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James McLean
v
State of Missouri

May 1843 - # 59 - St. Louis

Murder

McLean stabbed Gabriel Floyd with a knife at his house as four or five others beat him with clubs. They intended to rob him of $1-3000, but only got $50. McLean stabbed him and stole two of his pistols. McLean had dug a well for Floyd and was recognized. Floyd lingered for 31 hours and named McLean as his murderer. McLean found sleeping in stable with Floyd's pistols. McLean arrested & convicted - Appealed to Supreme Court b/c

1. Jury was sworn in, heard testimony and then dismissed for a week w/o supervision.
2. Deathbed statements of Floyd offered by his wife before jury - Judge allowed these w/o hearing them in private first.

Judgement reversed and remanded for retrial b/c of Appeal Point #1

State of Missouri }
County of St Louis } Be it remembered that heretofore, to wit, at a term of the St Louis Criminal Court begun and held at the City of St Louis within and for the county aforesaid on the first Monday of September, being the fifth day of said month and in the year of our Lord Eighteen hundred and forty two, were present the Honorable Alonzo W. Manning Judge, John Bent Esquire, Circuit attorney, George A Kennerly Esquire marshal of said County and Julius D. Johnston Clerk of said Court, whereupon the said Marshal returned into Court the Venire Facias to him directed with a panel of Grand Jurors thereon endorsed who being called came as follows, to wit, William Glasgow who was by the court appointed foreman, Wayman Crow, William Risley, Charles Mullekin Samuel Willi Stephen O. Coleman Bartholemew Hollinsworth Robert Cathcart John M. Parker, Mathias Steitz martin Simpson, John McCausland George King James Long, Samuel Conway Lewellyn Brown, James Walton Ruel M. Gratiot William Long Jacob W. Hoffman, Joseph LeBlond and Jacob R. Stine, twenty two good and lawful men who being duly ~~elected~~ empanelled and sworn and having received their charge from the court retired to consider of their presentements, and afterwards, to wit on the twenty seventh day of September aforesaid returned to the bar and delivered, as a true bill, an indictment which is in the words and figures following, to wit:

State of Missouri County of St Louis ss. St Louis Criminal Court September Term AD 1842.

The Grand Jurors of the State of Missouri empannelled sworn and charged to enquire for the body of the county of St Louis, upon their oaths present that James McLean, Henry Johnson and William G. Johnson alias George W. Johnson, late of the County of St Louis, laborers, on the tenth day of September in the year of our Lord one thousand eight hundred and forty two, with force & arms at the county of St Louis aforesaid, in and upon one Gabriel F. Floyd in the peace of the State then & there being, feloniously wilfully deliberately premeditatedly of their malice aforethought an assault did make, and that the said James McLean with a certain knife of the value of one dollar, which he the said James McLean in his right hand then and there had and held, they, the said Henry Johnson and William G. alias George W. Johnson, then and there being present, aiding and abetting him the said James McLean, he the said James McLean then and there with the knife aforesaid, one mortal wound of the length of four inches and of the depth of six inches, him the said Gabriel F. Floyd then and there did give, of which said mortal wound, he the said Gabriel F. Floyd then and there did languish and languishing did live, and afterwards, to wit, on the day and year aforesaid at the county aforesaid of the said mortal wound did die. And so the jurors aforesaid upon their oaths aforesaid do say that the said James McLean, the said Henry Johnson and the said William G. Johnson alias George W. Johnson in manner and form aforesaid him the said Gabriel F. Floyd did feloniously wilfully deliberately premeditatedly and of their malice aforethought did

and murder contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

And the jurors aforesaid upon their oaths aforesaid do further present that the said James McLean Henry Johnson and William G. Johnson alias George W. Johnson, on the day and year aforesaid at the county aforesaid, in and upon the body of one Gabriel F. Floyd in the peace of the state then and there being feloniously wilfully deliberately premeditatedly and of their malice aforethought, an assault did make, and that they, the said James McLean Henry Johnson and William G. Johnson alias George W. Johnson, with knives, staves clubs and bludgeons, in and upon the head sides stomach and breast of him the said Gabriel F. Floyd then and there feloniously wilfully deliberately premeditatedly, and of their malice aforethought did strike thrust wound and bruise then and there with the knives staves clubs and bludgeons aforesaid giving him the said Gabriel F. Floyd three mortal wounds on the head side and stomach of him the said Gabriel F. Floyd, of which said mortal wounds he the said Gabriel F. Floyd did languish and languishing did live, and afterwards on the day and year aforesaid at the county aforesaid he the said Gabriel F. Floyd of the said mortal wounds then and there did die And so the jurors aforesaid upon their oaths aforesaid do say that the said James McLean Henry Johnson and William G. Johnson, alias George W. Johnson, in manner and form aforesaid, feloniously, wilfully deliberately, premeditatedly and of their malice aforethought him the said Gabriel F. Floyd then and there did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state.

John M. Eager, circuit attorney pro tem: Endorsed "A true bill. Wm Glasgow, foreman."

The State of Missouri
vs.
James McLean, Henry Johnson & William G. Johnson alias George W. Johnson } Now at this day comes as well the attorney who prosecutes for the state as the said defendants in their own proper persons, who being forthwith demanded of and concerning the premises and how they will acquit themselves thereof, say they are not guilty in manner and form as charged upon them in the said indictment, and for their trial put themselves upon the country and the attorney for the state doth the like.

November Term 1842. — Monday 12th December 1842.

The State of Missouri
vs.
James McLean } Now at this day comes as well the circuit attorney who prosecutes for the state as the said defendant in his own proper person who moves the court to grant him a continuance of this cause and files his affidavit therefore, which motion being seen and heard and by the court here fully understood, it is considered that said motion be overruled thereupon the special venire

sued in this cause being called, come the following, to wit, Solomon A. Watts James Mc Fadden, Duke Ransom William Mc Kinstry, James F. Donaldson Frederick Latrace & Albert Billings, seven good and lawful men duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, and the residue of said venire being challenged and set aside according to the right of the parties, it is ordered that the Marshal forthwith summon thirty six other good and lawful men to appear before this court on Thursday morning next at ten o'clock from among whom to elect five jurors to complete the panel for the trial of the aforesaid issue, and that he furnish the prisoner or his counsel with the names of such jurors this afternoon.

Thursday 15th December 1842.

The State of Missouri
vs.
James Mc Lean } Now at this day come again the said parties as aforesaid as also the seven jurors aforesaid, and thereupon the venire being called, come the following, to wit, Reuben Anderson George Shafner, Henry H. Raisin Samuel Black and Joseph A. Berry, five good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, are added to the panel of seven heretofore sworn, making twelve good and lawful men and thereupon court adjourned to ten o'clock tomorrow morning.

Friday 16 December 1842.

The State of Missouri
vs.
James Mc Lean } Now at this day come again the said parties as aforesaid as also the jurors aforesaid & the trial of this cause being yet unfinished at the hour for adjourning court adjourned to ten o'clock tomorrow morning

Saturday 17th December 1842.

The state of Missouri
vs.
James Mc Lean } Now at this day come again the said parties as aforesaid as also the jurors aforesaid & the trial of this cause being yet unfinished at the hour for adjourning court adjourned to ten o'clock on monday morning next.

Monday 19th December 1842.

The State of Missouri
vs.
James Mc Lean } Now at this day come again the said parties as aforesaid as also the jurors aforesaid & the trial of this cause being yet unfinished at the hour for adjourning, court adjourned to ten o'clock tomorrow morning.

Tuesday 20th December 1842.

The State of Missouri
vs.
James Mc Lean } Now at this day come again the said parties as aforesaid as also the jurors aforesaid, who having now heard all the testimony and the arguments of this cause retire to consider of their verdict, and court adjourned to ten o'clock tomorrow morning.

Wednesday 21st December 1842.

The State of Missouri
vs.
James McLean } Now at this day comes again as well the circuit attorney who prosecutes for the state as the said defendant in his own proper person and the said jurors return here also into court, and being now agreed upon a verdict on their oaths aforesaid say that the said defendant is guilty of murder in the first degree in manner and form as charged upon him in the said indictment.

Saturday 24th December 1842.

The State of Missouri
vs.
James McLean } Now at this day comes again as well the attorney who prosecutes for the State as the said defendant by his attorney who moves the court to grant him a new trial of this cause and files his reasons therefor, but the court here not being sufficiently advised what judgment to render, takes time to consider thereof and the same is continued until next term.

January Term 1843. Tuesday 3d January 1843.

The State of Missouri
vs.
James McLean } Now at this day comes again as well the Circuit attorney who prosecutes for the state as the said defendant by his attorney and the court here being now sufficiently advised of and concerning the said motion of the said defendant for a new trial it is considered that the same be overruled.

Monday 9th January 1843.

The State of Missouri
vs.
James McLean } Now at this day the said defendant being brought again into court it is forthwith demanded of him if he hath any thing to say why the court now in pursuance of the verdict rendered in this cause should not proceed to pass sentence of death upon him, and he further nothing saith except as he before hath said, it is thereupon considered by the court that the said James McLean be taken back to the prison from whence he came, there to remain until Friday the third day of March next thence on that day to be taken to the place of execution, and there between the rising of the sun and the setting of the same on the day aforesaid that he be hanged by the neck until he be dead. And it is further directed that the Clerk make out a warrant under the seal of this court commanding the marshal to carry this sentence into execution.

Saturday 4th February 1843.

The State of Missouri
vs.
James McLean } Bill of Exceptions filed.

State of Missouri } In the St. Louis Criminal Court
vs. } January Term 1843 —
James McLean }

Be it remembered that heretofore, to wit at the September term of the St Louis Criminal Court held at the Court House in the City of St Louis on the first Monday of September in the Year of our Lord One thousand eight hundred and forty-two the Grand Jurors of the State of Missouri impannelled sworn and charged to inquire for the body of the County of St Louis presented an indictment against the said James McLean for murder in the first degree — That at the said term of the said Criminal Court the said James McLean was duly arraigned on said indictment and pleaded not guilty to the same and on motion of said James McLean the trial of said cause was continued to the November term of said Court to be held at the Court House in the City of St Louis on the first Monday of November eighteen hundred and forty two — At which time and place last aforesaid the issue so joined as aforesaid between the State of Missouri as Plaintiff and the said James McLean as defendant was moved for trial by the Circuit Attorney who prosecuted for the said State but because the said defendant James McLean was not prepared for trial the issue aforesaid was continued on the motion of the said James McLean and upon his affidavit which is as follows, until the 12th day of December 1842, —

State } St Louis Criminal Court
vs. } November term 1842.
James McLean }

St Louis County ss. James McLean the defendant in this cause being duly sworn says

that James Brown is a material Witness for this affiant on the trial of this cause and that without the testimony of said Witness this affiant cannot safely proceed to the trial of said cause as this affiant is advised by his Counsel and verily Believes that the said James Brown went to Galena about ten weeks since as this affiant has been informed and beleives and intended to have returned to the City of St Louis where he resided about the last of October last past or fore part of November, that he has not yet returned as this affiant has been informed and beleives but that he is daily expected having started some two weeks since for this City as this affiant has been informed and beleives and that in consequence of the State of the river the boat in which the said James Brown was is not yet arrived that this affiant would have procured the testimony of said James Brown to be used on said trial were it not that this affiant supposed and beleived he would be in attendance on the trial of said cause That this affiant can prove by said James Brown that he the said James Brown slept with this affiant on the night of the murder of Mayor Floyd from about 10 o,clock in the evening until next morning when this affiant was arrested That the said James Brown is not absent by the consent connivance or procurement of this affiant nor is this application made for vexation or delay but that Justice may be done And this affiant expects that said Brown will without doubt be in attendance as a Witness in this cause this or the next week

T. McLain

Sworn to and subscribed in open court
Decr 6th 1842 J. S. Johnston clerk

At which day came the parties aforesaid and the said defendant James McLean files with the clerk of this court the following affidavit

State } St Louis Criminal Court
vs.
James McLean } St Louis County ss. James McLean being duly sworn says that James Brown is a material Witness for this affiant on the trial of this Cause and that without the testimony of said Brown this affiant cannot safely proceed to the trial of this Cause as this affiant is advised by his Counsel and Believes - That some two or three months since said Brown went to Galena on Business but with the intention of returning to St Louis where he resided about the last of October or first of November last past, that said Brown is not yet returned to St Louis and this affiant has been informed within the last two days that said Brown has hired himself out in Galena and that his time will not expire before the first of January next and this affiant states that he verily Believes said information to be true, that this affiant has ever since the departure of said Brown expected and Believed that said Brown would have been present as a witness at this term on said trial that this affiant has been informed and Believes that said Brown had left Galena for this place and was detained in Consequence of the river And that were it not that this affiant expected that said Brown would be in attendance as a Witness at the trial of this affiant this affiant would have taken measures to procure his attendance or testimony to be used on said trial that this affiant expects and Believes he can prove by said Brown that he the said Brown slept with this affiant on the night of the murder of Mayor Floyd in the Livery Stable of one Long in the City of St Louis from 10 O,clock in the evening until the time in the morning when this affiant was arrested on said charge that this application is not made for Vexation or delay but that Justice may be done and that if a Continuance of this cause is granted this affiant will procure the attendance or testimony

of said Brown at the next term of this Court.

Sworn and subscribed in open court this 12th Dec 1842 JS Johnston clerk

L. McLain

And thereupon moves the Court to grant him a continuance of this cause which motion being heard and by the court fully considered the Court decided that said motion be oversuled to which decision the said defendant James McLean excepted, That thereupon the special venire issued in this cause being called the following to wit, — Solomon A. Watts, James McFadden Duke Ransom William McKinstry, James F Donaldson, Frederick Satrace and Albert Billings, seven good and lawful men were duly sworn to try said issue and the residue being challenged and set aside according to Law and the rights of the parties it was ordered that the Marshall forthwith summon thirty six other good and lawful men to appear before the Court at Ten o,clock on thursday morning then next from among whom to elect five jurors to complete the panel for the trial of said issue and that the prisoner or his Counsel be furnished with such names on the said 12th day of December That thereupon the said James McLean by his Counsel took exception to the manner of empannelling said Jury and also objected to the ~~seven~~ Jurors who had been sworn being permitted to seperate or to go at large until Thursday morning following And insisted that said seven Jurors should be kept in charge of the Marshall or one of his deputies so as no person should converse with them or in their presence about said trial and that they should not have an opportunity of conversing with each other in relation to said trial, that the court refused to entertain said application and discharged said Seven Jurors until 10. o'clock on thursday morning permitting them to go when they pleased but charged them to hold no conversation with each other or with any other person or persons in relation to said trial

that the said James McLean by his counsel excepted to the decision of the Court permitting said Seven Jurors to seperate and go at Large - That on the said fifteenth day of December in said November term came again the said parties as aforesaid as also the seven Jurors aforesaid and thereupon the venire being called came the following to wit Reuben Anderson George Shaffner Henry H. Harsin Samuel Black and Joseph A Berry five good and lawful men who being duly elected tried and sworn the trouse between the parties well and truly to try are added to the panel of seven Jurors before sworn making twelve good and lawful men That upon said trial,

Mrs Gabriel F Floyd - being duly sworn testifies as follows I retired on the night of the 26th August about 10 o,clock but did not sleep, about half an hour after I heard footsteps about the front door and some one turning the lock, my husband got up took his gun and went to the door, and I went to the servants room to call them to his assistance, was met by two men, when I opened the door to let them out, one of them presented a pistol to me and said if I spoke he would blow me through saying they only wanted money and asked how much we had; I told him $50 and he appeared surprised and at that time some one whose voice I do not know called to "bring out the little woman" - One of the servants escaped through the Back window and I dont know then what occurred for some time. When I saw my husband he was much cut and beaten and had a stab in his left side, he asked me to lay him on the bed, said he was dying (here the Counsel for the State asked the witness to relate what her husband said, to this the defendants counsel objected and insisted that whether the declarations of the deceased should be given in evidence or not was a question of law

to be determined by the Court and that in order to enable the Court to decide whether they were admissible, evidence should be given to the court to show whether the deceased regarded himself in Articulo mortes and past all hope of recovery when he made the statements now sought to be given in evidence, the Court overruled the objection and permitted the witness to go on with her testimony, To this decision the defendants counsel excepted the witness then proceeded as follows, "he was very faint but recovered a little and said he recognised the man "Mack" who had assisted in digging the well and that he said "Damn You I would not have dirked You if You had not resisted" he also said that 'Mack' told him he expected to get from one to three thousand dollars, that he fee before being stabbed with a view of recognizing the murderers and giving evidence against them – "Mack" he said had on a dark Calico hunting shirt, did not hear all he said nor do I recollect that Dr Lane was present – I cautioned my husband about his statement relative to 'Mack' and he said he was positive of both voice and person he had been there a number of days but was not engaged by Mayor Floyd never saw him in the house but always thought he appeared friendly, it was a bright moonlight night, saw the moon before going to bed – there was a wardrobe in our room which had on it a pair of pistols and a pair of vases the pistols were taken away (Here a pistol was shown to witness which she identified as being one of them) My husband made his declaration at various times it was about 31 hours from the attack till he died prisoner was known by the name of Mack (The hour for adjournment having arrived the Court here adjourned until the next day and the Jury were allowed to seperate and to go at large – Objected to by the prisoners counsel and objections overruled – At the usual hour next day the court met and the Cross

examination of Mrs Floyd commenced as follows,
I judged it was about 10 o.clock when I went to bed did not look at the watch the first person who came and who resided not a quarter of a mile off said it wanted a few minutes of 11 o.clock, the first time I saw my husband after he went out he was standing in the bed room and he said "I'm dying lay me down" he was then laid on the bed by the servant he expressed no hopes of recovery and seemed perfectly resigned he was lying in bed when he made his state ments, there were others there who heard more than I did, Capt Green arrived before Dr Lane I presume my husband made his statements with a view of having them given as evidence Capt Green did not leave the house from the time of his arrival till my husbands death — Mr Rucker stayed till Saturday morning, dont know that he came a second time, there were two men digging the well; McLean left a few days before the murder took place

Mr Thomas Briggs. I went to Major Floyds in morning of the assault upon him. One of his servants came to our house about 400 Yards distant and informed us of what had taken place, First saw him near the fireplace covered with blood and Mrs F. washing him, This was near 11 o.clock, He had a wound on his left side and said he was "a dead man". He told me that when in bed he heard footsteps about his house and first thought they were from cattle, that his wife told him she thought they were men and advised him not to go out, that he took his gun opened the door and saw five men, he snapped his gun and they then closed upon him and beat him, He said one of them was a man that helped to dig his well called "Mack" or "McLean" am not certain which he said He said he was a large man and beat him the most, he described his dress and said he had on a dark calico hunting shirt and a cap or handkerchief on his head. Do not recollect the rest. It was a bright moonlight night and would have been easy to recognize any known person Major Floyd never expressed any hopes of recovery in my hearing.

Cross examined – It was between 10 and 11 o'clock when I left home – Major F mentioned both "Mack" and "McLean" and said he helped to dig the well – Think when I first went in there was no one present but Mrs Floyd. I made a pallet at Major F's request – He said he was faint and didn't expect to ever recover – I never heard him say there was any chance for his life – I dont recollect that I ever told any person what he told me – I was not examined before a magistrate

Mr Samuel Downes, – I know the prisoner first saw him at Mulhalls grocery near the Grave Yard about two miles distant from Major Floyds; I board at Mulhalls and on the 26th August between 11 and 12 o'clock at night – a black man came to me and said there were murderers at Major Floyds – got there about 12 o'clock and found Major F. on a bed and asked him how he was – he said he should die but did not tell me that night who had assaulted him – I had been in the employ of Major F. and once when putting up ceiling "McLean" came into the house and while talking to me looked at a pair of pistols that were on the wardrobe and said "they were damned fine pistols" He were elevated on a scaffold at the time; the pistols could not be seen from the floor – Major F. said that when he went to the door after hearing footsteps he saw five men afterwards when in the room after being beaten two of the men were present and one of them went to the wardrobe and took the pistols off; went next day to see him he said he felt a little easier and told me he knew the man who had stabbed him, he said it was the man 'Mack' who had helped to dig his well – when he stabbed him he said "there Major damn You take that if You hadnt resisted we shouldnt have hurt You – we expected to get from one to three thousand dollars – He also said if they

would bring 'Mack' out then he would swear to him and Capt Green sent for him to the city but it was too late before he was taken out - he seen 'Mack' wore a dark hunting shirt -

Cross Examined. - I have not known the prisoner long got acquainted with him in July by his coming to Mulhalls ~~to board~~ when I boarded He had been at Mager Floyds three or four weeks and left then about two weeks before the murder occurred, there was a man named Delany worked a few days when 'Mack was absent - he was about St Louis after the murder, saw him last not two weeks ago Thomas Briggs and others were at Mager Floyds when I got there, I left shortly with others in pursuit of the murderers - heard Mager Floyd say he would die in presence of two or three others, the doctor had not arrived there when I left, I heard Mager Floyd say nothing about recovering -

Doct Pope. I assisted Dr Lane in a Post mortem examination on the body of Mager Floyd, he had several wounds on the head and one on the side severing the great intestine which wound I considered mortal -

Cross Examined. I did not see Mager Floyd before his death

Mr John Mulhall. I had known the prisoner two or three months saw him on the Tuesday before the murder, he spoke of Mager Floyd and said he thought a good deal of him also that Downes would receive at least $1000 for building his house; and that he would finish it on the following Friday On one occasion I heard Mc Lean say "he would have money whether he begged or stole it" It was between 12 and 1 o,clock when Mager Floyds negro man brought intelligence to my house of his Masters murder

Cross Examined. A puson named Spencer was with 'Mack at my house, have no acquaintance with him except by sight think I told what 'Mack said to me, to several

persons - think I told it to Downes after the murder. 'Mack's' arrest recalled it to my recollection; dont know anything about Macks reputation.—

Mr Bumgardner. — I know the prisoner was told that he was at work at Mayor Floyds —

Cross Examined. I never knew anything particular about the prisoner never saw him engaged in any occupation

Capt Green — On the night of the 26th August on hearing of the assault upon Mayor Floyd. I went to his house a little before 12 o'clock as near as I could jedge found him in bed and he said he was "a dead man" and that "he could not live long" he told me about his going to the door and seeing five men: he said he snapped his Gun and they commenced beating him with clubs and continued to do so till he fell down and pretended to be dead with a view of giving evidence, he said he looked particularly at the men and recognised 'Mack' the man who assisted in digging the well, that he had on a dark Calico hunting shirt and wore a handkerchief on his head, after he had fallen they went into the house and remained a short time; when they came out 'Mack' said he was sorry they had hurt him so much for so little money and that they expected from one to three thousand dollars afterwards while in his own room near the bed he was stabbed with a Knife by 'Mack' and he described another man in appearance about the size of 'Mack' who had assisted in beating him; said 'Mack' had beaten him the most - I remarked to him that he might not be beaten so badly as he supposed - he said it was impossible for him to recover for the wound in his side was mortal

Cross Examined. — Dr Lane said he thought Mayor Floyd would recover - Mayor Floyd said 'Mack' told him he was sorry he had beaten him so much for so little money and that he afterwards stabbed him;

Cannot give his precise words but he said as he was approaching the bed that man Mack stabbed him with a Knife, heard him repeat these declarations frequently until the night before his death between 2 and 3 o'clock. I have communicated his statements to several persons - Major Floyd did not rely on the statements of Dr Lane but said that he was wounded in the stomach and could not recover, I felt no little interest in this matter being an intimate friend S. F. Rucker. I went to Major Floyds the night he was beaten and found him in bed - he told me that five men came around his house and when he opened the door, they pulled him out and beat him in the Yard and then went to search for the money. I asked him if he had any idea of who they were he said one was (as I then understood him) Mc Lung' who had worked at the well; he was asked by some one present if it was Hicks "Oh! no" said he "Mc Lung" (as I understood it) I afterwards learned from Capt Green and Mr Mulhall the name was not 'McLung' and again asked Mayor F, and he said it was McLean, Mrs Floyd told him not to be too certain and he said if he were to live he could swear to him, but he should die, I was not there over 20 or 30 minutes, went in company with the officers to arrest McLean to the stone stable on Oak Street between Main and Second streets we found a negro and told him to get a light and Mr Cozens called for the man that kept the stable, a man came to the door of the hay loft who proved to be McLean: he called Rogers and I assisted Mr Cozens in getting up to where he was from the outside of the stable; Rogers answered from the back part of the stable which is from 50 to 70 feet in length, I told Mr Wimer to be particular in listening to answers from Rogers to Questions I should ask, I then asked him where he slept and also where his Cousin slept - He said he slept in the back part of the stable and his Cousin not far from

him asked him when McLean slept he said in the front part near the door, McLean put his clothes on and we went out in front of the stable on Oak street, While going through the lower part of the stable Mack went up to a pin took a hunting shirt from it and put it on. When in front of the stable a negro of Major Floyds came up and McLean said calling him by name "What have they got You too" did not ask McLean when he went to bed, there were one or two persons slept from five to ten feet distant from him, did not make any examination as to whether the prisoner had money or not or whether any of the horses had been out —

Cross Examined. It was before daybreak we arrived at the stable; I rode in from Major Floyds with Mr Winner one of Major F's negros and others three or four in number Mr Winner and myself first went to the back part of the stable — Rogers came down after McLean called him and I told him we wasted a light — I ~~told him~~ we were after McLean for killing Major Floyd; he said he went to bed the night before and he knew nothing more of him, we went into the stable at the south end where Rogers slept and proceeded to the north end where McLean and two others were —

Capt Shreves. — I was at Major Floyds the morning after the assault upon him: he told me that Mack who had assisted in digging the well was one of the persons who attacked him — I asked him the remainder of his name and he said McLean and that he recognized both his voice and person — he then described his dress and said he wore a dark calico hunting shirt and had a cap or handkerchief on his head, he said after they had beaten him he had some conversation with Mack, who said if they had known there was no more money they wouldn't have beaten him so much; that they expected to get from one to three thousand dollars; he then got into his room he said he hardly knew how and while there saw a man place a chair before

the

the wardrobe, get on it and take down his pistols; he said he felt very faint and turned to lie on the bed and was stabbed in the side he thought - by McLean, I came to town that day and heard that several persons had been arrested, and was at Squire Hydes office; went to the office and saw McLean with the hunting shirt on and immediately recognized him from Major Floyds description. —

Cross Examined. I saw Major Floyd about 8 o,clock the morning after he was attacked, he said the Doctor tried to encourage him, but he said that the wound in his side was deeper than the Doctor supposed and he thought fatal heard him say nothing about his affairs or when he expected to die; did not see him again alive after I left him; he was perfectly in his mind when he said he thought the wound in his side was fatal. —

Mr N. E. D. Cozens. I heard of the assault upon Major Floyd about 12 o,clock on the night it occurred and immediately went to the house, when I found several persons, Major Floyd said McLellan (as I understood) was one of those who attacked him Mrs Floyd told him not to be too certain and he said he could not be mistaken, I had but little conversation with him — I assisted in arresting McLean at the stone stable on Oak Street on our calling some one he came to the door of the loft and I asked him who he was and he said McLean, the upper door was open and he slept near it and Rogers slept some 30 or 40 feet distant — On arresting McLean he said he had been there all night and in passing down he took a hunting shirt from a pin and put it on; when in the street one of Major Floyds negro's was present and McLean said something to him which I do not now recollect. —

Cross Examined, There were two boys in the stable near the window, where McLean slept; I did not tell McLean any thing about Major Floyd

but told him there was a man beaten in the country, took prisoner to the Calabose and left him with Capt Long he spoke to a negro in front of the stable and said "have they got You too" or some such remark

Mr F. H. Wimer, I went to Major Floyds on the night of the murder, he stated that a person whom he called Mack who had been employed on his premises and who wore on that night a dark calico frock coat or hunting shirt was one of the men who had beaten him, Mrs F. told him to be Cautious as he might be mistaken in the person; we enquired about Mack and found several persons who knew him and told us that he was at the Stone stable on Oak Street; we went there and found a negro, whom we sent for a light, we then called for Rogers and asked for McLean, he said that he was in the stable and also that he had gone to bed about 9 o,clock he slept in the north and Rogers in the south end of the stable, when Mack was arrested we did not search him I thought his dress answered the description given by Major Floyd, After we went into the street one of Major F.'s negro's came up and Mack said "Halloo Old fellow have they got You too, —

Cross Examined, At the time we were at the stable Mr Rucker called my attention to the distance between where Mack and Rogers slept and also the time when Rogers said Mack went to bed which was at or about 9 o,clock and the same time with himself, there were five or six persons in the stable, I asked Mack when he went to bed and he said about 9 o,clock, do not think any one told him what he was arrested for; he seemed to be perfectly easy, he put on his pantaloons and shoes and took a hunting shirt from below, pants were light colored, It seems to me he was asked when his Coat was and he said down stairs that he would

get it; Major Floyd said the man who struck him was 'Mack' who had worked on the premises and who on that night wore a pair of light colored pantaloons and frock coat or hunting shirt, dont recollect seeing Mr Floyd in a passion - he said he 'would die' or was 'a dead man' in answer to several questions asked on that subject; saw no marks of blood on the prisoner, did not examine him

Dr Carr Lane. I arrived at Major Floyds about 2 o.clock on the night of the attack upon him and found him in bed covered with blood; he had four wounds upon his head which I thought were not mortal; he had also a wound in his side from a sharp instrument; I looked at it and said if it was not deep he might recover, he complained of pain in his bowels and I told him it might be from indi-gestion, I stayed with him till next morning but saw him no more till after his death; I was present at the Post Mortem examination, the skull was not fractured but the main bowel was severed two thirds off so as to admit the contents of the bowels into the cavity of the abdomen. From the time I saw Major Floyd he seemed to consider himself a dead man, he regretted that he had not been more on his guard and complained of his servants not going to his rescue, He or some one else said that the well digger was one of the party, I saw Major Floyd last about 12 o,clock on the day after he was beaten.

Cross Examined. I cannot tell what position Major Floyd might have been in when he received the wound in the side Came to town on Saturday after Breakfast and returned again and remained till 12 o,clock; when I last saw him I thought he had hopes of recovery, I thought if none of the bowels were cut he would recover if they were he would not; he said his servants were 'cowardly scoundrels' and seemed much irritated at not being able to defend himself he expressed no hopes of recovery in my hearing and said

very little about death; the reason I did not return before his death was that the messenger who came for me in the night did not find me; when leaving I left word to send for me in case of violent symptoms; It was entirely a matter of inference in my mind that Mager Floyd had any hopes of recovery —

Here the testimony for the Prosecution closed

For the Defence — Mager Graham. I belong to the Army, McLean the prisoner joined our regiment in May 1838 and remained till August 1839 he bore the character of a good soldier and so far as I know a peaceable man

Cross Examined. I have known nothing of the prisoner since 1839 nor heard of him till the present when summoned as a Witness by the Marshall —

Lieut R. E. Cochrane. I belong to the Army and knew the prisoner from Feb 1839 until he was discharged, his character was good in the regiment, he was a servant of Lieut Scott and took charge as servants generally do of all he had except money some servants are trusted with that

Cross Examined. I have not known the prisoner since 1839 saw him once at Fort Smith Arkansas he was a trainer of horses,

Lieut R. M. Cochrane. I belong to the Army and know the prisoner at the bar, he was in the company I commanded from May 1838 till Aug 1839 his conduct was good as a soldier, I think he was waiter to Lieut Scott & was regularly discharged

Cross Examined. I have not known him since he was discharged in 1839

Mr Hugh Rogers. — I was at the Store stable on Oak street the night of the murder of Mager Floyd, went to bed I think about 10 o'clock, McLean went towards his bed a few minutes after but I dont know whether he went to bed or not, I slept in the south end of the stable and he in the north end near the front window with a Young man named Spencer

then was also others near, I was at the Union Hotel and left there 25 minutes after nine and went to the stable and to bed, did not see McLean after he went towards his bed till he called me towards day, went down and saw Mr Rucker who asked for McLean and told me the circumstances of the murder, told him it was impossible for McLean to have been there as he had been in bed, do not recollect that I told Mr Rucker whether he went to bed at 10 or 11 oclock, McLean was told to put on his clothes and asked if he had a coat, he said not but that he had a hunting shirt and went into the lower part of the stable and got it, It had been about the stable for two or three days, saw it the evening before near where he took it from, McLean had a rag on his foot and said it was sore, never saw it till that morning have known him since April, first saw him at Shackletts race track, can say nothing about whom he associated with, have heard him spoken of as a quiet harmless man, he had been in the habit of sleeping in the stable since August, J. R. Rogers slept in the middle of the stable some 25 or 30 feet from me, he was unwell that night, woke up once in the night and heard some persons coming up the ladder and asked who was there and some one answered that it was Rogers; am not certain that it was his voice but am certain that it was not McLeans voice. A person may have got out the window without my knowledge went to sleep in a few minutes after lying down. —

Cross Examined, I have known McLean by sight since April, dont know his occupation — have generally seen him with horses — think it was about 10 o'clock when I last saw him on the night of the 26th August, think I have said that he might have gone down taken a horse and gone into the country and done what he pleased without my knowledge have heard that it was unusual for him to undress himself but that he did on that night, saw nothing of his sore foot till the morning he was arrested — saw the hunting

shirt a day or two before; McLean was not employed by me he was taking care of some horses that Mr Winticast put in my stable

Mr Edward Spencer. I was at the stone stable on Oak street on the night of Mayor Floyds murder, There were several other persons there among whom was McLean, Dont know what time I went to bed as I had no means of knowing, Mr Rogers told us to close the doors and go to bed and went up stairs first himself – I followed him and in a few minutes McLean came to where I was took off his clothes and came to bed – We lay side by side, It might have been 10 or 20 minutes before I went to sleep during which time there were a few words passed between us, after going to sleep I heard no more of McLean till morning, Think a person could have gone out the window without my knowing it – McLean had a sore foot from a burn – it was done with hot grease at the race track and had been sore about two weeks before (Witness was shown a hunting shirt which he identified and said it belonged to Mike Fanning and said he (witness) had lent it to McLean who had worn it some days before he was arrested, Saw it the evening before the murder in the shed hanging on a peg – A horse might have been taken out of the stable without my knowledge after I went to sleep, When I went to sleep McLean was in bed –

Cross Examined. I have known the prisoner since a year ago last spring, Knew him in Arkansas at 'Fort Smith', He was in the employ of the Fannings' taking care of horses, When I first saw him here he was digging a well at Mayor Floyds, Heard him say that Mayor Floyd was a libral man – Had no way of telling the time we went to bed – There was no one else with us – McLean picked up a boy who was near and threw him some distance on the hay, Do not recollect of ever having seen McLean take off his clothes in the stable till that night –

T. R. Rogers. I slept at the stone stable on Oak street on the night of the assault upon Mayor Floyd – There were several

others then among whom was the prisoner - William Fanning was then in the evening, Hugh Rogers told us are to go to bed after coming from lunch and said we would have to get up early in the morning - McLean and others went up stairs. After I went to bed I was obliged to get up and met a man named Welsh. Couldn't say that any person got out of the window might however without my knowledge - I went out a second time and when returning was asked by Hugh Rogers "Who was then" I answered it was I. This was either at 11 or 12 o'clock heard the clock strike but dont know which, Saw the hunting shirt which the prisoner wore in the evening but not after The passage to where I was went by my bed to the south end. Cant say that any one went out, they might however have gone down through the racks; I have frequently, Welsh went towards where McLean and other slept but I heard no talking —

Cross Examined — Hugh Rogers told us to go to bed so as to get up early - There are racks the whole length of the stable - The doors of the stable were fastened on the inside, A person might have gone out of the front window and gone in below the back way, It might have been 25 or 30 feet from where I slept to the north window —

John H. Milton. I have known the prisoner three Years, Saw him last before to day in August last Never knew any thing wrong of him, He has always been a peaceable man - He boarded at my house in Van Buren Arkansas for nearly two Years - I resided in this city now came here last summer. —

Cross Examined, — I never had any particular transactions with the prisoner. It is merely my opinion that he was an honest peaceable man when he was in Arkansas - He was Bar Keeper and horse trainer - Never heard his character called in question He once trained a horse for me — That the foregoing is all the

testimony that was given on the trial of this cause and the court having instructed the Jury as follows

State of Missouri
vs
James McLean } Charge of Court

The Prisoner at the Bar stands charged with the offence of murder in the first degree, This offence is described in the Statute of this State in the following manner 'Every murder which shall be committed by means of poisons or by laying in wait or by any other kind of wilful deliberate and premeditated ~~killing~~ or which shall be perpetrated in the perpetration or attempt to perpetrate any arson rape robbery burglary or other felony shall be deemed murder in the first degree'
The prisoner is charged with murdering one Gabriel Floyd If therefore You shall believe from the evidence that the prisoner did murder the said Floyd by the means or in the manner described You will find him guilty of Murder in the first degree and so finding will say that he is guilty of murder of the first degree -
To ascertain whether the prisoner at the Bar did participate in the killing of said Floyd - You have in part the declarations of said Floyd made before his death, Such declarations however are not considered evidence unless it is satisfactorily shewn that the declarations were made by the person when he believed that he was about to die - declarations made in the moments of such feelings as naturally arise upon the prospect of immediate death are good and legal evidence - If therefore You shall believe from the evidence that the prisoner at the Bar was identified by said Floyd before his death and he so stated to persons and that he made declarations of such identity under the belief that his wounds were mortal and that he was about to die

and that said Floyd was killed under circumstances that constitute murder in the first degree You will find defendant guilty - To ascertain the belief of said Floyd as to his wounds and his hopes of life - You may gather as well from Floyds own words as well as the description of his injuries as given in evidence by the Witnesses —

For the defence the prisoner at the Bar introduced testimony of an alibi that is he has offered testimony to shew that at the identical time of the killing of said. Floyd that he (the defendant) was at a different place when it would have been impossible for him to have been present at the said killing - If therefore You shall believe the witnesses testify to this alibi and that the testimony proves the fact that at the identical time of the murder of Floyd the prisoner was at a place where he could possibly have participated in the wounding &c of Floyd You must of course acquit - Proof of continuous good character in doubtful cases increases the probability of innocence but can have no weight when the proof is positive - If You have a reasonable doubt of the guilt of the prisoner You ought to give him the benefit of that doubt and acquit - If You find the prisoner guilty You will specify the degree of murder

The Jury retired and on the day of Dec in the said November term they returned into Court and delivered their verdict as follows

"We the Jury find the defendant James McLean guilty of Murder in the first degree"

Whereupon the said James McLean at the said November term of said Criminal Court filed his motion for a new trial and reasons therefor as follows.

State of Missouri vs. James McLean } St Louis Criminal Court - Nov term 1862

The Defendant moves the Court to set aside the verdict in this cause and grant

him a new trial for the following reasons.

1st The court erred in refusing continuance on affidavit

2d There was error in empannelling the Jury

3d The Court erred in permitting the Jury to seperate after they were sworn and before they rendered a verdict.

4th The court erred in permitting seven Jurors to be sworn and empannelled and then to seperate and go at large for several days.

5th The Court erred in not keeping Jury together and under charge of constable until they rendered their verdict.

6th The Court erred in permitting the dying declaration of Floyd to be given in evidence.

7th The Court erred in permitting improper evidence to go to the Jury.

8th The verdict was against evidence and against the weight of Evidence.

9th The Verdict was against law

10th Because since the trial the defendant has discovered new and material evidence

R. S. Blammerhassett
Atty for Defendant

and also filed with the court the affidavits of the said James McLean and one William Backley in support of said motion which affidavits are as follows.

State vs. James McLean } St Louis Criminal Court Nov term 1842

County of St Louis ss. James McLean the defendant in this cause being duly sworn says that at the present term of this court he has been found Guilty by the Verdict of a Jury of the wilful murder of Major Gabriel F Floyd that on the trial of said cause he

gave to his counsel the names of all witnesses then known to this affiant by whom he could prove his innocence of said charge and that all of said witnesses were examined on the said trial with the exception of one James Brown and a boy named Talleyrand and Lieut Scott who was then and now is absent in Washington City as this affiant is informed and beleives — That since the conviction of this affiant as aforesaid this affiant has understood and verily beleives that one or more of the persons concerned in said murder or who were cognizant of the same have voluntarily stated the circumstances of said murder as also the names of those concerned therein, And this affiant says that since said trial and conviction he has ascertained the fact and expects if a new trial is granted to him to be able to pr[illegible] such new trial by one William Barkley and by one William T. Johnson commonly called "Buffalo Bill" that said Floyd was murdered by Samuel McCauley — Bill Mullen Thomas Perry — William or Bill Mix and that the said "Buffalo Bill" knew such to be the fact and that this affiant had no knowledge of such murder and was and is innocent of the same — And this affiant further states that he knew nothing of such evidence at the time of trial — And that the same was discovered by him since the trial aforesaid

Sworn and subscribed to before me — J. McLain

this 24th day of Dec 1842

James J Purdy a Justice of the St Louis County Court

State vs James McLean } St Louis Criminal Court Nov term 1842

St Louis County ss. William Barkley being duly sworn says that he has heard the annexed affidavit of James McLean read, that he knows Samuel

McCauley, Bill Mullen, Thomas Perry William Mix and William G Johnson commonly called "Buffalo Bill" that he saw them in the months of August and September last past and from certain facts known to this affiant & from conversations had with the above named McCauley & Perry this affiant is enabled to say and so to swear if called on that the above named five persons were the persons who murdered Major Gabriel F Floyd in the night of the 26th August last — And that James McLean now convicted of said murder is innocent of the same — that this affiant freely and voluntarily communicated his knowledge of the persons who committed said murder to R. S. Blannerhassett on Yesterday the 23d inst for the first time

Sworn and subscribed to before me — William Bartley

the 24 day of Dec 1842

James T Purdy a Justice of the St Louis County Court}

which motion being heard and mature deliberation thereupon had and the said Court having heard read and duly considered the said affidavits of the said defendant and of the said William Bartley the said motion for a new trial afterwards to wit On the second Monday of January 1843 until which time the said Court continued said motion for advisement, was by the said Court overruled — To which decision the said defendant James McLean excepted — And afterwards to wit, the said Court on the second Monday of January 1843 in the January term of said Court pronounced the sentence of the Law on the said defendant James McLean ~~and which sentence is as follows~~ All which matters and things not appearing of record in this cause have been embodied in this bill of exceptions which the said defendant now here prays the Court to sign and seal and make a part of the record in this cause which is accordingly done this fourth day of February eighteen hundred and forty two

N W Manning (Seal)

State of Missouri }
County of St Louis } ss. I, Julius D. Johnston Clerk of the St Louis Criminal court within and for the County aforesaid certify the above and foregoing to be a full and true transcript of the record and proceedings of said court in the case of the state of Missouri vs. James McLean, indicted for murder, as the same now remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at the City of St Louis this fourteenth day of February in the year eighteen hundred and forty three.

J D Johnston Clerk.

The State
vs.
James McLean
Transcript

STATE OF MISSOURI, } ss.
Third Judicial District,

The State of Missouri, to the Honorable the Criminal Court of St. Louis County, GREETING:

FOR AS MUCH as in the record and process, as well as in the rendition of Judgment, on a certain plaint which was in our ~~Circuit~~ Criminal Court, for our County of St. Louis before our Judge thereof, between The State of Missouri

Plaintiff, and James McLean

Defendant,

~~in a plea of~~ on an indictment for murder *as it is said, manifest error hath happened, to the great damage of the said* James McLean *as by* his *complaint we are informed:* WE, *being willing that the error, if any there be, should be duly amended, and full and speedy justice done to the parties aforesaid in this behalf,* COMMAND YOU, *that if judgment be thereupon given, then a transcript of the record of the judgment, with all things touching the same, you certify and send (with this writ) to our Supreme Court, to be holden at the City of St. Louis, within and for the Third Judicial District, on the* third monday *of next, that our Judges of our said Court, inspecting the record of the judgment aforesaid, may cause to be done therein, for correcting the said error, what to them of right, and according to law, shall seem meet to be done.*

Witness, JOHN RULAND, *Clerk of our said Court, and the seal of office hereunto affixed, at the City of St. Louis, this* 7th *day of* February *in the year of our Lord, one thousand eight hundred and ~~thirty~~* forty three *and of the Independence of the United States of America, the* sixty seventh

Jno Ruland Clerk

No. 64 59.

Supreme Court - 3rd Judicial District - May Term 1843.

James McLean
Error to St
vs } Louis Criminal Court
The State of Missouri

3

Filed 1829

Filed February 10th 1843
Mr. Ruland Clerk

State of Missouri
County of St Louis } ss In obedience to the within writ I have made out a certified transcript of the record and proceedings of the St Louis Criminal court in the case of the State vs. James McLean, which was delivered to the counsel for said McLean.

Given under my hand and official seal at the city of St Louis this first day of March Eighteen hundred and forty three.

J D Johnston Clerk
St Louis Crim: Court.

McLean }
The State }

Points & authorities of Bray Atty. General.

1. That the Court improperly refused the second application for a Continuance

1. because the accused, in his affidavit, did not show that he had used due diligence to procure the attendance of ~~Baker~~ Brown

2. because the facts which the accused supposed he would be able to prove by said ~~Baker~~ Brown were not material.

2. The Criminal Court did not err in permitting the jurors to separate.

1 Because at common law it is a matter of discretion with the Court whether the jury shall be kept together until all the evidence is received, or whether they shall be permitted to separate.

2. Because there is no evidence that the Criminal Court improperly or unlawfully exercised this discretion.

See the King v. Woolfet al. 1. Ch. Rep. 401. cited in 1. Cowen. R. 227. Statutes of Mo. 1835. Title Practice and Proceedings in Criminal Cases. Art. 6. Sect. 14.

3. Although it is now settled that the Court, and not the jury, are to decide, whether, under the circumstances of the case, the dying declarations ought to be admitted, yet it is evident that the deceased considered himself, at the time he made the declarations, in a dying condition and past all hope of recovery, and actually was in such condition. Therefore the evidence was clearly admissible, and the Court will not reverse the judgment because the evidence was introduced in an irregular manner, particularly as it is not pretended that the defendant was prejudiced by the manner in which the evidence was introduced

4. Admitting that the declarations of the deceased were improperly in evidence, then it is clear that the verdict is sustained by the evidence, for the declarations of the deceased as to the identity of the defendant, and to the fact that the defendant was the person who gave him the mortal wound are positive and uncontradicted by any of the testimony –

5. The motion for a new trial was properly overruled, not only on account of the suspicious character of the testimony of Bailey, but of the utter insufficiency of the matter contained in the affidavits.

Mr Lean

~

The State

Points & Authorities

Bay. Atty. Genl

filed Aug. 17. 1843.

H. L. Boon clk

James McLain
Pltff in Error
vs
State of Missouri
Deft in Error

In the Sup. Court
July term 1843

Brief

At the September term 1842 of the St Louis Criminal Court the Pltff in Error was indicted for the Murder of Gabriel F. Floyd, to which Indictment he pleaded not guilty and on his Motion the trial of said cause was continued to the November term of the same year, at which time and place the case being again called was on Motion founded on Affidavit of said McLain continued until the 12th of December in said November term, and on the said 12th of December the said McLain not being yet ready filed with the desk of said criminal court his affidavit and moved the Court to continue said trial until the January term which motion was overruled and the trial was ordered to proceed to which decision the said McLain excepted and thereupon on the said 12th of Decr the Special Venire issued in said cause having been returned seven of the jurors so summoned were duly empanelled & sworn and the pannel being exhausted the Court ordered the Marshall to summon thirty six other jurors for Thursday the 16th of December then next ensuing. And thereupon the said McLain by his counsel moved the Court that the seven jurors so sworn should be kept together under the charge of the proper officer and not permitted to seperate and go at large which motion was overruled and the Court then adjourned until the 16th inst

permitting said seven jurors to seperate and go at large to which the ~~say~~ said McLain by his counsel excepted. On the 10th to which day the trial was adjourned five other jurors were impanelled and sworn. And after hearing the proofs and allegations of the parties, the said jury on the 21st of December in said November term came into court and found the said James McLain guilty of Murder in the first degree. During the progress of the trial the court adjourned each day for dinner and from day to day. the jurors being permitted to seperate and go at large to which the said McLain by his counsel objected requesting them to be kept together under the charge of the officer. but which objection was overruled by the court. and exceptions taken by the said McLain. On the 24th of December in said term the said McLain filed his motion for a new trial with two affidavits one by said McLain the other by one William Barkley in support of said motion. which said motion on the second Monday of January 1843 until which time it was continued by the court for advisement was overruled and the said James McLain was sentenced to be executed in pursuance of ~~with~~ said Verdict — The said McLane claims that said Verdict & judgment are erroneous & should be reversed Because first The court should have continued the trial of said cause until the January term. the affidavit of the said McLain for that purpose being entirely sufficient & containing every allegation ~~required~~ required by statute

People vs Vermilyea 7 Cow 525 6 Cow R 577 5 Cow 15

And by reference to the testimony of Mathew Cozens & Hugh Rogers the materiality of the testimony

of Brown on the account of whose testimony the motion was made is apparent & corroborates the truth of the affidavit—

Second. The jury after they are sworn should not be permitted to have seperated until they render their Verdict— This is the rule in Englands as also in this country. In the Case of the King vs Stone 6 Tarent. R. 530 which was an Indictmt for high Treason the court adjd from night until next morning. the jury retired to an adjoining Tavern and Bailiffs were sworn "well & truly to keep the jury neither to speak to them themselves nor to suffer any other person to speak to them &c" And in Com Dig. title Enquest F. it is laid down that after the evidence given the jury ought to continue together till they agree of their Verdict without eating drinking fire or Candle or speaking with any one &c — Then Cases of necessity as an affray the falling of the house &c are given as justifying the jury in seperating In 4th Black. Com. 360 it is said that when the evidence on both sides is closed and indeed when any evidence hath been given the jury cannot be discharged (unless in cases of evident necessity) till they have given in their Verdict. See also Gould's Case in Fost. 27 —

In Buller Nr. Pri. 308 it is said an officer of the court ought always to be placed at the door of the box where the jury sit to prevent any one

from having communication with them. And when they depart from the ~~court~~ bar, they ~~are~~ are to be attended by a Bailiff. sworn for that purpose.

In 4th Hay St. trials 232. Lord Delamere's Case it was resolved by all the judges. "The jury being once charged can never be discharged till they have given their verdict. this is clear. and the reason ~~is~~ of that is for fear of corruption. and tampering with the jury an officer is sworn. to keep the jury without permitting them to seperate. or any one to converse with them. for no one knows. what may happen. for though the law requires that honest men should be returned upon juries. And without a known objection they are presumed to be probi & legales homines. yet they are weak men. and perhaps may be wrought upon by undue applications In Watson's Case 2 Starkie 116 who was tried for high treason in 1817. which lasted several days the jury were kept together under charge of a Bailiff. So in the protracted trials in 1794 of Horne Tooke &c steps were taken to prevent the possibility of any communication with the jury. 6 T.R. 530 — See also 2 Tomlins law Dic. 306. 309.

The leading Eng. case on the other side was that of the Bishop of N. vs Earl of Kent. found in the year Book 14 Henry 7. fol 29. where by reason of a tempest the jury seperated ~~it~~ the seperation was held to be no cause for granting a new trial Six ~~jurors~~ judges

being of that opinion & five against it. And it was decided on the ground that it was a case of necessity. So in the case of Lord St. John vs Abbott Barnes 441 which was also a Civil Case. The same decision was made in the case of the King vs Woolf & al. for a conspiracy 1 Ch. R 401 Abbott Ch. J. who delivered the opinion of the court put the decision of the point on the ground ~~among others~~ chiefly that the rule should not apply to Misdemeanors & said "But I am of opinion that in case of a Misdemeanor their dispersion does not vitiate the Verdict, and then refers to the practise in cases of Misdemeanors & ~~&c~~ & adds "And I consider every instance in which that has been done as proof that it may be done"

Am. Cases. + New Jersey

In Branain vs Grannis 1 Conn. R. Clark vs Cole 1 Penn. R. 278. ~~and~~ Burrill vs Philips 1 Gall. R. 360 (Rhode Island) Ex parte Hill 3 Cow R. 355. ~~Oliver vs the Trustees of the first Presbyt. Church in Springfield 5 Cow R. 282~~ the Seperation of the jury was held to be no ground for setting aside the Verdict ~~of the jury~~. But it will be borne in Mind that in those as in English cases the decisions were made on the ground that in Civil Cases & in Cases of Misdemeanours the party claiming a reversal of Judgment on the grounds of the Seperation of the jury were bound to shew affirmatively that there was a tampering with the jury in such cases the presumption being in favor of the good conduct of the jurors but this rule does not

apply to Cases of Felony — On the other side and to prove that a Separation of the jury even in Civil Cases is a grounds of ~~Verse~~ Sitting aside the Verdict the court is referred to 3 days reports 287. 2 South. R 827 - Commonwealth of Vir. vs McCaul Virginia Cases 271 2 Leigh R 750 Martin's Case Walkers intro to Am. Law 640. 1 Cow R. Smith vs Thompson 221 & Note

Thirdly The court should have decided as a question of law whether the ~~dying~~ declarations of Floyd were admissible as Evidence or not. this he refused to do and left it to the jury as a question of fact — Greenleaf 190. Sec 160 1 Ch. Cr. law ~~[illegible]~~ 570. 1 Starke R 521-3 1 East P.C. 360 id 358 3 C & P. 629 6 C & P. 386 7 C & P. 187. 190 1 Hawkes 444 1 Leach 504 14 Eng. Com. L.R. 474 Note. id 494

Fourthly The dying declarations of Floyd were improperly admitted, the evidence being insufficient to shew that they were made in extremis & under a sense of immediate dissolution Greenleaf 188 Sec 158 id 189 & Cases in Note 4 1 East P.C 357 6 C. & P. 386 id 631 7 C & P. 187 2 Russel on Crimes 685. 14 Eng Com. law R 494

~~of Brown on whose account the motion was made is apparent and corroborates the truth of the affidavit —~~

Second ~~The jury should not be permitted to say after they are sworn and until they render their Verdict whether this principle expences on Authority or on policy. If this doctrine is to be determined by Authority or rests on principle only in either case, it is claimed that the question should be determined in favor of the Peffin Error. The practise has never been otherwise in the English Courts in all cases of Felony and 2 Tomlins Law dic 306 309~~

~~And such is the uniform practise in many of the States of the Union 2 Sigh R. 750 Martin's Case. Walker intro to Am. law 640~~

Thirdly ~~The court should have decided as a question of law whether the dying declarations of G. F. Floyd were admissible in evidence or not this he refused to do. And left it as a question of fact to the jury — in this there was error — Greenleaf 140 Sec 160. 1 Starke R 521.523. 1 East P.C. 360 id 358 3 C & P 629 6 C & P 386 7 C & P 187.190 1 Hawk 444 1 Ch. Cr. law 570 1 Leach 504~~

Fourthly ~~The dying declarations of Floyd were improperly admitted as the evidence was insufficient to shew that they were made in extremis, and under a sense of impending & immediate dissolution. 1 East P.C. 358-9 2 Russel~~

Greenleaf 188 Sec 158 1 East P.C. 357 6 C & P 386 id 631. 7 C & P 187 2 Russell Cr 685 Greenleaf 189 Cases in Note 44

Fifthly. The evidence introduced on the part of the State was insufficient to warrant a conviction if the fact that the Deffin Error assisted in digging Floyd's well ~~be~~ be omitted the conviction then rests wholly upon the declarations of the deceased. And though we may concede for the sake of the argument that those declarations were properly before the jury. Yet it must be recollected that the person to be affected by them was not present when they were made - had not the power of a cross examination - And that from the circumstances necessarily attending ~~such~~ the commission of such an offence such confusion & surprise must have existed as could not but lead to mistakes as to the identity of persons. And the omission of facts essentially important to the completeness and truth of the narrative. See Greenleaf on Ev. 192. 1 Phil. & [illegible] on Ev. 305 & 306. 2 John 2 356 2 Poth obl [illegible] 5. 2 Starke 263 - There is moreover a material discrepancy in the testimony of the witness who swear to Floyd's declarations. Mrs Floyd ~~calls him~~ swears he called him Mack. Briggs says it was Mac or McLean, can't tell which. Downs calls him Mack. Bucker says it was a man by the ~~name of~~ McClung as he understood from Floyd. Cozens said he understood it to be ~~McClle~~ McLellan. And Dr Lane says Floyd told him [illegible] Mill [illegible] giving therefore to the State all the effect which from this testimony it could claim legally belongs to it it is submitted that it would be establishing a dangerous precedent to permit a conviction involving the life of ~~an in~~ a human being to rest on such proof

But independent of the ~~fa~~ insufficiency of the case made by the State the Plff in Error presents two different defences – The one his good character which in all doubtful cases or where the testimony consists of circumstantial evidence and not positive in its results is entitled to great weight and in general sufficient to outweigh ~~all~~ the evidence on the part of the prosecution where from such evidence a ~~well founded~~ doubt exists as to the guilt of the Prisoner – The other where sustained an unanswerable defence to any prosecution – the defence of an alibi – it is ~~not~~ not possible to arrive at the exact time the Murder was committed but from the testimony of the witnesses on the part of the State it must have been from 10 o'clk to 20 minutes past 10. The distance from the City to Floyds house was near [illegible] miles – Hugh Rogers swears positively to the time he left the Union Hotel – 20 minutes to 10 o'clk. and that when he got to the stable and directed the persons there among whom was the Plff in Error to go to bed it was 10 o'clk. Spencer swears that he went to bed with Plff in Error leaving awake talking about 15 or 20 minutes & then went to sleep the Plff in Error being there when he went to sleep. John R. Rogers corroborates the testimony of the witnesses as to time and swears that at 11 o'clk when he went out of the stable and met the boy Welsh he saw the Calico Hunting Shirt hanging up in the passage back of the stable so far as the testimony of these witnesses is concerned standing unimpeached disconnected from the party accused and the transaction. It cannot well be conceived

how a jury of 12 impartial men could disregard such testimony. And yet they are so. Court may always look into the evidence. Commonwealth vs Green. 17 Mass R. 515. 1 Wheler's Cases 500

Sixthly — For the reasons above mentioned, and the additional reason of newly discovered evidence, the Court below should have granted a new trial — The affidavits were full on every point required to be shewn to entitle the party to a new trial on the grounds of newly discovered evidence

Blumenhardt
for Plff in Error

In the Supr. Court

James McLean
Plff in Error
vs
The State of Missouri
Deft in Error

Brief
Blumenhardt
Atty for Plff in E.

Filed Aug. 17. 1843.
N. L. Born Clk

James McLean
vs
The state of Missouri

Appeal from the ~~Circuit~~ Criminal court of St Louis county

At the September term of the Criminal court for St Louis county the appellant James McLean was indicted for murder in the first degree, and at the November term of that court next succeeding he was tried and found guilty. To reverse the judgment of the criminal court this appeal is prosecuted

In the bill of exceptions it appears ~~that during~~ the said term of November, to wit, on the 12th day of December 1842 he prayed a continuance of his cause, and at the same time filed his affidavit that one James Brown is a material witness for ~~the plain~~ him the defendant, and that he could not safely go to trial without the evidence of said Brown - That some two or three months since the said Brown went to Galena on business, but with the intention of returning to St Louis, his place of residence, on or about the first of November ~~1842~~ last past that said Brown had not returned to St Louis, and that the affiant had good reason to believe Brown would return at the next term of said court. That the affiant ex-

pected to be able to prove by said Brown that he and Brown slept together in the stable of one Long in the city of St Louis on the night that Gabriel Floyd the deceased was murdered, and for whose murder the affiant was indicted, from the hour of ten of the clock of that night, till the next morning when the affiant was arrested &c.

The court overruled the motion for a continuance, and proceeded on that day to impannel a jury. Seven jurors were sworn to try the issue, and the residue being challenged and set aside for cause shown, the Marshall was ordered forthwith to summon thirty six others to appear on the 15th day of said month of December. The seven jurors were left at liberty to go where they pleased from the 12th day of said month of December till the 15th, the court charging them to hold no conversation with any persons. Exceptions were taken to the refusal of the court to grant the continuance and the action of the court in permitting the seven ~~members~~ jurors ~~XXXXX~~ to go at large as aforesaid. On the said fifteenth day of December five other persons were sworn on the jury. ~~The trial continued from the 15th till the 22nd day of December~~

The first witness examined was the wife of the deceased: she stated that about 10 O'clock at night of 26th of

August 1842 she retired to rest, but did not sleep - that about half an hour after she heard foot steps about the front door, and some person turning the lock - her husband got up, took his gun and went to the door, and she went to the servants room to call them to his assistance, and was met by two men, when she opened the door to let them out, one of them presented a pistol to her and said if she spoke he would blow her through, saying they only wanted money, and asked how much they had &c. - that when she saw her husband he was much cut and beaten, and had a stab in his left side - he asked her to lay him down on the bed, said he was dying - Here the counsel for the state desired the witness to relate what her husband said: to this the counsel for the prisoner objected, and insisted that whether the declarations of the deceased should be given in evidence or not was a question of law to be determined by the court, and that in order to enable it to decide whether they were admissible, evidence should be given to the court whether the deceased regarded himself in Articulo mortis and past all hope of recovery, when he made the statements now sought to be given in evidence. The court overruled the objection and permitted the witness to pro-

ceed with her testimony. This decision of the court was excepted to, and the witness was permitted to proceed. She proceeded to state that he was very faint, but recovered a little, and said he recognized the man Mack who assisted in digging the well, and that he said "Damn you I would not have dirked you if you had not resisted. That the deceased stated that he recognized McLean as the man that beat him and stabbed him with the dirk. the deceased lived 31 hours after he was stabbed, and, at various times before his death, made these declarations". It is stated on the record that here the hour of adjournment having arrived the court adjourned till the next day, and that the jury were allowed to separate and go at large to which objection was taken and the objection overruled. At the usual hour on the next day the court met and the examination of the witness was continued. The witness stated that the first time she saw her husband after he went out, he was standing in the bed room, and he said "Jane dying, lay me down". He was then laid on the bed by the servants, he expressed no hopes of recovery and seemed perfectly resigned, he was lying in bed when he made his statements, and witness presumed the deceased made his statements with a view to their being given in evidence

Several other witnesses testified to the declarations of the deceased. From them it appears that the deceased on hearing the footsteps at his door got up and

took his gun in his hand, and when the door was opened he was dragged out, (his gun having missed fire) and beaten with sticks, after the assailants ceased to beat him he ~~[illegible]~~ made his way into the house he knew not how, and was stabbed after he had gotten into his bed room. The witnesses all concur in saying that while he made these statements, he also declared that he did not believe he should ever recover - called himself a dead man &c. It was in evidence that the deceased lived betwixt three and four miles from the stable in St Louis where the accused went to bed as appears by the evidence of several witnesses about 10 O'clock of the night on which the murder was committed and at which stable he was arrested next morning

After verdict and judgment the defendant moved for a new trial for the reasons following

1st Because the court permitted the seven jurors first sworn and impannelled to separate and go at large for several days

2. Because the court did not keep the jury together under the charge of an officer until they delivered in their verdict

3rd. Because the court refused to grant a continuance

4 Because the declarations of the deceased were admitted in evidence,

The indictment had been found at the September term, and the continuance till the November term was almost a matter of course; and probably the continuance was as necessary to the state as to the prisoner. It would seem then that, on so important an occasion when a man's life was at stake, it was not very unreasonable to ask a continuance till the next succeeding ~~term of the court~~

In Greenleaf's evidence p. 190 section 160 it is said "The circumstances under which the (dying) declarations were made are to be shown to the judge; it be-

ing his province and not that of the jury to determine whether they were admissible. In Woodcock's case v. Leach's Cr. Cases 5-57 the whole subject seems to have been left to the jury under the direction of the court, as a mixed question of law and fact: but subsequently it has been held a subject exclusively for the consideration of the court, being placed on the same ground with the preliminary proof of documents, and of the competency of witnesses which is always addressed to the court. But after the evidence is admitted its credibility is entirely within the province of the jury, who of course are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony upon the whole only such credit as they may think it deserves."

The testimony of the first witness in the case was well calculated to mislead the judgment. The witness, wife of the deceased, said, "when I saw my husband, he was much cut and beaten, and had a stab in his left side: he asked me to lay him on the bed, said he was dying, &c." ~~&c~~ The declarations of the deceased testified to by other witnesses were in like manner, mingled with such declarations as these viz. that he was dying — was a dead man — or that he would never recover. And although it seems that no court, could on hearing these statements of the witnesses, hesitate to decide

that the declarations of the deceased ought to have been received in evidence, yet as the criminal court transgressed the rule of evidence, as it is now understood, in suffering these declarations of the deceased to go to the jury before it had ~~decided that they were admissible~~ examined the witnesses to enable it to determine whether they were made in articulo mortis, and as in a capital case it seems to me improper for ~~any~~ this court to assume the authority to say that the prisoner was not injured by this error of the Criminal court, I am of opinion that for this error the judgment of that court ought to be reversed

In a note to the case of Smith vs Thompson 1st Cowen 221 all the cases concerning the separation of jurors are reviewed. The result of all is, that a verdict will not be set aside merely because a jury have separated without the leave of the court, when it has not been proved that they have been tampered with, or their verdict is not so inconsistent with the evidence as to raise the presumption of influence aliunde; and that in cases of misdemeanor the jury may disperse with leave of the court. This is the result of the English cases; and it is there added that the American cases on this subject present nearly the same view of the question. But the better opinion, on considering all the cases cited, ~~[illegible]~~ in the note above mentioned ~~[illegible]~~, is that in Capital cases, and in cases of felony in general, the jury ought to be

kept together, and that although occasions may occur in cases of imminent danger &c, on which jurors may be excused from fine for dispersion, yet it is the duty of the court to keep them under the charge of an officer when it is not in session. ~~Our statute provides~~ To the same purpose see the case of the People vs Douglass 4. Cowen p. 35

Our statute provides that "The proceedings prescribed by law in civil cases, in respect to the empannelling of jurors, the keeping of them together, and the manner of rendering their verdict, shall be had upon trials on indictments, and prosecutions for criminal offences, except in cases otherwise ~~provided~~ provided by statute"+. It has not been suggested by counsel, nor has it been found on the examination of our statute law that the legislature has made any statutory provision for keeping juries together either in civil cases, or in trials on indictments, and prosecutions for criminal offences. It seems then that there is nothing in our statute on which the above recited provision can act, and the consequence therefore is that we are left as we were at common law

~~It is then the opinion of myself only that the court erred in suffering the declarations of the deceased to~~

+ Section 14. Article 6th of the act to regulate proceedings in criminal cases p. 490 of the digest of 1835

~~to go to the jury before~~. The majority of the court does not concur with me in opinion that the judgment of the criminal court ought to be reversed because that court suffered the declarations of the deceased to go to the jury, ~~[illegible]~~ before it took time to examine whether they ~~[illegible]~~ were made under a sense of impending death, because no injury has been done to the prisoner by their admission in evidence

But all the court concur in opinion that * ~~[illegible]~~ because the jury after being sworn were permitted to go at large while the court was not sitting

It was contended that the weight of evidence was much against the finding of the jury. Nothing will be said on this subject as it is but right that jury should be uninfluenced by the opinion of the court as to the weight of the evidence, and because the judgment will be reversed on another point

The judgment of the criminal court is reversed and the cause will be remanded to ~~the criminal court of St Louis County~~ that court to be proceeded in conformably to this opinion

George Tompkins

W. B. Napton

* a new trial ought to have been granted

Mr. Scott

44.

McLean
vs. opinion
The State

July term 1843

Tompkins

Filed Aug. 17. 1843.
H. L. Boon clk