No. 8540

Supreme Court of Illinois

B.H.Schnier

---

vs.

People

Pleas Continued and held at the Court House in the town of Carlyle County of Clinton and State of Illinois before the Honorable A K S Mahony Judge of the Second Judicial Circuit in said State Amos Watts States Attorney John B Roper Clerk and James Justice Sheriff officers of the Clinton County Circuit Court of the March term thereof to wit on the seventh day of March in the year of our Lord One thousand eight hundred and fifty nine.-

When the jurors of the Grand Jury returned into Court endorsed "a" true Bill" the following Bill of Indictment to wit

" State of Illinois } ss } Of the March term of the
" Clinton County } Clinton Circuit Court in the year
" of Our Lord 1859.

" The Grand Jurors Chosen selected and sworn in and for the
" County of Clinton in the name and by the authority of the
" People of the State of Illinois upon their oaths present that
" Bernard H Schnier of the county of Clinton aforesaid on the
" third day of March in the year of Our Lord one thousand
" eight hundred and fifty nine at and in the County of
" Clinton aforesaid in and upon one Benedict Thesing
" in the peace of the people aforesaid then and there being
" did then and there unlawfully wilfully feloniously
" and of his malice aforethought make an assault, and
" that the said Bernard H Schnier with a certain stick of the
" length of three feet and of the thickness of two inches which
" the said Bernard H Schnier in his hands then and
" there had and held in and upon the head of him the said
" Benedict Thesing did then and there wilfully unlawfully
" feloniously and of his said Bernard H Schniers malice

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"aforethought Struck beat and wound, giving to the said
"Benedict Theusing then and there with the Stick aforesaid
"one mortal wound and bruise of which mortal wound and
"bruise the said Benedict Theusing on the day and year
"aforesaid at the County aforesaid died. And So the Grand
"Jurors aforesaid upon their oaths aforesaid do say that the
"said Bernard H Schnier him the said Benedict Theusing
"in manner and form aforesaid on the day and year last aforesaid
"at the County aforesaid unlawfully wilfully and feloniously and
"of his Malice aforethought did kill and murder Contrary
"to the form of the Statute in such cases made and provided and
"against the peace and dignity of the people of the State
"of Illinois Amos Watts States Attorney"

Upon which Indictment the following indorsements were made to wit "No 37." "March Term AD 1859"
"The People vs Bernard H Schnier" "Indictment for Murder"
"A True Bill. J W Henry Foreman" "Witnesses Gerhard Bachel
Dr Henry Kleinkorte John Sholtes C N Halsteas Albert Kreep Henry
Stockler John Schultz" "Filed March 14th 1859 W B Roper Clk"
"Filed March 15th 1859 W B Roper Clk"

Whereupon the Court does make the following order to wit

The People
vs
Bernard H Schnier } Indictment for Murder

And now at this time it is Ordered by the Court that this cause be continued until the next term of this Court And afterwards to wit on the 20th day of April AD 1859 the said defendant Bernard H Schnier presented his Petition for a Writ of "Habeas Corpus" to the master in Chancery in for said County of Clinton, which is as follows

State of Illinois } In the Clinton Circuit Court
Clinton County }ss

To the Hon Judge of the second Judicial Circuit Court of the State of Illinois

Humbly Complaining the undersigned respectfully shows to your Honor that on the 5 day of March A.D 1859 he was arrested and Committed to the County Jail of Clinton County Illinois where is now unjustly and unlawfully detained in said Jail and in the Custody of the Jailer thereof under and by vertue of the following bill of Indictment

State of Illinois }
Clinton County }ss

Of the March Term of the Clinton Circuit Court in the Year of our Lord 1859

The Grand Jurors Chosen Selected and Sworn in and for the County of Clinton in the name and by the authority of the People of the State of Illinois upon their oaths present that Bernard H Schniss of the County of Clinton aforesaid on the third day of March in the Year of Our Lord One thousand eight hundred and fifty nine at and in the County aforesaid in and upon one Benedict Theising in the peace of the People aforesaid then and there being did then and there unlawfully wilfully feloniously and of his malice aforethought make an assault and that the said Bernard H Schniss with a certain Stick of the length of three feet and of the thickness of two inches which the said Bernard H Schniss in his hands then and there had and held in and upon the head of him the said Benedict Theising did then and there wilfully unlawfully feloniously and of his said Bernard H Schniss malice aforethought Strike beat and wound giving to the said Benedict Theising then and there with the Stick

aforesaid one mortal wound and bruise of which mortal
4 wound and bruise the said Benedict Thusing on the day and
year aforesaid at the County aforesaid died. And so the Grand
Jurors aforesaid upon their oaths aforesaid do say that the said
Bernard H Thusing Schnier him the said Benedict
Thusing in manner and form aforesaid on the day and year
last aforesaid at the County aforesaid unlawfully wilfully
and feloniously & of his malice aforethought did kill
and murder Contrary to the form of the Statute in such cases
made and provided and against the peace and dignity
of the People of the State of Illinois

Amos Watts States attorney

Your petitioner would therefore respectfully pray Your
Honor to grant an order a writ of "Habeas Corpus" by which
your petitioner shall be brought before your Honor when and
where the legality of the said Indictment and all the papers
and proceedings connected therewith together with the testimony
of witnesses in said cause may be heard and decided upon
by your Honor And he your petitioner admitted to bail or otherwise
dealt with as the law directs &c

Bernard H Schnier

By Davis & Sparks Attys

State of Illinois
Clinton County

Bernard H Schnier by Davis and Sparks
his attorneys on this day came before the
undersigned Master in Chancery in and for said County and
produced his application for a writ of "Habeas Corpus" Upon
reading the bill And on consideration thereof, It is ordered
that a writ of Habeas Corpus issue to James J Justice
Sheriff of said County Commanding him to have the body
of Bernard H Schnier together with the day and cause of
his caption and detention before the Circuit Court in and

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for the County of Bond now sitting on the 25th day of April instant at 8 Oclock A M for examination admitting to bail or recommitment

Done at Carlyle this 20th day of April A D 1859

Zophar Case Master in Chancery

C C Ill

The Clerk of the Circuit Court of Clinton County will issue Subpoenas for witnesses in accordance with the above order and in the above Cause

Zophar Case Master in Ch'y"

Upon which a writ of "Habeas Corpus" was issued out of the Clerks office of the Clinton Circuit Court in the words and figures following to wit

State of Illinois }
Clinton County } ss The People of the State of Illinois
To the Sheriff of Clinton County Illinois Greeting

We command you that the body of Bernard H Schnur in your Custody detained as it is said together with the day and cause of his caption and detention by whatsoever name the said Bernard H Schnur may be known or called you safely have before the Hon Wm H Snyder Judge of the 24th Judicial Circuit Court in the State of Illinois at Greenville in Bond County Illinois on the 25th day of April A D 1859 at 8 Oclock A M to do and receive all and singular those things which the said Judge shall then and there consider of him in this behalf and have you then and there this writ

Witness John B Roper Clerk of our said Circuit Court and the Seal thereof at Carlyle this 20th day of April A D 1859. J B Roper Clerk

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Upon said writ the Honorable William A Snyder made the following endorsement and order to wit

" On this 25th day of April 1859. I examined the witnesses " subpoenied concerning the charge of murder in Bernard " A Schnirr pursuant to a writ of Habeas Corpus and finding " him guilty of manslaughter, I have fixed his bail at the " sum of five thousand dollars. which can be given at " Clinton County Ills. with security to be approved by John " B Roper Clerk of the circuit Court & in the mean time he " be remanded to the Jail of Clinton County

" Wm A Snyder Judge 24th
" Judicial Circuit Ill

And afterwards to wit at the August term of said Court to wit at a Circuit Court begun and held at the Court House in the town of Carlyle County of Clinton and State of Illinois on monday August first in the year of our Lord One thousand eight hundred and fifty nine present the Honorable Wm A Snyder Judge of the second Judicial Circuit of said State Amos Watts States Attorney, John B Roper Clerk and James J Justice Sheriff holding said Court, the following proceedings were had and orders made and entered of record to wit

" The People } Monday August. 1st 1859
" vs } Indictment for Murder
" Bernard A Schnirr

" And now at this day comes the said people " by Amos Watts States Attorney and Parish and Haynie who " prosecute on behalf of the said People and the said defen " dant by Davis and Sparks his attorneys And on motion " the defendant is admitted to execute a new bond as a " substitute for the bond heretofore taken in this behalf with " Albert Krisp & Gerhard Dierst his security and that the

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" bail bond be withdrawn. Whereupon the States Attorney
" gives notice to the defendant that the prosecution will introduce
" Alfred Kreep Henry Horchler John Schultte, and ask the Court for leave
" to endorse their names upon the back of the Indictment Whereupon
" leave is granted and this cause set for hearing on thursday next
" And afterwards to wit Thursday August 4th 1859. the follow-
ing order was made and entered of record to wit.

" The People

" vs Indictment for murder

" Bernard H Schnier

" And now at this time comes the defendant by Mann & Sparks
" his attorneys and moves the Court for attachments for Henry Lampa
" Henry Wiesterman Franz Albers and William Mollitor witnesses
" on behalf of the defense, And thereupon attachments issued by
" order of the Court.

" And now at this time comes again the said defendant in
" proper person and he being arraigned pleads "not guilty"
" to the Indictment. And was thereupon furnished with a copy of
" the Indictment and a list of Jurors and witnesses And the panel
" of petit Jurors being exhausted, It is ordered by the Court that
" Sheriff summon as talesmen twenty four Jurors to meet the
" Court tomorrow morning. 8 Oclock to which time Court adjourned

Friday August 5th 1859

" Court met pursuant to adjournment present the same as before
" Whereupon the Sheriff returned into Court the panel of twenty four
" talesmen Jurors in compliance with the order of Court of
" yesterday. And that panel being exhausted It is ordered
" by the Court that the Sheriff summon as talesmen Jurors a panel
" of twenty four to meet the Court forthwith, Whereupon the Sheriff
" returned into Court a panel of twenty four Jurors in compli-
" ance with the order of court,

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And now Comes William Mottetor & Harman Westerman two of the witnesses on part of defense for contempt in not obeying the process of this Court to appear as Witnesses and after examining the same to purge themselves of Contempt It is ordered by this Court that the said William Mottetor be discharged upon the payment of the costs of attachment and that Harman Westermann be discharged without costs, Whereupon Court adjourned until tomorrow morning eight o'clock

Saturday August 6th 1859

Court met pursuant to adjournment present the same as yesterday —

And now again Comes the said people by Watts, Parish & Haynie their attorneys and the said defendant by Davis & Sparks his attorneys, And the pannel being exhausted It is Ordered by the Court that the Sheriff summon a pannel of twelve talesmen Jurors to be returned by two Oclock of this day. Whereupon the said Sheriff returned a pannel of twelve talesmen Jurors and the Court adjourned until monday next at two oclock PM

Monday August 8th 1859.

Court met pursuant to adjournment present the same as on Saturday last,

And the Jury being made up and being called answered to their names and who being severally examined tried and sworn to try the issue joined, Whereupon the Court being notified that the Orignal indictment in this cause is lost or mislaid It is Ordered that the further trial for the present be postponed until search be made for the same, Afterwards upon diligent search the orginal Indictment was found And the Jury being called came to wit Edward Lynch J T Blitter J.J. Stevens James Ellegood Joseph Davis P.H. Amos Peter Kistner Charles Moore Smyth Moore Thomas

"Camden John Myers and Francis Peterson who having
"been severally tried and sworn to try the issue Joined as aforesaid
"And after hearing a portion of the evidence It is Ordered by the
"Court that this Court adjourn until tomorrow morning at
"eight Oclock A.M.

Tuesday August 9th 1859

Court met pursuant to adjournment present the same as
yesterday "And the Jury being called came again Edward
"Lynch J.J. Butler J.J. Stevens James Ellegood Joseph Davis
"P.H. Amos. Peter Restner Charles Moore Smyth Moore Thomas
"Camden John Myers and Francis Peterson. Whereupon the
"Court proceeded to the examination of witnesses in this cause
"Whereupon the defendant by his attorneys moves the Court for
"an attachment against Hermann Stittendorf Justice of
"the peace for refusing to obey Subpoena duces Tecum for
"his docket and papers in the Cause of Benedict Thesing
"against Bernard H Schnier And the Court adjourned
"until tomorrow morning eight Oclock A.M.

Wednesday August 10th 1859

Court met pursuant to adjournment present the same
as on yesterday, "And the Court proceeds with the
"examination of the testimony, When the Counsel for
"the prosecution moves the Court that the defendant be
"put in custody of the Sheriff, which motion after
"Argument of Counsel is allowed by the Court Whereupon
"It is ordered by the Court that the Sheriff take charge
"of the body of the said defendant, And that the Court
"adjourn until tomorrow morning at 8 Oclock A.M.

Thursday August 11th 1859.

Court pursuant to adjournment present the same as
on yesterday

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"And now at this time comes again the said people by Watts
"Parish & Haynie who prosecute and the said defendant by
"Davis and Sparks his attorneys and the Argument of this Cause
"before the Jury continued. And the Court adjourned until tomorrow
"morning at eight oclock A.M.

Friday August 12th 1859.

Court met pursuant to adjournment present the same as on yesterday

"And now at this time comes again the said People by
"Watts Parish and Haynie who prosecute and the said defen
"dant by Davis & Sparks his attorneys And the argument of
"this Cause Continues before the Jury and Closed when the Jury
"retired to Consider of their verdict and the Court adjourned
"until tomorrow morning eight Oclock A.M

Saturday August 13th 1859

Court met pursuant to adjournment present the same as yesterday

"And now at this time comes again the said People by
"Watts Parish and Haynie who prosecute in this behalf
"and the said defendant by Davis and Sparks his attorneys
"and the Jury having weighed the arguments of Counsel
"the evidence in this cause adduced as well as the instructions
"of the Court and having considered the same returned into
"Court and after being called came to wit Edward Lynch
"J.T. Butler G.J. Stevens James Ellegood Joseph Davis
"P.N. Amos Peter Kistler Charles Moore Smyth Moore
"Thomas Camden John Myers and Francis Peterson
"and returned the following verdict to wit "We the Jury
"find the defendant guilty of manslaughter and fix
"the time of his confinement in the Penitentiary at the
"term of eight years." Upon which the said defendant

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" by his attorneys interposed his motion for a new trial and
" a motion in arrest of Judgment, and after argument of
" Counsel and no evidence being introduced to prove that
" any Juror had expressed opinion previous to being sworn
" upon said Jury in support of his motions for a new trial and in arrest of Judgment
" the same were overruled by the Court, It is therefore considered
" by the Court that the defendant be sentenced to the Pen
" itentiary for the period of eight years as by the verdict
" of the Jury aforesaid returned into court, one day of which
" time in Solitary confinement and the remainder at hard
" labor, It is further ordered by the Court that the Sheriff of
" the County of Clinton see that this order is duly executed
" by delivering the said Bernard H Schmies to the Warden
" of the State Penitentiary at Alton and that the State
" of Illinois have and recover of and from the said defen
" dant her costs in and about this suit expended and that
" execution issue therefor &c.

" And it is further ordered by the
" Court that the Defendants counsel
" be allowed to prepare a Bill of
" Exceptions in this cause which
" is to be signed by the Judge of
" this court at Salem in the county
" of Marion during the next Term
" of the circuit court of the said
" county of Marion, which will
" commence on the 3d Monday of
" August instant. A. D. 1859.

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12. State of Illinois
Clinton county } I John B Roper clerk of the
circuit court in and for said county of Clinton
do hereby certify that the foregoing Sheets
are a true and perfect Transcript of the records
and proceedings in the case of "The People
vs Bernard H. Schnier," indicted for murder

In Testimony whereof I have hereunto set
my hand and official Seal at Carlyle in the
county of Clinton aforesaid this seventeenth
day of August in the Year of our Lord
one thousand eight hundred fifty nine

J B Roper Clk
of the Clinton County
Circuit Court

13:

The People
vs
Bernard H. Schnier

Indictment for
murder in the
Clinton County Circuit
Court, August Term 1859

Be it remembered that on the trial of the above styled cause, the People introduced Dr. L. N. Halstead, who was duly sworn, and stated, that he was acquainted with the Defendant Schnier, that he did not know Scheiding, the deceased; never saw him until he went to hold an inquest over his dead body; that he summoned Dr. Klinkorte to make a post mortem examination. When he got to the house of Mr. Schnier he found the corpse in a coffin, and ordered it to be laid on a lounge, so that the examination could be made. Klinckorte examined the body, and called my attention to a cut in the scalp on the frontal bone; after the Dr. turned the scalp down he found a fracture from the left temporal bone, running across to the right. We discovered an ounce to an ounce and a half of coagulated blood, between the scalp and the bone; after which

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14. we discovered this crack in the head, the crack running from the left temporal bone over the crown of the head to the right. Directed the Doctor to saw off the head and to retain it in his possession. This piece of bone which I held in my hand was loose in the left temple, and the Dr. pulled it out with his hands or forceps. Between the bone and the pericranium there was about two ounces of coagulated blood. The crack does not follow the sutures. I am a physician myself, but know a little of surgery. Don't know what made this fracture in the cranium. I call it there fractures; they might have been made by falling, a blow, or instruments, or a hard substance. The deceased may have fallen when there were rails lying, and so fractured his skull. It would seem that something hurt over the head. I have known instances when People have fallen and made as severe a fracture as this. I judge it was a kick that made it, but at the same time it might have been a fall. There was on the ground a pile of rails, and he may have fallen on them and broken his

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craniums, but it seems to me to have been a blow. In two instances I have known men to fall on their heads and to kill themselves. Without hearsay I have no opinion as to the cause of death. I came to the conclusion that he came to his death either by a fall or a blow; the cause was a hard fall or a hard blow. I think it was not likely that the fracture could have been made across the head by a fall. But he might have fallen in such a way as to make it. I have seen the skull twice since it was sawed off.

Cross-Examined by Defendant's Counsel.

The sutures of the skull are much wider now than they were at the time we were at Greenville, to which place the Defendant was carried upon a writ of habeas corpus. It is more probable that the fracture was made by a blow than by a fall.

Dr. Klein Korte, being sworn, stated:- That he knew the Defendants; knew Benedict Theising, deceased; saw him on the 3rd. of March last about 4 o'clock. He was then in a dying state. Stayed

with him about 15 minutes. He died about
16. 15 minutes after I left him. I went to
see him on Friday; he had a little
contusion on his head. I took my needle
and probed it to the bone; there was but
little swelling. I told ~~the defendant~~
Reising, the brother of the deceased,
that the deceased could live with the
contusion, and that he must have an
examination made. I went and made
a post mortem examination on the man,
and found him as he was before. I
cut the hair away from the head with
scissors, and made an incision from the
right to the left. We found coagulated
blood, about one ounce between the scalp
and upper layer. I detected instantly
the fracture on the right temple, and
found a fracture on the other side.
Dr. Halstead ordered me to cut away the
cranium. I can't tell what caused
the fracture; it must have been a blow
or external force that produced it.
If it had been made with a sharp
~~substance~~ instrument it must have penetrated
the cranium. It could not have been
made with such a thing. If it had
been made with an instrument of a

broad surface, the contusion must have been broader; I therefore think the thing with which it was made must have been small and blunt or round, for I could cover it - the contusion - with the ball of my thumb. It may have been in the shape of a ball or round stick. I concluded he was killed by another man, without hearing any body say anything about it: cannot tell what degree of force would be necessary to produce the fracture; it might have been made by falling, or a stone, or angulous piece of wood. A blow on one side of the head may produce a fracture on the other side. The blow must have been struck from above to have produced the fracture. The face of the deceased was a little swollen, and his feet was cold when I went to see him, and I thought he might have congestive fever. Several people were present when I called to see him: the wife of the deceased and others. The Defendant told me that at mid-day he was right, but got sick near the fence, that he took him to his house, Teising's wife being sick, and afterwards

died of dropsy. Defendant did not say anything about Teiding's having received an injury. I said it was congestive fever and he did not tell me any better

Cross-Examined by Defendants Counsel:-

I said a fracture might be produced on the opposite side of the head to that on which a blow was inflicted. There were two little wounds in the contusion about the size of a head of a needle. There were two little wounds in the contusion through which I could feel the cranium with my needle. I examined the person of the deceased thoroughly, and there was no where on his person any sign whatever of violence, except the contusion on the head. He was thoroughly stripped and I examined his whole person. The contusion was the result of one blow only. The contusion externally could not have produced death. The external wound could not have produced death. It is possible that the deceased in aiming a blow at another with a weapon might have brought it over his own head in such a way as to have made the external contusion. It may be possible that the

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death of the deceased was caused by a fall on an angular piece of wood or stone or fence rail, though I dont believe it. If he had fallen on wood, stone or other hard substance, concussion of the brain might have been produced, or the coagulation of blood. There was satisfactory evidence to my mind that the brain had undergone a severe concussion. I think many men may have died from concussion of brain when there were no signs of external violence. No one who was present when I called to see Teising at Schneis's request said anything about any violence having been used on Teising, on Thursday. I was there again on Friday. I found the body in precisely the same condition in which I left it except that it had been removed into another room. I again saw it on Saturday morning when I went there with Halstead. I found the body on Saturday as on the former day, save a piece of linen over the face to keep off the flies: this was between nine and ten on Saturday morning at Mr. Schneis's. It is customary when a person dies in the neighborhood of the deceased, to bury the body on the following day.

I knew both the deceased and the defendant, about six years before the death of the former. I have known both the defendants and the deceased as good men.

Re. Examined by the People.

Coagulation of blood may be in the brain from various causes.

Gerhardt Borchel, being sworn, and being unable to speak the English language Squire Lamphir was sworn to interpret, and to render the German into English. Witness knows Defendants, and knew Theising: lived with Theising: saw him 10 o'clock, forenoon, at his house. It was on Thursday, 3rd of March last. Theising was at the fence when I saw him; Schneir was at the fence with him. Theising was not doing anything, Schneir was throwing down the fence. It was Theising's fence. They were quarrelling. I was about a half of a forty acre tract away from them. There was a ~~fence~~ fence between them. I could see Theising clearly. Schneir's wife, son, and another young man living with Schneir, were there. They were there when I first saw them. Theising was standing then and moving about a little. The

fence was pink between Theising and Schneir. They were four or five feet apart. Theising was on his own land. It was now about one or half past two o'clock in the evening. I cannot say whether it was clear or cloudy. I could hear them talking, but could not tell what they said. They were talking loud. I did not go to them right off. I went there for the purpose of helping Theising to make a ditch in the afternoon. I did not do anything; I was standing still, waiting for Theising to go to work at the ditch. I did not go from where I stood until Theising fell. I saw him fall. Schneir was standing closest to him at that time. They were on opposite sides of the fence, facing each other. He fell backward, he was facing Schneir when he fell. I could not see any thing in Schneir's hand. They were about neck from where I was. Theising was nearer to me than Schneir was. The fence ran north and south. I saw both Schneir and Theising, when Theising fell, and was a few minutes after Theising fell to where they

were. When I got to them the blood was coming out of his nose and mouth of Theising. Schneir and his wife were holding him up and washing his face, when I got to them. Theising did not say a word; I don't know whether he knew any thing or not. He could not speak. I spoke to Theising, he gave me no answer. He died about 5 o'clock on the same day. The others were standing close to Schneir, on his own side of the fence, farther from me, than Schneir was. I did not see any thing (weapon) on the ground when I got there. There were around about Theising pieces of fence rail, and I saw nothing else on the ground. I was at the fence after Theising died; I saw on Schneir's side of the fence a stake about five or six feet ~~along~~ and as thick as my arm, and standing loose at the fence. ~~Lying loose~~. It was ~~[illegible]~~ round, but I could not see whether it had been in the ground or not. I did not see any others around there like it. The fence was staked but not ridered; some of the stakes were round and some split. Schneir had thrown down ten or twelve panels of the fence. He pushed the fence down.

I could see Schneir forcing the fence over.
23. He had a rail or stake or fence rail in
his hand to pry the fence over. It was
about a quarter of an hour from the time
I first saw them until I went to them.
Schneir was throwing the fence down when I
first saw them. I did not see him use
the stick in any other way than in forcing
over the fences. I saw the upper end in
his hand, and the lower end was on
the ground. He did not say anything when
I first came to where he was. I asked
what was doing there, and I said the
last owned be worse than the first. Schneir
(the German word used by the witness was
"schlag" which was rendered stroke
said the stroke was rather hard, but
by the interpreter)
that he was sorry for it." I dont know
the feelings between them, except that they
had some quarrel about the fence. As
far as I know Theising's fence was standing
on Schneir's land. Schneir wanted it off;
I knew this a half a month before this
happened. I was at Theising's only a
half of a month before this happened.

Cross Examined by Defendant's Counsel:-

Theising threw the rail over to Schneir's side
when he was standing. I saw Theising
throw the rail over, but could not see
whether he threw it any one or not.

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He had a rail in his hand and was throwing
24. it over, and fell backwards. Schnein was
standing close to him, when Theising
threw the rail. They were standing face
to face, and Theising threw and fell back.
At the very instant the rail left his
hand, he fell backward. He was not
standing on a pile of rails when he fell
but there were pieces lying around about
him. I could not see from where I
was whether there was a pile of rails
or not. I cannot describe the rails
lying about him, but the most of
them were pieces. I did not examine the
rails to see whether there were pieces
on them. Schnein, his wife and son,
and I, took Theising to Schnein's house.
Mrs. Theising was very sick at the time.
I was not at Schnein's when the Dr.
came to see Theising. Schnein wanted
to take Theising home, but I said that
he had better take him to Schnein's house,
because Theising's wife was sick. The
German word "schlag" means a fall as well as
a blow. Schnein was on his own land,
and was pushing the fence off his
land, on to Theising's. He had removed 10 or 12
5 panels. He moved the fence from

his land to Theising's by spraying it with
25. a rail. It was about 80 to 90 yards
from Schneis's house to the fence. It
was about half of 40 acres from
Theising's house to the fence. I can't
say where the rail Theising threw fell;
can't say how far it fell from Schneis;
can't say whether it hit Schneis, or
any body else; don't know that Theising
had any ill will towards Schneis, except
about the fence. I has been at Theising's
only about half a month; never heard
him threaten Schneis with any violence;
Don't know when John Schulte is; I
saw him on the day Theising & Schneis
Schneis's house and at the fence, when
the difficulty occured. There was no
body else besides Schneis, his wife and
son and Schulte at the fence when the
difficulty occured. This is not the
Schulte who was present at the fence
at the time of the difficulty (Theodore
Schulte was here called into court and
the witness requested to look upon
him.)

Re-Examined by the People.

I was too far off; I couldn't tell what
kind of rail Theising had. Schneis did

[8540-12]

26. not knock any rails off of the fence, he only pushed it over on Heising's land. The fence had not been standing in that very place, where it then was, more than 3 or 4 days. I was not there when a survey was made of the line between Schnier and Heising. They had a pole stuck at each end, to show where the line was. That is all I can tell about it. After the difficulty had happened I went to look at the line. I can't tell who put the poles there. There was a rock put in the ground by the poles. I heard Heising and Schnier quarrel. Heising picked up the rail and threw it over; he picked it up about a yard from the fence. I could not see precisely how he threw it over the fence. As I stood Schnier was on the left, and Heising was on the right. I could not see whether Schnier stood nearer the corner or the middle of the fence. I did not look for the rail after I got down there. I could not tell which was the rail thrown; the rails were lying in some places and standing in others. I saw him, Heising, throw the rail clear over the fence.

5.

I can't tell particularly its size, it was
27 a piece of a rail.

Here the Court adjourned; and
the Examination of this witness was resumed
at the calling of the court in the after-
noon: a Witness said: I said before "the
stroke was hard, rather hard and he
was sorry for it." The Prosecution then
offered to prove by the witness his
understanding of the meaning of the word "Schlag", to
which the Defendant by his Counsel
objected. His objection being overruled
by the Court, he then and there ex-
cepted to the ruling of the court; and
the Court allowed the witness to go
on and give his understanding of the
meaning of the word "schlag," as used
by the Defendant. And the witness said:-
"I understood the Defendant to mean
when he used the word "schlag", that
he struck the deceased. ~~I understood~~

2 The Prosecution then offered to prove the sense in which he used the word "Schlag" and intended the jury to understand it in his testimony
by the witness ~~his definition of the word~~
~~"schlag"~~, to which the Defendant, by
his Counsel, objected, and his objection
being overruled by the court, he then
and there excepted, when the witness
stated: "I understood the German

[SISMO-19]

word "schlag" to mean that the Defendant struck the deceased. Theodor Shulte was living with Schmier at the time. There are two Schulter, young men. The other is smaller than the one now here in court. The last time I saw the other Schulte was in last April. I don't know how long he lived with Schmier after the difficulty with Kissing. I

am Re-Cross-Examined by Defendant's Counsel. I understood from Schmier that he struck the deceased, and I am not mistaken as to the meaning of the word "schlag" used by Schmier I before stated.

Henry Hargler being sworn and examined by the Prosecution, said:- I was at Schmier's house after Kissing was dead, his body was still lying there. He told me that he had struck the deceased on the arm with a stick, but that he did not think it would have hurt him so that he would die. He gave me a bottle of Whiskey and asked me to take a drink, and then I went away. This was the day after Kissing died, and was in the morning about nine o'clock. This is all I know about the case.

Crop Examined by Defendants' Counsel.

29 He did not tell me on which arm he hit Fleming, nor the kind of stick he used. It was in Schneir's own house, where the dead man was lying, that he told me what I have before stated. There was nobody but Schneir and myself present, when he told me that he had struck Fleming on the arm. I told no man of what Schneir told me about 3 hours afterwards. I was not at Greenville as a witness against Schneir. I was summoned as a witness in this cause about 8 days ago. It was an officer who summoned me. Schneir did not tell me any thing more than what I have stated. He did not tell me another word about the case. I went to see the dead man. He (Schneir) said it was no use, that he had hit the man on the arm with a stick, but did not mean to hurt him. Schneir gave me the bottle & drank, and went out of the room again. It was on the day after the man died about 9 o'clock. I went next night and stayed all night, to see that nothing was done

[85 40-45]

30 to the body; Dick Kiding requested me to do so. I have known Schneir a long time, and his neighbors considered him a good man. Last winter he and Kiding had a falling out, and were not good friends.

The Prosecution then closed in chief. The Defendant offered C. H. Guithaus, who was duly sworn "to prove that the word "Schlag" in the German language means a fall more frequently than a blow" to which the Prosecution objected, and the Court sustained the objection, and the Defendant then and there excepted to the ruling of the court.

The Defendant then offered to prove by C. H. Guithaus, an expert in the German language, "the meaning of the German word "Schlag" as used by the Defendant in conversation with the witness Bochtel, and at the same time both the German as taken down by the interpreter at the request of the Prosecution, as well as that taken at the request of the Defence, so as to enable the witness Guithaus to say what the meaning of the said German word is, in that connection."

Said Guithaus not being present at the Speaking of said word by Defendant

31

31

To which the Prosecution objected, and the objection being sustained by the court and the evidence ruled out, the Defendant then and there excepted.

The Defendant then introduced John L. Lester, who upon his oath said:- I have known the Defendant twenty years; I never heard his character called in question.

The Prosecution then asked if he had not heard of his shooting at one Schulte. He said that he had never heard of any such act. The Defendant called Jed. Dennis, who at his oath said: I have known Defendant for twenty years. I have never heard his reputation for peace and quiet spoken of. C. H. Guithaus is called and states that he knows Defendant; has known him 22 years. Says he is a peaceable citizen, having had but one difficulty in all that time, and that is the difficulty with Reading; that he never heard of Schneir's having a difficulty with Ben Schulte, in answer to a question propounded by the Prosecution.

The Defendant then offered to prove

82 by the witness Guithaus who is a German by birth, and an expert in the German language "that the German word "Schlag" as used by the Defendant in conversation with the witness Borchel, which conversation he has detailed to the jury, signifies in the German "a fall," and that that is the primary and true signification of the word, but the witness, Guithaus, was not present at the conversation between the witness Borchel and the Defendant Schnier;" On objection by the Prosecution the Court ruled out the above evidence, and the Defendant then and there excepted to the ruling of the Court. Here it was conceded by the Prosecution that the Defendants reputation for peaceableness was good. The Defendant then introduced A. J. Randall, who was sworn and testified that he was a grand-juror for Clinton County at the last term of the Clinton Circuit Court; that the Grand Jury had under consideration the Defendants case; that John Schulte was called and sworn as a witness for the prosecution against the Defendant,

and as nigh as he could state his remembrance of Schulte's evidence it was,
33. that he, Schulte, stood near Schmeir and the deceased while they were quarrelling about the fence. That Theising picked up a stick and threw or passed it over to Schmeir, saying "take this, you have ale the balance," and fell as he passed the rail over. Schmeir had a round stick which he used in forcing the fence; did not see a blow stricken; did not see Schmeir strike any one. This witness said that he could not recollect whether Schulte said Schmeir had a stick in his hand, but thinks he said that the stick was lying on the ground at the time Schmeir and Theising were quarrelling.

Cross Examined by the People.

He said that he did not think anything was said by Schulte about the rail that was passed over touching Schmeir. He said that he, Schulte, was struck himself, and his attention was called away, and he did not see any blow stricken by any one.

The Defendant introduced Allen Petrie, who was sworn and stated:

[BSHDHY]

34. That he served as a grand juror for Clinton County at the last March term of the Clinton Circuit Court, when the charge against Schneir was examined, and the indictment found. That John Schulte was examined as a witness on the part of the People; he stated that he was present when Theising came to the fence where Schneir was spying. That Theising threw a stick which he had to dodge; that he dodged back and saw Theising fall. The Grand Jury asked Schulte particularly whether Schneir had a stick in his hand at the time; he said that he did not see any stick in Schneir's hand from the time Theising came there to the time he fell. Schulte was examined thoroughly by the Jury. He was first sworn on a Bible without a cross, and examined, and the Jury supposing it possible that he might not have stated all he knew about the case, caused him to be sworn on a Bible with a cross on it, and he then swore precisely as he had done before, that he did not see Schneir strike at or throw anything at Theising, nor have anything in his hand.

Cross-Examined by the People.

35.

The Jury occupied a considerable time in examining the witness, and that the witness stated that he did not see Schneir have anything in his hand from the time Theising came up to the fence until he fell: that he did not see him have anything in his hand at all, at anytime after Theising came up.

Here the Defendant proved by James M. Rogers, Levi Edmonds, Lambert Cooper, Gerard Durst, and Esquire Lamspin that the Defendant's character was good for peaceableness.

William G. Burnside was introduced by the Defendant and sworn, and stated, that he was County Surveyor of Clinton County: and that he surveyed Theising's land at Theising's request and ascertained the line between Theising and Schneir, and put posts into the ground at the corners of the tract, and also stones when the line ran between Schneir and Theising. The fence was on Schneir's land at the north corner. I surveyed the lines truly and accurately. The line was a half of mile in length. There was no fence at the south corner where the dividing line commenced. The fence was on

[8540-18]

Schneir's land near the South corner, but did not extend quite down to the corner. There were two fences; they were about twenty feet apart where Theising began and there was a narrow lane. The lane I don't think extended quite as far as to the North corner. I made two surveys, first for Theising when he was with me, and then for Schneir when both Theising and Schneir were along with me. I made the last survey in the month of February last. The two surveys made by me agree. The fence along the line was not straight; at some points it was on one side of the line at others on the opposite side. I made the first survey some two or three years before I made the last. I should think about 100 yards of the fence next the North corner was on Schneir's land. I have not been on the place since Schneir attempted to remove the fence on to Theising's land.

Cross. Examined by the People. I surveyed the line between Theising and Schneir three years ago; don't recollect whether there was a fence there at that time or not. I remember that the rails

were old, of which the fence was made when I last surveyed the line. The line I ran on the west side of Theising's land. The line was between the place where Schnier lived, and that where Theising lived. There was a misunderstanding between the parties as to where the line was. I dont know whether they knew where the line was or not. I learned from Theising that he and Schnier had a law-suit about the fence.

Albert Krieg, introduced by Defendants and sworn, stated:

"Knows where the fence stood about which Schnier and Theising had the difficulty. Saw the south corner of it when I passed along the road near the line. The road is a private road on Schnier's land. I have not been on the ground since the difficulty happened. Defendants offered to prove by this witness "that he had a conversation with the Defendants about two hours after the difficulty is said to have occured at the fence between the Defendants and Theising, in which Schnier used the word "schlag" in relation to the cause of Theising's death, and that the true and genuine sense of the said

word so used by the Defendant." The evidence was ruled out by the court, when so offered, and the Defendant then and there excepted to the ruling of the court.

The People Cross-Examined this witness, but he stated nothing in addition to what he had stated in his examination-in-chief.

Hermann Schuler, the son of the Defendant, was sworn, and examined by the Defendant, and stated, that he was 18 years old, knew Theising about 12 years before his death, and that he lived about a quarter of a mile from witness' father; that Theising died on the 3rd. of March last at Defendant's house. Witness was present when the difficulty occured at the fence between his father and the deceased. John Schulte, my mother and I were present when Theising came to the fence, which was about 80 yards from fathers house. Defendant, John Schulte and I went to the place to remove the fence which was on my father's land. Theising put the fence there; it had been there about three years. We put a stick under and shoved it over upon Theising's land; some of it fell down. Theising came there while we were removing the

and requested an interpreter, but upon suggestion by the Prosecution the court refused to allow him to testify through an interpreter.

fence. no body came with him. When
39 Theising came up he commenced quarelling
with my father. He picked up half a
rail and threw it over to us. He threw
the rail so, as fast as he could; I mean
as hard as he could. I did not hear him
say anything when he threw the rail. As he
threw the rail he fell. There were two rails
lying across each other when he stood.
These were between his feet. I could see his feet
through the fence. I cannot say how many
rails were lying where Theising fell. They
were of various kinds - oak and ash. I
saw Theising fall. I did not see my father
have anything in his hand at any time
while Theising was there. I saw my
father all the time after Theising came
up. I was about 3 or 4 feet from my
father when Theising threw the rail and
fell. They were standing face to face,
when Theising threw the rail, and four or
five steps apart. The fence was between
them when Theising threw and fell. Theising
took the rail from the ground and threw it
over: the rail was 7 or 8 feet long, and
4 inches thick. I think it was oak: it was
an old rail. I was standing on our side
32 of the fence when Theising came up. There

40 was no body between me and Theising to prevent me from seeing him when he threw. There was nothing between me and Theising to prevent me from seeing him when he threw and fell. The fence came up about midway to my breast. I could see Theising on the opposite side plainly. Theising threw the rail about five steps. I jumped back and out from the rail else it would have struck me on the head and killed me. I stood facing Theising when I jumped out one side. I saw him all the time. I stood on the left hand of my father at this time and South of him. My father stood still; the rail struck me a little about the leg, and gave me a little pain. I saw my father all the time. I saw him as I jumped out of the way of the rail. My father was standing still when Theising picked up the rail, and I am sure that my father had nothing in his hand at the time. I cannot tell so "particular" where John Schulte was standing at the time Theising threw the rail. My mother was on the North side of my father: she had no-
41 thing in her hand. I did not see John Schulte have any thing; there may have

been about 10 rails about where Theising stood. He did not talk to any body but my father. I don't think it possible for my father to have hit Theising without my seeing him. Theising had on wooden shoes. I saw Borchel, the witness, that day at the fence. He came up to the fence after Theising fell. He helped to carry Theising to my father's house. My father talked in German to Borchel. I heard what he said to Borchel. He said to Borchel that Theising might have fallen too hard on the rails.

41

Cross Examined by the People.

John Schulte, my father and I went down to the fence together. I went down with my father because the constable told him he must remove the fence in ten days, and I went to help him. My mother came down afterwards. I don't know why she came. We threw the fence down with a stake; we removed it with a stake four or five long. Can't say what sort of wood it was. We put the stakes under the fence and shoved it over. We shoved some with our hands. Mother did nothing. We were just on the road to

[83440-3]

go home when Theising came; we had got done. We were on our land on our own road. It was my father's lane. My father did not take a stick with him to the fence. When Theising came we had not got done. I answered Mr. Davis that Theising came while we were removing the fence. It may have been 10 minutes after Theising came down before we got done. Here the witness desired that an interpreter might be called to aid him by putting the questions to him in German, and to give his answers in English after he had delivered them in German, as he could not understand the English well enough to give his evidence in that language. But the Prosecution objected, and the Court refused him an interpreter, and compelled him to give the whole of his evidence in the English tongue.

Here the Court adjourned it being noon.

Testimony of Hermann Schmier continued:-
Theising held the rail by the end and threw it over-handed. Father faced him as he threw it. It passed right over. It came toward me to strike me on the head. Can't say how far I jumped back. I jumped right back from the rail. It

struck me as I went to jump back. I was looking right at Mr. Sheising - saw him all the time. I could see - I saw both Sheising and my father. I saw the rail coming. We were standing all together, my father, mother, John Schalte and myself. I saw them all, and saw Sheising fall. Just as he threw the rail, he fell; just as the rail went out of his hands he fell. There were many rails when he fell. I did not see anything hit him. Can't tell just how he fell. I said yesterday he fell back. Can't say so particularly. I mean to say today what I said yesterday. I say I think he fell back. The rails did not lie flat on the ground where he fell. He stood with his feet on the ground all the time. I said that if I had not jumped back the rail would have hit me on the head and killed me. I jumped a little away and the rail fell on the ground. I saw Borchel. ~~He~~ & stood as far from me as from me to you. I heard Borchel speak to my father when he came up. Cannot say particularly what words he used. What I said to Mr. Davis I mean to say to you. Father said to Borchel that Sheising might have fallen too hard on the rails. I know he said rails. I say the same to you. I

said to Mr. Davis. Fence is the German word for rail. I have never talked about what I was going to tell here. I just say what I know. I never told my father what I was going to tell. I have lived at home all the time. I told Col. Davis that we were throwing down the fence. When we put the fence away, my father threw the stick down. When we got done we put the sticks down. We left them on the ground. I can't tell so particularly how long we worked after Theising came; it may have been five minutes. I said yesterday I was on my father's left side. I don't know so particular where John Schulte was. I can't say particularly whether my father's hands were hanging down when Theising threw the rail. He stood still: can't say that he did not move his hands. I did not hear Theising say anything when he threw the rail over. Can't say which was the farthest away from Theising when he threw John Schulte or I. I told Mr. Davis Schulte had nothing in his hand when Theising

threw. I had no stick in my hand after we quitted pushing the fence over. I had a stick in my hand when I was shoving

the fence, when I quitted showing the fence I threw it down by the fence. The rising was about as high as Mr. Davis, the juryman.

45.

Theodore Schulte was introduced by the Defendant and sworn:- John Schulte is my brother. My brother lived with Lambert Cooper about a month and fourteen days before he went away. He lived with Mr. Schmeir, the Defendant, at the time of the difficulty at the fence and was there.

Cross Examined by the People

He left Mr. Schmeir's after the difficulty, and went to Mr. Cooper's to live. I lived and still live with Mr. Schmeir. Mr. Schmeir sent me after John the night before he went to Greenville. He wanted John to go up as a witness for him. I learned from Mr. Cooper that my brother had gone away on Saturday night before. I did not know anything about his going away. He had money of his own. He stayed at Cooper's the last night he stayed in this country. A man inquired for John on Sunday - a stranger. John got about $5.00 a month for his work. I dont know of any body furnishing him money to go off.

This is all the evidence that was given in the cause.

5540-23

46. All the evidence being in the Court instructs the Jury at the instance of the People as follows:

State of Illinois } August Term of Clinton
Clinton County } Circuit Court A. D. 1859.

The People of the State of Illinois } Indictment
against } for Murder.
Bernard H. Schneir

The Court is requested by the Prosecution to instruct the Jury as follows.

1. If the Jury find the Defendant "not guilty," the form of your verdict will be, "We the Jury find the defendant not guilty." Given.

2. If the Jury find the defendant guilty of murder the form of your verdict will be "We the Jury find the Defendant guilty of murder in the manner and form as charged in the Indictment. Given.

3. If the Jury find the Defendant guilty of manslaughter, the form of your verdict will be, "We the Jury find the defendant guilty of manslaughter and fix the time of his confinement in the Penitentiary at the term of not less than

one, and may extend to his natural life" Given.

47. To which Instruction the Defendant then and there excepted.

4. 2. Murder is the unlawful killing of a human being in the peace of the People, with malice aforethought either express or implied by law. Given.

5 3. Malice includes not only anger hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill-will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive - a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty, and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart. Given.

To which Instruction the Defendant then and there excepted.

6 4. If the Jury shall find from the evidence, that the killing of Benedict Theising has been proved as charged, then any defense which the defendant may rely upon in

[RSHO-94]

48 justification or excuse of the act, or to reduce the killing to the grade of manslaughter, it is incumbent on the Defendant satisfactorily to establish such defense either by proof arise out of the evidence produced against him, or by introducing proof in his own behalf. And if the Defendant has failed to establish satisfactorily any such defense, the killing being proved, the verdict must be guilty of murder. Given.

To the giving of the above Instruction to the Jury the Defendant then defendant then and there excepted.

7 The Court further instructs the Jury that when one person kills another with a deadly weapon, no words of reproach or gestures, however irritating or provoking, amount to a considerable provocation in law, and where one person unlawfully kills another by striking him a blow with a deadly and dangerous weapon, where no considerable provocation appears, or provocation apparently sufficient to excite irresistable passion, the law makes such killing murder. Given.

To the giving of which Instruction the Defendant then and there excepted.

8. The court instructs the Jury that if

without adequate provocation, and without
49 such provocation as is apparently sufficient
to excite irresistable passion, a person
strikes another with a deadly weapon,
likely to occasion death, although he
had no previous malice against the
party, yet he is to be presumed
to have had such malice at the moment
from the circumstances, and is guilty
of murder. Given.

The defendant excepted then and there to the
giving of the above instruction.

Q. The law presumes that a person in-
tends all the natural, probable and usual
consequences of his acts; that when one
person assails another violently, with a
dangerous weapon likely to kill, not in
self-defense, and not in a sudden heat
of passion, caused by a provocation
apparently sufficient to make the passion
irresistable or involuntary, and the life of
the party thus assailed is actually destroyed
in consequence, the legal and natural pre-
sumption is, that death or great bodily
harm was intended, in which case the
law implies malice, and such killing would
be murder. Given.

[B540-25]
2

10 If the Jury believe from the evidence
50 that the Defendant was in the commission
of an unlawful act against the property
of Benedict Theising at the time of the
difficulty between the Prisoner and said
Theising, which terminated in said Theis-
ings death, and that said difficulty
was by the Defendants procurement,
and that during said difficulty Defendant
struck said Theising with a deadly weapon,
inflicting injuries upon said Theising
as charged, then it must appear either
that defendant in good faith declined
any further difficulty with Theising,
or that said blow, if you believe it
was inflicted by defendant, was inflicted
in necessary self-defence, or in defense
of his wife or son, and if such does not
appear then the verdict should be guilty
of murder.

Given.

To the giving of the above Instruction the Defen-
dant then and there excepted.

11 If the Jury believe from the evidence
that on or about the third day of March
last, in the County of Clinton, the defen-
21 dant and deceased, met at a certain
fence, and a quarrel ensued between

51

them, and that the defendant then and there struck deceased a blow on the head with a dangerous and deadly weapon as charged, without any considerable provocation, or such provocation as was apparently sufficient to excite sudden or irresistable passion, and that on the same day deceased, from the effects said blow, so inflicted, died, then the Jury should find the Defendant guilty of murder. Given.

12. If after a due and proper consideration of all the facts and circumstances in evidence before you, you shall believe the defendant not guilty of murder, then you should consider whether the defendant is guilty of the crime of manslaughter, and if you shall believe from a view and consideration of all the facts and circumstances in evidence, that the defendant is guilty of manslaughter, then you should so find, and fix by your verdict the term for which he shall be confined in the penitentiary at any length of time not less than one year, nor than the during

[8540-24]

his natural life. Given.

To the giving of which Instruction the defendant then and there excepted.

13. Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistable; or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistable passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing, his wife or son. The killing must be the result of that sudden violent impulse of passion supposed to be irresistable. For if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing

shall be attributed to deliberate revenge
53 and punished as murder. Given.

14. Involuntary Manslaughter consists in the killing of a human being without any intent so to do, in the commission of an unlawful act, which might produce such a consequence in an unlawful manner; provided always, where such an involuntary killing shall happen in the commission of an unlawful act, which in its consequence naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offence shall be deemed and adjudged to be murder. Given.

To the giving of the above Instruction by the Court the Defendant then and there excepted.

15. To extenuate an unlawful killing or homicide from the crime of murder to manslaughter, two facts must concur, there must appear to be both provocation and passion. Provocation without passion will not extenuate, nor will passion merely without provocation, reduce the mur-

[85540-27]

54

lawful killing from murder to manslaughter.

Given.

16 No breach of a mere word or promise, no trespass to his lands or goods; no affront by bare words or gestures, however false or malicious, and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder, where the party killing makes use of a deadly and dangerous weapon, or otherwise manifests an intention to kill or to do some great bodily harm. But the provocation which the law requires and regards as sufficient to extenuate homicide from murder to manslaughter, must in general be an assault upon the party killing - it must be an offer to effect violence upon the party killing. Where one man attempts or offers to strike or beat another, and that other shoves them without malice and under the influence of passion, caused by the provocation, strike a blow which results in the death of the assailant, the killing would be manslaughter under such circumstances.

22

Given

55.

The Court gave the following Instructions, which were drawn up and presented to the Court, after the closing speech was made for the Defense, notwithstanding a rule of Court which requires that Instructions shall be prepared and presented to the Court before the ~~commencement of the~~ by the prosecution or Closing of the argument closing speech ~~or part of the defense~~.

17 The Court instructs the Jury that the law conclusively presumes that every sane man intends or contemplates the natural and probable consequences of his own acts; and that therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon. In this case it is the duty of the Jury to consider all the facts and circumstances in evidence before them, and if from such consideration they are satisfied, beyond a reasonable doubt, that the Defendant unlawfully killed Theissing with a dangerous or deadly weapon; where no considerable provocation

appeared for such killing, then the Defendant is guilty of murder. Given.

To the giving of which Instruction the Defendant then and there excepted.

18. That while the law recognizes the right of self defense where one party is assaulted by another; and also recognizes the right of a father to interpose in defense of his child, yet a bare fear of being assailed will not justify one man in taking the life of another. Given.

To the giving of the above Instruction the Defendant then and there excepted.

19. The true rule of law upon the principle of self-defense of person is this: Where a man who in the lawful pursuits of his business is attacked by another, and where from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life, or to commit any felony upon his person, the killing of the assailant under such circumstances, will be excusable or justifiable homicide, although it should afterwards appear that no felony

57

or real danger was intended. Upon this rule of the law of self defense before a party can be acquitted of the crime of murder or manslaughter, where the evidence proves a homicide, the jury must be satisfied from the evidence, First, That the accused was attacked by the deceased, or that his child or wife or servant was attacked by the deceased.

Secondly, The attack must be made with a deadly weapon or under such circumstances as were calculated to raise a reasonable apprehension of death or of receiving great bodily harm.

Thirdly, That the party killing, killed the assailant in order to save his own life, or that of his child, wife or servants, or to prevent his own person, or that of his child, wife or servants from receiving great bodily harm. If the jury believe from the evidence that the Defendants, his son and John Schalte, were engaged in removing a fence erected by Theising, and that while they were so engaged the deceased came up to them and a quarrel ensued, and the deceased man picked up a rail, or a piece of rail, and threw it over to the opposite side of the fence,

[8540-29]

15

remarking that "You have got my fence, here take his balance", and did not attack or assault or attempt to commit any violence upon the person of the defendant, nor upon the defendants son or wife, and the circumstances attending the throwing over of the piece of rail were not calculated to induce a reasonable and well grounded apprehension upon the part of the defendant that his life or person, or that of his son or wife was in imminent danger of death or of great bodily harm at the hands of Preising, then you cannot acquit the Defendant on the ground of justification.

Given.

To the giving of the above Instructions the Defendant then and there excepted.

20. The true test of self defense, is, was the Defendant, or his son, or his wife, or his servant, attacked by the deceased man, in such a manner and under such circumstances as were calculated to raise in the Defendants mind a reasonable and well-grounded belief, that he, or his son, or his wife, or his servant, were in imminent danger of life or great bodily harm? The danger must be real or apparent, in a

59

minute and perfect, and not a merely imagined enemy or existing machination, for unless there be some overt act, apparently indicating a design to take the life of the Defendant, or that of his son, wife or servants, or to do one or all of them great bodily harm, he was not justified in taking the life of Dominick Theising.

Given.

To the giving of which last exception the Defendant then and there excepted.

21. If a man kill another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well grounded belief of imminent danger to life, or of great bodily harm, the law will not justify the party killing.

Given.

To which Instruction being given the Defendant then and there excepted.

22. Back upon the grounds of justifiable Homocide, or the principles of self defence, the Court further charges you, that, even although you should believe, that Theising attacked the defendant or his son still, if

[8540-30]

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you believe from all the evidence in this case, the party assailed could have escaped his adversaries vengeance at the time of the attack, without the killing of Theising, the defence of justification or self defense has failed, and the defendant cannot be acquitted upon the law of self-defence.

Given.

To the giving of the above Instruction the Defence then and there excepted.

23. The Court further instructs you that if a man for the purpose of bringing another into a quarrel, provoke him so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger kills his adversary, he would be guilty at least of the crime of manslaughter, if not of murder, because the necessity being of his own creating shall not operate in his excuse.

Given.

To the giving of which Instruction the Defendant then and there excepted.

24. That if you believe from a view of all the evidence that Theising did not assault the defendant, nor his son, nor his wife then

P1

the Defendant cannot be acquitted upon
61 the grounds of self defence. Given.

The Defendant requested the Court to give to the Jury the following Instructions on behalf of Defendant.

The Court instructs the jury

1st. That no homicide is murder unless it be committed with malice aforethought, which malice aforethought is either express or implied. Malice express is when the killing is done by a person who before the killing has threatened to do it, or has threatened the deceased with great bodily harm, and in like cases; malice implied is where the accused person shoots into a crowd of people and kills a human being in that way and all such cases which show the accused fatally bent on mischief in the prosecution of the fatal act, or where there is no considerable provocation by the party killed or when all the circumstances of the killing show an abandoned and malignant heart.

Given.

2. Manslaughter is the unlawful killing of a human being without malice aforethought either express or implied. It is voluntary

or involuntary - voluntary upon a provocation apparently sufficient to excite irresistable passion, or involuntary in the doing of an unlawful act, or a lawful act without due caution and circumspection.

Given. +1

3rd. Malice will not be implied when the act which produces death is common and usual, and not manifestly calculated to produce death or great bodily harm.

Given.

4th. The Court instruct you that if there be any other reasonable hypothesis arising out of the evidence given in this cause, than that the Defendant unlawfully killed Sheising, the Defendant is entitled to the benefit of such hypothesis and ought to be acquitted.

Given.

5th. You cannot find the Defendant guilty of unlawfully killing the deceased Sheising upon a preponderance of evidence, but you must be satisfied beyond a reasonable doubt, from the evidence given to you by witnesses who have been sworn and examined in this cause, that the Defendant unlawfully and

e 3

feloniously killed and slew the said deceased, otherwise you must find a verdict of not guilty. Given.

6th. The Court instructs the Jury that unless they believe from the evidence that all the material allegations in the indictment in this cause are proved beyond any reasonable doubt, that they must find the Defendants not guilty.
Given.

7th. The Court instructs the Jury that they must have convincing proof of the guilt of the defendant before they can properly find their guilty; and if there be any reasonable hypothesis, consistent with the evidence in this cause, upon which he may be innocent they ought to find him not guilty. Given.

8th. The Court instructs the Jury that it is not enough, that the Jury believe from the evidence, that is more probable that the Defendant killed the deceased, as charged in the indictment, than that he died from some other causes, but they must be satisfied beyond a reasonable doubt from all the testimony that

64. he is guilty as charged in the indictment, or else they ought not to find him guilty. Given.

9th. The Court instructs you that an assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another, and that if you believe from the evidence in this cause, that the deceased assaulted the Defendant with a rail or ~~stick~~ stake, and that the Defendant thereupon killed the deceased, (then the Court inserted the words "without malice") under the honest belief (however erroneous) that he was in imminent danger of losing his life, or of receiving great bodily harm ~~of~~ the hands of the deceased;- (then the court inserted these words:- "and that he had not the opportunity of retreat, consistent with his personal safety,")- You ought to find a verdict of not guilty. Given.

~~10th~~ To the refusal of the Court to give the above Instruction No. 9, as prayed for by the Defendant, and to the modifying of the same by the court by inserting

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65.

the word "without malice" after the word "deceased", and before the word "under", in said instruction, and also to the inserting of the word: "and that he had not the opportunity of retreat, consistent with his personal safety", & when the word "deceased" and the word "you" in said instruction, the Defendant then and there objected and excepted.

10th. The Court instructs you that if you believe from the evidence that the deceased Fleming struck with or threw a rail or stake at the Defendant Schneir, and within the distance to strike with or hit by throwing, and that the Defendant Schneir thereupon killed the deceased (The Court here inserted the words "without malice") under the honest belief however erroneous it may have been that he was in imminent danger (Here the Court inserted the words "at the time") of losing his life or of receiving great bodily harm from the striking or throwing as aforesaid, ~~that~~ then (here the Court inserted these words "and retreat was inconsistent with his personal safety") then you ought to find a

[P5410-32]

66. verdict of not guilty. Given.

The Court refused to give the instruction No. 10 as prayed for by the Defendant, and inserted the words "~~without malice~~" above quoted; to the refusal of the Court to give said instruction No. 10 as prayed for by the Defendants, and, also to the insertion of the words above quoted by the Court, into the said instruction, the Defendant objected, and then and there excepted.

11th. The Court instruct you that the evidence must show that the death of Theising was caused by a blow as described in the indictments and proved by the evidence in this cause; and unless you believe from the evidence that the defendants inflicted a blow on the head of the deceased, and thereby killed him, your verdict should be not guilty. Given.

12th. In all criminal cases and particularly charges of murder or manslaughter, the law presumes that the Defendants is innocent, and so the jury must regard him, unless it is clearly proved (Here the Court inserted these words "in manner

67

and form as charged in the indictment") beyond all reasonable doubt that he is guilty. Given.

The modification of the Instruction as made by the Court by the insertion of the above quoted words, and to the refusal of the court to give said Instruction No. 12, as prayed for by the Defendant, Defendant then and there excepted.

73th. The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt, that the Defendant struck and killed the deceased, yet if the deceased struck, threw at or hit him with a rail or stake or any other missile, and was in striking or throwing distance, and thereby (Here the Court inserted the words "& by such means") produced a reasonable and well grounded belief in the mind of the Defendant, that he was in imminent danger of receiving great bodily harm from the deceased; (Here the Court inserted the words "and that retreat was inconsistent with his personal safety") then he was justified under the law and must be found not guilty. Given.

68. The Court refused to give the 13th Instruction as prayed for by Defendant, and inserted the words above quoted, and thereby modified the same. The Defendant then and there excepted to the refusal of the Court to give the said instruction as asked by the Defendant, and also to the giving of the said Instruction as modified by the Court.

14th. The court instructs you that the confessions of a party are weak (Here the Court struck out the words "are the weakest of all"; and inserted the above words "are weak") evidence unless made in open court, and with full knowledge of the use that is to be made of them (The court here inserted "or unless corroborated by other evidence") and if you believe from the evidence that the Defendant has made any radical statements in relation to Striking the deceased, they are of the least weight as evidence in this cause, unless they are corroborated by ~~other~~ independent evidence.

Given.

The Defendant then and there excepted to the modification of the 14th. Instruction as made by the court, and to the

giving of the same to the Jury as modified.

15th. The Court charges you that the law of self defence is applied to the domestic relations, such as husband and wife, parent and child, and master and servants, and if you believe from the evidence in this cause, that the deceased Theising threw a rail at the wife or the son of the defendant, in such a way as to create in the mind of the Defendant an honest fear (Here the Court inserted "the belief and" between the words "honest" and "fear") that either the wife or son was in imminent danger (Here the court inserted "so eminent that retreat was apparently inconsistent with personal safety") of losing his or her life by the hands of Theising; and that under the influence of that fear he immediately killed Theising, the killing was lawful and you ought to acquit the Defendant. Given

To the refusal of the Court to give the said 15th Instruction as asked for by the Defendant, as well as to the modifying of the same by the insertion by the Court into the instruction of the words above quoted, the defendant

[P.S.H.S.-38]

thru and there excepted, and also to the giving of the 15th. Instruction so modified.

16th. The Court instructs you that you cannot weigh the evidence in this cause and find the Defendant guilty of either murder or manslaughter upon a preponderance of evidence in favor of his guilty but you must be satisfied by the facts and circumstances given in evidence, that he is guilty beyond all reasonable doubt in manner and form as charged in the indictment before you can find him guilty of any crime whatever, and that unless you are so satisfied you must acquit him. Given.

17th. The law presumes every man innocent until the contrary is clearly proved, and unless you are satisfied beyond a reasonable doubt that the Defendant is guilty in manner and form as charged in the indictment, you ~~should~~ ought to find the ~~Defendant~~ a verdict of not guilty.

The Court refused to give this instruction and wrote as its reason thereof that the same was included in No. 12, and to the refusal of the Court to give the same, the Defendant

then and there excepted.

The Defendant requested the Court to give the following instruction to the Jury

"18th. The Court instructs you that you are the judges of the law and the facts of this cause, and that you are not bound by the opinion of this Court as to what the law is."

Which the Court refused to give, and the Defendant then and there excepted to the refusal of the Court to give the said Instruction to the Jury.

19th. The Court further instructs you that if you believe from the evidence that no one saw strike at the deceased Sheising, and so inflict the wound of which it has been proved he died, then you can act only upon the circumstances and facts given in evidence, and that unless you believe from the whole of the facts and circumstances given in evidence that the Defendant unlawfully killed Sheising, and that beyond all reasonable doubt, you ought to acquit him.

Given.

72

20th. The Court instructs the Jury that neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient to prove the guilt of the defendant, unless it produce full belief of his guilt to the exclusion of all reasonable doubt. Given.

21st. The Court instructs the Jury that it is a rule of criminal law that the guilt of the accused must be fully proved. Given.

Whereupon the Jury retired to consider of their verdict, and returned the following paper into court, without the signature of any one or the name of any one as foreman or as Juror thereto signed, or in any way indicating the person against whom it was returned:

"We the Jury find the defendant guilty of manslaughter and fix the time of his confinement in the Penitentiary at the term of Eight years ——."

The paper upon which the above quoted words were written, was not filed by the clerk of the court as a part of the proceedings in the cause.

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upon the coming into Court of the Jury with the above paper
the Defendant, thereupon and there in open Court entered a motion for a new trial in these words:-

The People
against
Schneir,
} Indictment for Murder.

The Defendant moves the Court in the above styled cause for a new trial, for the following reasons:-

1st. Because the verdict is contrary to the law.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the verdict is contrary both to the law and the evidence.

4th. Because the Court permitted the People to give to the jury improper evidence; and rejected proper evidence offered by the Defendant.

5th. Because the Court permitted Borchel a witness for the prosecution to state to the jury his conclusion of the meaning of the German word "Schlag" as used by the Defendant in a conversation with the witness in relation to the death of the deceased.

6th. Because the Court refused to allow the Defendant to prove by experts in the German language the meaning

of the said German word.

7th. Because the Court gave to the Jury improper instructions on the law of the case on the part of the people.

8th. Because the Court refused proper instructions asked for by the Defendant.

9th. Because the Court made alterations and interlineations in the instructions requested by the Defendant, and thereby destroyed or so obscured their meaning as to make them unintelligible.

10th. The Court misdirected the Jury as to the form of their verdict.

11th. Because one of the jurors who tried the cause had expressed his opinion of the guilt of the defendant before he was sworn, and elected as a juror in the cause, of which expression of opinion by the juror the Defendant had no knowledge until the Jury had retired to consider of their verdict.

The Court overruled the Defendants motion for a new trial and the Defendant then and there excepted to the opinion of the court in overruling his said motion.

And thereupon entered his motion in arrest of judgment, which is in the following words:-

75.

State of Illinois
Livingston County } ss.

In the Livingston Circuit Court
at August Term A. D. 1859.

The People
against
Bernard H. Schneir.

Indictment for
Murder.

The Defendant Bernard H. Schneir, by Davis and Sparks, his attorneys, comes and moves the court to arrest the judgment in the above cause, for the reason to wit:-

1st. That the indictment in said cause is not sufficient to authorize the court to pronounce judgment against the Defendant.

2nd. The record and proceedings are erroneous and wholly in many respects, insufficient to warrant any judgment of the court whatever upon the Defendant.

3rd. In the arraignment and the subsequent proceedings of the court against the Defendant there is manifest error, and the judgment of the Court ought to be arrested.

4th. In the entries and orders in the cause as made by the Court there are uncertainties and omissions which make it wrong for the court to pronounce judg-

ment upon the Defendant.

5th. It does not appear by the record that the Defendant was present during the whole progress of the trial.

6th. It does not appear by the record and proceedings in the cause, that the court adjourned and opened at the time to which the court was adjourned.

Which motion in arrest of judgment the Court over-ruled, and the Defendant then and there excepted, and excepts to the ruling of the court therein.

And then and there prayed that his bill of exceptions might be signed, sealed and allowed by the Court, but there not being time to prepare the same for the signing and sealing of the court, during the term thereof, it was ordered by the Court, that the bill of exceptions should be prepared by the counsel for the Defendant, and that the same should be allowed, signed and sealed by the Judge of the said Circuit Court, at Salem in the County of Marion, during the August term of the Circuit Court of Marion County, which is

77. accordingly done. A K S O'Melveny (Seal)
Judge 2nd Jud Circ
Court held at which
Clinton County is a part

State of Illinois } I Amos Watts States Attorney in and
County of Clinton } for the Second Judicial Circuit in the
State of Illinois, do hereby Certify that
the foregoing Record and bill of exceptions presents a full and true history of the
proceedings on the trial of Bernard H Schnier as set forth
in said Record and Bill of Exceptions as I verily believe

Given Under my hand and Seal this 18th day
of August A D 1859 A K S O'Melveny Judge
Amos Watts States Attorney

L8540-38

28.

And now on this Day of August A. D. 1859, Defendant comes and by his Counsel T. G. C. Davis, and W. A. J. Sparks, ~~assigns and~~ says, That in the record and proceedings in this cause there is manifest error, and for special assignment of errors says that the Court erred:-

1st. In permitting the witness Borchel to give his understanding of the meaning of words stated by him, to have been used by the Defendant in a conversation with him, the witness, in relation to the cause of the death of the deceased.

2nd. The Court erred in refusing to allow the Defendant to prove by experts in the German language the meaning of the German word "schlag", as used by the Defendant in conversation with the witness Borchel.

3rd. The Court erred by ruling out evidence offered by the Defendant to prove that the word "schlag" in its true and primary signification, means and signifies "a fall".

4th. The Court erred in giving to the Jury the Instructions numbered

as prayed for by the People.

[8340-40]

79 5th. That the Court erred by refusing to give Instructions No 9 and 10 as prayed for by the Defendant.

6th. The Court erred by modifying the said Instructions numbered nine and ten, and by giving them to the Jury as modified by the court.

7th. The Court erred by refusing ~~to give~~ to give Instruction No , as prayed for by the Defendant.

8th. The Court erred by modifying said last named Instruction, and by giving it to the jury as modified by the Court.

9th. The Court erred by refusing to give Instruction No. , as prayed for by the Defendant.

10th. The Court erred by modifying said last named Instruction, and by giving it to the jury as modified by the court.

11th. The Court erred by refusing to give Instruction No. 17 as prayed for by Defendant.

12th. The Court erred by refusing to give Instruction No 18, prayed for by Defendant to the jury.

13th. The Court erred by ~~refusing to set~~ overruling the Defendants motion for a new trial.

80

14th. The Court erred by overruling Defendants motion in arrest of judgment.

80

15th. The Court erred by giving judgment against the Defendant, and sentencing him to confinement in the Penetentiary of the State.

16th. The Court erred by giving judgment against the defendant upon the verdict as returned into court by the Jury.

17th. The Court erred in not giving judgment in favor of the Defendant, and in giving judgment against the Defendant when by the law of the land judgment ought to have been pronounced in favor of the defendant and not against him.

F. G. C. Davis, &
W. A. J. Sparks
Attorneys for the
Defendant.

Joinder in Error
Fanner. States Atty
Pro Cur

The Clerk of the Supreme Court in the First Grand Devision will issue a supersedias as required by law upon filing the forgoing record in his office
August 19th 1859. J. D. Caton
Ch Just &c

Let the prisoner be admitted to bail Bond in the penal sum of five thousand dollars. Albert Knep & Gerhard Durst Sureties approved
J. D. Caton

[8540-41]

2 1/4

B. H. Schmidt

vs

The People

Filed 22d August
1859.
A. Johnston Clk

It is agreed that Bernard N. Schnier who was convicted at the August Term AD 1859 of the Clinton County Circuit Court of Manslaughter and sentenced to Eight years imprisonment in the Penitentiary and upon which by order of Chief Justice Caton a Supersedeas has been issued by the Clerk of the Supreme Court for the first Grand division of Illinois; be admitted to bail by filing bond with sufficient securities to be approved by the proper officer ~~of this County aforesaid~~ in such sum as may be thought proper by any Judge of Supreme Court Alton

August 31. 1859.

Davis & Shaw
attys for Deft.

Amos Watts States Attorney 2d
Judicial Circuit
Heaynie & Parish
Attys for State.

[8548-48]

Argument to bail
B. Schmier

Filed Nov. 17- 1859-
N. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Clinton 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* Clinton *county, before the Judge thereof between* The Peopl of the State of Illinois *plaintiffs and* Bernard & Schnier *defendant it is said manifest error hath intervened to the injury of the aforesaid* Bernard & Schnier *as we are informed by his complaint, and we being willing that error, if any there be, should be corrected 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 our Supreme Court 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 November *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.*

WITNESS, *the Hon.* John D. Caton *Chief Justice of the Supreme Court and the seal thereof, at* MOUNT VERNON, *this* twenty second *day of* August *in the year of our Lord one thousand eight hundred and* fifty nine.

Noah Johnston
Clerk of the Supreme Court.

18 SUS-83

24

SUPREME COURT.

First Grand Division.

Bernard H Schnell

Plaintiff in Error,

VS.

The People

Defendant in Error.

WRIT OF ERROR.

Issued - Made a Supersedeas and FILED - 22d August 1859 -
N. Johnston Clk

This writ of Error is made a Supersedeas and is to be obeyed accordingly.
N. Johnston Clk

[redacted]. Supreme Court. First Grand Division of the State of Illinois

Bernard H. Schnier.

vs

The People of the State of Illinois

Indictment for Murder

The Clerk of the Supreme Court of the first Grand division of the State of Illinois will please file Record in the above cause and issue Supersedeas, and give notice to States atty ~~for 2d Judicial Circuit Court~~ re to oblige

Davis & Sparks
Attys for
Deft.
"

[8540-49]

24

Supreme Court 1st Division

Bernard St. Schnier
vs

The People of the State
of Illinois

Precipe

Filed 22d Aug. 1839
S. Johnston Clk

Davis & Shaw
for Plff.

State of Illinois }
Clinton County } ss

Albert Kriep and Gerhard Durst (who are about signing a bond with Bernard H. Schnier who was lately tried and convicted of the crime of Manslaughter and sentenced by the Circuit Court of Clinton County Illinois to Eight years confinement in the Penitentiary. And who has filed his bill of exceptions in the Supreme Court for the first Grand division of the State of Illinois. and upon which by order of Chief Justice John D. Caton a Supersedeas has issued from the Clerks office of the Supreme Court for said first Grand division to stay the execution of said sentence and who has this day been admitted to Bail by the Honorable Sidney Breese Judge of the Supreme Court in the sum of Five thousand dollars) and having been first duly sworn on their oaths declare that they are both together "to wit" (Albert Kriep and Gerhard Durst) worth in Real and Personal Estate a sum exceeding Five thousand dollars over and above all debts that they owe or other liabilities of any and every kind which they have incurred or which may be against them and further say not

Subscribed and sworn to before me this September 7th AD 1859. And in witness whereof I have hereunto set my hand & official seal
A. Kriep
Gerd Durst

W. K. Guthrie Clk

[3540-46]

State of Illinois } Christopher T Gunthus and
Clinton County } ss Matthew J Murray having
been first duly Sworn on
their oaths declare that they verily believe
the foregoing affidavit made by Albert Kiel
and Gerland Durst to be true and cor-
rect and further say not
Subscribed & Sworn to. M J Murray
before me This September Chr T Gunthus
7th A D 1859
Geo N Robertson County Judge Seal

~~State of Illinois~~
~~Clinton County~~
~~Sept 7th A D 1859~~

24

Affidavit of Albert
Kiel Gerhard Durst
M J Murray
Chris Gunthus

Filed Nov. 17, 1859
A. Lafountain Clk

Bernard H. Schnier
vs
The People

1st "

2. The Court Erred in excluding the Evidence offered by the defendant to prove the meaning of the German word "Schlag" as used by him in Conversation with the Witness Borchel. Having previously allowed said Witness to give his understanding of said word. Upon this point we shall not cite authorities nor refer to Law. Books.

2 The instruction given for the People — No. 10 is clearly Erroneous there was no Evidence in the Case conducing to prove that the defendant procured the difficulty in which Deering lost his life —
The Law of self-defence was not properly stated by the Court in this instruction
Reedings Hrrs vs Taylors Hrrs 13. B. Monroe 486 Campbell vs The People 16th Ills 18. Selfridges Case Wharton's Law of Homocide 456. State vs Scott 4. Nedell 415. Grainges vs The State 5. Yerger 461. Monroe vs The State 5. Georgia R. 89. People vs Anderson. 2. Wheeler. C.C. 407. 18th Ills 265.

3 The Court clearly Erred in giving instruction No. 17 for the People. The defendants Counsel

[8540-47]

have been able to find but one authority in support of the doctrine contained in this instruction "Mr. Greenleaf and it is unsupported by the authorities to which it refers "See 1st Greenleaf See 18.

4. The 19th instruction is Erroneous in misstating the Law of self-defence.

5 The 20th instruction is Erroneous in misstating the Law of self-defence.

6th The 21st instruction is Erroneous ~~is Erroneous~~ in substituting the opinion of the jury for the Judgment of the Defendant as to the imminency of his danger.

7th The Court grievously Erred in giving the 22d instruction for the People See Campbell vs The People 16th Ills 18. Selfridges case Whartons Law of Homocide 456 State vs Scall 4th Iredell 415. Grainger vs The State 5th Yerger 461. 1st Carrington & Payne 319. (Marginal) (Ref. vs Scully) Stewart vs The State 1 Ohio R. 72-3. Mawgridges Case. Kellyng. R. 128. 1st Hawks R. 457. Selfridges Case Whartons Law of Homocide 431-2.

8th The 23d instruction is Clearly Erroneous

Because it is predicated upon a state of facts which did not appear in Evidence and was therefore calculated to mislead the Jury

9th The Court Erred in refusing to give instruction No. 10 as prayed for by the defendant and also in modifying the same and in giving it to the Jury as modified See Campbell vs The People and Selfridges Cases above Cited—

10th The Court Erred in refusing to give instruction No. 10 as prayed for by the defendant and in modifying the same and in giving it to the Jury as modified

11th The Court Erred in modifying instruction No. 12 offered by the defendant Because in his modification he makes it nonsensical.

12th The Court Erred in refusing to give instruction No. 13. offered by defendant. and in modifying the same as to make it misstate the Law of Self-defence.

13th The Court Erred in refusing to give Defendants instruction No. 14. as prayed for and in modifying the same and in giving it as modified.

[3540-42]

14th The Court grievously Erred in refusing to Give instruction No 15. as prayed for by the Defendant and in modifying the same and in giving it as modified. Because as modified it is calculated to mislead the jury & also misstates the Law of Self-defence and the modification renders it unintelligible.

15th The Court Erred in refusing to charge the jury that they were Judges of the Law and facts of this Case and were not bound by the opinions of the Court as to what the Law is as asked by Defendant in his 18th instruction. (See Revised Statutes. Scates Treat & Blackwell 408. Sec 188. Whartons Criminal Law 998—1000—1—7 State vs Snow. 6th Shepley 346. State vs Jones 5th Alabama 666 Holden vs The State 5th Georgia 441. Warren vs The State 4th Blackford 150. 5th Law Reporter (N.S) 6. Smiths Case Whartons Law of Homicide 416. State vs Croteau 23. Vermont 14. Commonwealth vs Knapp 10th Pickering 495 2d Scammons 336.

Schuier

vs

People

Brief-

Carlyle Sept. 5. 1859

Dear Sir

My son tells me that he forwarded to Mt. Vernon on Thursday last a letter for me from Chicago. I did not get it Thursday night, & left Mt. Vernon Friday morning, and none has been forwarded to me here - If there is one, at your office, please forward it -

yrs. truly

Sidney Breese

Maj. N. Johnston

Mt. Vernon Ill.

P.S. Since writing the above Mr. Davis counsel of Schnier who has obtained permission to file a dependency, wishes to

[8540-58]

withdraw the word to speak
it to me in order that the
Depts. may be called, on
the opportunity the State
Atty. Mr. Watts. Please
to Mr. Davis leave the
word so that I may
interpret it —

Yrs. truly
Sidney Breese

Rec'd and refund to,
Delivered to Mr
W. A. J. Sparks
5 Sept. 1859

STATE OF ILLINOIS—IN THE SUPREME COURT—FIRST GRAND DIVISION—NOVEMBER TERM, 1859.

Page of Record.

PEOPLE,
vs.
BERNARD H. SCHNIER,

1 to 12 This action was based upon an indictment for murder found by the grand jury of Clinton county at March term, 1859. And was tried at the August term, 1859. And the defnd'nt was found guilty of manslaughter by a jury, and sentenced to confinement in the penitentiary for eight years.

It was ordered by the Court that a bill of exceptions be signed in vacation and during the term of the Cir. Court in Marion co., where the same was signed by the Judge of said Cir. Court of Clinton co.

13 to 15 Dr. C. N. Halstead, for the people, testified that he is coroner of Clinton Co., and as such, assisted by Dr. Klinekorte, made a post mortem examination of the body of the dec'd; that he found the corpse in a coffin at the defnd'nt's house, and ordered it to be laid on a lounge, so that an examination could be made of it. Dr. Klinekorte called his attention to a cut on the scalp down, and found a fracture running across from the left to the right temporal bones; found an ounce or 1 1-2 ozs coagulated blood between the scalp and bone. He was not absolutely certain whether the fracture was caused by a blow or a fall; it might have been done by a fall There was a pile of rails on the ground, and the dec'd may have fallen upon them and broken his cranium. Without hearsay he had no opinion in regard to the cause of the death.

15 to 20 Dr Klinekorte was called to dec'd about 4 o'clock, 3d March, 1859; and found him in a dying condition. The dec'd died about half an hour after he first saw him. Called again on Friday the 4th and made a slight examination, and made post mortem examination on the next day—Saturday—and found the cranium fractured, and thinks the fractures were the cause of his death. There was a very slight contusion on the head; could cover it with the end of his thumb. The external wound or contusion could not have produced death. There was concussion of the brain, and thinks concussion of the brain will produce death The defnd'nt did not say anything about Theisings receiving an injury; said he was we'l at mid-day and got it at the fence. The fracture must have been produced by a blow from above, though it might have been caused by a fall on a stone or angular piece of wood. It is customary when a person dies in the neighborhood to bury the body on the following day. Coagulation of blood may be in the brain from various causes.

20 to 28 Gerhardt Borchel, a German, was sworn and examined through an interpreter, being unable to speak the English. Witness lived with Theising in his lifetime; saw him at 11 o'cl'k on 3d March 1859, at the fence, when Schneir was throwing down the fence; it was Theising's fence; they were quarreling. I was half a 40 acre tract away from them; the fence was between them; I could see Theising clearly; Schnier's wife, son and another young man were there; Theising and Schnier were 4 or 5 feet apart; they were talking loud. I did not go rrom where I stood till Theising fell; I saw him fall; Schnier was standing closest to him at that time. They were on opposite sides of the fence facing each other; Theising fell backward; he was facing Schnier when he fell; I could not see anything in Schnier's hand; I saw both Schnier and Theising when Theising fell. Went to where they were in a few minutes; Schnier and his wife were holding Theising up, and the blood was running out of his nose when I got there; Theising did not say a word; he could not speak, and died about 5 o'clk on same day; I did not see any weapon; there were round about Theising pieces of rails; after Theising died I was at the fence; I saw a stake 5 or 6 feet long standing loose at the fence; Schnier had pushed down 10 or 12 pannels of fence; I could see Schnier prying the fence over with a rail or stake he had; did not see Schnier do anything with the stake but pry the fence with it. When I got to where they were I asked what was doing; then I said the last would be worse than the first. Schnier said the ~~blow~~ stroke was rather hard but he was sorry for it. (The German word used was "schlag." which was rendered ~~blow~~ stroke by the interpreter.) Did not know the feelings between Schnier and Theising, except that they had some quarrel about the fence. Theising threw a rail over to Schnier's side, where he was standing, but could not see whether he threw it at any ~~more~~ one or not "He had a rail in his hand and was throwing it over and fell backwards" When Theising threw the rail they were standing face to face, and Theising fell back at the very instant he threw the rail; (the German word "schlag" means a fall as well as a blow;) Schnier was on his own land; can't say whether the rail thrown by Theising hit Schnier or any body else.

Here the prosecution offered to prove by the witness his understanding of the meaning of the word schlag "as used by the defnd'nt;" objection by defnd'nt which was overruled and exception to the allowing the statement to be made by the witness was taken, and also the sense in which he used the word "schlag" in his testimony—objection and exception.

28 to 30 The prosecution proved by H. Hughler that defnd'nt told him he had struck Theising on the arm, but did not think it would have hurt him so that he would die; defnd'nt asked him to take some whisky, he took a drink and went off; this was at Schnier's house; I did not see the dead body; Schnier said it was of no use.

30 to 32 The defnd'nt then offered to prove by a German, C. H. Githouse, that the German word "schlag" means a fall more frequently than a blow, but the Court upon objection ruled the evidence incompetent, and exception was taken.

The defnd'nt offered to prove by an expert in the German tongue, the meaning of the German word "schlag," as used by the defnd'nt when speaking to the witness Borchel,.

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32 which was ruled to be incompetent and exception taken.. Defnd'nt proved his good character for peaceableness and for years past by a large number of witnesses.

32 to 33 The defnd'nt proved by one of the grand jurors who found the bill of indictment a
33-4-5 a true bill, that one Schutte who was a witness in the case before the said jury, that Schnier had nothing in his hand during the time of the quarrel.

35 to 37 Wm. G. Burnside surveyed the lines between Schnier and Theising twice; Theising, was present the last time as well as Schnier.

38 to 45 Hermann Schnier, son of defnd'nt, was present during the whole quarrel; saw Theising throw a rail at his father or himself with great force, and Theising fell as he threw;
45 but did not see his father throw at or in any strike the dec'd. Theodore Schutte states that John his brother, went away from the country the night before Schnier wanted him as a witness, and sent him for the said John.

The Court. on the part of the people, inctructed the jury as follows:

46 1. If the jury find the defnd'nt not guilty, the form of your verdict will be, "We the jury find the defnd'nt not guilty"

46 2. If the jury find the defnd'nt guilty of murder, the form of your verdict will be, "We the jury find the defnd'nt guilty of murder in the manner and form as charged in the idictment."

46 3. If the jury find the defnd'nt guilty of manslaughter, the form of the verdict will be, "We, the jury, find the defnd'nt guilty of manslaughter," and fix the time of his confinement in the penitentiary at the term of not less than one year, and may extend to his natural life.

To which instruction the defnd'nt then and there excepted.

4. Murder is the unlawful killing of a human being in the peace of the people with malice aforethought, either express or implied by law.

47 5. Malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill-will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive—a thing done with a wicked mind where the fact has been attended with such circumstances as evince plain indications of a heart regardles of social duty, and fatally bent on mischief. Hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart.

To which instructions the defnd'nt then and there excepted.

47 to 49 6. If the jury shall find from the evidence that the killing of Benedict Theising has been proved as charged; then any defence which the defnd'nt may rely upon in justification or excuse of the act, or to reduce the killing to the grade of manslaughter, it is incumbent on the defnd'nt satisfactorily to establish such defence either by proof arising out of the evidence produced against him. or by introducing proof in his own behalf; and if the defnd'nt has failed to establish satisfactorily any such defence, the killing being proved, the verdict must be guilty of murder.

To the giving of the above instruction to the jury the defnd'nt then and there excepted.

48 7. The Court further instructs the jury that when one person kills another with a deadly weapon, no words of reproach or gesture, however irritating or provoking, amount to a considerable provocation in law, and where one person unlawfully kills another by striking him a blow with a deadly and dangerous weapon, where no considerable provocation appears. or provocation apparently sufficient to excite irresistable passion, the law makes such killing murder.

To giving of which instruction the defnd'nt then and there excepted.

48 to 49 8. The Coart instructs the jury that if without adeqdate provocation, and without such provocation as is apparently sufficient to excite irresistible passion, a person strikes another with a deadly weapon likely to occasion death, altho' he had no previous malice against the party. yet he is to be presumed to have had such malice at the moment from the circumstances and is guilty of murder.

The defnd'nt excepted then and there to the giving of the above instruction.

49 9. The law presumes that a person intends all the natural probable and usual consequences of his acts; that when one person assails another violently with a dangerous weapon likely to kill, not in self-defence, and not in a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary. and the life of the party thus assailed is actually destroyed in consequence, the legal and natural presumption is, that death or great bodily injury was intended, in which case the law implies malice, and such killing would be murder.

50 10. If the jury believe from the evidence that the defnd'nt was in the commission of an unlawful act against the property of Benedict Theising at the time of the difficulty between the prisoner and Theising, which terminated in said Theising's death, and that said difficulty was by defnd'nt's procurement, and that during said difficulty defnd'nt struck said Theising with a deadly weapon inflicting injuries upon said Theising as charged, then it must appear either that defnd'nt in good faith declined any further difficulty with Theising, or that said blow, if you believe it was igflicted by defnd'nt, was inflicted in necessary self-defence, or in defence of his wife or son, and if such does not appear, then the verdict should be guilty of murder

To the giving of the above instruction the defnd'nt then and there excepted.

50 to 51 11. If the jury believe from the evidence that on or about the 3d day of March last in the county of Clinton, the defnd'nt and dec'd met at a certain fence, and a quarrel ensued between them, and that defnd'nr then and there struck dec'd a blow on the head with a dangerous and deadly weapon, as charged, without any considerable provocation,

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or such provocation as was apparently sufficient to excite sudden or irresistible passion, and that on the same day dec'd, ftom the effects of said blow, so inflicted, died, then the jury should find the defnd'nt guilty of murder.

51—52 12. If after a due and proper consideration of all the facts and circumstances in evidence before you, you shall believe defnd'nt not guilty of murder, then you should consider whether the defnd'nt is guilty of the crime of manslaughter; and if you shall believe from a view and consideration of all the facts and circumstances in evidence that the defnd'nt is guilty of madslaughter, then you should so find, and fix by your verdict the term for which he shall be confined in the penitentiary at any length of time not less than one year nor than during his natural life.

To the giving of which instructions the defnd'nt then and there excepted.

52—53 13. Manslaughter is the unlawful killing of a human being without malice express or implied, and without any mixture of deliberation whatever It must be voluntary upon a sudden heat of passion caused by a provocation apparently sufficient to makt the passion irresistible, or involuntary in the commission of an unlawful act or a lawful act without due caution or circumspection. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing, his wife or son. The killing must be the result of that sudden violent impulse of passion sufficient to be irresistible. For if there appears to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, anu punished as murder.

53 14. Involuntary manslaughter consists in the killing of a human being without any intent so to do, in the commission of an unlawful act, which might produce such a consequence, in an unlawful manner, provided always where such an involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offence shall be deemed and adjudged to be murder.

To the giving of the above instructions to the jury the defnd'nt then & there excepted.

52—54 15. To extenuate the unlawful fiilling or homocide from the crime of murder to manslaughter, two facts must cencur: there must appear to be both provocation and passion. Provocation without passion will not extenuate, nor will passion merely without provocation, reduce the unlawful killing from murder to manslaughter.

54 16. No breach of a man's word or promise, no trespass to his lands or goods, no affront by bare words or gestures, however false or malicious, and aggravated with the most provoking circumstances, will free the party from the guilt of murder, when the party killing makes use of a deadly and dangerous weapon, or otherwise manifests an intention to kill or to do some great bodily harm; but the provocation which the law requires and regards as sufficient to extenuate homicide from murder to manslaughter must, in general, be an assault upon the party killing. It must be an offer to effect violence upon the party killing Where one man attempts or offers to strike or beat another, and that other shoald then without malice, and under the influence of passion, caused by the provocation, strike a blow which results in the death of the assailant, the killing would be manslaughter, under such circumstances.

55—56 17. The Court instructs the jury that the law conclatively presumes that every sane man intends or contemplates the natOral and probable consevuences of his own acts, and that therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weepon. In this case it is the duty of the jury to consider all the facts and circumstances in evidence before them, and if from such considetation they are satisfied beyond a reasonable doubt that the defnd'nt unlawfully killed Theising with a dangerous or deadly weapon, where no considerable provotation appeared for snch killing, the defnd'nt is guilty of murder.

To the giving of which instruction the defnd'nt then and there excepted.

56 18. That while the law recognizes the right of self-defence, where one party is assaulted by another, and a'so recognizes the right of a father to interfere in defense of his child, yet a bare fear of being assailed will not justify one man in taking the life of another.

To the giving of the above instruction the defnd'nt then and there excepted

56-7-8 19 The truo rule of law upon the principle of se'f-defense of person is this: Where a man who, in the lawful pursuit of his business is attacked, and whero from the nature of the attack there is reasonable ground to believe there is a design to destroy his life or to commit any felony upon his perfon. The killing of the assailant under cuch circumstances will be excusable or justifiable homicide, altho' it should afterward appear that no felony or real danger was intended Upon this rule of the law of self-defense, before a party can be acquitted of the crime of murder or manslaughter, where the evidence proves a homicide, the jury must be satisfied from the evidence, 1st, That the accused was attacked by the dec'd; or that his child, or wsfe, or servant, was attacked by the dec'd. 3d, The attack must be made with a deadly weapon, or under such circumstances as were calculated to raise a reasonable apprehension of death, or of receiving great bodily hurm. 3d, That the pariy killing killed the assailant in order to save his own life, or that of his child, wife or servant, or to prevent his own person, or that of his child, wife or servant from receiving great bodily harm. If the jury believe from the evidence that the defnd'nt, his son, and John Schutte were engaged in removing a fence erected by Theising, and that while hey were so engaged the dec'd came up to them and a quarrel ensued, and the dec'd man picked up a piece of rail and threw it over to the opposite side of the fence, remarking that "you have got my fenee, here, take the balance," and did not attaed or assault, or attempt to commit any violence

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upon the person of the defnd'nt, nor upon the defnd'nt's son or wife, and the circumstances attending the throwing over the fence of a rail, were not calculated to induce a reasonable and well grounded apprehension that his life or person; or that of his son or wife was in imminent danger of death or of great bodily harm at the hands of Theising. Then you cannot acquit the defnd'nt on the grounds of justification.

Exception was made.

58—59 20. The true test of self-defense is, was the defnd'nt or his son? or his wife? or his servant attacked by the dec'd man in such a manner, and under such circumstances as were calculated to raise in the defnd'nt's mind a reasonable and well grounded belief that he or his son, or his wife, or his servaut were in imminent danger of life, or of great bodily harm? The danger must be real, or apparent, imminent and pressing, and not merely imaginary or existing in machination; for unless there be some overt act apparently indicating a design to take the life of the defnd'nt, or that of his son, wife or servant, or to do one or all of them great bodily harm, he was not justified in taking the life of Benedict Theising. (Exception.)

58 21. If a man kill another through mere cowardice or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well grounded belief of imminent danger to life, or of great bodily harm, the law will not justify the party killing. (Exception.)

59—60 22. But upon the ground of justifiable homicide, or the principles of self-defense, the Court further charges yon that even although you should believe that Theising attacked the defnd'nt, or his son, still if you believe from the evidence in this case, the party assailed could have escaped his adversary's vengeance at the time of the attack without the killing of Theising, the defence of justification or self-defense has failed, and the defnd'nt cannot be acquitted upon the law of self-defence. (Exception.)

60 23. The Court further instructs you that if a man for the purpose of bringing another into a quarrel provoke him so that an affray is commenced and the person causing the quarrel is overmatched, and to save himself from apparent danger he kills his adversary he will be guilty at least of the crime of manslaughter if not of murder. Because the necessity being of his own creating, shall not operate in his excuse (Exception.)

61 24. That if you believe from a view of all the evidence that Theising did not assault the defnd'nt nor his son, nor his wife, then the defnd'nt cannot be acquitted on the ground of self-defense.

The defnd'nt requested the Court to give the following instructions:

61 1. That no homicide is murder unless it be committed with malice aforethought which malice aforethought is either express or implied. Malice express is where the killing is done by a person who before the killing has threatened the dec'd with great bodily harm and in like cases. Malice implied is where the accused person shoots into a crowd of people and kills a human being in that way. and in all such cases which show the accused fatally bent on mischief in the prosecution of the fatal act, or where there is no considerable provocation by the party killed, or where all the circumstances of the killing show an abandoned and malignant heart. (Given)

61—62 2. Manslaughter is the unlawful killing of a human being without malice either express or implied. It is voluntary or involuntary. Voluntary upon a provocation apparently sufficient to excite irresistible passion, or involuntary in the doing of an unlawful act, or a lawful act without due caution or circumspection (Given)

62 3. Malice will not be implied when the act which produces death is common and usual and not manifestly calculated to produce death or great bodily harm (Given.)

62 4. The Court instructs you that if there be any other reasonable hypothesis arising out of the evidence given in this cause than that the defnd'nt unlawfully killed Thesing the defnd'nt is entitled to the benefit of such hypothesis and ought to be acquitted. (Given)

62—63 5. You cannot find the defnd'nt guilty of unlawfully killing the dec'd Theising upon a preponderance of evidence, but you must be satisfied beyond a reasonable doubt from the evidence given to you by witnesses who have been sworn and examined in this cause, that the defnd'nt unlawfully and feloniously killed and slew the said dec'd, otherwise you ought to find a verdict of not guilty. (Given.)

63 6. The Court instructs the jury that unless they believed from the evidence all the material allegations in the indictment are proved beyond any reasonable doubt they ought to find the defnd'nt not guilty. (Given)

63 7. The Court instructs the jury that they have convincing proof of the guilt of the defnd'nt before they can find him guilty; and if there be any reesonable hypothesis consistent with the evidence ia the cause upon which he may be innocent, they ought to find him not guilty. [Given]

63—64 8. The Court instructs the jury that it is not enough. that they believe from the evidence that it is more probable that the defnd'nt killed the dec'd as charged in the indictment, than that he died from some other cause; that they must be satisfied beyond a reasonable doubt from all the testimony that he is guilty as charged in the indictment or else they ought not to find him guilty. [Given.]

64 9. The Court instructs you that an assault is an unlawful attempt coupled with a present ability to to commit a violent injury upon the person of another, and that if you believe from the evidence in this cause that the dec'd assaulted the defnd'nt with a rail or stake, and that the defnd'nt thereupon killed the dec'd [here the Court inserted the words "without malice,"] under the honest belief [however erroneous] that he was in imminent danger of losing his life or of receiving great bodily harm at the hands of the dec'd, [here the Court inserted these words, "and that he had not the opportunity of retreat consistent with his personal safety,"] you ought to find a verdict of not guilty. [Given as modified.]

Exception to refusal to give, and to giving as modified.

65 10. The Court instructs you that if you believe from the evidence that the dec'd, Theising, struck with, or threw, a rail or stake at the defnd'nt, Schnier, and within the distance to strike with or hit by throwing, and that the defnd'nt, Schnier, threupon killed the dec'd (the Court here inserted the words "without malice,") under the honest belief, however erroneous it may have been, that he was in imminent danger (here the Court inserted the words "at the time") of losing his life, or of receiving great bodily harm from the striking or throwing as aforesaid (here the Court inserted the words "and retreat was inconsistent with his personal safety"), then you ought to find a verdict of not guilty. (Exception to refusal to give and to giving as modified.)

66 11. The Court instructs you that evidence must show that the death of Theising was caused by a blow as described in the indictment and proved by the evidence in the cause and unless you believe from the evidence that the defnd'nt inflicted a blow on the head of the dec'd and thereby killed him, your verdict should be not guilty. (Given.]

66—67 12. In all criminal cases and particularly charges of murder or manslaughter, then the law presumes that the defnd'nt is innocent, and so the jury must regard him, unless it is clearly proved (here the Court inserted these words "in manner and form as charged in the indictment") beyond all reasonable doubt that he is guilty. (Exception to refusal to give, and to giving as modified.)

67 13. The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defnd'nt struck and killed the dec'd Yet if the dec'd struck at or hit him with a rail or stake or any other missile, and was in striking or throwing distance, and thereby (here the Court inserted the words "and by such means") produced a reasonable and well grounded belief in the mind of the defnd'nt that he was in imminent danger of receiving great bodily harm from the dec's (here the Court inserted the words "and that retreat was inconsistent with his personal safety") then he was justified under the law and must be found not guilty. [Exception to refusal to give, and to giving as modified.]

68 14. The Court instructs you that the confessions of a party are weak (here the Court struck out the words "the weakest of all" and inserted the above words "are weak") evidence unless made in open court, and with full knowledge of the use that is to be made of them, [the court here inserted "or unless corroborated by other evidence,"] and if you believe from the evidence that the defnd't has made any casual statements in relation to striking the dec'd, they are of the least weight as evidence in this cause, unless corroborated by independent evidence. [Exception to refusal to give, and to giving as modified.]

69 15. The court charges you that tho law of self-defense is applied to the domestic relations such as husband and wife, parent and child, master and servant, and if you believe from the evidence in this cause that the dec'd, Theising, threw a rail at the wife or son of the defnd't, in such a way as to create in the mind of the def'dt an honest fear [here the Court inserted the words "belief and" between the words honest and fear] that either the wife or son was in imminent danger [here the Court inserted "so imminent that retreat was apparently inconcistent with personal safety"] of losing his or her life by the hands of Theising, and that under the influence of that fear, he immediately killed Theising, the killing was lawful and you ought to acquit the defn'dt. [Exception to refusal to give, and to giving as modified).

70 16. The Court instructed the jury that they could not weigh the evidence and find defnd'nt guilty upon a preponderance of evidence.

70 17. The Court refused to give instruction 17, and wrote upon it "refused because included in No. 12." (Exception)

71 18. The Court instructs you that you are the judges of the law and the facts of this cause, and that you are not bound by toe opinion of this Court as to what the law is. (Refused.) (Exception)

71—72 19th, 20th, and 21st instructions given as prayed for.

Verdict as above stated; motion for a new trial for the following reasons: 1st, Because
73—74 the verdict is contrary to the law. 2d, Because the verdict is contrary to the evidence. 3d, Because the verdsct is contrary both ty the law and evidence. 4th, Because the Court permitted the people to give to the jury improper evidence, and rejected proper evidence offered by defnd'nt. 5, Because the court permitted Borchel, a witness for the prosecution to state to the jury his conclusion of the meaning of the German word "Schlag" as used by the defnd'nt in conversation with the witness in relation to the death of the dec'd. 6 Because the court refused to allow the defnd'nt to prove by experts in the German language the meaning of the said German word. 7, Because the court gave the jury improper instructions on the law of the case on the part of the people. 8, Because the court refused proper instructions asked for by the defnd'nt. 9, Because the court made alterations and interlineations in the instructions requested by defnd'nt, and thereby destroyed or so obscured their meaning as to make them unintelligible. 10, The court misdirected the jury as to the form of their verdict. The motion was overruled and exception taken.

Brief—

Law of self-defence—Campbell vs. The People 16 Ills. 18. Wharton's law of Homicide 456. State vs Scott, 4th ~~Hawk~~ 415. Grainger vs. the State, 5 Yerger 461; Monroe vs. State 5, Georgia R 89. —Iredell

The jury are judges of law and facts—Black~~s~~ Statutes 408. Wharton's Criminal Law 998—1000—1—7. State vs Snow, 6 Shepley 346. State vs Croteau 23 Vermont 14 Holden vs the State 5 Georgia R 441. Warren vs the State 4th Blackford 150. well

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Davis & Shanks attys.

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Schnier
v
People

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No 24 – 10.

Nov. Term 1859.

B. A. Schnier

by

The People

Error to Columbiana

Reversed and

Remanded –

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