Gray, Daniel L vs. State of MO; 1854 Polk Co 206/3
et al

70/26

- assault w/a knife
- multiple parties charged w/the same assault, not possible so indictment reversed
- assaulted party trespassing on their property
- multiple weapons used in conflict
- father and his 3 sons: Gray, Daniel; Gray Robert, and Gray, William B
- Change of venue from Benton

State of Missouri } Set
County of Polk }

Be it Remembered that on the 13th day of October A.D. 1853 a Transcript of the Record and proceedings of the Benton Circuit Court of Benton County in the case wherein the State of Missouri is Plaintiff and Daniel Gray & others are Defendants was filed in the Office of the Clerk of the Circuit Court of said County of Polk which Transcript is in the words and figures following Towit

State of Missouri } SS
County of Benton }

At a Circuit Court of the Seventh Judicial Circuit of the State of Missouri began and held at the Court House in the City of Warsaw within and for the County of Benton on Monday the 13th day of September A.D. 1852 — Present

The Hon. Waldo P. Johnson Circuit Judge
Seth B. Howard Esq Sheriff
and Thomas J. Bishop Clerk

When and where amongst other men had the following proceedings Viz —

State of Missouri
vs
Daniel Gray
Daniel L. Gray
Robert Gray
William B. Gray

Be it Remembered that at the above named term of the Benton Circuit Court the Grand Jurors empannelled and sworn to enquire within and for the body of the County of Benton at and dureing said term Viz James M. Wisdom who was appointed foreman John Foster Arthur Mathis Aaron Turpin

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Jacob W. Raymond James Tipton Meshac Green David Kidwell Jacob Davison John Z. Jenkins Isaac Watson Branham Hill William A. A. Parks Joseph Seiper Samuel Lessley Daniel Nave & Thomas Rains which Jurors were duly sworn on the first day of said term and afterwards on the same day returned into Court and presented to said Court the following Bill of Indictment against said Daniel Gray & others Viz

State of Missouri } ss In the Benton Circuit Court
County of Benton } September term AD 1852

The grand Jurors for the State of Missouri empannelled charged and sworn to enquire within and for the body of the County of Benton aforesaid upon their oath present that Daniel Gray Robert Gray William B Gray alias William Brathett Gray and Daniel L. Gray late of the County of Benton aforesaid lately on the 15th fifteenth day of February in the year of our Lord eighteen hundred and fifty two with force and arms at the County aforesaid in and upon one Abner Dice in the peace of the State then and there being unlawfully and feloniously an assault did make and that the said Daniel Gray Robert Gray William B. Gray alias William Brathett Gray and Daniel L. Gray with force and arms unlawfully and feloniously with a certain knife of the length of eight inches and of the width of one inch and half which knife they the said Daniel Gray Robert Gray William B. Gray alias William Brathett Gray and Daniel L. Gray in their right hand then and there had and held the said Abner Dice then and there feloniously stab cut and wound in and upon the neck face and lower jaw of him the said Abner Dice whereby he the said Abner Dice was then and there greatly wounded and disfigured and received great bodily harm contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State

And the Grand Jurors aforesaid upon their oath aforesaid do further present that the aforesaid Daniel Gray Robert Gray William B Gray alias William Brathett Gray and Daniel L. Gray all late of the County of Benton aforesaid on the fifteenth day of February in the year of our Lord eighteen hundred and fifty two with force and arms at the County aforesaid in and upon one Abner Dice in the peace of the State then and there being unlawfully and feloniously an assault did make and that the said Daniel Gray Robert Gray William B. Gray alias William Brathett Gray and Daniel L. Gray did then and there with force and arms unlawfully and feloniously and with a certain knife then and there make on the body of the said Abner Dice then and there inflicting with the said knife on the body neck and face of said Dice great bodily harm and then and there wounded Maimed and disfigured him the said Abner Dice under such circumstances which would have constituted Murder if death had ensued contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State

Benj H Emerson Cir. Atty

A true Bill James M. Wisdom Foreman of the Grand Jury

Filed Sept 13th 1852 W. S. Bishop Clk

Indictment Felonious Assault

Abner Dice G. W. Hopkins Radford

The Grand Jury return here into Court and by their foreman present to the Court a Bill of Indictment against Daniel Gray and others. And it is ordered that a Writ of Capias be issued on said Bill of Indictment directed to the Sheriff of Benton County which Writ was issued on the same day and is in the words following

Benton County Set

The State of Missouri

To the Sheriff of Benton County Greeting

We Command you to take Daniel Gray Daniel

L Gray Robert Gray and William B. Gray if they be found in Your County and them safely keep so that You have their bodies before the Honorable Judge of our Benton Circuit Court at the Court House in the City of Warsaw on the first day of our next term of said Court which will be held at the Court House in the City of Warsaw in the County aforesaid on the Second Monday in March next to answer our said State of Missouri of and concerning a certain felonious assault wherewith they stand indicted in our said Court and this You shall in no wise omit and have you then and there this bodies and this Writ In Testimony Whereof I Thomas J. Bishop Clerk of the Benton Circuit Court have hereunto set my hand and affixed the seal of our said Court at the City of Warsaw the 13th day of September A.D. 1852

(Ss)

Thomas J. Bishop Clerk

Upon which Writ the Sheriff made the following return

State of Missouri County of Benton

I do hereby Certify that I did on the 13 day of Sept 1852 serve and take Daniel Gray & Daniel L. Gray Robert Gray States prisoners and said Defendants gave Bond for their appearance at the Court House in Benton County State of Missouri on the 2nd Monday in March 1853 S. B. Howard Sheriff B.C.

fee $3.00

And afterwards during the same term and on the same day were had the following proceedings

State of Missouri
vs
Daniel Gray
Daniel L Gray
Robert Gray

} Indictment for a Felonious assault

Now at this day comes the Circuit

attorney who prosecutes for the State of Missouri in this behalf and the said Daniel Gray being also here present and thereupon also came James D. Gray and Washington McLernan as bail for said Daniel Gray and who are considered good and sufficient and the said Daniel Gray James D. Gray and Washington McClearnan before the Court here acknowledge themselves to owe and stand justly indebted jointly and severally to the State of Missouri in the sum of Five Hundred Dollars to be made and levied of their respective goods and chattels lands and tenements to and for the use of the State of Missouri upon Condition Nevertheless if said Daniel Gray shall make his personal appearance before this Court at the Court House in the City of Warsaw in Benton County on the Second Monday in March next and Answer the said Indictment and not depart from this Court without leave then this recognizance to be void otherwise to remain in full force

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State of Missouri
vs
Daniel Gray
Daniel L. Gray
Robert Gray

} Indictment for a felonious assault

Now at this day comes the Circuit Attorney who prosecutes for the State of Missouri in this behalf and the said Daniel L. Gray being also here present and thereupon also comes James D. Gray and Washington McLearnan as bail for said Daniel L. Gray and who are considered good and sufficient and the said Daniel L. Gray James D. Gray and Washington McLearnan before the Court here acknowledge themselves (to) jointly and severally to owe and stand justly indebted to the State of Missouri in the sum of five Hundred Dollars to be made and levied of their respective Goods

and Chattels Lands and tenements to and for the use of the State of Missouri upon Condition Nevertheless if said Daniel L. Gray shall make his personal appearance before this Court on the first day of the next term thereof to be begun and held at the Court House in the City of Warsaw on the Second Monday in March next to Answer the Indictment aforesaid and not depart from said Court without leave then this recognizance to be Void Otherwise to remain in full force

State of Missouri
vs
Daniel Gray
Daniel L Gray
Robert Gray & others

Indict for a Felonious Assault

Now at this day comes the Circuit attorney who prosecutes for the State of Missouri in this behalf and the said Robert Gray being also here present and thereupon comes also James D. Gray and Washington McLearnan as bail for the said Robert Gray and who are considered good and sufficient and the said Robert Gray James D. Gray and Washington McLearnan now here before the Court acknowledge themselves to owe and stand justly indebted jointly and severally to the State of Missouri in the Sum of Five Hundred Dollars to be made and levied of their respective goods and chattels lands and tenements to and for the use of the State of Missouri Upon Condition Nevertheless if said Robert Gray shall make his personal appearance before this Court on the first day of the next term thereof to be begun and held at the City of Warsaw in Benton County on the Second Monday in March next and Answer the Indictment aforesaid and not depart from said Court without leave then this Recognizance to be Void Otherwise to remain in full force

State of Missouri
vs } Indictment for a Felonious assault
Daniel Gray
Daniel L Gray
Robert Gray

Now at this day comes here into Court George W. Hopkins William S. Radford and Abner H. Dice and Severally acknowledge themselves to owe and stand justly indebted to the State of Missouri in the sum of Fifty Dollars each to be made and levied of their respective
7 goods and chattels lands and tenements for the use of the State of Missouri upon Condition Nevertheless if said George W. Hopkins William S. Radford and Abner H. Dice shall appear before the Court at the next term on the first day thereof to be begun and held at the Court House in the City of Warsaw in Benton County on the Second Monday in March next to testify as Witnesses in this case on the part of the State and not depart from this Court without leave then this Recognizance to be void otherwise to remain in full force

State of Missouri
vs } Indictment for a Felonious assault
Daniel Gray
Daniel L. Gray
Robert Gray

Now at this day comes Eli Philips and William T. Philips and Severally acknowledged themselves to owe and stand justly indebted to the State of Missouri in the sum of Fifty Dollars each to be made and levied of their goods and Chattels Lands and tenements for the use of the State of Missouri upon Condition Nevertheless if said Eli Philips and William T Phillips shall make their personal Appearance before this Court

on the first day of the next term thereof to be begun and held at the Court House in the City of Warsaw in Benton County on the Second Monday in March next to testify in this case on the part of the Defendants then this Recognizance to be void Otherwise to remain in full force

And Afterwards at the next term of said Court being the March term for the year 1853 and on Tuesday the 15th day of March 1853 were had the following proceedings

The Defendants filed a Petition for a change of Venue which Petition is in these words

The State of Missouri
vs } Indictment for a Felonious
Daniel Gray } Assault &c
Robert Gray } In Benton Circuit Court
Daniel L. Gray }
Impleaded &c

To the Benton Circuit Court Your Petitioners the above Defendants would represent to the Court that the minds of the Inhabitants of said County of Benton are prejudiced against them so that a fair trial cannot be had in said County. They would also represent that the same is true as to the inhabitants of Hickory County wherefore they pray for a change of Venue

W. Claire Means and Hendrick
Attorneys for Defendants

This Affiant Daniel Gray Ro. Gray and Daniel L. Gray being duly sworn doth depose and say the above Petition is true and that the facts on which the application for a change of Venue is founded have first came to their Knowledge since the last preceding continuance of this Cause
Sworn to and Subscribed in

open Court the 15 March
A.D 1853
Wm. J. Bishop Clk
Filed March 15 1853 Wm J. Bishop Clerk

State of Missouri
vs } Indictment for a Felonious assault
Daniel Gray & others

10 Now at this day comes the Circuit Attorney who prosecutes for the State of Missouri in this behalf and the said Defendants Daniel Gray Daniel L. Gray & Robert Gray being also here present and said Defendants now file a Petition praying a change of Venue in this case and it appearing to the Court that the causes alledged in said Petition are sufficient therefore it is ordered that a change of Venue be granted in this case and this cause be removed to the Circuit Court of Polk County

And Daniel Gray one of said Defendants James D. Gray and Henry Moulder as bail for him come and acknowledge themselves jointly and severally to owe and stand justly indebted to the State of Missouri in the sum of Five Hundred Dollars to be made and levied of their goods and chattels Lands and tenements to and for the use of the State of Missouri upon condition Nevertheless if said Daniel Gray shall make his personal appearance before the Honorable Judge of the Circuit Court of Polk County at the Court House in the town of Bolivar in Polk County on the third Monday in April next and then and there Answer to an Indictment for a Felonious Assault and not depart said Court without leave then this Recognizance to be void otherwise to remain in full force

And Robert Gray one said Defendants James D. Gray & Henry Moulder as bail for him come and acknowledge themselves jointly and severally to owe

and stand justly indebted to the State of Missouri in the sum of Five Hundred Dollars to be made and levied of their goods and chattels Lands and tenements to and for the use of the State of Missouri Upon Condition Nevertheless if said Robert Gray shall make his personal appearance before the Honorable Judge of the Circuit Court of Polk County at the Court House in the town of Bolivar in Polk County on third Monday in April next and then and there answer to an Indictment for a Felonious Assault and not depart from said Court without leave then this recognizance to be Void Otherwise to remain in full force

And Daniel L. Gray Also one of said Defendants James D. Gray and Henry Moulder as bail for him come and jointly and Severally acknowledge themselves to owe and stand justly indebted to the State of Missouri in the sum of Five Hundred Dollars to be paid to the State of Missouri and levied of their goods and chattels lands and tenements to and for the use of said State Upon Condition Nevertheless if said Daniel L. Gray shall make his personal Appearance before the Honorable Judge of the Circuit Court of Polk County at the Court House in the town of Bolivar in Polk County on the third Monday in April next and then and there answer to an Indictment for a Felonious assault and not depart from said Court without leave then this recognizance to be void Otherwise to remain in full force

And George W. Hopkins Jr Abner H. Dice Harvey G. Thompson and George W. Hopkins Sen Witnesses on the part of the State and Jesse Ball Eli Phillips William J. Phillips and Washington McMillan Witnesses in this case on the part of the Defendants come and Severally acknowledge themselves to owe and stand justly indebted to the State of Missouri in the sum of Fifty Dollars each to be levied of their respective goods and chattels Lands and tenements to and for the State of Missouri Upon Condition Nevertheless If they the said George

W. Hopkins Jr. Abner H. Dice Harvey G. Thompson George W. Hopkins Sr. Jesse Ball Eli Phillips William T. Phillips and Washington McMillan shall make their personal appearance before the Honorable the Circuit Court of Polk County at the Court House in the town of Bolivar in Polk County on the third Monday in April next to testify as Witnesses in this case and shall not depart from said Court without leave then this Recognizance to be void Otherwise to remain in full force

State of Missouri }
County of Benton } ss

I Thomas J. Bishop clerk of the Benton Circuit Court. Do certify that the foregoing is a true full and complete Transcript of the Record and proceedings in the case of the State of Missouri vs Daniel Gray Robert Gray
12 William B. Gray Alias William Brethett Gray and Daniel L. Gray with all things thereto relateing as the same now remains of Record in my Office as by the record thereof now remaining in my office manifestly appears

(LS) In Testimony whereof I have hereunto set my hand and affixed the Seal of said Court the 23 Septr 1853

Thomas J. Bishop Clerk

Filed 13th Oct 1853 Thomas Rountree C.R.

Be it Remembered that at a circuit Court began continued and held within and for the County of Polk in the State of Missouri at the Court House in the Town of Bolivar in said County on Tuesday the 19th day of April A.D. 1853. the following proceedings among others were had in and by said Court To wit

The State of Missouri } Indictment for a
vs } Felonious Assault
Daniel Gray }
Robert Gray & }
Daniel L Gray }

Now at this day comes the Circuit Attorney who prosecutes for the State of Missouri in this behalf and suggests a demmution of the Record in the above cause It is therefore ordered that a rule go against the Clerk of the Circuit Court of Benton County directing him to make
13 out a Transcript complete of the Record and proceedings in said cause including the order of removal the Petition therefor and the Recognizance of the Defendants and all Witnesses and Transmit the same duly certified to the Clerk of the Circuit Court of Polk County without delay

And afterwards Towit at the Court and on the day and year last aforesaid the following proceedings among others were had in said Court Towit

State of Missouri
vs } Indictment for a Felonious assault
Daniel Gray
Robert Gray
Daniel L. Gray

Now at this day came the above named Daniel Gray Robert Gray and Daniel L. Gray as principals and James D. Gray and Washington McClerin as Securities and acknowledged themselves jointly and severally indebted to the State of Missouri in the just and full sum of Fifteen Hundred Dollars good and lawful Money of the United States to be levied of their respective goods and Chattels lands and tenements to the use of said State to be rendered. To be Void on Condition that the said Daniel Gray Robert Gray and Daniel L Gray shall make their personal appearance in this Court on the first day of the next term thereof to be begun and held at the Court House in Bolivar on the third Monday after the fourth Monday in September next and answer the State of Missouri of an Indictment prefered against them for a Felonious assault

and not depart without leave of the Court

And afterwards to wit at a Circuit Court began continued and held within and for said County of Polk on Tuesday the 18th day of October A.D. 1853 the following proceedings among others were had Towit

State of Missouri
vs
Daniel L. Gray
} Indictment for a Felonious assault

Now at this day came the Circuit Attorney who prosecutes for the State of Missouri in this behalf and the said Defendant in his own proper person and the Circuit Attorney who prosecutes as aforesaid says he will not nor does he further prosecute said Defendant in this behalf on the 2nd Count in said Indictment and thereupon the said Defendant requiring a seperate trial being
14 forthwith demanded of and concerning the premises and how he would acquit himself of the same says he is not guilty thereof in manner and form as in said Indictment he is charged and for his trial puts himself upon the Country and the Circuit Attorney who prosecutes for the State doth the like and thereupon came the Jurors of a Jury Towit George W. Hays Thomas Hale John W. Wakefield Middleton Lane Jacob B. Clark David D. Stockton Mathew G Campbell Benjamin Coats William Coon Alexander Fausett John Ballenger and David Wright twelve good and lawful men who being duly elected tried and sworn to well and truly try and true deliverance make between The State of Missouri and the said Defendant and having heard part of the evidence this cause is adjourned over until tomorrow Morning

And afterwards to wit at the Court aforesaid continued and held on the 19th day of October 1853 the following proceedings among others were had in said Court Towit

State of Missouri }
vs } Indictment for a Felonious Assault
Daniel L. Gray }

15 Now at this day came again the Circuit Attorney who prosecutes for the State in this behalf as well as the said Defendant in his own proper person and also the Jury empannelled in this cause and having heard all the evidence and the argument of Counsel this cause is adjourned over until tomorrow Morning

And afterwards Towit at the Court aforesaid continued and held on the 20th day of October AD 1853 the following proceedings among others were had in said Court Towit

State of Missouri }
vs } Indictment for a Felonious Assault
Daniel L. Gray }

Now at this day come the Circuit Attorney who prosecutes for the State of Missouri in this behalf and the said Defendant in his own proper person and also the Jury empannelled in this cause who on their oaths do say We the Jury find the Defendant Guilty in manner and form as in said Indictment he is charged and the Jury having failed to assess the punishment. Therefore the Court doth assess the punishment to a Fine of Five Hundred Dollars It is therefore Considered by the Court that said Defendant make his Fine with the State of Missouri by the payment of the sum of Five Hundred Dollars by the Court in manner and form aforesaid Assessed and that said Defendant render himself in Execution &c

And afterwards Towit at the Court and on the day and Year last aforesaid the following proceedings among others were had Towit

State of Missouri
vs
Daniel L. Gray } Indictment for a Felonious Assault

Now at this day comes the said Defendant by his Attorney and files herein his Motion to set aside the Verdict of the Jury and grant a new trial in the above cause

And afterwards To wit at the Court and on the day and year last aforesaid the following proceedings among others were had To wit

State of Missouri
vs
Daniel L Gray } Indictment for a Felonious Assault

Now at this day comes again the Circuit Attorney who prosecutes for the State of Missouri in this behalf and the said Defendant in his own proper person and the motion filed to set aside the verdict of the Jury and grant a new trial in this
16 cause came on to be heard and being fully heard and understood was by the Court overruled to which opinion and Judgement of the Court in overruling said motion the said Defendant excepts and prays an appeal to the Supreme Court which is granted and thereupon the said Daniel. L. Gray as principal and James. D. Gray as his Security and acknowledged themselves jointly and Severally indebted to the State of Missouri in the Just and full sum of Six Hundred Dollars good and lawful money of the United States to be levied of their respective goods and chattels Lands and tenements to the use of said State to be rendered. To be void on Condition that the said Daniel. L. Gray shall appear at the Supreme Court of the State of Missouri to be holden at the City of Jefferson on the 2nd Monday in January next

to do and receive judgement on said Appeal and in the Circuit Court of Polk County in said State at such time and place as the Supreme Court shall direct and render himself in Execution and obey every order and judgement which shall be made in the premises

And afterwards towit at the Court aforesaid Continued and held on the 22nd day of October A.D. 1853 the following proceedings among others were had in said Court towit

State of Missouri
vs
Daniel L. Gray } Indictment for a Felonious assault

Now at this day comes the Circuit attorney who prosecutes for the State of Missouri in this behalf and the said Defendant by his attorney and tenders his Bill of Exceptions which is signed and sealed and ordered to be filed and enrolled as forming apart of the Record in said cause and the same is done accordingly

And which said Bill of Exceptions so signed and sealed as aforesaid is in the words and figures following towit

The State of Missouri
vs
Daniel L. Gray indicted with Daniel Gray William B Gray & Robert Gray } In the Polk Circuit Court Fall Term 1853

Be it remembered that on the trial of the said Daniel L. Gray at this term of the Court who has severed in his trial in this cause the following testimony was given on the part of the State towit

State
vs
Dan'l. L. Gray

Abner. H. Dice witness sworn. I am acquainted with Daniel. L. Gray also with Robert Gray and Wm. B. Gray and Daniel Gray likewise on the 15th January 1852 in Benton County the difficulty took place in the Morning between 8 and 9 O'Clock myself George M. Hopkins & W. Radford went out to work we had cut down one tree and cut two or three cuts I had quit chopping and went to making glits on an old log some five or ten steps from the place where the boys were when I first saw Dan'l Gray Dan'l. L. Gray Robert Gray & W. B. Gray comeing a Hundred and fifty Yards off. Dan'l Gray and Robert were before and the other two were behind. They all went up to the boys and the old man Dan'l Gray said to the boys, Young men we want no difficulty with You but Dice has got to leave
18 this timber or we will kill him as he turned round to me he said we have come to Kill you and he made at me with a Hickory club the head of it about the size of the top of the chair post and Robert Gray came forward at the same time with a club a little large than the other the old man drew his club over his head I dont think Robert Gray did and just at that time William. B. Gray drew a Pistol and cocked it and Daniel. L. Gray likewise drew a Pistol ~~and~~ in his right hand and cocked it and held on his hip under his Coat with the muzzle of the pistol towards me and he had something in his ~~right~~ left hand that I supposed to be a pistol It was about the size but am not certain what it was Daniel Gray came on in the direction where I was and when he got near where I was about in striking distance I give back and he picked up my axe and made at me as if he were a going to split me open I stepped back near where my

gun was and picked up my gun he still had the axe drawed overhanded just as I got my gun picked up Hopkins and Radford run down where I was I suppose by that time I had got some ten or 15 steps from where I was making gluts I know I had stepped back a step or two from where I picked my gun when the boys that is Hopkins and Radford came running up and got in between us I then had my gun cocked the old man David Gray then dropped the axe or laid it down and said he wanted no fuss. Then David Gray and Robert Gray commenced jawing me they jawed me for some time and I got round where Hopkins & Radford had been at work and observed to Hopkins Radford if they were a mind to listen to them they could do so and if not they could go to work at that time Hopkins & Radford went to work at that time the four Mr Grays seemed to be following to get all around me and between me and Hopkins & Radford all the Grays continued talking and abusing me about that time Wm B. Gray observed to the other Grays that he was going home after his rifle and that they could stay there if they chose that he had as good a rifle as ever fired and that the matter should be settled before dark I observed to Hopkins & Radford that I could not stand it any longer Then all four Grays made at me at the same time David Gray with his stick and axe both drawn in both hands Robert Gray with his stick drawn and the other Grays run up at the same time. I then attempted to present my gun and before my gun was level Hopkins run up and caught my gun in one hand and the axe that David Gray had in the other hand the next thing I knew David Gray had me by the cravat Wm B. Gray was beating me in the side with the fist David L. Gray the Deft was

Kicking me. Those Young men Hopkins & Radford pulled the old man off of me my Shirt was torn off and as he pulled the old man off my Cravat came into just as they got them all off of me. I got the axe and as I got the axe and raised it Robt Gray ran at me with the stick we struck at the same time he struck on this (left) arm and disabled me and my axe glanced over him and hit over about the shoulder and I dont know whether it cut him a nat we both fell as I rose Daniel Gray run at me and struck at me with the stick and glanced me and as I gave back I got out my knife as he struck at me with a stick and glanced me I struck at him with a knife as I struck at him with the knife the first time he pitched forward and aimed to gather hold of me I as he did that I struck him twice with the knife. I think he got hold of me after the first lick just at that time I saw Wm B. Gray he had a home made knife it had blood on it I
20 fell I had no more recollection as well as I recollect I tried to tell them to hold me up when I came to myself I was cut upon the side of my face (here is the wound upon my face) It was some time before I could get home I vomited up between a Gallon and a half gallon of blood that Knight the Physician said my wind pipe was cut I became very sick and made motions to them to raise me up in the bed. I was disabled by the wounds received from that time to this and to do myself justice have not been able to do a days work since. my Voice has been injured by it previous to that time I had as clear a voice as any man since then I can hardly speak plain my arm was disabled but my Arm got well before I was able to go about. We were timing to make rails. This all occured in Benton County

It was about half a Mile from my House I would say
between 1/4 and 1/2 Mile I recollect of them packing
me off the Grays went off I did not notice what
Daniel L Gray did with the Pistol I was noticeing the
21 old man. Daul L. had a pistol in one hand and what
I supposed to be pistol in the other He was then about
ten a fifteen feet from me Daul L. Gray said
something concerning whipping me but I cant rec
-ollect what it was I was Cutting rail timber on
Congress Land that is if the Land was entered I have
no knowledge of it. It was not when I was at the
Land office before the difficulty which was the Jan.
or Feby before that

Cross Ex.

That was the first day we had worked at that particular
place two hundred Yards from there Mr Phillips
had made rails for me I never made any line
with the Grays but told them that if I made a
line I would go to Clinton to do it I told Phillips
not to go over a certain line, where we making
rails it was on the same quarter that Mr Phillips
made rails I never told them about any line between
me and Mr. Grays. I did not call the Grays thieves
I said a great deal but I cannot remember what
I said when Daul Gray first come up I told him
to go way that I was making rails on public Land
and did not want to be bothered I might have said
they were a pack of God damned Scoundrels and think
I did say that a great deal was said I did not con
-sider them friends of mine and did not want
any difficulty with them I did not say any
thing about expecting to have a difficulty I expected
from threats they had made when I saw them
comeing to have a difficulty I mentioned to
One of the Young men where the Grays were

coming that I did not want to leave that timber nor did I want to have any difficulty. I did not always have my Gun with me when out at work I recollect that Lafayette said something about fighting with me but whether it was with weapons or not I cant tell my reply to that was that Mr Feaster would fight him. I have no recollection of Lafayett Gray starting home. I never said that they owed me Money and that if they did not pay it I would take it out of their hides. I did say that they owed Money to little orphan children and if they did not pay it I could make the Money entering land. I never did in passing the house of Mr Gray turn up my body and pat it in an insulting manner to the ladies of the family was too well raised for that. Mr Gray did not request me not to cut the timber on the Land as well as I can remember the language was about what I told you there was much abusive language. I never spoke to Radford or Hopkins of the Grays coming a having a difficulty with them till we saw them coming down there was some timber and brush between where the difficulty occured and Grays House so that the House could not be distinctly seen Colonel Ballou is employed by me to assist in this prosecution

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George Hopkins Jr. being sworn says I was employed by Abner H. Dice with Bradford to make rails on public Land and we went out to work. It was on the 15th day of January A.D. 1852 Not long after we got there Daniel Gray W.B. Gray Robert Gray and Daniel L. Gray came they named to me and Mr Radford that they did not want any difficulty with us but that land to be stoped as well as I recollect I think it was Robert It was some one of the party. Old Mr Gray walked down where Dice was making some gluts I told Dice

that he had to stop that that he had to quit it Dice set his axe down and told him to go away he was attending to his own business. Gray stepped up & picked up the axe and told Dice he should stop it. When old Mr Gray said that Dice picked up his gun and told him not to rush on him. Dice was backing all of the Grays were rushing on him when he picked up the Gun. They all rushed up and Dice said boys come here would you see a man imposed on by such a damned set as this. Radford and myself went down and got in between them and plead for peace among them and said that was no way to settle business. They then commenced abusing each other a good deal was said on both sides. after they got through quarrelling Dice went back to making his gluts Daniel Gray & William B Gray went to Dice and told he must stop that and challenged him for a fight Daniel L. Gray also challenged him for a fight with fists Guns Knives or Pistols or in any way Dice replied that he would not belittle himself to fight any such set as they were William B. Gray then walked up towards us and said we will have this matter settled before the setting of the sun I am going home now after my rifle. Dice said take Notice of that Gentlemen I have taken as much as I am going to take he is going home after his gun rifle Dice took his gun and ran where we & the Grays were when he got there Robert Gray rushed at him with a stick and struck at him. Dice knocked off the lick with his gun old Mr. Gray started towards Dice and caught up an axe and got up in about striking distance Radford took the axe from Gray and the gun from Dice as he stood between them old Mr Gray then collared Dice caught him by the throat with his hands Brother Gray turned into hitting Dice with his fist Radford took

Daniel Gray Daniel. L. Gray & Robert Gray from Dice
and Brethet was still hitting him with his fist Dice
hallowed to me to take him away one minuet and I
did so as quick as Dice got loose he backed out rather
out of the croud some 4 or 5 steps Robert Gray made
at Dice again with a stick Dice gave back and told
him not to rush on him he kept rushing and Dice
picked up his axe and struck at him and hit him
over the right shoulder Old Mr. Gray then run at Dice
with a stick and Dice saw him comeing and droped
his axe and told him not to rush on him Gray rushed
up and Dice drew his knife out of his pocket Gray kept
on and Dice struck him three times with the knife
when he had struck him three times with the knife
Brethet Gray ran up with a Bowie Knife and struck
Dice in the neck when Dice was struck with the knife
he hollowed Oh Lord I am a dead man. Defendant
said to Radford dont let Dice have his gun as we are
now going home the Grays went towards their home
and Radford took Dice down to Hammonds. Dice was
cut in the neck it bled a good deal I did not go with
24 Radford I went to Dices house the difficulty occured
tolerably early in the morning after breakfast. At the
time Brethet Gray was hitting Dice Defendant was
right in among them I did not see him put his hands
on Dice or kick him The old man Gray & Robert
Gray came there with sticks they were good sized
walking sticks Roberts looked as if it had been used
some but the old man looked like it had been freshly
cut. I did not see any of the Grays have any Pistols
I saw them frequently put their hands in their pockets
as if they were about to draw some at the time Mr.
and Defendant went down where the old man and Dice
were at the time the old man picked up the axe &
Dice his gun William & Defendant put their hands
in their pockets I think Dice was always backing

till they would come up to him with the exception of the time when Brethet spoke of going after his rifle then he came round as before stated. I heard no threat from the Gray when they first came up only they told Dice that had to be stopped

Cross Examination of Hopkins

We had commenced cutting timber there that morning two weeks before had cut timber 250 yards from there on that morning before the Gray were seen coming down Dice said he would not be surprised if the Gray should come down and raise a fuss said I dont want you to do any thing only look on when we saw them coming I said dont run and leave me hear. Dice replied you never knew this child to run we were near the edge of the timber could see the House and people passing around the house no timber or brush to obstruct the view. The Gray all treated me well but said this had to be stoped said the timber was on their claim and did not want it cut Daniel Gray said there was a line betw Wm B. Gray but Dice with his fist my opportunity to see what past good than one in the fight dont recollect of seeing Defendant hit Dice in any way during the difficulty whilst they were quarreling Defendant proposed peace said to Daniel Gray lets go home he wont fight Defendant had proposed to fight Dice or that Wm B. Gray would fight him a fair fight. At the time Dice said he would not be surprised if the Gray came and made a fuss he said they claimed five Miles around. The Gray were there about half an hour none of them proposed to leave but Defendant and that was done when Dice and the old man were first parted and he gave a reason that Dice would not fight the Sticks that Robert and Daniel Gray had were over an inch in diameter at the larger end

Evidence for Defendant

Martha Ann Gray sworn on the part of Defendant says. I am the Daughter of Daniel Gray I remember the difficulty between Abner H. Dice and Daniel Gray Robert Gray Wm. B. Gray and Daniel L. Gray I was in the house at my Fathers heard Abner H. Dice swearing & cursing very loudly I went out and saw the parties the noise of loud talking soon ceased and I went into the house again soon afterwards I again heard the noise of loud talking and went out again I could see the parties distinctly the distance was about a quarter of a mile from the house to where they were after watching there a short time I saw Daniel Gray Robert Gray Wm B. Gray and Daniel L. Gray start home William B. & Daniel L. Gray were something in advance of the other two at that time I saw Dice who was on their
26 left run around by where Rayford & Hopkins were at work and passed around on the right of Daniel and Robert and before them, when they commenced fighting. The house where I was in in the prairie and the fight was at the edge of the timber the ground is higher at the House and where the difficulty took place than the intervening ground and there was no timber or other thing to obstruct the view. I could distinguish Dice from my Father or brothers by their clothing Dice was in his shirt and pantaloons his pantaloons were low and his shirt was very white William B. & Daniel L. Gray were dressed in blue clothes black Hats Daniel Gray wore a red Overshirt and white Hat and Robert Gray was dressed in blue clothes and a red Hat. About a half a mile from Fathers to Dices had frequently heard his voice that Distance was well acquainted with the same when Father and Brothers returned to the house Father had three wounds one on the forehead another on the back of the neck and a third on the left shoulder the last had the appearance of a deep stab

Father was confined with his wounds for three weeks that he never passed his door steps Robert Gray also had a wound on the shoulder and William B. Gray had a cut on the arm Robert Gray had been afflicted for about twelve months with Rheumatism so that he was unable to work and much of the time confined and at the time of the difficulty with Dice could scarcely walk and had to use a walking stick he was crippled at that time could scarcely get up out of a chair He went with my Father and Brothers to when Dice was at work. There was a difficulty before that time between the Families On examination in chief the Witness made this further statement which was excluded by the Court to which the Defendant excepted. Abner H. Dice passed Fathers House frequently and have seen him shake his fist at us have saw him do so as much as a half dozen times he shook his fist at Robert when passing the house at one time when myself and Sister & Miss McSearin were there He turned himself in the saddle and patted the hinder part of his body at us this was all before the difficulty The road when he passed was 150 yards from the house.

Sarah Amelia Gray sworn says I am the Daughter of Daniel Gray and know of the difficulty between my Father & Brothers with Abner H. Dice It was a quarter of a mile from our house There is a plain road from the house and when they had the difficulty is in plain view of the house It was about the edge of the Prairie the road led to my brother in laws Samuel Bales it was at the edge of the road. The road passed Feasters first and then Gibsons I was in the House and heard Dice swear and went out and he hushed I went in the House again and soon heard the fuss commence again and I went out again and saw Father and Brothers all start Home

Wm B. Gray and Defendant were before Dice was at their left hand Dice run around before them and by Hopkins & Radford and the fight commenced Wm B. Gray and Defendant went back Robert had been afflicted about a Year with the Rheumatic pains he then was just able to get up and used a cane I know Dices Voice I have heard from his house He had on a white Shirt and low Pantaloons Father and my Brothers had Coats on Father had red Shirt and white Hat. Wm B. Gray and Defendant had on blue clothes and black Hats Robert wen blue clothes and a red Hat. I went down to the battle ground about two hours after the fight and found Roberts walking stick also a piece of a silk handkerchief about the size of my hand it was in a direction towards the House about 15 steps from the tree that had been cut down and near the road as near as I could tell from the House it was when Dice run around when we found the stick

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Cross Examined

Father and Brothers all came back to the house after the fight. His piece of handkerchief I supposed to be Dices. It was of a black stick we went to the ground to get Roberts walking stick he had no cane when he came back my sister found a Pistol there it was Wm B. Grays I did not know it was lost till we found it there we found it near the rails on the side near the house

Re Examined

My Father was wounded on his neck shoulder and forehead did not see the cuts on his neck and shoulder for three weeks He did not go out of his house Robert was cut on the shoulder Wm B. Gray had a cut on his arm Defendant owned a Pistal I cannot say whether he had it with him or not I did not know that Wm B. Gray till I found it on the ground

3 29

Washington McLearin being sworn states – I have been at the Battle ground between the Grays & Dice it is a quarter of a mile from the House. the House is in plain view of the battle ground The fight occured on the 15th of January a Year ago. Do not Know that the Grays had any entered Land.

Defendant propounded the following Question to the Witness. Was Daniel Gray in possession of entered land then If so state where the boundaries run of the Land he was in possession of if you know by observing the lines. which was objected to by the Circuit Attorney and overruled by the Court and excepted to by Defendant at the time.

Defendant propounded also the following Question to the Witness. — Was the Land when the difficulty occured in possession of Daniel Gray or near it which was objected to by the Circuit Attorney and overruled by the Court to which decision of the Court the Defendant excepted at the time. = I was not present at the time of the fight and only know whither the battle ground was as I learned it from others there is no brush there now nor was not a few days after the difficulty. The tree was cut down in open ground there may be some Post oak bushes west of the tree that Radford and Hopkins said was cut I did not know I. should be called in reference to this I am the son in law of Daniel Gray

Louis R. Ashworth being sworn states I have some acquaintance with the General character of Abner H. Dice from information before this difficulty I did not live in the same Neighborhood have no personal acquaintance with him they seemed to speak of him as a man not to be depended upon for truth from what I have heard said of him I should have hesitated to believe him on oath He was said to be a quarrelsome and troublesome man in the Neighborhood

Cross Examined

I have heard Dr Horn speak of him and John Smith

I heard this of them and others whose names I cannot recollect. I think Horn and Dice had had some personal differance had this Conversation with Smith he said Dice had told a falsehood on his son in a conversation about two

Daniel Bland a Witness for the Defendant being sworn states among Dices Neighbors they say he is an overbearing quarrelsome man that he would not stand to the truth

Cross Ex

I heard from men in Cedar County that Dice had sued and Dr Horn was their Counsel I thought they was a foul crowd and I left Dice was rd to be a tolerable fair man in his dealings.

James D. Gray a Witness for the Deft sworn I had a conversation with Dice near Sutters I cant state all he said in the chat. He said the Grays had stole from orphan children and he would make them pay it or he would have it out of their hides I have been on the battle ground the battle ground is in plain View of the house. about two days after the fight I was on the battle ground and could see the Dells of the house there was a space of 12 steps no trees or brush some scattering trees to the right and left

Cross By

before the conversation with Dice I had understood Dice had accused me of Stealing Cattle. I asked him if he had made the Statements. He then asked me if I thought he was a responsible man I told him I did not look on him as responsible for what he said. He jumped off his Horse and stripped himself and talked about fighting some I called him a liar and Coward after he got off his Horse I cant say he said his property was responsible if the grays wanted to test it. I drew a Pistol on him then but not until he drew a rock on me I am the son of Daniel Gray-

Elijah Bale a Witness for the Deft sworn that I am not acquainted with the general character for

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truth & veracity as well as some others he is thought to be a very quarrelsome and overbearing man and wont tell the truth if he has any thing else to tell I live about three Miles from him I have been there only two years never knew any thing of Dice in Cedar County there is some I have not speak of him I have heard it from others I cant say what brought on the conversation I think I have heard old Mr McClearin speak of him I have heard all of them speak of him in the language I have stated I live in three Miles from Grays my son married the daughter of Daniel Gray

Isaac Wickliff a witness for Deft I do not know Dices general character as a quarrelsome man I do not know his general character I live in twelve Miles of Dice I have heard of Dice what a Majority of his neighbors say that he would not confine himself to the truth Dice lived about Warsaw some time I have heard Mr Thompson talk of it also the Grays Mr McLearin It was Washington McClearin I heard speak of it Washington McClearin the son of old man McClearin I have heard John Ingram and H. L. Hicks speak of Dice Hicks had a lawsuit with Dice I married the widow of Stanford B McClearin

Evidence on the part of the Prosecution resumed

Mr Looney sworn states I cannot say I am acquainted with the general character of Abner H. Dice have lived in some four Miles of him for some three or four years have had dealings with him he is fair in his dealings never heard any thing against his general character

Mr Hopkins sworn states I have known Abner H. Dice near three Years am acquainted with his general character live in about four

miles of him his character is good heard not heard any one speak in other terms of him

George Hopkins sworn states I have lived in four miles of Abner H. Dice for near three years. (Testimony same as above)

James Barkley sworn states I have known Abner H. Dice 8 or 9 years knew him in Warsaw where we both lived two or three years together his character was good heard nothing against him since the time I lived in Warsaw I have been two years in California and have lived in Bolivar some two years heard not him frequently since I returned from California

Foster P. Wright being sworn states I cannot say that I know Dices general character Dice lived some two
32 or three years in Warsaw where I reside heard nothing against his character I did not mix much with the people and dont know that I heard his character questioned or spoken of

Mr Thompson sworn states I live some three miles from Mr. Dice know his general character his general character is good as far as I know have know him three a four years

Cross Examined

Have heard none except the Grays and Phillipses speak badly of him dont know that I ever heard any one speak of his character except the Grays and Phillipses

It is agreed on the part of the prosecuting attorney and Defendants Counsel that the foregoing is all the evidence in the case

3 Upon the trial of said cause the Defendant offered to read in evidence to the jury so much of the Depositions of Mr Eli Phillips and Phillips as went to prove that Daniel Gray & A. H.

Dice had agreed upon a line between them which Depositions were in the words and figures following to wit

" Deposition of Witnesses produced sworn and examined at the Court House in the town of Osceola in the County of St Clair and State of Missouri before Mr Eli Odom a an acting Justice of the peace within and for the County of St Clair and State of Missouri in a certain Cause now pending in the Circuit Court of Polk County in the State of Missouri between the State of Missouri Plaintiff and Daniel Gray and others Defendants on the part of the Defendants

Eli Philips of lawful age being produced sworn and examined on the part of the Defendants Deposeth and saith as follows in answer to the following questions

1 Question by the Defendant

Did you ever see the ground upon which the fight took place between Abner H. Dice and the Mr Grays who are indicted for the same If so state how far the same is from the House of Daniel Gray

Answer I saw the ground where the fight took place between the Grays and Abner Dice and I suppose the said ground to be about a quarter of a Mile from the House of Daniel Gray

Question Second by the Defendants

Is the above named ground in full and fair View of the house of the above named Daniel Gray

Answer the above named ground is in full and fair view of the House of Daniel Gray

Question the third by the Defendants

Is the ground where the fight took place between the Grays and Abner Dice upon rising Ground and is the House of Daniel Gray upon a rise and a Vally between them

Answer The House of Daniel Gray is upon a high place also the ground where the fight took place between the Grays and Abner Dice is upon high ground

Question the fourth by the Defendants

If there were several men on the ground where the above named fight took place dressed in different colored clothing and one of them was to single himself out from amongst the rest could you tell who he was from his dress and Voice If you were Acquainted with his voice and from seeing them in the same clothes before from the House of the said Daniel Gray

Answer I could could tell a person so differently dressed the distance from the ground where the above named fight took place to the house of the said Daniel Gray

Question the fifth by the Defendants

State what you heard Dice say about the above named ground and timber previous to the fight

34 Answer Previous to the fight between the Grays and Abner Dice I was working for the said Dice in the timber South of the House of Daniel Gray and he the said Dice showes me a line which he the said Dice said was the line between him the said Dice and Daniel Gray and charged me not to work overet for north of ~~it~~ said line was on the legal claim of the said Daniel Gray and the ground where the fight took place between the Grays and Abner Dice is some distance north of said line

Question Sixth by the Defendants

Was there not a quantity of good timber between the ground where the fight took place between the Grays and Abner Dice between the above named ground and Abner Dices house

Answer there was a quantity of as good or better timber between the ground where the fight took place between the Grays and Abner Dice than he the said Dice was cutting at that time

35

Question the Seventh by the Defendants

Do you not believe from what you heard the said Dice say previous to the fight between the Grays and Abner Dice that he Dice was trying to get into a fight a difficulty with the Grays

Answer I do believe that he Dice was trying to get into a difficulty with the Grays as he Dice accused James D. Gray and Robert Gray of stealing certain Cattle which I know to be false

Eli his + mark Phillips

William T. Phillips of lawfull age being produced and sworn and examined upon the part of the Defendants deposeth and saith

Question firstly the Defendants

Did you ever see the ground where the fight took place between the Grays and Abner Dice for which the Grays are now Indicted

Answer I have been shown the ground where the fight took place between Abner Dice and the Grays

Question Second by the Defendants

How far is the above named ground from the house of Daniel Gray and is it in plain view of the house of said Daniel Gray

Answer I think the above named ground is in about a quarter of a mile of the House of Daniel Gray and in plain view of the house of the said Daniel Gray

Question the third by the Defendants

Is the ground where the fight took place between Abner Dice and the Grays upon rising ground and is the House of the said Daniel Gray upon rising ground and a Valley between them

Answer both the House of Daniel Gray and the ground where the fight took between

Abner Dice and the Grays are upon high places and a valley between

Question the fourth by the Defendants

If there were several men on the ground where the fight took place dressed in different colored clothing and one of them was to single himself out from the rest could you tell who he was from his voice if you were acquainted with his voice and from seeing him in the same clothes before from the house of the said Daniel Gray

Answer I could tell a person so differently dressed the distance of the ground where the fight took place between Abner Dice and the Grays to the House of the said Daniel Gray or by his voice if distinctly heard.

36 Question the fifth by the Defendants

State what you heard Dice say about the above named ground and the timber that he was then and there working upon previous

Answer Previous to the fight between Abner Dice and the Grays I was working for the said Dice in the timber south of the House of the said Daniel Gray and he the said Dice showed me a line which the said Dice said was the line between him and the said Daniel Gray and charged me not to work over said line as he said North of said line was on the claim of Daniel Gray and that he did not want any difference about it

Question the sixth by the Defendants

Is the ground where the fight took place between Abner Dice and the Grays north of the above named line

Answer the ground where the fight took place between Abner Dice and the Grays is a quarter of a mile or five hundred Yards north of the line aforesaid

Question the Seventh by the Defendants

State what you heard Daniel Gray say about the above

named line between him and the said Dice previous to the fight

Answer I had been at work for Daniel Gray previous to the fight between Abner Dice and the Gray and he Daniel Gray showed me the same line as showed by Dice and told me not to work over on the South side of said line as he considered that on he the said Dices claim

Question the eighth by the Defendants

Was not a quantity of good timber between the House of the said Abner Dice and the ground when the fight took place between the Gray and Dice

Answer there was a quantity of as good a better timber the ground when the fight took place between Abner Dice and the Gray and he Dices House than he the said Dice was then cutting at that time

Question the Ninth by Defendants

Do You not believe from what You heard Dice say previous to the fight between the said Gra Dice and the Gray that he Dice was trying to get into a difficulty with the Gray

Answer I do from his the said Dice conversation of the said Dice

William T. Phillips

I Eli Odom an acting Justice of the peace within and for the County of St Clair in the State of Michigan. do Certify that in pursuance to the within Notice came before me at the Clerks office in Osceola in St Clair County and State aforesaid Eli Phillips and William T. Phillips who were then by me sworn and examined and such examination reduced to writing and subscribed by them respectively in my presence and their said Depositions are now herewith returned Given at the Clerks office in Osceola in the County of St Clair

and State of Missouri on this the 2nd day of April AD 1853 Eli Adam Justice of the Peace"
To which the prosecuting attorney objected the Court sustained the objection and Defendants Counsel excepted

The Court then on the part of the State gave the following instructions which Defendant objected to and to the giving of which instructions Defendant excepted Viz.

If the Jury believe from the evidence that William B. Gray wounded or inflicted upon Abner H. Dice great bodily harm with a knife as alleged in the Indictment and that such knife was a deadly or dangerous weapon or calculated to produce death and that the Defendant was there present aiding and abetting the said William B. Gray in such wounding or inflicting such great bodily harm they must find the Defendant guilty

And the Court further instructs the Jury that if they believe from the evidence that Daniel Gray Robert Gray William B. Gray and the Defendant
38 went up to where Abner H. Dice was at work with an intent to commit an assault and battery upon him and continued together abetting one another and that William B. Gray in the execution of such intent wounded Abner H. Dice or inflicted upon him great bodily harm with a knife and that such knife was a dangerous weapon or calculated to produce death they must find the Defendant guilty.

If the Jury believe from the evidence that Daniel Gray assaulted Dice with a stick and Dice had reasonable cause to apprehend a design in Daniel Gray to do him some great personal injury and that there was imminent danger of its being accomplished Dice had a right to defend himself to prevent a great personal injury to himself. and if the Jury further believe from the evidence that whilst Dice was so defending himself that William B. Gray wounded said Dice or inflicted great bodily harm on Dice

with a Knife and that said Knife was a dangerous or deadly weapon or calculated to produce death the said William B. Gray would be guilty as charged in the indictment and if the Jury so believe the said Wm. B. Gray guilty and that said Defendant was present aiding and abetting said Wm. B. Gray in the commission of said Offence they must find him guilty

And the Court further instructs the Jury on the part of the State That if the Jury believe from the evidence that William B. Gray did wound Dice or inflict upon him great bodily harm as alledged in said Indictment to constitute the Defendant an aider or abetor in the commission of the Offence by William B. Gray it is not necessary for the State to prove that the Defendant actually aided in the commission of the offence but if the Defendant was in such a situation as to be able readily to come to his assistance with the intention of aiding and assisting the knowledge of which was calculated to give additional confidence to Wm. B. Gray at the time then in contemplation of law Defendant was an aidder and abetter in the commission of the offence

And the Court further instructs the Jury on the part of the State. That although the Jury may believe from the evidence that Dice was cutting timber or trespassing upon the lands of Daniel Gray or any body else If Dice had have been Killed by William B. Gray whilst Dice was engaged in the commission of such Trespass unless he had Killed Dice in the lawful defence of himself or his Father he would have been guilty of Murder or Manslaughter

The Court also gave the following instructions on the part of the Defendant Towit

First The Court instruct the Jury that unless they believe from the evidence that Daniel L. Gray was present aiding and abetting his Father or brothers in the Commission of the offence of assaulting and wounding Dice then they should find him not guilty

That if they believe from the evidence that Defendant Daniel L. Gray went with his Father and brothers to where Dice was at work intending the Commission of Violence against Dice but that he abandoned said purpose before any Violence was done and that he did not aid or assist in doing any damage or assaulting Dice thereafter they should find him not Guilty

If the Jury believe from the evidence that Defendant had started home with the intention of having no further difficulty with Dice they must find him
40 not guilty unless they believe that he changed his purpose and did aid and assist in assaulting or wounding Dice

Second That if the Jury believe from the evidence that Defendant together with his Father and Brothers after they had gone to where Dice was at work but before the wounding of Dice took place had determined to abandon further difficulty with Dice and started home and that Dice then commenced the attack Defendant was justifiable in defending himself or his Father from such attack

That unless the Jury are satisfied from the evidence beyond a reasonable doubt that Defendant is guilty as charged in the Indictment they must find him not guilty

It is the province of the Jury to weigh the evidence of the Witnesses and if they believe from the evidence that any Witness in the cause has wilfully testified falsely to any Material fact they are authorised to disregard the whole or any part of the evidence of said Witness

And the jury having found Defendant guilty he afterwards filed his Motion for a new trial for reasons therein set forth Viz:t

Daniel L. Gray
vs
State of Missouri

The s.d Deft comes and moves the Court to set aside the verdict and grant a new trial

Because the verdict is against evidence

Because the Court erred in refusing proper evidence of the Deft.

Because the Court erred in giving the instructions for the State

Because the verdict is against law and evidence & for other causes

Otter Means & McClain attys for Deft

Which Motion was by the Court overruled and to which decision of the Court in overruling said Motion & refusing to grant a new trial Defendant also excepted and to all of which decisions of the Court Defendant excepts & prays this his Bill of exceptions be signed sealed and made a part of the Record in this cause which is accordingly done

Waldo P. Johnson Seal
Circuit Judge

State of Missouri } ss
County of Polk }

I Israel W. Davis Clerk of the Circuit Court of said County do Certify that the foregoing pages contain a full true and Complete Transcript of the Record and proceedings of said Court in said Cause as the same now appear on file and of Record in my said office

Witness my hand with the seal of said Court affixed at office this 20th March A.D. 1854

I. W. Davis clk

~~29~~ ~~31~~ ~~32~~

31.

State of Missouri

v

Danl. L Gray appt.

filed May 29 1854

Wm E Dunscomb

Clerk

Misfeed

Polk 7th

State of Missouri
vs.
Dan'l G. Gray Appl't.

Appeal from the Polk Circuit Court.

The judgment rendered in this case, must be arrested for the defects contained in the indictment

The defendants are charged under the 38th section of the act concerning crimes 2nd Art. with having jointly made an assault; and several being indicted it is charged; that they with a knife, which they then & there in their right hand held made an assault &c. This is an impossibility: It is on the face of it false and must be bad: The proper mode to pursue in such cases is to charge one of the defendants, with having made the assault and the other being present aiding & abetting will be as much implicated as though they had actually made the assault: although the offense might have been laid under the section, without the allegation deemed objectionable yet as the indictment contains the averment, and that averment shows that the thing charged to have been done was impossible, the indictment cannot be sustained.

Judgment reversed J. Ryland concurring. J. Leonard not sitting

Wm Scott

29.

Gray
vs
State

opinion

filed Sep. 29 1858

Wm E Drummond
Clerk

In the Supreme Court.
Jany. 1. 1855

State of Missouri
vs
Daniel L Grey } Indictment for felonious wounding
appeal from Polk –

Statement.

Defendant, Daniel L. Grey, together with Daniel Grey his father, and Robert & William B Grey his brothers, were jointly indicted in the Benton circuit court for a felonious wounding & inflicting great bodily harm on one Abner H Dice. On their application, a change of venue was awarded to Polk county – Defendant, having severed, was there tried, found guilty, and fined five hundred dollars – He made an unsuccessful motion for a new trial alledging error in the court in excluding proper testimony and giving wrong instructions, He has brought the case here by appeal –

The facts are about these: Dice, with two employed hands, Hopkins & Radford, commenced cutting timber and making rails about a quarter of a mile, and within sight and hearing of the dwelling of Daniel Grey, father to the others – Dice carried with him his gun, observing to H & R he should not be surprised if the Grey's came and made a fuss, and if they should come he only wanted them to look on. Daniel Grey & his sons were soon seen coming, and one of the hands told Dice not to run and leave them. Dice replied you never knew this child to run. The Greys came up to the place where Hopkins & Radford were at work, & Robert remarked they did not want to have any difficulty with them, but <u>that</u> had to be stopped – Dice was at a different place making splits – Daniel Grey, the father, went to him and told him to stop it. Dice laid down his

axe; the old man picked it up and as Dice says raised it - Dice got his gun and cocked it - the other Greys then rushed up, and so did Hopkins and Redford. After much abusive language, perhaps on both sides, Dice and his hands went to work again, at their different places. All the Greys had walking sticks of ordinary size, & Dice says, defendant had a pistol. Daniel & William B Grey, again went to Dice and told him he must quit - Robert remarked in the presence of Hopkins & Redford that the matter should be settled before sun down; he was going home for his gun. Dice hearing the remark, called out, take notice, he is going for his gun - I can stand it no longer, and taking up his gun ran to the place where the Greys, Hopkins & Redford were. Two witnesses, however, say, all the Greys started home - and that Dice ran around before them before the next difficulty commenced, but Hopkins says that when Dice came up with his gun, Robert went towards him and struck at him with his stick, which Dice knocked off with his gun; that the old man started up with an axe, and that Redford took the axe from him and the gun from Dice: that the old man collared Dice, and some of the boys commenced kicking & hitting him. but Redford took them all away from Dice: that Robert again made at Dice, and Dice struck and wounded him on the shoulder with an axe. As Dice struck Robert with the axe. the old man made towards him with his stick. Dice dropped his axe, drew a knife and struck the old man three times with it. cutting him on the forehead, neck, and shoulder. After

Dice had struck the three blows with the knife, Robert struck Dice on the neck with a home made bowie knife, wounding him - Both Dice & the old man Grey were badly wounded.

Defendant offered to prove, as Hopkins states was in the crowd during this last affrays but did not do any thing as he saw.

Defendant offered to prove that the land on which Dice was making rails was in the possession of his father Daniel Grey and also offered depositions today to show that that place was within Grey's line and so acknowledged by Dice, but the court rejected all this evidence and defendant excepted -

The court instructed the jury on the part of the state.

1st. If the jury believe from the evidence that William B Grey wounded or inflicted on Abner H Dice great bodily harm with a knife as alledged in the indictment, and that such knife was a dangerous or deadly weapon or calculated to produce death, and that defendant was there aiding and abetting said William B Grey in such wounding or inflicting such great bodily harm, they must find defendant guilty.

2d If they believe from the evidence that that Daniel Grey Robert Grey Wm B Grey & defendant went to where Abner H Dice was at work with intent to commit an assault and battery upon him & continued together abetting one another, & that Wm B Grey in the execution of such intent wounded Abner H Dice, or inflicted in him great bodily harm with a knife and that such knife was a dangerous weapon or calculated to produce death they will find defendant guilty

If the jury believe from the evidence that Daniel Grey assaulted Dice with a stick and Dice had reasonable cause to apprehend a design in Daniel Grey to do him some great personal injury and that there was imminent danger of its being accomplished, Dice had a right to defend himself to prevent a great personal injury to himself, and if the jury further believe from the evidence that whilst Dice was so defending himself that William B Grey wounded said Dice or inflicted great bodily harm on Dice with a knife and that such knife was a dangerous or deadly weapon, or calculated to produce death, the said William B Grey would be guilty as charged in the indictment, & if the jury believe William B Grey guilty and that defendant was present aiding and abetting William B Grey in the commission of said offence they must find him guilty.

4th although the jury may believe from the evidence that Dice was cutting timber or trespassing on the land of Daniel Grey or any body else if Dice had have been killed by Wm B Grey whilst Dice was engaged in the commission of such trespass, unless he had killed Dice in the lawful defence of himself or his father he would have been guilty of murder or manslaughter.

Defendant objected & excepted to the jury the instructions —

some instructions were given on the part of the defendant but in no wise modifying or in explanation of them.

Points and authorities

Wright & McClain for defendant

1st

The court erred in refusing to permit the testimony of Wilness McLearin, as to Daniel Grey's possession of the land, to be given in evidence, as well as in rejecting the depositions which tended to prove the same fact.

It was material to the defence of defendant to show that Dice was trespassing on the lands of his father — It was sufficient to show lawful possession, without adducing indefeasible title. Even a temporary right of possession is sufficient, in justifying an assault and Battery made to prevent a trespass to lands — (2. A. K. Marshall 798 2 Greenleaf Ev. § 98,) ~~It was lawful for defendant~~ — Though the lands may have been public lands, yet an occupant of Public lands of the United States may maintain trespass quare clausum, against a stranger; and the law affords to him the same means of preventing a trespass by a stranger, as it would if he had a fee simple title (Richardson et al. vs Murrell et al. 7. Mo. R. 333 — 5 Stewart & Porter 82 —)

Defendant had a legal right to accompany and assist his father to prevent a trespass upon his lands; and if he had been permitted to show that the purpose for which he went to the place was lawful, he could not have been made amenable for a wrongful act committed by another of his company in which he did not participate —

The law is, that where divers persons accompany one another in doing a lawful act, and one of them happens to kill a man, he that gives the wound is only guilty of the homicide; and the rest of the company shall neither be esteemed principals, nor

nor accessories. (2 Hawkins P.C. 442. S. 9)
An assault and battery, may be justified in defence of real or personal property, (2 Marshall 274) and it being a justifiable act, to exclude evidence of possession, and then instruct the jury, that if the party went with the intent to commit an assault & battery, and if one of the party inflicted a wound in the execution of the intent, all would be equally guilty, is manifestly wrong. Defendant is not guilty unless the wound or injury was a consequence of his wrongful act. Though the Greys may have went with the intent to commit an assault & battery if the same should be necessary to prevent a trespass, the wounding was an entire different act; and they who were doing a rightful act, are not liable for a wrong act, done by one of the company. Hawkins (P.C. 442. S. 9) says if the act intended, though unlawful, was a bare trespass and one of the company be guilty of a larceny, it is a felony in such offender only, because it is a crime of a nature entirely different from that intended and not caused by the execution of it—

2d. It is not material whether Daniel Grey or his sons, were in fault during the first difficulty, as it had entirely ceased before the wound was inflicted. It was sufficiently complete to have constituted a distinct cause of action, if any wrong had been done (Gillon vs Wilson 3 Monroe 217)

3. The court below erred in giving the instructions on the part of the state. A fair trial and a true exposition of the law required the court to have told the jury, that the act of Robert

was justifiable if he struck the blow, in the necessary defence of his father, if his father was wrongfully assailed, and in eminent peril of life or great bodily harm — (State vs Comico Mo. R. XI, 579). In the difficulty, when the wound was given, Dice first used, and continued to use, deadly weapons; saying he would stand it no longer, and rushing to where the Greys were with his gun; he struck and wounded Robert Grey with an axe, because Robert had struck at him with his walking stick; and then Daniel Grey, in protection of his son Robert came up with his stick only, he struck the old man with his knife, gashing him on the forehead, neck & shoulder, before Robert struck him in defence of his father — and the Court erred in assuming that the Greys were in fault in the ~~first~~ second difficulty; or in the first

State of Missouri
vs
Daniel S Greg

Dept. Brief

Wright

In the Supreme Court
July Term 1854

The State, respondent
vs. } Appeal from Polk
Daniel L Gray, appellant

Defendant, with three others, was indicted in Benton for a felonious assault in Benton. He took a change of venue to Polk, and was then tried and convicted. He moved for a new trial, because

1st The verdict is against evidence

2d The court erred in refusing proper evidence of deft.

3d Because the court erred in giving instructions for the state

The motion was overruled, and the defendant appealed. The evidence rejected was two depositions, to prove a line between appellant and the party assaulted on public land, (the fight having grown out of cutting timber upon the public land) The record shows no notice, or that the witnesses were out of the jurisdiction of the courts

Gordenhiw, attorney general, for the State

The evidence supports the verdict — amply supports it — so strongly that the point will not be argued.

There are three objections to the testimony, either of which was sufficient to reject it: 1st There was no notice; 2d no proof that the witnesses were beyond the jurisdiction of the court; and 3d the evidence was not competent. It could, in no event, be material, whether there was a line on public land between the assailed and the assailant, or not. If there was one, it could give the respondent no right to assail any body, on account of it?

The instructions for the State are so clearly the law, they will not be argued.

The State

vs. Appl from Polk

Paul L Gray

Brief for the State

respondent