin Circuit Court, the defendant, Davis, pleaded not guilty—a trial was had, and the jury found him guilty of manslaughter and fixed his term of confinement in the penitentiary at seven years.

5–6–7. The bill of exceptions shows that Sylvester Turner was sworn and examined as to his competency as a juror. Turner stated that he would convict upon circumstantial evidence if it was strong enough, and supposed a case in which the circumstances might induce him to convict, but said even upon his supposed case there might be a doubt. The counsel for the defence then asked Turner what he would do in case of such a doubt, and the question not seeming to be understood, the counsel for the defence propounded to Turner this question:

"Suppose you should be sworn upon this jury, and the evidence should "be of such a character as to lead you to believe, as a man, that the "defendant was guilty, or such that a bystander would believe he was guilty "—yet you, as a sworn juror, in sifting over the whole evidence, should find "a reasonable doubt as to whether the defendant was actually guilty—would "you give him the benefit of such a doubt and turn him loose?" Turner answered, "I don't think I would." The court thereupon decided Turner to be a competent juror, upon the ground that he did not believe the juror understood the full import of the question. The defendant Davis, excepted, and peremptorily challenged the juror.

7–8. John Miller, being sworn and examined touching his competency as a juror, stated that he was sixty-two years of age. The court informed Miller that his being over sixty years of age exempted him from serving. Miller said he was willing to serve—the court decided him competent—the prosecuting attorney tendered him to the defendant—the counsel for the defence accepted him, and he was sworn upon the jury, the defendant being present aiding and assisting his counsel in selecting the jury.

[8472-48]

8. A jury of twelve being sworn, the prosecution introduced Samuel Lyons as a witness.

Lyons testified that in the early part of September, 1856, Thomas Gustin, Lou. Norris, Taylor, William Davidson and Bob Davis were coming from Caseyville, and, when opposite a school house, about a mile from the Ohio river, the bottom of Taylor's wagon bed got loose and Taylor stopped and requested witness to fix it. While witness was in the wagon fixing the bottom, Bob Davis came up behind the wagon and said he was going to
9. ride. Taylor told him he could not ride, that the oxen were "give" out.—Bob repeated that he was going to ride, when Taylor again told him that he could not ride, and that if he got in he would be under obligations to help him out. Bob then said "I will whip you, you damned old son of a bitch," and picking up a stick, struck Taylor a violent blow with it on the right side of his head. Taylor then drove on about half a mile, when he gave up the team to Tom Gustin and walked along behind the wagon. Taylor walked all the way from the school house to Hall's, except about two hundred yards which he rode. He wanted to go into the Smyrna meeting house, but Tom Gustin took him on to Hall's.

Witness saw Taylor the next day, when he was trying to get his breath, but did not move or speak.

10. The stick with which Davis struck Taylor was four or six feet long and two and a half inches through—it was a white oak limb, and was sound. Witness put his foot on it and tried to break it, but it would not break. It was not a black-jack.

17. Bob struck overhanded and hit Taylor on the right hand side of the head, about an inch above the eye.

11. Upon cross examination, Lyons stated that Taylor did not go over the river to Caseyville, and that all the company did not start from the river together—that the wagon was half a mile ahead, Davis and Davidson being with the wagon, and witness came up afterwards—that the school house was a mile from the river and four or five miles from Hall's—witness was in the wagon when Bob struck Taylor, and Taylor was standing by the oxen, and Bob was behind the wagon when he went to get in, but afterwards came along by the hind wheel—Tom Gustin and Billy Davidson were just under the hill coming up. Taylor was standing near the shoulders of the oxen when Bob came up by the wagon close to the hind wheel—witness was
12. standing in the wagon at the back end, and Bob had just passed the middle of the hind wheel. Taylor was standing still, a facing Bob exactly, when the blow was struck—Bob struck overhanded, the stick was drawn up over the right shoulder, back of the head. Norris was about two or three steps from Bob and back of the wagon—Norris was not far from the parties—they were near together, all on the right of the wagon—Taylor stood in reach of Bob at the same time.

Taylor stood about as far from Bob as the oxen's shoulders to the middle of the wagon—witness was standing about the middle of the wagon, and jumped out over the side of the wagon after Bob had struck Taylor,
13. and caught the stick with both hands between Bob's hands—when witness jumped out of the wagon, he "lit" on the ground close to Bob.

12. The stick was a limb that had fallen off a tree—it was the same thickness all the way, without any knots or limbs on it. It was not cut off at
15. either end.

Witness does not know where the stick struck Taylor.

13. Witness remained at the place until Tom Gustin and Davidson came up, which was within two to four minutes. Taylor drove on and Bob got into the wagon and rode. Witness did not leave the stick there.

14. Witness said he could not have reached Bob from where he stood.

Bob struck Taylor, no matter where. At the time of the difficulty the parties were nearly opposite to the school house.

Witness had nothing against Bob Davis—could not say that he wanted him punished.

He might have told John Mason that he wanted Bob hung, but he never said to Mason or Hensley that if Bob was cleared, he, witness, would kill three or four and leave the country.

15. Witness said that he did not, at any time, say that he wished he had not told Bob to strike Taylor.

Nor did he say to any person, nor any where, that he could have stopped the lick by raising his hand.

Witness had nothing against Taylor, but had seen persons he liked better.

He never told any person that he could borrow $5 or $10 of Elijah Mason for Bob to leave with, and that Bob must go away.

15. Witness did not do anything with the stick at the time of the difficulty,
16. but took it to John Ricketts' a day or two afterwards. The stick was close to the track, and he threw it down where he found it. The bark was mostly off the stick.

16. Witness stood at the place alone until Gustin and Davidson came up.

He does not know whether Sam. Crider saw the stick or not—he might.

17. He never said he must swear the warrant out to save himself. Norris and himself swore out the writ against Bob—witness told Norris he had better go down and swear out the writ, the Squire wanted him to.

Witness and Norris did not meet at the justice's—witness went there first, and Norris afterwards.

It was an hour in the night when they got to Hall's. Bob was in the wagon with witness when Gustin took Taylor to Hall's.

Taylor walked behind the wagon all of the time after the difficulty, and was not ahead of the wagon at Sheridan's.

Witness could not say that he was not hostile towards Taylor.

18. Witness said he never told old Mrs. Davis that Taylor struck Bob on the shoulder. He was not at Mr. Davis' the next morning, and did not see the old lady or Bob there.

Upon re-examination by the prosecution—Lyons said that the wound was on the right side of the head and was not cut any. He was at Hall's when Taylor died, and then Taylor's eye was very black and swolen.

Taylor was stouter than Bob—Bob was as stout as common young men in good health—he had the ague.

19. Thomas Gustin, sworn on behalf of the prosecution, stated, that the persons mentioned by Lyons were all the company, and as witness came up with those that had gone along, he saw Bob and Taylor going along—Taylor driving.

It was some fifty yards from the school house when witness came up with them.

Taylor drove about half a mile, and at last witness went to Geo. Hall's with him. Taylor rode about a fourth of a mile—he was bad off, and complained very much; he did not talk any along the road. He would some-

times kneel down on the ground and groan, and put his head on the ground and groan and moan, and then get up and make a few steps and kneel down again, and seemed in considerable pain.

20. He had a wound over his right eye—witness did not see it that night, but on the next morning—it looked like a bruise; did not examine it at all.

Witness was at Hall's when Taylor died, which was about 12 o'clock next day.

There was not much difference in the strength of Bob and Taylor—Taylor was 45 years old—but his age had not lessened his strength—he was a large man.

Witness came with Billy Davidson from the river—he does not know whether the wound bled—Taylor bled out of his ears when he died, but not much.

He did not see the stick.

21. Upon cross-examination, Gustin said it was forty or fifty yards towards the river, from the school house, when he overtook the wagon. Bob and Taylor were with the wagon, Taylor by the steers, and Bob behind the wagon. Lyons and Norris were standing about ten or fifteen steps behind the wagon, talking with George Lacy.

Taylor drove to the creek, which is about a half or three quarters of a mile from the school house, and then witness, Gustin, drove to Sheridan's. Taylor went on ahead, and the team caught up with him at Sheridan's,

22. where he was sitting on a sled by the side of the road. Taylor then got in the wagon and rode a little ways—then Lyons drove the team.

It was after sun down when they were at the school house. When witness came up with the wagon, they all went on, and Lacy went the other way.

It is five miles from Hall's to the river.

All went over together and came back together from Caseyville.

Lyons did not have a stick in his hand when Davidson and witness came up at the school house. It was forty or fifty yards from the school house, towards the river, where Lyons, Norris and Lacy were standing when witness came up.

Taylor drove to the creek, and Bob Davis got into the wagon at the creek.

23. Lackey lives about a quarter of a mile from Hall's. Bob Davis was in the wagon when they got to Lackey's and was asleep.

Lyons was driving the team when they found Taylor sitting on the sled.

24. George Hall being sworn on behalf of the prosecution, stated that at nine o'clock at night, Thomas Gustin and Taylor came to his house, and Taylor wanted to stay all night. He was bad for about an hour and then got easy. He was in every position, and quite restless. Witness could hardly keep him in bed the first hour. Witness did not discover any bruise at all—did not examine Taylor's head—his face was very red. He died the next day—he only spoke one word.

26. Dr. S. T. Young, a physician, sworn on behalf of the prosecution, stated that he had practiced five years or more—he heard the description of the wound by the witnesses, and could not say professionally the blow from Bob Davis caused the death of Taylor—nor could he say that he believed as a professional man, that the blow caused his death.

26. Dr. Dunn, stated that he was at Hall's when Taylor died—has practiced thirty years. The wound was a lacerated or bruised wound, and might

have been done with a brickbat or rough substance. The wound was on the left side of the head. Did not examine it, and did not know that Taylor died from the effects of the wound.

27. The defence then introduced Samuel Crider, who stated that Sam. Lyons brought a stick to his house two or three days after he had heard of Taylor's death, and asked witness if he wanted to see the stick that Taylor was killed with. The stick was a black-jack, between six and eight feet long, cut off at each end, and had a considerable knot on it—the bark was off in places—it was three inches at the large end and two inches at the small end.

28. Miss Jane Lackey, sworn on behalf of the defence, stated that she heard about the time Taylor died.

She heard Samuel Lyons say that he wished he had never told Bob to strike Taylor, and that he, Lyons, could have stopped the blow by raising his hand. Lyons told Bob, the defendant, that he, Bob, must leave the country, and he, Lyons, could borrow the money of Elijah Mason for him to leave with; Bob said he had nothing to leave for, and should not leave. Lyons seemed very anxious about Bob's leaving, but did not say what for. Lyons said that Taylor struck Bob on the shoulder, or something like it.

Lyons also said he only swore the writ out to save himself.

On cross-examination Miss Lackey stated that it was the next day after the difficulty that Lyons was at Lackey's and at old Mr. Davis'; Bob was at home at old Mr. Davis' at the same time Lyons was there, when Lyons told Bob he must leave.

29. Mrs. Mary Jane Davis testified for the defence that she was at Mr. Lackey's when Lyons said he was sorry he had told Bob to strike Taylor—she heard Lyons say that—and that he or Norris could have stopped the blow—he, by raising his hand, and Norris by risking a fiddle which he had in his hands.

29–30. Mr. Archibald Lackey testified for the defence, that he, in company with Norris, went to Caseyville early the next morning after the difficulty, and, when near the school house, Norris said that was the place where the fuss happened; they looked along the road for the stick and could find none at all of any size—there was no stick to be seen there.

30. John Mason testified for the defence that only two days before he heard Lyons say that if Bob Davis was cleared he intended to kill three or four and leave the country, he spoke of going to Ohio or Indiana where he had lived before.

30–31. William Hensley testified for the defence that he saw John Mason and Lyons at the time and place mentioned by Mason, and heard Lyons say that if Bob Davis was cleared, a man might kill as many as he pleased—did not hear him say that he would kill any one and leave the country—he might have said so to Mason.

31. Mrs. Nancy Davis testified that she was the mother of Robert Davis, the defendant, and that, on the day after the difficulty, Mr. Lyons came to their house and told the defendant that he must leave the country—that he, Lyons, could borrow five or ten dollars of Elijah Mason for him to leave with.

He further said that Bob went to get into the wagon and Taylor pushed him away—that Bob tried a second time to get into the wagon, and then Taylor struck him on the shoulder, and then Bob got the stick and struck Taylor.

31–2. Stephen F. Young testified that Lyons' general character for truth and

veracity was bad, and had been for a long time—he could not say whether he would believe him under oath—owing to circumstances.

32. COMMODORE MILLER, being sworn, was asked, by defendant's counsel, if Lyons had not proposed to swear in a certain suit between witness and John Mitchell, anything he, Miller, wanted him to—that he disliked Mitchell and wanted to see him beat. The court refused to allow the question to be answered, and the defendant excepted.

33. E. C. WINGATE testified for the prosecution that he lived near Mr. Lyons, and was somewhat acquainted with him, and that his character in the neighborhood was tolerably good.

33. DANIEL HALE testified that he had dealings with Lyons, lived two or three miles from him, and was acquainted in the neighborhood—thought Lyons' character for truth and veracity, in the neighborhood, was good.

JAMES RALPH did not know anything about his character.

DANIEL OLDHAM lived in Lyons' neighborhood, but knew nothing of his character.

This was all the evidence in the case.

The fifth instruction given by the court to the jury, for the prosecution, was as follows:

34. "If you believe, from the evidence, that the defendant killed the "deceased, by striking him on the head with a stick, that the size of the "stick was such, that in the hands of a man of ordinary strength, striking a "violent blow with it on the head, it was a dangerous weapon, and that the "necessary consequence of the blow struck by the defendant, with such a "stick, upon the head of deceased, was to destroy his life, and that his death "was caused by such blow, you should find defendant guilty of murder."—Defendant excepted.

The sixth instruction was as follows:

35. "If you believe, from the evidence, that defendant killed deceased, by "striking him on the head with a stick, as charged in the indictment, you "should find him guilty of murder." Defendant excepted.

SEVENTH INSTRUCTION:

"If you believe, from the evidence, that the defendant killed the "deceased with a stick, but when he struck the blow, if the evidence satis- "fies your mind that it was not his intention to kill him, but only to chastise "him, you should find him guilty of manslaughter, and fix his time of con- "finement in the penitentiary for any period not exceeding eight years."—Defendant excepted.

EIGHTH INSTRUCTION:

35–6. "Before you convict, for either murder or manslaughter, you must be "satisfied, from the evidence, that deceased's death was occasioned by the "blow on his head, struck by defendant, you are to judge from the whole "evidence, and if your minds are satisfied, beyond a reasonable doubt, that "the death of deceased resulted from such blow, you should find him "guilty." Defendant excepted.

TENTH INSTRUCTION:

36. "If you believe, from the evidence, that the stick in question was a "large one, and that the necessary consequence of a violent blow with it on "the head, by a man of ordinary strength, would be to destroy human life, "the law regards such a stick, when used in striking a fellow-creature, as a "deadly weapon—and if you further believe, from the evidence, that de-

"fendant struck deceased with such a stick, upon the head, and thereby "caused his death, he is guilty of murder." Defendant excepted.

ELEVENTH INSTRUCTION:

36–7. "The court further instructs you that although you may believe that "the character of Lyons, one of the prosecuting witnesses, has been im- "peached to a greater or less extent, yet if you believe he has sworn the "truth in the material parts of his evidence, you are not bound to throw his "evidence aside because it may not be corroborated in some particulars of "minor importance—if you believe his evidence in the material parts of it "to be true, and from the whole evidence, if you believe the defendant is "guilty of murder or manslaughter, you should find accordingly." De- fendant excepted.

TWELFTH INSTRUCTION:

37. "If the jury believe, from the evidence, that the defendant struck the "deceased with a stick—and that the said stick was a large one, and that its "necessary consequence, in the hands of an ordinary man, when striking a "human creature on the head with it, would be to destroy human life, the "law considers such a stick to be a deadly weapon. Therefore, if you be- "lieve, from the evidence, that the defendant struck the deceased with such "a stick on the head, that the violence of the blow knocked him down and "produced insensibility, speechlessness, and other symptoms of a fatal char- "acter, and that, suffering great agony, he died within the space of twenty "hours or thereabouts, after the wound was given—these are all circum- "stances which you should take into consideration, in coming to a conclusion "as to whether the blow occasioned the death of deceased." Defendant excepted.

40. Fifth instruction asked for by the defendant:

"Although it is true that the jury are to determine, from the evidence, "whether the blow, charged to have been given by the defendant, was the "cause of Taylor's death, yet, it is by medical testimony alone that the "agency of the alleged violence, as a cause of death, is to be determined. "That is, in determining whether Taylor's death was caused by the blow "alleged, the jury must look alone to the evidence given by the physicians, "and, unless it is proven by such evidence that Taylor's death was caused "by the blow alleged, the jury must find the defendant not guilty."—[Whar. Med. Jur. § 1140.

This instruction the court refused to give, and the defendant excepted.

42. Twelfth instruction asked for by the defendant:

"The court further instructs the jury for the defendant that the opinions "of physicians, as to a cause of death, are entitled to great weight—and if "the physicians refused to give it as their opinion that Taylor's death was "caused by the blow charged, such refusal should be attentively considered "by the jury."

The court refused to give this instruction, as asked, but gave it with the following modification:

43. "UNLESS THE REFUSAL WAS IN CONSEQUENCE OF THE MEAGRE AND IMPERFECT "DESCRIPTION OF THE WOUND, AS GIVEN BY THE WITNESSES." Defendant excepted.

The jury thereupon returned a verdict, finding the defendant guilty of manslaughter, and fixing his term of confinement in the penitentiary at seven years.

[8472-54]

44. The defendant moved for a new trial, and in arrest of judgment, upon the following grounds:

1st, Because the verdict was contrary to law.

2nd, Because the verdict was contrary to evidence.

3rd, Because the court erred in deciding Sylvester Turner to be a competent juror in this cause.

4th, Because the court erred in deciding that John Miller was a competent juror, and allowing him to sit as such.

5th, Because the court erred in giving to the jury, on behalf of the prosecution, instructions numbered 5, 6, 7, 8, 10, 11, and 12, respectively.

6th, Because the court erred in refusing to give instruction number 5 for defendant.

7th, Because the court erred in refusing to give instruction number 12 as asked for by the defendant, and in giving said instruction as modified by the court.

8th, Because a portion of the jurors acted improperly and irregularly, in drinking spirituous liquors in company with persons not belonging to the jury, at a public grocery, after they had been sworn.

45. 9th, Because it is uncertain, from the face of the indictment, whether the deceased died in the year 1856, or in the year 1857.

The eighth ground was based on an affidavit of the defendant, that a portion of the jurors, after they were sworn, and before the entire panel was made up, went, in company with other persons, not of the jury, to a public grocery, and drank spirituous liquors.

46. The motion for a new trial and in arrest of judgment was overruled, and judgment and sentence entered in accordance with the verdict—and

48. the defendant excepted.

N. L. FREEMAN, Attorney
for plaintiff in error.

J. W. EDWARDS, PRINTER, SHAWNEETOWN.

[8472-55]

Robert Davis

vs. } abstract

The People

Error to Hardin

STATE OF ILLINOIS, } ss. 1st Grand Division
SUPREME COURT. }

THE PEOPLE OF THE STATE OF ILLINOIS,

To the Sheriff of White **County,**

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the Circuit Court of Harden County, before the judge thereof, between The People of the State of Illinois - Plaintiffs - and Robert Davis

defendant, it is said that manifest error hath intervened to the injury of said Robert Davis

as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mt. Vernon, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to ~~the said~~ James S Robinson Esq - State's Attorney

that he be and appear before the Justices of our said Supreme Court, on the first day of the ~~next~~ this term of said Court, to be holden at Mount Vernon, in said State, on the ~~Second~~ 1st Tuesday after the Second Monday in ~~November next~~ this month, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said James S Robinson Esq notice, together with this writ.

John D Caton

Witness, the Hon. ~~SAMUEL H. TREAT~~, Chief Justice of our said Court, and the seal thereof, at Mount Vernon, this tenth day of November in the year of our Lord, one thousand eight hundred and fifty-seven

N. Johnston

Clerk of Supreme Court.

[8472-56]

I acknowledge due and legal service on the within writ. This 13th of Novem 1837 - by Jno C. Powell Esqr Sheriff of White Co. —

J. E. Robinson

States Atty 12th Jud

Robert Davis

Pltff in Error

vs } Sci fa

The People

Defts in Error.

STATE OF ILLINOIS
SUPREME COURT, } ss. 1st Grand Division WRIT OF ERROR.

THE PEOPLE OF THE STATE OF ILLINOIS;

To the Clerk of the Circuit Court for the county of Hardin GREETING,

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Hardin county, before the Judge thereof, between

The People of the State of Illinois

plaintiffs, and Robert Davis

defendant it is said manifest error hath intervened, to the injury of the aforesaid Robert Davis

as we are informed by his complaint, and we being willing that error, should be corrected if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Count, the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Mount Vernon, in the county of jefferson, on the 1st Sunday after the 2d Monday of this Month ~~next~~, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law:

John D. Caton

Witness, the Hon. ~~WALTER B. SCATES~~ Chief Justice of our said court, and the seal thereof, at Mount Vernon this tenth day of November in the year of Our Lord One Thousand Eight Hundred and Fifty-seven

N. Johnston
Clerk Supreme Court.

[8472-501]

45

Robert Davis
Plff in error
vs } Writ of Error
The People
Defts in error

Issued & filed Nov. 10. 1857
N. Johnston Clk

Shawneetown
Nov 8th 1857

Maj. Noah Johnston
Dr Sir

I herewith inclose a precipe for a writ of Error & scire facias in the case of Robert Davis vs The People - Will you please issue a writ of Error, but it need not be sent out of your office as I will bring up the record myself - but please issue a scire facias for James S. Robinson as we did in the case of Stuckie vs The People - and send it to Shff of White Co. for service - also if you will send me a duplicate scire facias I will get Robinson to acknowledge service - for fear that you send to Shff will miscarry - I will pay the $5 - when I come up at Court -

I believe, under the law Robinson is the atty for the People in the Sup. Ct. by virtue of being States atty in the same Circuit in which it sits -

Yours very truly
N. L. Freeman

[8472-58]

Davis

vs

The People

Filed Nov. 10. 1857

N. Johnston Clk

No 45

Aug. 1857

Robert Davis

vs

The People

847

Error to Hardin

Reversed and

Remanded