Ostrander, Levi v. State of Mo 1860 St. Louis 8th 445/4

Old Box 609/6

30
13

F 60
M 60

Nap R + direct verdict recorded
A = Udf Lowright
D C Woods

COV from St. Charles

Scott dissents

murdered William McCoy
shot him

1st verdict = guilty of murder in 2nd degree
15 yrs.

sent back to room; asked several times; juror begins to disagree
discharged jury / mistrial

LC = murder in 1st degree
death sentence

O = shouldn't have sent them back

Transcript from St. Charles County.

State of Missouri }
County of St Louis } S.S. Be it remembered that on the Second day of March in the year of our Lord Eighteen hundred and fifty nine, there was filed in the office of the Clerk of the St Louis Criminal Court a transcript in a certain case of the State of Missouri, vs. Levi Ostrander, which transcript is in the words and figures following, to wit:

State of Missouri }
County of St Charles } At a Circuit Court begun and held at the Court House in the City and County of St Charles, within and for the County of St Charles on the Second Monday of November Eighteen hundred and fifty eight. Present the Hon Aylett H Buckner, Judge of said Court.

The Sheriff returned into Court a panel of forty jurors and thereupon the following panel of Grand Jurors were selected under the direction of the Court, to wit: Gordon N. Wallace, foreman, W. N. Kenner, John Chapman, Anton Meyer, Jacob Potter, F. X. Dorlague, George W. Huffman, A. S. Matson, Johnathan Thomas, Sheltial Ball, John B. Allen, Preston B. Scott, Robert D. Callison, Robert McClarin, Charles Le Favre, Charles F. Miller, L. M. Howell, seventeen good and lawful men of the County of St Charles, who being duly empanneled sworn and charged retired from the bar to consider of their presentments.

And afterwards on the Ninth day of November Eighteen hundred and fifty eight said Grand Jurors returned into the said Court an indictment against Levi Ostrander, which is entered of record in the words following.

The State of Missouri
ps
Levi Ostrander } Murder.
Endorsed a true Bill.

And the said indictment is in the following words and figures, to wit:

State of Missouri } Circuit Court
County of St Charles } November Term 1858.

Indictment.

The Grand Jurors for the State of Missouri empannelled sworn and charged to enquire in and for the body of the County of St Charles on their oaths present that heretofore, to wit: on nineteenth day of October A.D. 1858, at the County of St Charles one Levi Ostrander, in and upon one William McCoy, feloniously wilfully deliberately premeditatedly and of his malice aforethought did make an assault and that the said Levi Ostrander, a certain pistol then and there loaded and charged with gun powder and divers leaden bullets which pistol the said Levi Ostrander, in his right hand then and there had and held at to against and upon the said William McCoy, then and there feloniously wilfully, deliberately premeditatedly and of his malice aforethought did shoot and discharge and that the said Levi Ostrander, with the leaden bullets aforesaid out of the pistol aforesaid then and there by force of the gunpowder and bullets sent forth as aforesaid the said William McCoy, in and upon the right and left side of the body and the back of him the said William McCoy, then and there feloniously wilfully deliberately premeditatedly and of his malice aforethought did strike penetrate and wound giving to him the said William McCoy, then and there with the leaden bullets

aforesaid so as aforesaid shot discharged and set forth out of the pistol aforesaid by the said Levi Ostrander, in and upon the right and left side of the body and the back of him the said William McCoy, mortal wounds each of the depth of six inches of which said mortal wounds the said William McCoy, then and there died. And so the jurors aforesaid upon their oaths aforesaid upon their oaths aforesaid do say that the said Levi Ostrander, the said William McCoy, in manner and form aforesaid feloniously wilfully deliberately premeditatedly and of his malice aforethought did Kill and murder, against the peace and dignity of the State.

A. P. Minor, 1st Atty

Endorsed: "A true Bill. Gordon A. Wallace. Foreman."

And afterwards in said Court on the Ninth day of November Eighteen hundred and fifty eight the following proceedings were had in said cause, to wit:

The State of Missouri
vs
Levi Ostrander } Murder.

Now at this day appears the Circuit Attorney, who prosecutes for the State and the said defendant being in custody was brought into Court and being demanded of a concerning the premises and how he will acquit himself thereof says that he is not guilty in manner and form as charged in said indictment and thereupon on motion of this cause is continued to the next term of this Court and said defendant is remanded to jail.

And afterwards in the vacation of said Court an application was made to the Judge thereof for a change of venue the petition for which is in the words and figures following

to wit:

The State of Missouri } In the Circuit Court of St Charles
against } County and State of Missouri.
Levi Ostrander }

Petition for change of Venue

To the Honorable Aylett H. Buckner, Judge of the St Charles Circuit Court of the State of Missouri. The defendant prays the Honorable Judge aforesaid to grant him a change of venue to some other Judicial Circuit in the State of Missouri as the inhabitants of your entire Judicial Circuit are prejudiced against the applicant that he believes justice cannot be done him and a fair trial had and thus he will ever pray.

S. S. & W. C. Woods
Attys for Defendant.

State of Missouri.

Levi Ostrander. the defendant being duly sworn upon his oath says that the matters and things as stated in the above petition he knows are true, as he has conversed with many intelligent persons who are unprejudiced against defendant (since he was indicted for murder and his cause continued) from various parts of the Third Judicial Circuit upon whose representations he believes and relies as true are true without reference to the prejudice of said inhabitants against him and that he believes that justice cannot be done him or a fair trial had in his behalf in said Third Judicial Circuit.

Levi Ostrander.

Sworn and Subscribed to before me this the 8th day February A. D. 1859.

SEAL

Fred Kretschmar.
Clerk St Louis Criminal Court.

5

State of Missouri
3d Judicial Circuit } In Vacation of St Charles Circuit Court

On a hearing of the within application for a change of venue by the defendant Levi Ostrander, made to the undersigned Judge of the St Charles Circuit Court, it is ordered that the venue in the cause of the State of Missouri vs. Levi Ostrander, be changed to the 8th Circuit and it is also ordered that the Clerk make out and certify a transcript of the record as provided by law and transmit the same to the St Louis Criminal Court.

Given under my hand the 18 Feby 1858.

A. H. Buckner.
Judge St Charles Circuit Court.

I have received due notice of the foregoing application for a change of Venue.

A. P. Minor. Ast Atty.
3d Judicial Circuit.

State of Missouri
County of St Charles } I. Ben Emmons Jr. Clerk of the Circuit Court of St Charles County, certify the foregoing to be a full and correct transcript of the record and proceedings in the case of the State of Missouri, vs. Levi Ostrander, as the same remains of record in my office.

Seal

In witness whereof, I hereunto set my hand and affix the seal of said Court, this first day of March, Eighteen hundred and fifty nine.

Ben Emmons Jr.
Clerk

Friday March 25th 1859.

The State of Missouri
vs
Levi Ostrander
} On indictment for Murder first degree. Change of Venue from St Charles Co

This cause is continued on affidavit of defendant on account of the absence of witnesses Jeremiah Lawler, and John W. Ray.

Tuesday May 3d 1859.

The State of Missouri
vs
Levi Ostrander
} Murder first degree. Change of Venue from the County of St Charles Mo

Now at this day comes the Circuit Attorney who prosecutes for the State, and the said defendant being brought into Court, thereupon came a jury, to wit: D. M. Branch, S. M. Stelle, John Murray, David Turnbull, David Bradford, James P. Blundin, William H. Timberlake, Timothy Dunn, Ernest H. Doctor, Isaac Isaacs, Charles Scudder, and Henry W. Smith, twelve good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, the trial of the cause progressed, but not being concluded at the hour of adjournment, further proceedings herein are deferred until the meeting of the Court to-morrow morning.

July 3

Wednesday May 4th 1859.

The State of Missouri
vs
Levi Ostrander
} Murder in the first degree. Change of Venue from St Charles Co Mo

Now again come as well the parties aforesaid as also the jurors aforesaid, and thereupon the trial of the cause progressed, but not being concluded at the hour of adjournment further proceedings herein are deferred until the meeting of the Court to-morrow morning.

Thursday May 5th 1859.

The State of Missouri
vs
Levi Ostrander } Murder first degree. Change of Venue from St Charles County Mo.

Now again come as well the parties as aforesaid as also the jurors aforesaid, and the trial of this cause being now fully ended and concluded the jurors aforesaid retire to consider of their verdict.

Friday May 6th 1859.

The State of Missouri
vs
Levi Ostrander } Murder first degree. Change of Venue from St Charles Co Mo

Mistrial } Now again come the parties as aforesaid and the jurors sworn in this cause also come and say they cannot agree among themselves what verdict to render in the premises. Therefore it is considered by the Court that the jurors aforesaid be discharged from the rendition of a verdict herein, and it is ordered by the Court that this cause be continued.

Tuesday May 10th 1859.

8

The State of Mipsuri
vs
Levi Ostrander
} Murder in the first degree. Change of Venue from St Charles County Mo.

Motion to record Verdict filed by defendants Counsel

Monday May 16th 1859.

The State of Mipsuri
vs
Levi Ostrander
} Murder 2nd degree, Change of Venue from St Charles County.

Motion to record verdict overruled.
} The Court here having duly heard and considered the defendants motion to record verdict and being fully advised of and concerning the premises doth overrule the same.

Wednesday July 20th 1859.

The State of Missouri
vs
Levi Ostrander
} Murder 1st degree. Change of Venue from St Charles Co Mo.

Continued for the State on account of the absence of Witnesses.

Tuesday September 6th 1859.

The State of Mipsuri
vs
Levi Ostrander
} Murder first degree. Change of Venue from St Charles Co Mo.
Continued on affidavit of the defendant filed herein.

9

Wednesday November 9th 1859.

The State of Missouri
vs
Levi Ostrander } On indictment for murder first degree. Change of Venue from St Charles County Missouri.

laid over

The defendant files his affidavit for a continuance of this cause. thereupon this cause is laid over until Tuesday the fifteenth inst.

Tuesday November 15th 1859.

The State of Missouri
vs
Levi Ostrander } Murder in the first degree, change of Venue from St Charles County, Missouri.

The Court here having duly heard and considered the defendants affidavit for a continuance hereinbefore filed and being thereof fully advised doth overrule the same: thereupon this cause is laid over until Friday the Eighteenth inst:

Friday November 18th 1859.

The State of Missouri
vs
Levi Ostrander } On indictment for murder in the first degree. Change of Venue from St Charles County, Mo.

Now again come as well the Circuit attorney who prosecutes for the State as the said defendant in his own proper person and thereupon come also a jury, to wit: Nathaniel Chandler, William Remmington, James T. Cooper, Samuel Webster, John O. Hart, Edward Chase, Richard Warren, William W. Hobbs, John Cross, Thomas Mills, John McHenry, J. E. Diamond, twelve good and lawful men

Jury.

who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, the trial of the cause progressed, but the same not being concluded at the hour of adjournment, further proceedings herein are deferred until the meeting of the Court to morrow morning.

Saturday November 19th 1859.

The State of Missouri
vs
Levi Ostrander } On indictment for murder in the first degree.

Now again come as well the parties as aforesaid as also the jurors aforesaid, and thereupon the trial of the cause progressed, but the same not being concluded at the hour of adjournment further proceedings herein are deferred until the meeting of the Court on Monday morning next.

Monday November 21st 1859.

The State of Missouri
vs
Levi Ostrander } On indictment for Murder in the first degree.

Now again come as well the parties as aforesaid as also the jurors aforesaid and thereupon the trial of the cause progressed, and the same being now fully ended, the jurors aforesaid upon their oath aforesaid say they find the said defendant guilty of Murder in the first degree as charged in the said indictment.

Verdict.

Tuesday November 22d 1859.

The State of Missouri
vs
Levi Ostrander } Murder 1st degree.

Motion to set aside verdict of

Murder in the first degree filed by defendants counsel= Motion to record verdict of Murder in the second degree filed by defendants counsel.

Monday December 5th 1859.

The State of Missouri
vs
Levi Ostrander } On indictment for Murder in the first degree. Change of venue from St Charles County, Mo

Now again comes the Circuit Attorney who prosecutes for the State and the said defendant is brought into Court in custody of the Marshal: thereupon the defendants motion to set aside the verdict of Murder in the first degree, and the motion to record verdict of Murder in the second degree, being argued and submitted to the Court, and by the Court here fully understood, therefore it is considered by the Court that said motions be severally overruled: and the said defendant being demanded if he hath or knoweth anything to say why the Court here should not now proceed to pass sentence of death upon him in pursuance of the verdict rendered against him, and having nothing to say. therefore it is considered by the Court that the said defendant Levi Ostrander, be taken from this Court to the place from whence he came there to remain until Friday the twentieth day of January next, thence on that day to be taken to the place of execution and there between the hours of ten o'clock in the forenoon, and four o'clock in the afternoon of said day, be hanged by the neck until he be dead: and it is further directed that the Clerk of this Court make out a warrant under the seal

Motion to set aside Verdict of Murder 2d deg &c overruled

Judgment

of this Court commanding the Marshal to carry this sentence into execution: Whereupon the defendant prays an appeal to the Supreme Court, from the judgment of this Court rendered against him, and the Court

Appeal. } here being of opinion that there is probable cause for such appeal, or so much doubt as to render it expedient to take the judgment of the Supreme Court thereon, doth grant the same and doth order and direct

Stay of Execution. } that such appeal shall operate as a stay of proceedings on the judgment herein: And on motion of the defendant leave is given him to file his bill of Exceptions on or before Monday next, the twelfth instant.

×

Monday January 16th 1860

The State of Missouri
vs
Levi Ostrander } Murder 1st degree.
Bill of Exceptions filed by consent of parties.

Bill of Exceptions. }

Bill of Exceptions

State
vs
Levi Ostrander } In the Criminal Court - of St Louis County.
Indictment - Murder in 1st degree

Bill of Exceptions

Be it remembered that on the trial of the above entitled cause - the State introduced a witness Dr Green, who on oath testified as follows.

Dr Green. I am at present a physician, I reside in St Charles County and know the deft - I did not know McCoy - I saw him on North Missouri Railroad about one mile east of Mellville in St Charles Co - this was a year ago the 19th of last

October - about 3 or 4 o'clock in the evening - I had been to Mr Custers, and was going South at the time I was called - stating there was a man lying on the road, shot and he wished me to see him immediately - the mans head was lying on a tie - I did not examine the body - saw a hole in his clothes on his right side - between 5th & 6th ribs and 3 or 4 inches from the back bone - 4 inches il rection - I told him he was a dying man and nothing could be done for him - His respiration pulse and general appearance made me think so - I think I stated he could not live over half an hour, - He said he knew he was a dying man, or dead man, I am not sure which - I remained there till he died - he lived 20 or 30 minutes after I got there - I saw him taken off west some hundred yards - I had no doubt but he died of the wound - I asked him who shot him - He said Levi Ostrander, shot him - I asked him what he shot him for - He stated that he shot him for telling Gods truth - Being called on by different persons he made that statement 3 times in the half hour - He was appearantly from 55 to 60 years old - He said there was a ball in his left or right groin - not certain which - I saw no mark on his clothing, except the hole - dont recollect seeing any mud on them - He prayed the Almighty to pardon him as he was a sinner - this was about half or three quarters of a mile from Ostranders house - it was between Ostranders and Melville; - I saw Meredith where McCoy, was lying - I think he came before McCoy, died - 3 ladies got there about the time I did - Miss Moore - Mrs Craig - and Mrs Bowman.

X examined by May Wright.

The character of Deft was very good as a man of peace -

McCoy, did not go into any explanation of the circumstances under which he came to his death - did not state anything about did not state what transpired when the parties met - George Higginbotham called me - he is the son of the old man and uncle to the boy Meredith - Mellville is west of Astranders house - Higginbotham's house is 200 yards west of Astranders house - Higginbotham's house was between a 1/2 and 3/4 of a mile from where the man was lying from Higginbothams house to Mellville is 1/2 to 1 3/4 of a mile - I think Marshall Bird, was one who asked McCoy who shot him - The boy was not there when I got there - He came up after I and the ladies did - I dont remember from which way he came up - I saw the deft that evening when he was under arrest as I understood - at his own house just about dusk - dont know myself that he had given himself up - the crowd that was with him said that he had - I think I saw the iron hoop there some time in the evening - Cant say how far from the body - dont think I saw it lying on the ground - it was in the hands of persons I think - I did not know the deceased at that time - Deft was at that time Overseer of hands on the North Missouri Railroad - I understood there was a post mortem examination - I did not see it - was requested to but did not go - Dr Pringle conducted it - I did not see the naked body - My inferences were drawn from the wound I saw - The wound I saw - I am pretty confident was in the right side - he lay on his left side - I should say that wound was not the cause of the blood I saw - If the wound was received while the arm was raised - when the arm fell the muscles would be apt to close the

wound so as to in a great measure prevent the blood from flowing freely- I should say the wound I saw was not the cause of the death- I did not see which way the boy came from- Mr Bowman's house was the nearest one to the place where I saw the body- there is another road there by the Railroad where I saw the body- that old road runs by Higginbotham's to Melville, distant 1½ to 1¾ miles- I cant say at what hour Ostrander usually went to dinner- Ostranders house was from 30 to 50 yds from the line of the Railroad- the old road ran within 30 feet of his house which was situated between the old road and the Railroad- there was a deep cut where the body lay- 5 or 6 feet independent of the dirt thrown up- The spot designated by the boy as the spot where the difficulty occurred was where a gully had been filled the track was 5 or 6 feet wide- the ties were 9 foot ties I understood- they varied in their extension beyond the rails from 6 inches to 2 feet- Ostrander had been disabled before the difficulty- I had visited him- I think he was laboring under desease at that time and that I was treating him for it- he had desease of the Kidneys- that desease impairs the spinal range and Ostrander was lame of it- It had fallen down into his hip.

Re-Examined by Mr Mauro

The Railroad is the most direct road from Higginbotham's to Melville- the distance ¼ to ½ a mile shorter than by the old road (shows where the wound was) persons use both roads. the road was muddy at that time. we would have no right to expect a great deal of blood to flow externally from a wound in that place- I think if the arm were raised when the wound was made- when the arm fell it would have

the effect of stoping the flow of blood - I saw tracks at the place where the difficulty was said to have occurred - I saw the tracks of one person distinctly - Meredith pointed out the tracks - one track went down the embankment sideways & then came came up a few feet east towards Higginbothams place - that was McCoys track - Saw another one that went in a Southwesterly direction a few steps and I tracked it no further.

Re X ammined

I saw a good many other tracks there - only noticed particularly those that were pointed out to me - I should say the tracks were not more than 6 feet apart where they left the road - the ties at that place came above the ground - I doubt whether a man standing on one side of the embankment could see a man standing on the other side.

C. W. Pringle

Charles W. Pringle - a witness on the part of the State being said - I live in Warren County - I knew McCoy before his death - had seen him at my house just before his death - He is dead - I saw him on the day he died - Saw him when he was alive, at Bowman's store - dont recollect what times of day it was - it was before he was shot - next saw him a corpse - on the railroad track about 3/4 of a mile from Melleville - Dr Green was there - McCoy did not speak, he was dead when I got there - The body was taken to Mr Bowmans house there was a post mortem - after night - conducted by me - I found 3 wounds upon the body of McCoy - they had all the appearance of gun shot wounds - caused by a bullets - one shot I saw was in the right side of the back, of the body - the ball ranged forward downward and to the left - I probed it into the cavity of the chest and afterwards cut the body

open and traced the course of the ball - I should think that wound was about 5 or 6 inches from the back bone rather behind the side - I extracted the ball - It was a fatal wound - there was intirnal hemorhager - The next wound I examined was just about 3 inches below the left shoulder blade - the ball ranged forward downward and to the right - both balls passed through the liver I think - I think it would have been fatal - I did not probe that wound as thoroughly as I did the first - found considerable difficulty in inserting the probe in that wound as I did in the fust - both wounds produced hæmorrhage and his stomach was distended by it - The 3d wound was in the left hip - I examined that wound very superficially - it was here (shews where it was) It was in the back part of the hip - I saw the body undressed - dont think his pantaloons were taken off - The clothes were powder burnt by the wound under the shoulder blade - the burnt place was near the size of my hand - cant say how near the parties must have been my impression was that they were very close - the weapon must have held very close to the deceased - I think both hands must have been raised, because - the character of the wounds would seem to indicate it - could not tell how - I had to run the probe upwards.

X examined by Maj Wright -

The wound in the right side shows that the right arm must have been raised when the wound was given - The wound in the left side shews that the left arm was raised when that wound was given - But neither shews that at the time of receiving each wound that both hands were raised at the same time - I have known Deft - his neighbors speak well of him - I formed a favorable impression of him myself - I treated him for a wound in the leg - the cars had run over his leg and cut the Anterior tibialis musch in two - I had

told Ostrander that he would always be week in that leg- McCoy was dead when I saw him- I dont recollect whether I saw the boy Higginbotham- dont think I did- dont think I saw old Higginbotham- Know now that I did see the boy at Bowmans- I saw the hoop at Baumans after the shooting- may have seen McCoy with it as I saw him that day at Melville- I did not give my testimony before the magistrate- I did testify before the Coroner- there was right smart excitement- I was'nt present at the magistrates examination of Deft.

Re examination- by Dft Atty:

I dont mean to say that deceased had'nt both arms raised at the same time- Dont mean to state positively that he had them raised at all- The same result might have followed if the deceased had fallen down and thrown out his arms to save himself at the time he received the shot.

Meredith Higginbotham sworn

Meredith Higginbotham- a witness introduced by the State- being duly sworn deposed as follows-

I will be 12 yrs old on the fourth day of Dec- I live in St Charles County- I knew McCoy in his lifetime- I was with him at the time he received the wounds of which he died- I left home that day about 12 O'clock I think- after dinner, started to go to Melville to have a hoop mended- My grandmother sent me- This is the hoop- Mr McCoy, went with me- He took it- and I went with him- We went up the Railroad- Went first to Bowman's store- In going up fell in with Mr Bowman and two or three other men- We overtook Mr Ostrander- Met Mr Ostrander he was coming down- I kept in company with those persons till I got to the store- Mr Bowman- Erasmus Woods, and some one else were in company with us when I met Ostrander- met him about ½ a mile from the store- The train came up from St Louis as we struck the Railroad-

I staid at Melville about ½ an hour - I went to no other place but Bowman's store - Mr Coy took the hoop to the blacksmith shop - I and Mr Coy started back alone. Mr Ostrander met us this side of Melville about ½ a mile - he was about a ¼ of a mile off from us when we first saw him coming I reckon - Mr Mr Coy first said he saw him coming - Mr Ostrander spoke first - He said, "You have been talking about me since you left my house" then he said "now I am going to settle up with you" Mr Coy said "No I havent been taking about you - and then Ostrander said "yes you have - what was put in that letter you sent down to St Louis" Mr Coy said "I got John Ray, to write it for me" and then Ostrander says "thats enough" thats as near as I can come to it - Then Ostrander pulled out his pistol and the first cap exploded - did'nt go off - Next time he shot and then I ran behind Mr Ostrander, and ran down the bank - and then Mr Mr Coy kept backing down the bank, and Ostrander shot again, and then I ran up through the woods to the big road and he shot again - I did not see either of them until I got on the rail road, and then I saw Mr Mr Coy, coming down the Railroad - when he came up where I was he told me to run and tell my uncle George to come after him, that he was in the manner of dying - I went - When I got back he was dead - Ostrander got the pistol out of his pocket - I think out of his right pantaloons pocket - He just pulled it right out then - when he said thats enough - the pistol was just pointed right straight down the track at Mr Mr Coy. He commenced begging him not to shoot him - He said "Oh Levi don't shoot me" Mr Coy had the hoop in his hand when Ostrander pulled out the pistol - he held it just so (down) When he was begging him not to shoot he raised the hoop up in

both hands - raised it just as soon as Ostrander pulled the pistol out - McCoy kept backing all the time - kept going away from Ostrander - Ostrander fired just as soon as he could cock the pistol again after it snapped - during all the interval McCoy was backing - McCoy did not advance at all but kept backing - Before Ostrander fired I ran behind him - ran away down the bank - Ostrander and McCoy were about three feet apart - I was standing on the left hand side of McCoy - I was standing between the rails - The second shot was fired about a minute after the first - I reckon - I saw Ostrander when he fired the 2nd time - McCoy was just going down the bank backing down on one side when Ostrander fired the 2nd shot. His side was towards Ostrander - I cant tell how far Ostrander held the pistol from him - I only heard the 3d shot fired I did not see it - When I last saw McCoy as I ran away he was at the bottom of the bank and going towards the woods - the bank is about as high as you are (Mr Mann) McCoy did nothing with the hoop but just hold it up - Ostrander kept following him up as he went back. I cant tell whether the pistol had one barrel or more than one - When I saw McCoy, after the shooting - he just walked right along - I was gone about ½ an hour - good many people there when I got back - I went back to the place where the shooting was - to shew it - Dr Green was there - Dont Know whether Mr Bowman was there - McCoy had been living with Deft - I dont Know how long before he was living at grand Pa" - After he lived at Defts he had been working out, and he went to Texas County with Pa - he had been back 3 or 4 days before he was killed - on Tuesday he was killed I think - he came back on Sunday I believe - I dont recollect how long he was gone to Texas County.

X Examined

I dont live with my father, he lives about ½ a mile from Grand Pa - I am an adopted child of Grand Pa - He staid with Ostrander - McCoy was living with Grand Pa the day he was killed and had been for about six months - I saw McCoy, when he and my father started to Texas County - I was very good friends with McCoy - I saw Mr Ostrander nearly every day - he was boss of the track and of the men - I dont know whether Grand Pa and Dept were on very good terms or not - McCoy said to me yonder he comes now - If he says anything to me, be particular and notice what it is - He did not say I expect to have a difficulty with him - Before he said that neither he nor I was talking about Ostrander - I am sure he did not say, "I expect to have a difficulty with him" - I was a witness before the magistrate - I did not swear so there - I did not so swear on the trial here in May - I think I gave the same account here of what was said when they met that I did before the magistrate and at the trial in May - McCoy said when Ostrander asked him what he had put in that letter written by Ray - "it is none of your business" McCoy, did not say to Ostrander that he lied or was a liar. - I did not swear so before the magistrate (here the words from the witnesses statement before the magistrate are read to him "McCoy told him that he had told a lie") I never swore so - I think I gave the same account before the magistrate that I have to day as well as I could recollect it - The bank is about feet high - I believe the South side is the deepest - I went down the North side - McCoy backed down - sideways - the South side - I ran north - and turned East and went on down straight East -

about 100 yds from the railroad - I ran about 100 yards before I got on the railroad again - and then I went down the Railroad - When I got on the R.R. - McCoy was coming down west of me - about as far as from here to the front door - he was running - It was about 150 yds from where I got on the RR to where the shooting took place. McCoy did not have the hoop then - When I came back I did not see the hoop - I did not see the hoop till next day. - I was standing on the left side of McCoy - when he pulled out the pistol I was looking at Ostrander - I was not looking then at the hoop or the right hand of McCoy - Before the snap and 1st fire I ran behind Mr Ostrander, and down the bank - I was just down the bank when the 1st shot was fired - I was just getting into the woods when the second shot was fired - When the 3d pistol fired I could see through the woods - could see Mr Ostrander - I was about 50 yds off - I had not then turned East - The woods were little bushes - higher than my head - them bushes - the ground was not level - I was looking at both of them when the 1st pistol fired - I had got down the bank when the 1st pistol fired - The bank was not in my way - I swore before the magistrate that McCoy said "Oh Levi dont shoot me" - I did not see the pistol in the hand when it first fired - Ostranders back was to me when I looked up - when we were all three together - Ostrander & McCoy were face to face - At the time of the first fire McCoy was on the East side of Ostrander - moving - I could see part of McCoy's body - I could see the most of him - I dont know whether I could see his right side or his left side - I could not see the pistol

when the second shot was fired - because his back was to me - At the 2nd shot Ostrander was on the track and McCoy was getting down on the opposite side from me - I could see a little of McCoy - He said Oh Levi dont shoot when he first pulled the pistol out - Before the shooting Mr McCoy, looked like he was mad. - Ostrander asked McCoy by whom he could prove the charge that was made in that letter - McCoy said he could prove it by John Ray, - I believe - When McCoy, said "None of your business" - Ostrander said he had been taking it cool and easy" - McCoy said "yes you do" I did not swear before the magistrate that McCoy, told Ostrander, that he told a lie - McCoy seemed to be the maddest of the two - I am certain that neither of us mentioned Ostranders name before McCoy said "yonder he comes now" - He did'nt say "yonder he comes now" he said "yonder comes Mr Ostrander" I dont know whether I swore he said "he" or "Mr Ostrander" at the last trial in May - McCoy did'nt say "Levi" or "Ostrander" but "Mr Ostrander" I had stopped in the woods when the 3d shot fired could see Mr Ostrander from there but could not see McCoy - Could'nt see the pistol - the only time I saw that was when it snapped - I said in my examination in chief I heard the 3d shot but did'nt see it - I was about 50 yds off when the 3d shot fired - I saw Mr Ostrander - I did not see either of the shots - I was much alarmed - had never been before in such a scene of danger in my life - The first time I saw the hoop raised was when Ostrander pulled out the pistol then raised it and begged him not to shoot - I did not see the hoop raised

before Ostrander pulled out the pistol - I did not see the hoop raised at any other time - after McCoy said yonder comes Mr Ostrander, no other words passed between us about him - I dont Know at what hour Ostrander usually went to his dinner - I Know where he lived - I did not see him anymore that evening after the shooting - I am certain I only saw the hoop raised once - That was before the pistol was fired - and before it was snapped - just as soon as it was pulled out - He said Oh Levi dont shoot me a good many times - dont Know how may times - I never heard him say that after the pistol snapped - Mr Ostrander is much the taller of the two - Mr McCoy was going down the bank the last time I saw him before I got back on the railroad again - I did not see the hoop when I shewed the people the place where the shooting was.

Re Examined

The bank is pretty nigh straight up and down - dont slant much - Ostrander says "Can you prove it" McCoy says, "yes I can prove it by John Ray, or Mr Ray", I believe - Ostrander said "what did you put in that letter that was sent to Stlouis" McCoy said "none of your business" - that was the first they said about it - McCoy said he could prove by Mr Ray or John Ray, what was put in that letter - The pistol was pulled out before the hoop was raised -

Re X examination.

When Ostrander pulled the pistol out McCoy raised the hoop - I mean by that, that if he raised the hoop before Ostrander pulled the pistol out I did not see it - all that I have testified of the homicide occured in St Charles Co. Mo.

25

Geo H. Walker Sr 3

George H. Walker introduced as a witness on the part of the State being sworn testified as follows.

I lived in Oct /58 at Mr Pritchards, in Warren County about 4 miles from Mellville. I know the deft got acquainted with him 10th of May /58. Saw him off and on every few days from that time till he was arrested – I did not know McCoy – Well I had a little conversation with Deft about McCoy – it was on the 9th of Oct I believe – the Saturday before the 15th of Oct – The way the conversation came up it was something about a letter, written to St Louis – at that time the paymaster came up and Ostrander, reced the money – and Ostrander said at the time that he didn't know but what the company was trying to cheat him – or wouldn't pay him – with holding his money because of the letter – I think he said that a man by the name of Ray had written the letter for McCoy, and he said at the time that McCoy had at that time gone down South to enter some land – He said if McCoy ever came back and come about him he was going to shoot him – and says he "here's what I've got to do it with" opening his coat and shewing his pistol – The pistol was buckled around him in a belt – I think it was in a belt – I aint certain – anyhow I saw the pistol (shews where – on the left side) I could not see the pistol before the coat was pulled back I cant say what kind of a pistol it was – dont recollect why he said he was going to shoot him only concerning the letter – I heard of McCoys death the evening or the evening after he was killed – aint sure which – I had this conversation 9th of Oct – It was on Saturday I know – Know nothing more about the case.

X Examination

I had this conversation with Ostrander right on the Railroad ~ that is about about ten feet off of it several hands present ~ I dont Know whether they heard it ~ It was the paymaster of the N. M. R. R. ~ that came up ~ his name was Flynn or Burlinghame ~ dont Know which ~ It was the day Ostrander receid money ~ Mr Ostrander spoke of the letter ~ all that I recollect about the origin of the conversation was that the company did not pay him the money they owed him ~ He just come right off the cars ~ I cant say whether he was excited or not ~ cant say whether he was in earnest ~ Ostrander didnt say, "if he crosses my path" or "if he dont stop molesting me" or "if he dont let me alone" I made no memorandum of the words ~ have been summoned but never on the stand before in this case ~ I dont Know what Defts character for peace is ~ He said the company wouldnt pay him in consequence of that letter ~ I cant say whether he was in earnest or playful ~ I told him that he had better let McCoy alone ~ I think he said he'd go through with his threats ~ but I wont be positive as to that ~ I didnt advise him any more.

James B. Moore } James B. Moore ~ a witness on the part of the State being duly sworn says.

I live in St Charles County ~ I have had some acquaintance with Deft ~ I had some small acquaintance with McCoy. I recollect the occurrence of the shooting ~ Before the shooting McCoy had been absent from the County ~ he said he was going to Texas County with Higginbotham ~ To the best of my Knowledge he had been back 2 1/2 days before the shooting ~ I saw him on Tuesday before

the shooting at the blacksmiths shop in Melville. I should consider old man McCoy a very small man weight about 114 I suppose. May be not so much. I am not a good Judge of weight. I recollect the month he went off, not the day. it was about two weeks before I saw him at the blacksmiths shop. I heard Ostrander say something in relation to McCoy. To the best of my recollection I was going up to Melville and passed by where he was at work. he and I had a conversation walking up the road. We were talking about the condition of the road and he said they had been trying to get him off it off the road. or off the work. cant say which, and I asked him who. and he said old man McCoy, was the head man at it. and I asked him in what way the said old man McCoy had writ a letter. and then he called that back and said he had it wrote. he cant write. and if ever he comes back here I'll put a ball through him. and if he goes down to the shanty why my men will kill him" to the best of my knowledge I think thats it. nothing else. thats all I heard from Mr Ostrander.

X Examination

It was in Oct. cant tell the day. I wasnt posted up on the month or the day of the month at that time. I think I am posted up on the words Mr Ostrander used. I recollect his threats, thats what I say. kind of a wet time. bad condition of the road. thats what brought it up. No sir he never put that to me at all (McCoys threats to put obstructions on the road) He did not tell me who wrote the letter, he did not tell me what kind of a letter. The letter had nothing to

do with the conversation ~ He said old man McCoy. was at the head of it ~ I think I was sober that day if I know myself ~ Sometimes I have been intoxicated ~ To the best of my knowledge it was about one o'clock in the day ~ Dont think I had been drinking that day before this conversation ~ Dont keep liquor at home ~ I was going up to Melville ~ Dont recollect whether I drank any where ~ I got there ~ Dont recollect whether I got intoxicated that day ~ I know Willard Simpson, I dont recollect whether I told him all the conversation, I had with Ostrander ~ Dont recollect whether I told Mr Simpson, that Ostrander said that if McCoy. didnt stop troubling him he'd put a ball through him ~ I think I said "immediately" before when I answered the question ~ I swore before the magistrate ~ well ~ I cant recollect every thing that was brought up there ~ but I think the main source is what I tested here ~ Dont understand the difference between saying I'll kill Judge Glover ~ and I'll kill Judge Glover if he dont stop troubling me ~ Im not a learned man ~ I cant remember how the conversation arose between Simpson and myself.

Jno H. Bowman } Mr John W. Bowman: a witness for the State being duly sworn testified as follows.

I reside in St Charles County, I moved there in 44 ~ been living there ever since ~ I know Defts ~ Dont know exactly how long I had known him before this case occured ~ I knew McCoy in his lifetime ~ should judge from his appearance that he was from 50 to 60 years old ~ he weighed bet 140 and 150 lbs ~ 5 feet 8 or 10 inches high ~ I recollect the day on which he was killed ~ I live a

mile and a 1/4 this side of Melleville – I used the railroad to go from my house to my store – I overtook Erasmus Woods – deceased – and Meredith Higginbotham and went up to Melleville in company with them – overtook them just as it got on the R. R. – Not certain that I saw him have the hoop there then – Saw the hoop after McCoy was killed – went up to Melleville in Company with Mr Coy. – Met Ostrander about 1/4 a mile from Melleville he was by himself – he spoke to me, and shook hands with me. Ostrander asked me what the men doing – The cars had passed us going up – Ostrander was coming down from depot towards his house when we met him – It had rained that day in the morning and was muddy – I saw McCoy the last time before his death at my store in Melleville – about an hour before his death – he said he was going home – next saw him lying on the road – next about a mile from where Ostrander lived – I did not feel of him – I saw the boy at the store & afterwards where the body lay – I went to the place of the difficulty with Meridith – Saw a good many tracks – Erasmus Woods – mine and others were there – Saw two tracks go off on one side of the road and one on the other – It was 440 yds from there to where the body lay – two large tracks and one small track – Two large ones on the same side of the bank – one was going backwards and one forwards – one track was backing right off the road – It looked as if he had stepped on the end of the tie and slipped – one track followed right after the other – I think they were the tracks of two persons – The tracks were about 2 or 3 feet apart at first and then they got further

apart ~ I was present at the post mortem - saw the places on the clothes where the wounds entered - one was scorched - powder burnt - the others merely holes - I followed the tracks 30 or 40 yards, at that point the tracks came together and crossed together - before they came together the track that went backwards and sideways down the bank turned, around and went forwards ~ there was a small track that went down the bank towards the woods on the other side from these two just spoken of (Here the witness drew a diagram of these three tracks and explained minutely the course and direction of each) I did not see where the small tracks came upon the railroad again - I had a conversation with deft the Sunday before in which McCoys name was mentioned ~ It was at the School house ~ Ostrander and Ray were just coming out ~ I observed that McCoy, and Hiram Higginbotham had got back ~ Ostrander said "he'd better not come about me ~ if he does I'll hurt him ~ if he goes down to the shanty my men will hurt him" He gave no reason at the time - I knew the reason ~ Ostrander then spake up and said he was going to St Louis tomorrow to see about that letter ~ Had no conversation on the subject of McCoy, going from the School house ~

X Examined ~

I thought very well of Mr Ostrander never heard anything against him ~ I was going to Melville going west - cars arrived about 12 o'clock ~ Met Mr Ostrander - he shook hands and asked me where his men was he said he would send his men to put up some wood and then he would go home and get his dinner and

then he would come back to Melville - the others all stopped - It was 440 yards from where the tracks went off the bank to where the body lay - I stepped it off - The little track left the road and went towards the brush about 2 or 3 steps west of the place where the two tracks went off, and went down the bank to the other side - Small brush on the north side of the Rail road at the place where the tracks went off - The embankment is about 8 or 10 feet high - the South side is a little deeper not much - There were a good many persons there when I got there - no comparison was made of the tracks - I saw Mr Ostrander that same evening at my house - He came on the porch to get a drink of water - I understood he gave himself up - I expect I have taken a little interest in this cause - I spoke of one witness - I believe that was all - I told Jim Moore, that if I was him I'd have Walker examined too - of course I have - its natural that a man should want others to think as he does - I staid home and did not go to preaching - Mrs Bowman went and I staid at home with my child who had been burnt - I recollect the circumstance positively by that -

John Ray. Sr.

Here the state introduced upon the witness stand John Ray, Sr. who under oath testified as follows.

I Knew Ostrander and McCoy - I saw deft at the School house the sunday before the difficulty - I saw Bowman there that day - I heard a conversation in which something was said about McCoy. - To the best of my recollection it was stated that McCoy had come back - Ostrander said McCoy had better keep out of his way - His men would hunt him if he went to the

shanty ~ There was no preaching there that day ~ no class meeting there that day ~ there was to have been class meeting but there was not enough there ~ I think that Bowman came just as we were leaving ~ I was to have conducted the class meeting ~ there was preaching the Sunday before that ~ I wrote a few lines for McCoy addressed to Maj Walker ~ The letter was written on 3 sides of a sheet ~ I wrote a few lines on the 4th side of the sheet ~ I dont know what was in the letter I did not read it.

X Examination

I was at preaching at the school house the Sunday before that conversation about McCoy ~ Know that was the Sunday because I heard on the Wednesday morning afterwards that he had killed him ~ Mr Penn preached ~ after thinking the matter over I come to the conclusion that the class meeting was held the Sunday before McCoy was killed ~ I had heard that some were of the impression that it was that Sunday and some that it was the Sunday before ~ Mr Bowman asked me if I recollected about it ~ I never heard McCoy make any threats against Ostrander ~ I dont remember whether I stated, on the former trial, that I had never heard Ostrander make any threats against McCoy ~ I wrote at McCoys request a letter stating that Ostrander had put in more time for him McCoy than he had worked, and drawn the money ~ I signed the letter ~ McCoy requested me to ~ This conversation occurred as Mr Ostrander, Bowman and myself were walking up about a quarter of a mile from the School house ~ I think he said it ~ I have conversed

with. Mr Bowman, on the subject of that conversation — I think Mrs Bowman was there — I think Mrs Ostrander, was there — I dont recollect whether I was there the Sunday before, or not — I wrote the letter some time in December — I never heard anything against Ostrander — And here the evidence in Chief, on the part of the State Closed.

J. Lawler

Whereupon the defendant called as a witness in his behalf Jeremiah Lawler, who being sworn testified as follows.

I live in St Charles County — I know deft — knew him first in Jany 48. his character was excellent as a peaceble man — I knew McCoy, — McCoy, when he first left Ostranders, in about a week or two after that, asked me if I would write a letter to Majr Walker — I told him I would and asked him what he wanted me to state in that letter — He said he wanted me to state that Ostrander was dishonest and had defrauded the Company of a number of dollars — I hesitated and advised him to put it off for a while until his temper cooled — I said he and Ostrander were good friends and both yankees and after a while would make it up — Mr McCoy, expressed a desire for revenge and satisfaction against Mr Ostrander — I didnt write the letter — He told me that a gentleman was about to write the letter for him — I never saw the letter — I've heard a great deal of abusive language used by Mr McCoy, in reference to Ostrander, — he said Ostrander was a scoundrel and a coward — and that he was not afraid of him at all — heard him say so on more occasions than one — I heard McCoy, say that it would be a

good thing to lay something on the track and throw that pay master off ~ he alluded to the man that pays the hands - Ostrander was overseer - Old Higginbotham was present when McCoy was present when McCoy made the remarks about throwing the cars off the track ~ Dont Know whether the boy Meredith was present or not ~ I think no one but Old Higginbotham, McCoy and myself were present.

X

I was School teacher at old Higginbothams - now live about fifteen miles from Higginbothams ~ I have known Ostrander since /58 ~ If I said 48 I was mistaken ~ I meant /58 ~ McCoy thought Ostrander had insulted him ~ desired satisfaction for that ~ I never heard McCoy make threats of personal violence against Ostrander ~ I dont Know whether Ostrander was paymaster or not ~ I Know that he was called Overseer on the road ~ McCoy. said that Ostrander had called him an old fool ~ that was the first thing I Knew of any difficulty between them.

J. W. Simpson. James W. Simpson, a witness for the defence being duly sworn upon his oath says.

I am a Justice of the Peace in St Charles County - I Know Deft ~ dont Know exactly how long I had known him before the 19th Oct /58 ~ think it was in July 58 ~ I never heard any thing against him - dont Know anything to the contrary as to his being a man of good character for peace ~ I am not the Justice who took down the examination ~ Elliott was I think the Justice who did ~ Ostrander came down and gave himself up to me ~ I Know James Moore - I had a conversation

with him in reference to what had passed between him and Ostrander~ Mr Moore said that Ostrander said that "if McCoy didn't hush talking about him he would shoot him~ Moore told me that at my house~ It was sometime before the shooting took place~ dont recollect how long before~ Sometimes Mr Moore indulges too much~ That was about the amount of it~ I was not down at the scene of the homicide~ I was sick and for that reason did not try the case~ Ostrander came and sat with me until he was sent for~ I was sick~ I made out no warrant~ Moore asked me what I thought of the difficulty between Higginbotham & Ostrander and McCoy.~ He referred to Moses Higginbotham the Grand father of Meredith Higginbotham~

Question~ What did Ostrander say when he gave himself up.~ Objected to by Mr Mauro~ Objection sustained and exception taken.

X

I never heard anything against Moore except that at times he would indulge a little too much~ I believe his character for veracity is good~ He so received as a truthful citizen amongst those who knew him~

Miss Sallie Walker. 3

Mis Sallie Walker a witness for the defence being put upon her oath said~

I lived in St Charles County in 1858. the School house spoken of was about 3 miles distant~ I have been there~ I dont remember whether I was there the sunday before the difficulty or not~ dont remember whether it was that Sunday or the sunday before that I was there~ I Know Mr Bowman~ he has not been trying to argue me into the belief that I was mistaken~ He thought

that Mr Penn, did not preach there the Sunday before the difficulty and I cant say for certain that he did — I have talked with Mr Bowman about it — I think there was preaching there that day — If I am right Mr Bowman, was not there. — Mr Bowman was not at the preaching but Mrs Bowman was — recollect the circumstance that Bowman's child was burnt.

Jos Wendover. Jos Reed Wendover, a witness introduced by the defendant, being duly sworn, testified as follows.—

I know deft — have known him about three years — First saw him in my store — He was then living in this state — He purchased goods in my store quite a number of time — He was engaged on the North Mo R. Road — So far as I have heard — his character for peace was good — I have heard persons speak of him who said they knew him — the account they gave was favorable.

X

Here the state asked leave of the Court to re-introduce Meredith Higginbotham for the purpose of proving a fact omitted in the examination in chief, to wit: That the testimony he had given in before the committing Magistrate had not been read over to him before he signed it — To which Deft objected — Objection overruled and exception taken.

Maj Walker. Maj Walker — put upon the stand a witness by the deft. being duly sworn said.

I know the deft — I received a letter, but forget now by whom it was signed — cant say if the name signed to the letter was McCoy, or not — Defts pay was stopped by my order, in consequence of the letter — I directed Burlingame or Hanford to investigate the matter —

report to me - I never heard anything against the character of Deft except this charge - I felt bound to investigate the matter because of my position as an officer of the road.

X Examined.

Deft was not paymaster - McCoy was killed before the matter was investigated - I never heard of any investigation - No report was ever made to me - I dont say that no investigation could have been had before McCoys death.

Re Examination

The reason no investigation was had in fact because the deft was arrested, and no longer an officer of the road.

Jno Flynn. John Flynn. a witness introduced on the part of defendant being duly sworn testified as follows.

I have know deft since the spring of 1857 - I never saw the letter - I was paymaster and supply agent - I received orders to retain the pay of deft - Deft bore the reputation of a peaceable man - I have a very slight recollection of McCoy - It is usual and proper for persons in the position of Deft to carry weapons.

James S Burlingame. James S. Burlingame. a witness introduced upon the stand by Deft being duly sworn deposed as follows.

I have known defendant for two years last June - Road Master - I thought deft was a peaceable man - I know McCoy face and name - never heard him speak of deft.

X

I saw that letter - substance of it was charging Ostrander with returning false time - McCoy had received part - It was done the same day in Sept - dont recollect date of letter - Sept or august was the last day.

H Marshall Henry Marshall - being sworn as a witness in the cause on the part of deft. testified as follows.

I had employment with N. M. R. R. Co in 1858 – I saw a letter making complaints against Ostrander – The nature of the charge was, that he had been swindling the company by giving false time – that he had hand employed upon his own farm – and charged the time to the company and received the money for hands thus employed – and that Mc Coy rec'd part of the money.

Here defendant offered and read in evidence the deposition of Leonard R. Sargeant – which reads thus:

Deposition of L. R. Sargeant.

State of Missouri
vs
Levi Ostrander } In St Louis criminal Court –

Affiant Leonard R. Sargeant, states that he is well acquainted with the defendant Levi Ostrander, – Has known him for about eighteen years, and knows his general character well during that time, as well as his character for peace and good order, and takes pleasure in stateing that during all that time he has borne an irreprochable character as a peaceable man – affiant states that he has known him while in charge of a gang of men employed on public and private works, and that he has uniformly borne the best reputation for good order, peace and quiet as well as for honesty, truth and industry – commanding the respect and confidence of his employers and the community generally, here and elsewhere.

Sworn to and Subscribed before me
this 16th day of July 1859
W^m. Johnstone. Justice of the Peace } L. R. Sargent

Deft also offered and read in evidence the deposition of the boy Meredith Higginbotham – as taken down and certified to by

the committing magistrate.

Deposition of M. Higginbotham

State of Missouri
County of St Charles } This affiant Merideth Higginbotham states on or about the 19th day of October 1858 Levi Ostrander did shoot William McCoy with a pistol between Wellville and John H. Bowmans on the North Missouri Railroad and killed the same.

Sworn to and subscribed before me this Oct 20th 1858. } Meredith his X mark Higginbotham

Henry T. Elliott. Justice of the peace

I do hereby certify that this is a true copy of the entry made docket. Given under my hand this 21st day of Oct 1858.

Henry T. Elliott. J. P.

And this being all the evidence in the cause the Deft by his counsel asked the Court to the jury the following instructions which the Court refused.

2d Instructions. Refused B

The jury are further instructed that if they shall find that there was but one witness to the facts and circumstances or to any of them, attendnt upon the killing of McCoy, and that that witness was Meredith Higginbotham - before the jury should convict upon his evidence, they ought to be satisfied, both of his ability to see, accurately - and to relate correctly - the actual circumstances under which the killing took place - and of his integrity to detail therein fairly - If on the contrary the evidence furnishes any ground to suspect, either his ability, or his integrity as a witness - they ought not to convict on his testimony.

Refused

It is not necessary that the Deft should prove by positive testimony, that the killing of McCoy, if he did it - was done in lawful self defence. - If from the whole circumstances in the case the jury can infer that before the killing McCoy

in striking distance and in anger, raised the iron hoop shown in evidence to strike Deft therewith – that Deft had reasonable cause to apprehend, a design upon the part of said McCoy, to do him some great personal injury, or some great bodily harm, and that deft also had reasonable cause to apprehend that said design would be immediately executed – and under such circumstances, shot and killed said McCoy, to prevent the execution thereof – such killing was justifiable, and the jury ought to acquit the defendant.

Refused It is a question for the jury, to determine under the evidence, whether the ability or integrity of the witness Meredith Higginbotham has been successfully impeached.

Refused If the jury believe from the evidence that the deft shot at and killed the deceased in revenge for any past injuries either real or supposed, there is no self defence in the case.

Refused A lawful provocation does not require an actual battery, a blow either actually giving or menacing gesture, complied with an ability to do bodily injury – amounts in law to a provocation.

~~[illegible]~~

to which deft at the time excepted.

Then the Court on its own motion gave the following instructions

1st Instructions Given

The defendant is charged with the crime of murder in the first degree, with having wilfully deliberately, premeditatedly and of his malice aforethought killed and murdered William McCoy.

If the jury believe from the evidence that the defendant

at Saint Charles County and previous to the finding of the Indictment did wilfully deliverately, premeditatedly and of his malice aforethought Kill and murder the said McCoy. by shooting him with a pistol as charged you will find him guilty of murder in the first degree.

By wilful is meant on purpose and not by accident.

By deliberate is meant in cool blood, that is not in a heated state of the blood caused by lawful provocation

By premeditated is meant, thought of before hand any length of time however short.

And by an malicious act is meant, an act done wilfully intentionally and without circumstances of excuse or justification to excuse and mitigate the character of the offence or justify the act. Malice is either express or implied.

Express malice is where one with a sedate and deliberate mind and formed design kills another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait antecedent menaces, former grudges, and concocted schemes to do him some bodily harm.

And malice is implied in the law from any cruel deliberate act done without justification or excuse in the law.

Words of reproach or contempt how grevious soever are not provocation sufficient to free the party killing from the guilt of Murder.

Given If the Jury believe from the evidence that the defendant wilfully intentionally and premeditatedly shot and killed William McCoy. as a matter of revenge for or because of the fact that McCoy had written or caused to be written a letter and had sent it or caused it to be

sent to the North Mo Rail Road company or officers of said Company charging defendant with defrauding said Company then the Killing is is malicious and murder in the first degree and so the jury should find.

Evidence of good character may be regarded by the jury as evidence tending to lesson any probability of guilt which may have been raised against the defendant by the evidence in the cause or as disproving the crime charged. should the jury regard it as disproving it - but if the jury are satisfied beyond a reasonable doubt of the guilt of the defendant then good character heretofore enjoyed by defendant if so enjoyed cannot avail him as a defence to the prosecution.

If you find the defendant guilty of murder in the first degree you will state the fact in the verdict.

Given — If the jury believe that the defendant killed the deceased in lawful self defence when he Ostrander had reasonable cause to apprehend a design on the part of McCoy, to Kill him Ostrander or to do him some great personal injury and that defdt also had reasonable cause to apprehend that said design would be immediately accomplished and that he slew McCoy under such circumstances as a matter of real or seeming unavoidable necessity to prevent the execution of such felonious design on the part of McCoy, then he is justified on the ground of self defence and ought to be acquitted and such circumstances may be made to appear by direct or circumstantial or inferential evidence.

Given — If you entertain a reasonable doubt of the defendants guilt you ought to acquit him - A doubt to authorize an acquittal upon this ground ought to be a reasonable

doubt touching his guilt and not a bare possibility of the defendant innocence.

It is the duty of the Jury without fear favor or affection carefully impartially and justly to weigh the evidence in the cause and give it such faith and credit as you in the exercise of a sound judgment may think it entitled to.- and solely upon the evidence in the cause and the law under the instruction of the Court are you sworn to decide whether defendant is guilty as he stands charged or not-

Your Verdict should be nothing more or less than a just and impartial response to the law and the evidence in the cause, without being unduly influenced by any opinion you may entertain of the severity of the punishment of the offence as prescribed by the Statute, or any aversion you may feel in relation thereto or any consideration other than those of strict and impartial duty.

Given If you believe that any witness or witnesses in the cause has knowingly or wilfully testified falsely as to any material matter of evidence you are at libity to disregard and reject the whole of the testimony of such witness or witnesses.

Given It is a question for the Jury alone to determine the weight of the evidence in the cause - and pronounce upon the ability or disability capacity or incapacity or dishonesty of any witness in the Cause and give such weight to the evidence in the cause as in their judgment it is fairly entitled to.

-+-

to which deft excepted.

And be it remembered that after verdict rendered defendant by his counsel moved the Court to set the same aside.

44

Mo to set aside verdict of Murder 1st degree

State
vs
Levi Ostrander

} Indictment for Murder in 1st degree.

The defendant by his counsel moves the Court to set aside the finding of Murder in the first degree returned on yesterday by the jury, for the following reasons-
1st The trial was illegal - there being no power in the Court to put Deft on his trial on the Indictment, nor any legal capacity in the jury to be charged with the Defendant upon any issue on the indictment, for the reason, that at the May Term of this Court, the Defendant was put on trial on the said indictment, and a jury of the Country was duly empannelled, sworn, and charged with the Defendant, who after deliberation returned into Court and rendered a verdict in proper legal form, and to the legal effect - of Guilty of Murder in the 2nd degree - which verdict was responsive to said Indictment - within the issues - and altogether out of the power of this court, to annul, set aside or vacate, except at the instance of the Defendant on motion for a new trial, which motion Deft has never made.
2nd Because the finding of Murder in the 1st degree of yesterday, is void, and cannot support judgt, and should be set aside as an illegal interpolation of the record.
3d The entire proceedings of this attempt at a second trial of the Defendant - for the same offence - is a palpable violation of the constitution of this State.-
4th The former verdict rendered against the defendant of Murder in the 2nd degree, was at the beginning of the 2nd trial - and now is in full force - tho' kept from the Record by the action of this Court.

In addition to the foregoing reasons against this finding of yesterday - there are others, to wit:
1st The Court refused to give proper instructions to the jury, at the instance of Defts Counsel.
2nd The Court gave improper instructions against Deft.
3d The Court permitted illegal evidence to go to the Jury agnst Deft. and against his objection.
4th The Court refused to instruct the jury, as to the law of murder in the 2nd degree & Manslaughter, or of either.

Wm J. T. Wright and Woods
for Deft.

which motion was by the Court overruled and to such ruling deft at the time excepted.
Whereupon Defendant by his counsel filed his motion in arrest of judgment. (no such motion filed) which motion the Court overruled to which ruling deft at the time excepted.

H. A. Clover (seal)

Wednesday February 1st 1860

The State of Missouri
vs
Levi Ostrander } Murder 1st degree.
Bill of Exceptions filed by consent of parties.

Bill of Exceptions.

State vs
vs
Levi Ostrander } St Louis Criminal Court
May Term 1859.
Indictmt for Murder.

2nd
Bill of Exc

Be it remembered, that on the day of this a Jury was empannelled in the above cause, and regularly charged with the defendant - who after the evidence was heard for the State and for the Deft, and after

argument of counsell, and the instructions of the Court, retired to consider of their verdict- and after deliberating returned into Court, a paper writing=

V "We the jury in the case of the State vs. Levi Ostrander, find him "guilty of murder in the 2nd degree, and assess his punishment to confine= "ment in the State Prison for the term of fifteen years."

D. M. Branch. foreman."

When the following proceedings were had

St Louis May 17th 1859.

I certify the following facts for the consideration of the Supreme Court of the State of Missouri.

Statement of the Court. 3

On the third day of May 1859 there came on to be tried in the St Louis Criminal Court, the case of The State of Missouri, against Levi Ostrander, on an Indictment for Murder in the first degree, and a Jury being empannelled in the cause were duly sworn and charged with the trial of said cause, and the evidence was heard and fully concluded both on the side of the State and on the side of the prisoner, and the cause was argued by Messrs David C. Woods, and Uriel Wright counsel learned in the law for the prisoner and Mr Mauro Circuit Attorney for the State, whereupon the Court instructed the jury upon the law of the case as follows.

Instructions given. 3

The defendant is charged with the Crime of Murder in the first degree, with having wilfully, deliberately premeditatedly and of his malice Killed and murdered William McCoy.

If the Jury believe from the evidence that the defendant at Saint Charles County and previous to the finding of the indictment did wilfully deliberately, premeditatedly and of his malice aforethought Kill and murder the said

McCoy. by shooting him with a pistol as charged you will find him guilty of Murder in the first degree.

By wilful is meant on purpose and not by accident.

By deliberate is meant in cool blood that is not in a heated state of the blood cause by lawful provocation.

By premeditated is meant. thought of before hand any length of time however short.

And by malicious act is meant an act done wilfully, intentionally and without circumstances of excuse or justification to excuse and mitigate the character of the offence or justify the act.

Malice is either express or implied.

Express malice is when one with a sedate and deliberate mind and formed design Kills another: which formed design in evidenced by external circumstances discovering that inward intention as lying in wait antecedent menaces. former grudges, and concocted schemes to do him some bodily harm.
And Malice is implied in the law from any cruel deliberate act done without justification or excuse in the law.

Words of reproach or contempt how grevious soever are not provocation sufficient to free the party killing, from the guilt of Murder.

If the Jury believe from the evidence that the defendant wilfully, intentionally and premeditatedly shot and killed William McCoy, as a matter of revenge for or because of the fact that McCoy, had written or caused to be written a letter and had sent it or caused it to be sent to the North Mo Rail Road Company or office of said company charging defendant with defrauding said Company, then the killing is malicious and murder in the first degree and so the jury should find.

If you have a reasonable doubt of the guilt of the defendant you ought to give him the benefit of such doubt and acquit.

Evidence of good character may be regarded by the Jury as evidence tending to lessen any probability of guilt which may have been raised against the defendant by the evidence in the cause or as disproving the crime charged should the Jury regard it as disproving it, but if the jury are satisfied beyond a reasonable doubt of the guilt of the defendant then good character heretofore enjoyed by defendant if so enjoyed cannot avail him as a defence to the prosecution.

If you find the defendant guilty of murder in the first degree you will state the fact and the verdict.

If the Jury believe that the defendant killed the deceased in lawful self defence when he Ostrander has reasonable cause to apprehend a design on the part of McCoy to Kill him Ostrander or to do him some great personal

injury and that defendant also had reasonable cause to appre= hend that said design would be immediately accomplished and that he slew McCoy. under such circumstances as a matter of real or seeming unavoidable necessity to prevent the execution of such felonious design on the part of Mc= Coy. then he is justified on the ground of self defence and ought to be acquitted and such circumstances may be made to appear by direct or circumstancial or inferential evidence.

It is a question for the Jury alone to determine the weight of the evidence in the cause and pronounce upon the ability or disability, capacity or incapacity integrity or dis= honesty of any particular witness in the cause and give such weight to the evidence in the cause as in their judg= ment it is fully entitled to.

The Jury are instructed that if they shall believe from the evidence that the boy Meredith Higginbotham swore falsely knowingly to any material fact in the case they are at liberty to reject his evidence.

And before the Court instructed the Jury the counsel for the prisoner Uriel Wright Esq. prayed the following instructions of the Court to be given to the Jury by the Court as law governing the case under the evidence in the cause.

Instructions refused -

"It is not necessary that the deft should prove by positive "testimony that the killing of McCoy. in striking distance "and in anger raised the Iron hoop shown in evidence "to strike Deft therewith - that Deft had reasonable cause

50

"to apprehend a design upon the part of said McCoy, to do
"him some great personal injury, or some great bodily harm,
Refused "and that defendant also had reasonabe cause to apprehend
"that said design would be immediately executed, and under
"such circumstances shot and killed said McCoy to prevent the
"execution thereof, such Killing was justifiable and the jury
"ought to acquit the defendant.

" The Jury are further instructed that if they shall find
"that there was but one witness to the facts and circumstances
Refused "or to any of them, attendant upon the killing of McCoy, and
"that that witness was Meredith Higginbotham, before the
"Jury should convict upon his evidence they ought to be
"satisfied both of his ability to see accurately and to relate
"correctly, the actual circumstances under which the Kill=
"ing took place, and of his integrity to detail them fairly.=
"If on the contrary the evidence furnishes any grand to
"suspect either his ability or his integrity as a witness, they
"ought not to Convict on his testimony.

" It is a question for the jury to determine under the evidence
"whether the ability or integrity of the witness Meredith Hig=
"ginbotham, has been successfully impeached"

And also requested in writing as follows.

The Court is further requested to charge the jury as to mur=
der in the 2nd degree and manslaughter in its degrees.

Wright and Woods
for Deft.

on which the Court wrote.

I refuse so to charge May 5. 1859.

H. A. Glover Judge.

which Instructions and request the Court refused to
give or comply with and also after the instructions of the

Court had been given to the Jury. David C. Woods Esq of counsel for the prisoner orally audibly and in the hearing of the Jury suggested to the Court that the Court had omitted or neglected to charge to Jury with reference to the law of murder in the Second degree, to which suggestion of the counsel so made as aforesaid the Court orally audibly and in the hearing of the Jury responded that the Court had refused the written request of his associate Counsel Maj Wright to charge the Jury with reference to the law of murder in the second degree and refused then so to instruct the Jury.

And I set out the above and foregoing instructions only that the Court to which this statement is certified may be informed and know the fact that I refused in instructing the Jury advisedly and whether rightfully or wrongfully, to instruct the Jury as to the law of murder in the second degree the Court from a view of the whole evidence in the cause deeming "that this was no case for an instruction as to the law of murder in the second degree the Court having no doubt unless it stultified itself and refused to permit its judgment to be influenced by considerations which govern all all the rest of mankind that the case was not under the decision of the Supreme Court,-one for an instruction on the law concerning murder in the second degree.

State vs Phillips & Ross.

24 Mo Rep p 489.490.

and the Court conceived itself bound by the decision of the Supreme Court above quoted from to omit and to refuse to instruct the Jury upon the evidence as to the law of murder in the second degree-to declare what the law of murder in the second degree in the State is or was, or what is the punishment for that offence

by the laws of the State of Missouri.

And the Jury retired to their Room to consider of and concerning their verdict in the premises, and on the following day the Jury in the mean while being Kept together. came into Court accompanied by the Deputy Marshall of the County who had in the Interim had them in charge and took their seats in the Jury box and the Deputy Marshall aforesaid handed to the Court the instructions of the Court given to the Jury and a paper which paper is in the words and figures following. to wit.

"We the Jury in the case of the The State vs. Levi Ostrander find him guilty of murder in the 2d. degree and assess his punishment to confinement in the State Prison for the term of fifteen years."

"D. M. Branch. foreman"

and the Court having inspected the said paper handed the same to Mr Attorney for the State and to the Counsel for the defence for their inspection.

And the Court then gave the Jury the following additional instruction.

Gentlemen. I instruct you that if you find the defendant wilfully and intentionally shot and killed deceased with a pistol there can be no murder in the second degree in the case.

State vs Phillips 1 Ross et supra

State vs Shoultz. 25 Mo Rep p 153.

and the Court requested the Jury to retire and deliberate further of and concerning their verdict in the premises. The Defendant objected to the action of the Court in sending the Jury out again to deliberate upon a verdict they had already rendered - and denied

that the Jury could find another verdict in the case - Whereupon the Jury retired to deliberate further and after the lapse of some time again returned into Court and the foreman of the Jury handed to the Court the instructions of the Court and the paper above set out signed D.M. Brand, foreman.

Whereupon the Court asked the Jury whether they had yet been able to agree upon a verdict and the foreman of the Jury responded -

Not otherwise except as they had declared in the paper then held in the hands of the Judge being the paper signed. D.M. Branch. foreman.

Whereupon the Court asked the foreman whether they agreed to render such verdict referring to the paper signed D.M. Branch. foreman, and the said foreman responded: Yes.

Whereupon the Court told the jury that it was desired by the Counsel for the defence and it would perhaps be more proper that the verdict should be made responsive to the charge of murder in the first degree and that their verdict should also declare that they found the defendant not Guilty of murder in the First Degree, but Guilty of Murder in the Second degree if such was their verdict, and for the purpose of having the verdict conform to the charge he would ask them if they found the defendant Guilty or not Guilty of the charge of murder in the First Degree and if they found him not guilty of the offence of murder in the first Degree, then whether they found him Guilty or not Guilty of murder in the second degree and if they found him Guilty of

murder in the Second degree would then have the Verdict so recorded in due form:-
And thereupon the Court propounded to the foreman of the Jury. Gentlemen. How say you is the defendant Guilty or not Guilty of the charge in the Indictment of murder in the first degree.
To which the foreman responded Not Guilty of murder in the First Degree as charged in the indictment.
Whereupon one of the Jurymen made remark. That is not my Verdict, I am of opinion that the defendant is Guilty of Murder in the first degree, but I agreed to the verdict of murder in the Second degree as a compromise, and the Court here remarked that it had no right to Know, and didn't want to Know the motives which had led to the formation of their Verdict, what he wished to Know, and what he enquired of the Jury was whether they found the defendant Not guilty of murder in the first degree, since they had found him Guilty only of murder in the Second degree, and again asked them: Do you find the defendant not Guilty of murder in the first degree, to which the foreman responded Yea, and the other Juryman alluded to responded Nay.- the Court informed the Jury that the Verdict of Guilty of Murder in the Second degree by necessary implication found the defendant not Guilty of murder in the Second degree.
State vs. Ball 27 Mo Rep p 327.
and asked the Jury again whether they would find the defendant not guilty of Murder in the first degree and the same result was had as before the foreman

answering it was the verdict, and the other Juryman alluded to. It was not his verdict and he could not agree to it. Whereupon the Court abandoned as a hopeless effort to attempt to obtain from the Jury a verdict as to whether defendant was or was not Guilty of Murder in the first degree, and remarked to the jury that if they agreed to render a Verdict of Murder in the Second degree he would receive it and asked the Jury if they agreed upon and would render that Verdict and asked the Jury. Gentlemen do you find the defendant Guilty of Murder in the Second degree and the foreman responded he could'nt answer that the action of the other Juryman had placed him in a very absurd position as that when he wrote and signed that Verdict he was authorized so to do for himself and fellows, but that for himself such was his verdict, and the other Juryman alluded to remarked that the verdict of Guilty of murder in the Second degree was not his verdict, and that he did not agree to it and could not and would not make such a Verdict, that he was of opinion that the defendant was Guilty of Murder in the first degree, and the Court after further conversation with the jury with reference to the necessity of their agreeing to a verdict if possible and with reference to the probability of their being able to agree upon a Verdict, and the Court being of opinion that there was no probability of the agreement of the Jury and being assured by divers of the Jury that there was an impossibility of the Jurys agreeing, and the Court so believing from the matters aforesaid as well as from the manifest temper of the

body that the jury could not agree upon a verdict on the matter discharged the Jury from a further consideration of the case and a mistrial was the result. And subsequently the Attys for the defence filed the following motion.

State
&
O'Strander } Indictment for Murder.

Motion to record verdict of Murder 2d. degree.

The Defs by his counsel moves the Court record the verdict & have the same entered upon the records of this Court forthwith as rendered and returned into this Court by the Jury empannelled in the above charge - The said verdict being in writing and signed by the foreman of the Jury.

Wright & Woods. for Deft.

which motion the Court overruled, and the defendants Counsel proposing to apply to the Supreme Court of the State for a mandamus upon the Judge of the Court to compel and force him to do it this statement is made and furnished so that the decision of the Supreme Court may be made upon the application with the same effect as upon the return to an alternative mandamus.

Calhoun. vs. Buffington. Mo Rep 25 p 443.

and if the supreme Court should be of opinion that the paper writing aforesaid is a verdict and should be recorded as the verdict of the Jury and upon which the Court should render a judgment then this Court will proceed so to do: otherwise not. Respectfully

H.A. Clover. Judge
of the St Louis Criminal Court.

And the Court further certifies that the evidence given and the whole of the evidence given on the trial of the said cause was the same substantially as given on the 2nd trial of the cause, as the same is set out in the other bill of exceptions filed in the cause, and to which reference is here made the same to be considered as if herein set out so that the Supreme Court can see the evidence given in the cause upon which the Criminal Court based its action in the giving of instructions, in the refusal to give instructions, and all its other action in the matter.

H. A. Glover.
Judge St Louis Criml Ct.

and thereupon the Deft by his Counsel moved the Court in writing to have the said Verdict so returned by the Jury aforesaid recorded.- Which motion is in the following words and figures.

State
o
Ostrander } Indictment for Murder.

The Deft by his Counsel moves the Court to record the verdict and have the same entered upon the records of this Court forthwith - as rendered and returned into this Court by the Jury empannelled in the above cause - The said verdict being in writing and signed by the foreman of the Jury

Wright & Woods for Deft.

which motion the Court overruled, and to the decision of the Court overruling the motion aforesaid the Deft excepted -

All the facts, introduced on said motion are herein

stated, and the Deft, asked the Court to preserve by Bill of Exceptions, his several exceptions to the action and decision of the Court, which is done accordingly.

Be it remembered also that at the October Term of this Court - after the deft was again put upon his trial and the jury delivered a verdict of murder in the 1st degree, the Deft again moved the Court in writing to record the former verdict which motion was in the following words and figures.

Motion to record verdict of Murder 2d deg. renewed.

State
&
Levi Ostrander } Indictment for Murder.

The defendant renews the motion made at a previous term of this Court, that the verdict rendered by the Jury first empannelled, sworn and charged with Defendant on this Indictment - of murder in the 2nd degree, be recorded.

U. & J. T. Wright & Woods
for Deft.

which motion the Court also overruled, and Deft excepted, on which motion the same facts were again considered, as have been previously set out in the first Bill of Exceptions.

H. A. Clover. (Seal)
Judge St Louis Criml Ct.

State of Missouri }
County of St Louis } ss. I, Frederick Kretschmar,
Clerk of the St Louis Criminal
Court, within and for the County aforesaid certify
the foregoing to be a true and correct copy of
the record and proceedings in the case of the
State of Missouri, Against Levi Ostrander,
as fully as the same remains of record and on
file in my office.

In testimony whereof, I hereto set my
hand and affix the seal of our
said Court at office in the City
of St Louis this 27th day of February
A. D. 1860.

Fred Kretschmar
Clerk

Index

	Page
Transcript from St Charles Co	1
Indictment	2.
Petition for change of Venue	4.
Jury	6
Mistrial	7
Mo to record Verdict overruled	8.
Jury	9
Verdict	10
Mo to set Verdict of Murder in 2d degree overruled	11.
Judgment	11
Appeal	12
Stay of Execution	12
Bill of Exceptions	12.
Dr Green	12. 13. 14. 15. & 16.
C. W. Pringle.	16. 17. & 18.
Meredith Higginbotham.	18. 19. 20. 21. 22. 23. & 24.
George H. Walker	25. & 26.
James B. Moore	26. 27. & 28.
John W. Bowman,	28. 29. 30. & 31.
John Ray. Sr	31. 32. & 33.
Jeremiah Lawler	33. & 34
James H. Simpson	34. & 35
Miss Sallie Walker.	35 & 36.
Joseph Vendover	36.
Maj Walker	36. & 37.
John Flynn	37
James S. Burlingame	37.
Henry Marshall	37. & 38.
Deposition of L. R. Sargent.	38.
" " M. Higginbotham	39.

Instructions Refused 39 to 40.

" Given 40. 41. 42. 43.

Mo to set aside Verdict of Murder 1st Degree 44 to 45

Second Bill of Exceptions 45.

Statement of the Court 46.

Instructions Given 46. 47. 48. to 49.

" Refused 49. to 56

Mo to record Verdict of Murder 2d Degree. 56.

" " " " " " " " renewed 58.

(6) 270.

March 1860

The State of Missouri

vs } Transcript

Levi Ostrander.

Appeal to the Supreme Court
from the
St. Louis Criminal Court.

Filed March 3d. 1860.

Wm. G. Glanville.

Transcript $26.60.

opts. stat. / opts. bf. / orig & sub. /

Received, 31 May 1860 – C. p. 59

State
vs
Orlando

Supreme Court
Appeal from the
St Louis Criminal
Court
Indictment for Murder

Statement of the Case

The Defendant was tried by a Jury regularly sworn & charged - and convicted of Murder in the 2nd Degree -- The Court refused to receive the verdict - recommitted the Jury, and sent them back to reconsider their verdict against the exception of the Deft -

The Jury returned the same verdict as before -

The Court pleed them, as to the form of the verdict - told them that in legal effect their verdict was one of Not guilty, as to Murder in the 1st Degree - and requested them to put it in that form -

The colloquy & exposition of the Court being one of the Jury - and the Court declared the case a mistrial -

The Court refused, repeated application to have the verdict recorded - Put the Defendant

again on trial for the same offence on the same Indictment. Cut off all legal opportunity of plea of former acquittal of Murder in the 1st degree — or of former conviction of Murder in the 2nd Degree — & deprived the Defendant of all right to file a motion for a new Trial — —

On the second trial the Defendant was Convicted of Murder in the 1st degree — under which he now stands. —

A motion for a new trial was filed on the last ~~trial~~ verdict & overruled —

There are other questions on the record — but the main question is the power of the Court to refuse a verdict rendered in proper legal form — within the scope of the Indictment, and responsive thereto. —

U & I T Wright

State
vs.
Ostrander

Statement by
N & G L Wright

Filed 16 April 1860.
Wm L Glanville
Ch

The State of Missouri } In Supreme
vs } Court March
Levi O'Strander } Term AD 1860
Appellants Brief — by D C Woods

The 1st point to be considered, is the fact of the 1st finding of a former Jury — Whever a prisoner, either in terms or effect, is acquited by the Jury, the verdict as returned should be recorded. The State vs Arrington 3 Murph 571.

After the Jury returned a special verdict, the Court gave instructions and resubmitted the case to them, who thereupon returned a general verdict. If a special verdict finds the facts responsive to the issue on which a Judgement can be rendered, the functions of the Jury cease, and it is the duty of the Court to give the Judgement. (R. C. 1855, p 1263, & 20) See 27th Mo R. 380 See 22 Mo R. The State vs McQuiag. p 319.

If the Jury assess a punishment below the limit prescribed by law for the offence of which the defendant is convicted, the Court shall pronounce sentence, and render Judgement according to the lowest limit prescribed by law in such cases (R. S. 1845, 883 & 5)

A party indicted for murder may be found guilty of manslaughter in the third degree, in manner and form as charged in the indictment, although it contain no such separate charge Plumer Vs The State 6 Mo. R. P. 231.

See Mallison Vs The State 6 Mo R. P 399.

On a trial for murder, the Jury, after the Case was Committed to them, Came into Court and inquired of the Court whether they could find the defendant guilty of manslaughter only. The Court told the Jury that they were Judges of the law and facts, that they could find the verdict as they pleased, and that, when it was rendered, the Court would pass upon its validity — Held, to be an instruction, and that having been given orally, the Judgement must be Reversed.

See Gibson Vs Lewis 27th Mo R. P. 13.

Where a verdict is merely informal, the Court may put it in proper form; and where there is a substantial omision, it may supply it by the Court, with the Consent of the Jury, so as to make it conform to their intention Henley Vs Asbuckle 13th Mo R. P. 206.

A verdict is not valid and final until pronounced in open Court, and before it is recorded, the Jury may vary from the first offer of their verdict, and the verdict which is recorded shall stand. Blackley vs Sheldon 7 Johns 32.

On the trial of an indictment for an assault on M., with an intent to Ravish and Carnally Know her, by force and against her will, the Jury Returned a verdict that the defendant was "not guilty of an assault with an attempt to Commit a Rape in manner and form," & but that he was "guilty of an assault upon, and improper & unlawful intercourse with the said M." at the time & place in the indictment mentioned. Held, that this was not a special verdict, and that it warranted a Judgement against the defendant for a simple assault. The Commonwealth vs Fitchblat, 4 Met. 354.

Every verdict is presumed to be right and just, unless the Contrary appears

Elswick vs Newson 4 Dana. 260

See the case of Burnet vs Maxey. 4 Port. 410.

The State vs Goodwin 5th Iredell 401.

U.S. vs Sarchet Gilpin 273—

Roberts vs Rockbottom. Co 7th Met 46.

If the Jury find according to the law and the evidence, a new trial will not be granted because they did not find, as they were instructed in the law by the Court. Van Vacter vs Brewster 1. Smedes & Marsh. 409.

On a trial for grand larceny, the Jury found the prisoner guilty, but their verdict ascertained no terms of imprisonment. The Court discharged the Jury, but they were instantly called back, before any of them had left the Court-house, but one, who had gone a short distance accompanied by the deputy Sheriff. Held, that the verdict must be set aside, and a new trial granted Mills's Case 7 Leigh. 751.

The second point I propose to make was the Conduct of the Court, after the Jury had returned a verdict for Murder in the second degree: In publicly rebuking the Jury for returning such a verdict under the evidence. And thereupon expressed the opinion that the Jury must either convict the defendant of Murder

in the first degree or they must acquit"
It is error for a Court to comment
upon the evidence in a Criminal
Case, unless requested so to do by
the prosecuting attorney and the defendant.
The State Vs Dunn 18th Mo R. P. 419.

The 3rd point is: That from the decision
of this honorable court in the case of The
State Vs Bale 27th Mo. R. Page 327. A Con-
viction of murder in the second degree
necessarily acquits of murder in the first
degree, and the verdict in the latter case,
so long as it stands, unquestionably bars
any prosecution for the first named
offence. The same principle is decided
in the case of Plumer 6 Mo. R. 232.
When the first Jury returned their
verdict and the Court of his own
motion gave an additional instruc-
tion the foreman of the Jury expressed
to the Court: That he had been
instructed by some Gentleman that
foreman that they could not
conscientiously find any other
verdict than the one returned to the
Court of murder in the second degree."
If we are permitted to take the cases of Bale

and Plummer as precedents, how can this defendant be put twice in Jeopardy of his life, in violation of his Constitutional Rights?

The weight of evidence is to be determined by the Jury alone. The State vs Allen 2 Md. R. 318.

The 4th point and last point I propose to make was the poling of the Jury by the Court of his own motion. I allow me in this connection to say, that I can find no precedent for such an assumption of power either in Maryland or in any of her sister states. The right for either party to poll a Jury has never been questioned in American Jurisprudence. Hubble vs Patterson 1. Md. R. P. 392. Rankin vs Harper 2 B. Mo R. P. 576.

Either party has a right to have the Jury polled on their return of a verdict, or after the amendment of their verdict by the Court, and to ask them severally if such was their verdict. Johnson vs Howe 2 Gilman 342.

See the case State vs Angel 7 Riddell 27.

The court will not instruct the Jury that there is no evidence of a material fact, if there be any evidence whatever tending to prove it Whiteford vs Buckmyer 1 Gill 127.

The Supreme Court will not interfere with the verdict of a Jury on the ground that the evidence does not support the verdict, The State vs Anderson 19th Mo R 241. The Supreme Court will not reverse a Judgement of the Court below, refusing a new trial, when the evidence in the Couse would warrent a finding by the Jury either way. McKnight vs Wells 1. 13. Rennick vs Walton 7th Mo 292. Williams vs The State 9 Mo R. 268.

In conclusion allow me to add; that if ever in the Judicial history of Missouri (the Court of last resort) should interpose to save a fellow creature from an ignominious death! 'Tis the Case at bar. Suffer not the penalty of death to attach to the lost finding, for it would be in violation of Constitutional right, and at war with the great precepts of Divine teaching. The first Jury went upon the hypothesis that the defendant deserved punishment; but not the penalty of death for there were many, many palliating circumstances! I regret, that the repeated interposition of the lower Court, shook to ruins the high purposes and mandates of one who had not the manly courage and dignity of character to resist the frowns of a Court, after a feeling of consciousness of having done right to his fellow man!

I hope that this Honorable Court will pardon me for having spoken thus! Nothing but a high sense of duty, drives me to the doing of that, that the soul would spurn upon ordinary occasions! I cannot avoid the internal conviction, that if this man is executed, a great wrong will have been perpetrated! Hence I throw myself into the breech, to prevent, if possible, the ignominy of such a crime in the ides of the third quarter of the nineteenth century! Duty tells me stop, for Justice will be done and my client saved from a felon's death! Could I leave him to abler hands, or hearts more willing to do their fellow-men Justice? Hence, I relinquish the prisoner to the hands of the Court.

J. C. Woods

270

The State of Missouri
vs
Levi Ostrander

Defendants Brief
by D. C. Woods

Filed 16 April 1860
Wm J Glanville
Ck

Supreme Court

State
vs
Levi Ostrander

Appeal from the St Louis Criminal Court –

Points made for Defendant by U & I T Wright –

As to the 1st verdict

I. The Court ~~had~~ was under a perfect legal obligation to record the verdict rendered by the Jury of Murder in the 2nd degree. –

3. Murphy 371.
1 Haywood 174.

II – The court illegally influenced the Jury to defeat their verdict.

As to the 2nd verdict

I The entire proceeding of the second trial was against the constitution of this state. –

II If the above point fail – the court

erred in refusing a new Trial.

Ci & J. L. Wright
for Deft

State
vs
Ostrander.

Brief of U & G
T Wright for
Deft.

authorities cited

3 Murphy 371
1 Hayward 176
1 McCord 232.

Filed 16 April 1860.
Wm S Glanville
Ck

State v. Olhausen

The only point arising on this record which presents any difficulty, is based upon the action of the Criminal Court upon the verdict or supposed verdict of the jury at the first trial. The history of this proceeding will appear from the detailed statement certified by the Judge in the bill of exceptions - the material parts of which are here inserted:

[The Clerk will here insert in brackets or inverted commas that part of the bill of exceptions beginning at page 52 of R. commencing with the words "and the jury retired &c." & ending on page 56 - line 3 - with the words "was the result."]

Our State Constitution provides, that the right of trial by jury shall remain inviolate, & that in all criminal prosecutions the accused has the right to a speedy trial by an impartial jury of the vicinage. This bill of rights, contained in the tenth article of the Constitution, declares further that "no person after having been once acquitted by a jury, can for the same offence be again put in jeopardy of life or limb". In the spirit of these constitutional provisions, ~~the legislature~~ the legislature has passed laws, marking with great exactness the

line separating the power & duties of the judge from those ~~app~~ assigned by the Constitution & the laws to the jury. The right of a jury, in a criminal prosecution, to determine the facts without regard to the views of the Judge who presides at & conducts the trial, is secured by the most stringent enactments. The Judge is confined to an exposition of the law; he is not permitted, "on the trial of ~~any~~ the issue on any indictment to sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested so to do by the prosecuting attorney & the defendant or his counsel," & his instructions upon points of law are required to be in writing. Rev. Co. '55. Cr: Practice. Art. 6. s. 31 &c.

These constitutional & legislative provisions are manifestly repugnant to some ancient usages ~~in the conduct of criminal prosecutions~~ which ~~were tolerated, if not sanctioned by the common law, in the conduct & which are referred to~~ are said to have ~~occasionally or~~ prevailed, ~~&~~ to have been tolerated, if not sanctioned, in the conduct of criminal trials in England. Bacon says: (Bac:

Abr. Tit. Verdict, Letter B.) = It is said, that after a jury have given a verdict of not guilty in an indictment for felony, the judge may, if the verdict be in his opinion contrary to clear & full evidence, send them out again to reconsider their verdict." Hawkins says: (2 Hawk. P.C. ch. 47. s. 11.) = It hath been adjudged, that if the jury acquit a prisoner of an indictment of felony against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again & reconsider the matter; but this is by many thought hard, & seems not of late years to have been so frequently practised as formerly."

It is ~~hardly~~ scarcely necessary to observe, that the power over verdict ~~here~~ attributed by these authors to the Judges in England ~~does not~~ is not recognized or sanctioned by any law or usage here. Such powers as these would be entirely incompatible with that constitutional protection which a verdict of acquittal gives to a prisoner. If the criminal judge may refuse to receive a verdict in a criminal case, because it is manifestly against the evidence, the judge must of course & from necessity be authorized to determine the questions of fact for himself - so that his

opinion of the facts & not the opinion of the jury must ultimately prevail. What becomes of the constitutional guaranty of the verdict of acquittal, if the Judge may refuse to receive or record the verdict, because in his opinion it is against evidence?

Sir Matthew Hale expounds the law somewhat differently from Hawkins & Bacon, on this point. He goes no further than to say that "if the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again & consider better of it, & alter what they have delivered." Hale's P.C. v. II. p. 300. and chiefly, following Hale, says that "if the jury through partiality or mistake deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it & recommend an alteration." This language is so loose & general, that it hardly needs any particular criticism in connexion with the particular history of the case we have

under consideration. It is not necessary for us to enquire how far & up to what time mistakes may be corrected by jurors. These positions of Hale & Chitty are based upon the authority of Plowden, who is also referred to by Bacon & Hawkins. The case in Plowden (Saunders v. Freeman Plow. C. 209) & is not a criminal proceeding & therefore has really nothing to do with the principle stated as applicable to criminal trials. It was a case where the jury rendered a privy verdict & afterwards in open court changed it & the verdict delivered in open court was sustained. In the course of the decision, it was incidentally said by the Court of C. B. ~~[illegible]~~ ~~[illegible]~~: that "even in court, if the jury pronounce a verdict, they may change it, if they have mistaken it, or if it was not full in law, or for any other reasonable cause immediately perceived; for it was said in the Lord Ch: Justice Montague's time one Archer was arraigned in the King's Bench for felony of the death of a man, & the jury gave their verdict

not guilty, & presently after they said they had mistaken themselves, & they said he was guilty, & this last was received & entered as the verdict. And in 11 Henry 4th in conspiracy against two the Inquest found one guilty, & it was there said that their verdict was contrary to itself, for a conspiracy cannot be but between two at least, & if the one is not guilty the other is not guilty - for which reason they were sent back & afterwards they came again & said that both were guilty, & this was received as their verdict."

Now it is obvious that the instances put by the judges in Plowden, whether they would be allowed in England ~~now~~ at this day or not, do not form any precedent for the course of proceeding taken in the Criminal Court of Illinois. Upon the bringing in of the verdict here, there was no suggestion by the jury or any one of them, that any mistake was made, nor do any of the subsequent developements show that there was ~~any mistake~~ any mistake

or misunderstanding as to the verdict agreed upon.

And in relation to the Conspiracy case, the Judges said the verdict was "contrary to itself"; that "it was contradictory, repugnant & therefore insensible. One man could not be convicted of a conspiracy - therefore the acquittal of one was virtually the acquittal of the other. The verdict we are considering is not subject to any objection like this; - but if it was, we are not prepared to say, that such a power could be exercised here, as was exercised in the Conspiracy case in England. Chitty says: "This is considered as bearing too hard on the prisoner, & has been seldom done in modern times, when the Reason is in his favor" Ch: J Taylor of N. Carolina very properly observes on this Conspiracy case, cited in Flowden & commented on by Chitty "Some of the harsh rules of the Common law, in relation to Criminal Trials, have been gradually softened by the improved spirit of the times; & this, among others, is relaxed in modern practice, where the Jury bring in a verdict of acquittal. It is considered as bearing too hard on the prisoner & is seldom practised. I think this course of proceeding

is fit to be imitated here, whenever a prisoner, either in terms or effect, is acquitted by the jury, & that in all such cases the verdict should be recorded." Nate v. Arrington 3 Murphey R. 573.

The result of the authorities, in modern times at least, seems to be that, when in a criminal trial a verdict is returned which is sensible & essentially responsive to the issue, the Court has no other duty to perform, except to have it recorded. According to ancient customs in England & one which prevails in many Circuits in this State & a very laudable & safe one, the Clerk reads over the verdict to the Jury & calls their attention to it by these: "Gentlemen of the jury, hearken to your verdict while the Court records it. You say &c &c. and so say you all." This is the time for the correction of mistakes, if any have been made & this is the mode ~~in~~ in which it should be done. Regina v. Vodden 6 Car C.C. 226. 1 Bennett & Heard' Lea. C.L. p. 547.

If these principles be correct, we do

not think there can be any question that the Criminal Court was wrong in giving the instruction which was given after the verdict came in & sending the jury back to ~~their~~ reconsider their verdict. We do not speak of the propriety or impropriety of the instruction, as an expression of opinion on the part of the Court in reference to a point of law; nor do we consider it of any consequence that the opinion of the Court upon the facts was right & that of the jury wrong. We suppose that only one interpretation could be placed upon the instruction which the Court gave after the verdict was rendered, by the jury or by any one else. It was certainly not the enunciation of any new principle of law, which had escaped the attention of the Court ~~to~~ when the instructions applicable to the case generally were given; on the contrary it was a mere repetition, substantially, if not in precise language, of the law which ~~what~~ the Court had already declared to the jury. The instruction was intended, we suppose, & must have been so understood by the jury, as an ~~plain~~ ~~rebuke~~ intimation to them that ~~for a need finding~~

was not, in the opinion of the Court warranted by
the verdict, ~~under~~ the testimony. ~~as the Court thought,~~
~~did not warrant~~. The language of the Court was
" Gentlemen, I instruct you, that if you find
that the defendant wilfully & intentionally
shot & killed the deceased with a pistol
there can be no murder in the second degree
in this case." The verdict brought in by the
jury was a conviction of murder in the
second degree, with a specification of the
punishment. The Court was of opinion that
where the killing was wilful & intentional,
the offence would not & could not be murder
in the second degree; - and as in such cases
usually, & in this case particularly, the
question of accident or design was not left
at all doubtful by the evidence, the Court
concluded that the verdict was wrong - &
therefore called the attention of the jury to it,
that they might alter it. We do not
consider it important to enquire here, whether
the Court was right or wrong in the
conclusions arrived at either of law or fact;
nor whether the result of the action of the

Court in this particular case did not tend to the administration of justice. We regard it as solely a question of principle; - a determination of the true line of demarcation between the Court & the jury. As such it is important; & it would be dangerous & unsafe to allow a departure from fixed principles in criminal trials. Although the result in this case may be abstractly considered right; - although the prisoner may justly merit the punishment pronounced by the second verdict & final judgment of the Court upon that verdict, yet the power exercised here to bring about this result may be exercised in other cases, bearing a very different aspect. If the power does not exist; if it is substantially inconsistent with our Constitution & laws, it ought not to be exercised in any case. There is no doubt that the verdict was one which was responsive to the issues in the case, - that it was a verdict therefore which the jury were competent to find - & that it was sufficiently formal to authorize a judgment on it, under the repeated decisions of this Court. It was a verdict of murder in the second degree &

therefore by implication an acquittal of murder in the first degree. After the Court had submitted the verdict to the counsel for the State & for the prisoner & no objections were suggested to it, there remained nothing but to have it read to the jury & ascertain whether it was assented to by all the jurors. In the absence of any dissent there assent would be presumed & the verdict recorded.

So far, we have considered the case up to the period when the jury retired a second time at the order of the Court with an instruction. The subsequent events of the trial undoubtedly present questions of more difficulty. It seems that the jury returned a second time with the same verdict. At this stage of the proceedings, the jury were told by the Court, that it was desired by the counsel for the defence & was perhaps proper that their verdict should respond formally to the charge of murder in the first degree; that it should in terms declare that they found the prisoner not guilty of murder

in the first degree, but guilty of murder in the second degree, if such was [redacted] verdict, & with a view to ascertain whether such was their verdict, the Court proceeded to ask the jury, if they found the prisoner guilty or not guilty of murder in the first degree. To this interrogatory the foreman responded "not guilty of murder in the first degree" but one of the jurymen said that was not his verdict - that his opinion ~~then~~ was that the defendant ~~was~~ guilty of murder in the first degree & that he had agreed to the verdict originally found as a compromise. Subsequent conversations between the Court & the jury more clearly showed the dissatisfaction of the juror with the verdict & the result was a mistrial.

Had this result occurred immediately upon the bringing in of the verdict, & upon the interposition of the defendant's attorney & without any interference on the part of the Court, the ~~the~~ case would have presented a very different appearance. But we must look at the condition of the case as it stood at

the rendition of the verdict. Was the verdict responsive to the issue, ~~& was it~~ consistent with itself, sensible & capable of sustaining a judgment? If it was, why the delay in recording it? If the delay in having it recorded, the instruction of the Court, the remanding of the jury & the subsequent conversations between the Court & the jury had any influence in shaking the first determination of the jury, can the result with any propriety be regarded as a nullity?

It is obvious that a Court by calling a verdict a paper cannot change its real character & it would seem to be equally clear that a verdict, sufficient in itself & acquiesced in by the jury at the time it is rendered, cannot be impaired by any delay in having it recorded. The intimation of a Court, after the rendition of a verdict, of its impropriety upon the facts in evidence, will have weight with a jury. It is impossible to say, that this opinion,

evincing a plain dissatisfaction with the verdict, had no influence in producing the vacillation of the juror who ultimately dissented. As we have already said, we do not differ with the Court upon the law as declared in the instruction, nor do we deem it necessary to express any dissent from the conclusion on the facts which the criminal Court seems to have reached, nor have we any doubt that the object of the Court ~~We concede the propriety of both, the probability, perhaps the certainty, that~~ The result attained may be more in accordance with the demands of this particular case than could be reached by entering a judgment on the original verdict. But we are of opinion that after the verdict was rendered, the subsequent instructions & remanding of the jury were erroneous - & that the error was not cured or waived by the interposition of the defendants' ~~atto~~ counsel.

We shall therefore reverse the judgment & direct the verdict to be recorded. The Criminal Court will, of course, make the necessary changes in the record to conform it to the fact as certified in the bill of exceptions.

Judge Ewing concurs.

W. B. Napton

was to prosecute the ends of justice -

Scott J is in favor of affirming the judgment of the Court before & will file an opinion

270

State
v.
Ostrander

Opinion
of the Court

Negative

Filed 31 May 1860
W. J. Glanville
Ck.

Page 1.

State of Missouri }
County of St Louis } ss. Be it remembered that on the Second day of March in the year of our Lord Eighteen hundred and fifty nine, there was filed in the Office of the Clerk of the St Louis Criminal Court a transcript in a certain case of the State of Missouri, vs Levi Ostrander which transcript, is in the words and figures following, to wit:

Transcript from St Charles County

State of Missouri }
County of St Charles } At a Circuit Court begun and held at the Court House, in the City and County of St Charles, within and for the County of St Charles on the Second Monday of November, Eighteen hundred and fifty eight. Present the Hon Aylett H. Buckner Judge of said Court.

The Sheriff returned into Court a panel of forty jurors and thereupon the following panel of Grand Jurors were selected under the direction of the Court, to wit:

Gordon N. Wallace, foreman, W. N. Kenner, John Chapman, Anton Meyer, Jacob Potter, F. X. Dorlague, George W. Huffman A. S. Matson, Jonathan Thomas, Shelbial Ball, John R. Allen Preston B. Scott, Robert P. Callison, Robert McClarin, Charles Le Faivre, Charles F. Miller, L. M. Howell, Seventeen good and lawful men of the County of St Charles, who being duly empannelled, sworn and charged retired from the bar to consider of their presentments.

And afterwards, on the ninth day of November Eighteen Hundred and fifty eight said Grand Jurors returned into the said Court, an indictment against Levi Ostrander, which is entered of record in the words following.

2.

The State of Missouri }
vs } Murder
Levi Ostrander } Endorsed a true bill.

And the said indictment is in the following words and figures, to wit:

State of Missouri } Circuit Court
County of St Charles } November Term. 1858.

Indictment

The Grand Jurors for the State of Missouri, empannelled sworn and charged to enquire in and for the body of the County of St Charles on their oaths present that heretofore to wit: on nineteenth day of October AD 1858 at the County of St Charles one Levi Ostrander in and upon one William McCoy, feloniously, wilfully, deliberately premeditately and of his malice aforethought did make an assault and that the said Levi Ostrander, a certain pistol then and there loaded and charged with gunpowder and divers leaden bullets which pistol the said Levi Ostrander, in his right hand, then and there had and held, at, to, against and upon the said William McCoy then and there feloniously, wilfully, deliberately, premeditatelly and of his malice aforethought, did shoot and discharge, and that the said Levi Ostrander, with the leaden bullets aforesaid, out of the pistol aforesaid then and there by the force of the gunpowder and bullets ~~aforesaid~~ sent forth as aforesaid the said William McCoy, in and upon the right and left side of the body and the back of him the said William McCoy, then and there feloniously, wilfully, deliberately premeditatedly and of his malice aforethought

	T I T E
3.	did strike, penetrate and wound giving to him the said William McCoy, then and there with the leaden bullets aforesaid so as aforesaid shot discharged and ~~discharged~~ and sent forth out of the pistol aforesaid by the said Levi Ostrander, in and upon the right and left side of the body and the back of him the said William McCoy, mortal wounds each of the depth of six inches of which said mortal wounds the said William McCoy then and there died. And so the jurors aforesaid upon their oath aforesaid do say that the said Levi Ostrander, the said William McCoy, in manner and form aforesaid feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought did kill and murder against the peace and dignity of the State T. T. Minor. Ct Atty Endorsed. A true Bill. Gordon A. Wallace. Foreman.
	And afterwards in said Court on the ninth day of November Eighteen hundred and fifty eight the following proceedings were had in said cause: to wit: The State of Missouri vs Levi Ostrander Murder. Now at this day appears the Circuit Attorney, who prosecutes for the State and the said defendant being in custody was brought into Court and being demanded of and concerning the premises and how he will acquit himself thereof says he is not guilty in manner and form as charged in said indictment and thereupon on motion of this cause is continued to the next term of this Court and said defendant is remanded to jail
Issue.	

And afterwards in the vacation of said Court an application was made to the Judge thereof for a change of venue the petition for which is in the words and figures following to wit:

The State of Missouri } In the Circuit Court of St Chas.
against } County and State of Missouri.
Levi Ostrander }

Petition for Change of Venue

To the Honorable Aylett H. Buckner Judge of the St Charles Circuit Court of the State of Missouri. The defendant prays the Honorable Judge aforesaid to grant him a change of venue to some other Judicial Circuit in the State of Missouri as the inhabitants of your entire Judicial Circuit are prejudiced against the applicant, that he beleives justice cannot be done him and a fair trial had and thus he will ever pray.

S. S. and D. C. Woods
Attys for Defendant

State of Missouri

Levi Ostrander the defendant being duly sworn upon his oath says that the matters and things as stated in the above petition he knows are true, as he has conversed with many intelligent persons who are unprejudiced against defendant (since he was indicted for murder and his cause continued) from various parts of the Third Judicial Circuit upon whose representations he beleives and relies as true, are true without reference to the prejudice of said inhabitants against him, and he beleives that justice cannot be done him or a fair trial had in his behalf in said Third Judicial Circuit.

Levi Ostrander

5. Sworn and subscribed to before me this the 8th day February AD. 1859.

Seal

Fred Kretschmar
Clerk St Louis Criminal Court

State of Missouri }
3rd Judicial Circuit } In vacation of St Charles Circuit Court

Order of removal }

On a hearing of the within application for a change of venue by the defendant Levi Strander made to the undersigned Judge of the St Charles Circuit Court it is ordered that the venue in the cause of the State of Missouri vs Levi Strander be changed to the 8th Circuit and it also ordered that the Clerk make out and certify a transcript of the record as provided by law and transmit the same to the St Louis Criminal Court

Given under my hand the 18th Feby 1858.

A. H. Buckner
Judge St Charles Circuit Court

I have received due notice of the foregoing application for a change of venue.

A. P. Minor Ct Atty
3rd Judicial Circuit

Clerks Certificate }

State of Missouri }
County of St Charles } I, Ben Emmons Jr Clerk of the Circuit Court of St Chas County certify the foregoing to be a full and correct transcript of the record and proceedings in the case of the State of Missouri vs Levi Strander, as the same remains of record in my office.

Seal

In witness whereof, I hereunto set my hand and affix the seal of said Court this first day of March Eighteen hundred and fifty nine.

Ben Emmons Jr
Clerk

In the St. Louis Criminal Court.
Friday March 25th 1859.

The State of Missouri
vs
Levi Astrander

On indictment for Murder first degree.
Change of venue from St Charles Co.

Continuance.

This cause is continued on affidavit of defendant on account of the absence of witnesses Jeremiah Lawler and John W. Kay.

Tuesday May 3rd 1859.

The State of Missouri
vs
Levi Astrander

Murder first degree. Change of venue from the County of St-Charles. Mo

Jury

Now at this day comes the Circuit Attorney who prosecutes for the State, and the said defendant being brought into Court, thereupon come a jury. to wit: D. M. Branch, S. M. Stella. John Murray. David Turnbull David Bradford. James P. Blendin. William H. Timberlake. Timothy Dunn Ernest St. Doctor. Isaac Isaacs. Charles Scudder and Henry W. Smith, twelve good and lawful men who being duly elected tried and sworn the traverse between the parties, aforesaid well and truly to try. the trial of the cause progressed, but not being

7

-concluded at the hour of adjournment, further proceedings herein are deferred until the meeting of the Court to-morrow morning.

Wednesday May 4th 1859.

Trial progressed

The State of Missouri } Murder in the first degree
vs } Change of venue from St Charles Co Mo
Levi Astrander }

Now again come as well the parties as aforesaid as also the jurors aforesaid, and thereupon the trial of the cause progressed, but not being concluded at the hour of adjournment further proceedings herein are deferred until the meeting of the Court tomorrow morning.

Thursday May 5th 1859

Submitted to Jury.

The State of Missouri } Murder first degree. Change
vs } of Venue from St Charles Co Mo
Levi Astrander }

Now again come as well the parties as aforesaid as also the jurors aforesaid and the trial of this cause being fully ended and concluded the jurors aforesaid retire to consider of their verdict.

Friday May 6th 1859.

The State of Missouri } Murder first degree. Change
vs } of venue from St Charles Co Mo
Levi Astrander }

Now again come the parties as aforesaid and

8.

Mistrial

The jurors sworn in this cause also come and say they cannot agree among themselves what verdict to render in the premises. Wherefore it is considered by the Court that the jurors aforesaid be discharged from the rendition of a verdict herein, and it is ordered by the Court that this cause be continued

Tuesday May 10th 1859.

Motion to record verdict filed.

The State of Missouri
vs
Levi Alexander
} Murder in the first degree. Change of Venue from St Charles Co. Mo

Motion to record verdict filed by defendants Counsel

Monday May 16th 1859.

The State of Missouri
vs
Levi Alexander
} Murder 2nd Degree. Change of Venue from St Charles County. Mo

Motion to record verdict overruled

The Court here having duly heard and considered the defendants motion to record verdict and being fully advised of and concerning the premises doth overrule the same.

Wednesday July 20th 1859

The State of Missouri
vs
Levi Alexander
} Murder first degree. Change of Venue from St Charles Co. Mo

2nd Continuance.

Continued for the State on account of the absence of witnesses

Tuesday September 6th 1859.

The State of Missouri
vs
Levi Astrander

Murder 1st degree. Change of venue from St Charles Co Mo

3rd Continuance.

Continued on affidavit of the defendant filed herein.

Wednesday November 9th 1859

The State of Missouri
vs
Levi Astrander

On indictment for murder first degree. Change of venue from St Chas Co. Mo

Laid over

The defendant files his affidavit for a continuance of this cause, thereupon this cause laid over until Tuesday the fifteenth inst.

Tuesday November 15th 1859

The State of Missouri
vs
Levi Astrander

Murder in the 1st degree Change of venue from St Charles Co. Mo

Application for Continuance overruled.

The Court here having duly heard and considered the defendants affidavit for a continuance hereinbefore filed and being thereof fully advised doth overrule the same; thereupon this cause is laid over until Friday the Eighteenth inst.

Cause laid over.

Friday November 18th 1859.

10.

The State of Missouri
vs
Levi Astrander
} On indictment for Murder first degree. Change of venue from St Charles County Missouri.

Now again come as well the Circuit Attorney who prosecutes for the State as the said defendant in his own proper person and thereupon come also a jury to wit:- Nathaniel Chandler. William Remmington James T. Cooper. Samuel Webster. John O Stark. Edward Chase. Richard Warren. William M Hobbs. John Cross Thomas Mills John M Henry. & Diamond twelve good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, the trial of the cause progressed, but the same not being concluded at the hour of adjournment, further proceedings herein are deferred until the meeting of the Court tomorrow morning.

Jury

Trial progressed

Saturday November 19th 1859

The State of Missouri
vs
Levi Astrander
} On indictment for Murder in the first degree.

Now again come as well the parties aforesaid as also the jurors aforesaid, and thereupon the trial of the cause progressed, but the same not being concluded at the hour of adjournment further proceedings herein are deferred until the meeting of the Court on Monday morning next.

Trial progressed

Monday November 21st 1859.

11.

The State of Missouri }
vs } An indictment for Murder
Levi Ostrander } in the first degree.

Now again come as well the parties aforesaid as also the jurors aforesaid and thereupon the trial of the cause progressed and the same being now fully ended the jurors aforesaid upon their oath aforesaid say they find the said defendant guilty of Murder in the first degree as charged in said indictment.

Verdict.

12.

Motion to set aside Verdict filed.

Motion to record verdict of Murder 2d. deg filed.

Tuesday November 22nd 1859

The State of Missouri
vs
Levi Astrander
} Murder in 1st degree
Motion to set aside verdict of murder in the first degree filed by defendants counsel = Motion to record verdict of Murder in the second degree filed by defendants counsel.

Monday December 5th 1859.

The State of Missouri
vs
Levi Astrander
} An indictment for Murder in the first degree. Change of venue from St Charles Co May

Now again come the Circuit Attorney who prosecutes for the State and the said defendant (~~and his counsel~~ defendant) is brought into Court in custody of the Marshal: Thereupon the defendants motion to set aside the verdict of Murder in the first degree and the motion to record verdict of murder in the second degree being argued and submitted to the Court, and by the court here fully understood, therefore it is considered by the Court that said motions be severally overruled: and the said defendant being demanded if he hath or knoweth anything to say why the Court here should not now proceed to pass sentence of death upon him in pursuance of the verdict rendered against him and having nothing to say, therefore it is considered by the Court that the said defendant Levi Astrander, be taken from this court to the place from whence he came, there to remain until Friday the twentieth day of January next, thence on that day

Motion to set aside verdict of Murder 1st deg re overruled

Judgment

13. to be taken to the place of execution and there between the hours of ten o'clock in the forenoon, and four o'clock in the afternoon of said day, be hanged by the neck ~~&~~ until he be dead: and it is further directed that the Clerk of this Court make out a warrant under the seal of this Court commanding the Marshal to carry this sentence into execution: Whereupon the defendant prays an appeal to the Supreme Court, from the judgement of this Court rendered against him, and the Court here being of opinion that there is probable cause for such appeal, or so much doubt as to render it expedient to take the judgement of the Supreme Court thereon, doth grant the same and doth order and direct that such appeal shall operate as a stay of proceedings on the judgement herein: and on motion of the defendant leave is given him to file his bill of exceptions on or before Monday next the twelfth instant.

Appeal

Stay of Execution

Monday January 16th 1860.

The State of Missouri
vs
Levi Ostrander

Murder 1st degree
Bill of Exceptions filed by consent of parties.

Friday June 1st 1860.

The State of Missouri
vs
Levi Ostrander

On indictment for Murder in the first degree - change of venue from St Charles Co Mo.

In compliance with the opinion and judgement of the Supreme Court of the State of Missouri in the

above entitled Cause made and entered on the appeal prosecuted from the judgement of this Court to the said Supreme Court in said cause, this Court doth hereby order and direct that all the proceedings had and taken in this cause subsequent to the entry of proceedings had and made of record thereinon the sixth day of May in the year of our Lord One thousand eight hundred and fifty nine be set aside annulled and be forever hereafter held for naught and not esteemed the proceedings or judgement of this Court, and the Court doth further order and direct that the entry of proceedings had and entered in the Cause on the sixth day of May in the said year of our Lord One thousand eight hundred and fifty nine be set aside and vacated and the following entry of proceedings had in said cause be now this day entered "nunc pro tunc" as of the said sixth day of May in the year of our Lord One thousand eight hundred and fifty nine, in manner following to wit:-

Order Recording Verdict Murder 2d Degree

Friday May 6th 1859

The State of Missouri
vs
Levi Ostrander

On indictment for Murder in the first degree. Change of venue from St Charles Co Mo.

Verdict of Murder 2d Degree.

Now again come the parties as aforesaid and the jurors sworn in this cause being agreed upon a verdict, return here into Court a verdict in the words and figures following to wit:- We the jury in the case of the State vs Levi Ostrander find him guilty of Murder in the 2nd degree and assess his punishment to confinement in the State Prison for the term of Fifteen years.

15.

D. M. Branch - Foreman.

Tuesday June 5th 1860.

The State of Missouri
vs
Levi Ostrander } Murder 2nd degree.

Now at this day comes the Circuit-Attorney who prosecutes for the State and the said defendant is brought into Court and the Court here having duly heard and considered the defendants motion to set aside the verdict of Murder in the second degree hereinbefore rendered and being thereof fully advised doth order that said motion be overruled:- and it is considered by the Court that the said defendant for his offence of Murder in the second degree and in pursuance of the verdict rendered against him be imprisoned in the Penitentiary of this State for the space of Fifteen years, that he pay the costs of this prosecution and stand committed until this sentence be complied with:- Whereupon the defendant prays an appeal to the Supreme Court from the judgement of this Court herein rendered against him: and the Court here being of the opinion that there is probable cause for said appeal doth grant the same and doth order that said appeal operate as a stay of proceedings on the judgement: whereupon on motion of the defendant and by consent of the Circuit Attorney the Court doth grant the defendant Twenty days time to file his bill of exceptions herein:-

Motion to set aside verdict of Murder 2d degree overruled.

Judgment on verdict of Murder 2d degree

Appeal granted & Stay of Ex

16.

Tuesday October 23rd 1860.

The State of Missouri
vs
Levi Ostrander

Murder 2nd degree - Change of venue from St Charles County, Missouri.

Bill of Exceptions filed "nunc pro tunc" as of June 25th 1860. by consent.

Bill of Exceptions
St Louis Criminal Court

State
vs
Levi Astrander

Indictment.
Murder in the 1st Degree.

Be it remembered that on the trial of the above entitled cause the following evidence on the part of the State and on the part of the Defendant was introduced to wit:-

Agreement as regards Evidence in this cause.

It is agreed by the State and the Defendant that the Bill of Exceptions in the above cause already on file in the Clerks office of the Supreme Court, shall be used by the Counsel and the Supreme Court as the Bill of Exceptions in this case in so far as the evidence is concerned.

And this being all the evidence in the cause. The court instructed the jury as follows to wit:-

Instructions Given.

The defendant is charged with the crime of Murder in the first degree, with having wilfully, deliberately premeditatedly and of his malice aforethought killed and murdered William McCoy.

If the Jury believe from the evidence that the defendant at St Charles County and previous to the finding of

the Indictment did willfully, deliberately, premeditatedly and of his malice aforethought kill and murder the said McCoy by shooting him with a pistol as charged you will find him guilty of Murder in the first degree.
By willful is meant, on purpose and not by accident.
By deliberate is meant, in ~~xxxxxxxxx~~ cool blood, that is not in a heated state of the blood caused by lawful provocation. By premeditated is meant, thought of beforehand any length of time however short.
And by a malicious act is meant, an act done willfully, intentionally and without circumstances of excuse or justification to excuse and mitigate the character of the offense or justify the act. Malice is either express or implied.
Express malice is where one with a sedate and deliberate mind and formed design kills another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait antecedent menaces, former grudges, and concocted schemes to do him some bodily harm.
And malice is implied in the law from any cruel deliberate act done without justification or excuse in the law. Words of reproach or contempt how grievous soever are not provocation sufficient to free the party killing from the guilt of murder.
If the Jury believe from the evidence that the defendant willfully, intentionally and premeditatedly shot and killed William McCoy as a matter of revenge for or because of the fact that McCoy had written or caused to be written a letter and had sent it or caused it to be sent to the North Mo Rail Road Company or

18.

officers of said Company, charging defendant with defrauding said Company then the killing is malicious and murder in the first degree and so the jury should find.

Evidence of good character may be regarded by the jury as evidence tending to lessen any probability of guilt which may have been raised against the defendant by the evidence in the cause or as disproving the crime charged, should the jury regard it as disproving it; but if the jury are satisfied beyond a reasonable doubt of the guilt of the defendant then good character heretofore enjoyed by defendant if so enjoyed cannot avail him as a defence to the prosecution.

If you find the defendant guilty of murder in the first degree you will state the fact in the verdict.

If the jury believe that the defendant killed the deceased in lawful self defence when he Astrander had reasonable cause to apprehend a design on the part of McCoy, to kill him Astrender or to do him some great personal injury and that deft also had reasonable cause to apprehend that said design would be immediately accomplished and that he slew McCoy under such circumstances as a matter of real or seeming unavoidable necessity to prevent the execution of such felonious design on the part of McCoy, then he is justified on the ground of self-defence and ought to be acquitted and such circumstances may be made to appear by direct or circumstantial or inferential evidence.

If you entertain a reasonable doubt of the defendants guilt you ought to acquit him, — a doubt to authorize an acquittal upon this ground out to be a reasonable

doubt, touching his guilt and not a bare possibility of the defendants innocence.

It is the duty of the Jury, without fear, favor or affection carefully impartially and justly to weigh the evidence in the cause and give it such faith and credit as you in the exercise of a sound judgement may think it entitled to. - and solely upon the evidence in the cause and the law under the instruction of the Court are you sworn to decide whether defendant is guilty as he stands charged or not. -

Your verdict should be nothing more or less than a just and impartial response to the law and the evi- -dence in the cause, without being unduly influenced by any opinion you may entertain of the severity of the punishment of the offence as ~~xxxxxxxx~~ prescribed by the Statute or any aversion you may feel in relation thereto or any consideration other than those of strict and impar- -tial duty.

If you believe that any witness or witnesses in the cause has Knowingly or wilfully testified falsely as to any material matter of evidence you are at liberty to dis- -regard and reject the whole of the testimony of such witness or witnesses.

It is a question for the Jury alone to determine the weight of the evidence in the cause - and pronounce upon the ability, or disability, capacity or incapacity, or dishonesty of any witness in the cause and give such weight to the evidence in the cause as in their judgement it is fairly entitled to

To which defendant at the time excepted.

And the defendant asked the court to give the following

20
Instructions refused.

instructions - to wit: -

The Jury are further instructed that if they shall find that there was but one witness to the facts and circumstances or to any of them, attendant upon the Killing of McCoy and that that witness was Meredith Higginbotham. - before the jury should convict upon his evidence, they ought to be satisfied, both of his ability to see accurately - and to relate correctly - the actual circumstances under which the Killing took place - and of his integrity to detail them fairly. If on the contrary the evidence furnishes any ground to suspect, either his ability, or his integrity as a witness they ought not to convict on his testimony.

It is not necessary that the defendant should prove by positive testimony, that the Killing of McCoy, if he did it - was done in lawful self defence - If from the whole circumstances in the case the jury can infer that before the Killing of McCoy in striking distance and in anger, raised the iron hoop shown in evidence to strike Defendant therewith - that Defendant had reasonable cause to apprehend, a design upon the part of said McCoy, to do him some great personal injury or some great bodily harm, and that defendant also had reasonable cause to apprehend that said design would be immediately executed - and under such circumstances, shot and killed said McCoy, to prevent the execution thereof - such killing was justifiable, and the jury ought to acquit the defendant: -

It is a question for the Jury to determine under the evidence, whether the ability or integrity of the witness Meridith Higginbotham has been successfully

impeached.

If the Jury believe from the evidence that the defᵗ shot at and killed the deceased in revenge for any past injuries either real or supposed, there is no self defence in the case.

A lawful provocation does not require an actual battery; a blow either actually given or menacing gesture, coupled with an ability to do bodily injury amounts in law to a provocation.

But the court refused to give them or any of them to which Defendant, at the time excepted.

And the Jury having returned their Verdict of Murder in the 2ⁿᵈ degree against the Defendant.

He in due time filed his motion in writing to set aside the same which motion is in the words following to wit:—

Motion to set aside Verdict of Murder 2ᵈ degree

State
vs
Levi Ostrander
} Indictment for Murder.

The Defendant asks the Court to set aside the verdict of Murder in the 2ⁿᵈ degree rendered in the above cause, for the following reasons:—

1ˢᵗ The verdict is against the law of the land.

2ⁿᵈ The verdict is against the instructions of the Court.

3ʳᵈ The verdict is against the evidence in the cause.

4ᵗʰ The Court refused to admit proper & legal evidence offered by Defendant.

5th. The Court admitted improper evidence to be given against the Defendant.

6th. The Court refused to instruct the Jury upon the law of manslaughter Charged in the Indictment.

7th The Court refused to give legal & proper instructions asked by defendant.-

8th The Court gave of its own motion improper instructions

9th The Court instructed the jury,- not in writing.

10th Misconduct of the Jury, in sending for and obtaining, during their Consultation the 1st Volume of the R. Code and reading therefrom the Statute on the subject of homicide.

Unsupported by affidavit.-

And during the colloquy between the Court and Jury upon the rendition of the verdict of ~~Guilty~~ Guilty of Murder in the 2nd degree, and upon a question put by the Court to the foreman of the Jury as to how the Jury had become informed of or Known what the Crime of Murder in the 2nd degree was, under the laws of the State of Missouri since the Court had not instructed upon the law of Murder in the 2nd degree, but on the contrary had expressly refused so to do, and had not defined this offence, and how they had become informed of, or Know what the punishment for this offence was, or that their assessment of the punishment of imprisonment in the penitiary for Fifteen years, was proper or lawful under the laws of the land, since the Court had not instructed them as to what was the lawful punishment for the offence of Murder in the 2nd degree, but on the contrary had expressly refused so to do, the Foreman of said Jury responded for himself and his fellows

that they had sent for and obtained the Revised Stat-
-utes of the State of Missouri, and had referred to the
legislation of the State on the subject of Murder in the
2nd degree, and had so informed themselves of the off-
-ence and the punishment thereof and the fact was
and is that the Jury had so obtained the Revised
Statutes of the State, and had made reference as
aforesaid thereto.

And on the hearing of said motion it was sub-
-mitted that during the retirement of the Jury-
-ors of the Jurors procured the Statutes of this State
on Criminal Homicide and read the same to the
rest of the Jury, without the knowledge of the Court
or of the Counsel on either side, and without their con-
-sent. And this was all the evidence on the motion.
And the Court overruled the same. Whereupon the de-
-fendant excepted and prayed that his several except-
-ions might be signed, sealed and made a part
of the record in the cause. Which is done accordingly
and reference is also to be had to the other bill of excep-
-tions already on file in the cause as to the whole
conduct of the Jury in the rendition of said ver-
-dict the circumstances under which they made the
same, the action of the Court thereon, the action
of the Supreme Court on the action of this Court &c.

W. A. Glover Judge Seal

24.

State of Missouri
County of St. Louis } ss. I, Frederick Kretschmar Clerk of the St. Louis Criminal Court within and for said County certify the above and foregoing to be a true and correct transcript of the Record and proceedings in the above Entitled cause of the State of Missouri vs Levi Ostrander as the same now remain of record in my office.

Witness my hand and the seal of said Court hereto affixed at office in the City of St Louis this 31st day of October A. D. 1861.

Fred Kretschmar
Clerk.

Index.

Transcript from St Charles County filed	Page	1.
Indictment		2.
Issue		3.
Petition for a change of Venue		4.
Order of removal		5.
Clerk's Certificate.		5
Cognizance (1st)		6
Jury		6
Trial progressed		7
Submitted to Jury		7.
Mistrial		8.
Motion to vacate verdict filed		8.
Motion to vacate verdict overruled		8.
2nd Continuance		9.
3rd Continuance		9.

25.

	Page
Cause laid over	9.
Application for a Continuance overruled	9.
Cause laid over	9.
Jury	10.
Trial progressed	10.
Verdict rendered	11.
Motion to set aside verdict filed	12.
Motion to record verdict of Murder 2d degree filed	12.
Motion last aforesaid overruled	12.
Judgment	12.
Appeal	13.
Stay of Execution	13.
Order recording Verdict Murder 2d degree	14½
Verdict of Murder 2d degree recorded	14.
Motion to set aside Verdict of Murder 2d deg overruled	15.
Judgment on Verdict of Murder 2d degree	15.
Appeal granted & stay of Execution	15.
Agreement as regards Evidence in the Cause	15.
Instructions given	16.
Instructions refused	20.
Motion to set aside Verdict of Murder 2d degree	21.

7

368 (4)

October Term 1860

The State of Missouri
respondent

vs Transcript

Levi Ostrander
appellant

Murder 2nd degree

Appeal from St Louis Criminal Court

Filed 16th Novr. 1860.
W. S. Glanville
Clk.

Transcript $9.50

Wright & Wood for Appellant
Mauro for Respondent

Affirmed 21 Dec. 1860

452

State
vs
Levi Oshander

Appeal from the St Louis Criminal Court.—
Indicted for Murder

Statement.—

When this Court remanded the case to the Court below, with instructions to record the verdict—so soon as it was recorded the Defendant by his counsel filed a motion to set it aside & grant a New Trial,—for the reasons therein stated.

The motion will be found on the 26th page & sequens of the Record.

As the former Bill of Exceptions when the case was up before—contained all the evidence in the cause—by agreement, that Bill of Exceptions is to be used in the case now here,—and it will be found with the Record in the Case.—The agreement is stated in the Record.—

The question for the Court is whether the New Trial ought to have granted.

U & I T Wright
for Deft

State
vs
Ostrander

State

Filed 18 Decr. 1860
W. L. Glanville Clk

State
vs
Levi Ostrander

Appeal from St Louis Criminal Cut.

Points for Deft. by U & G T. Wright —

I — The Conduct of the Jury, in procuring through their Foreman, after their retirement, The Revised Code of this State, and making its provisions the basis of their verdict —, without the knowledge of the Court, or the consent of the Defendant (See 26th page of the Record) — was of itself an error fatal to the verdict.

This Court has so decided.

II — The verdict was against the law of the Land & the Instructions of the Court — the facts did not warrant murder in the 2nd degree,

See State vs Phillips & Ross. decided by this Court: — While it was the duty of the Court to receive the verdict, because within the issues

it was not less the duty of the Court to set aside because against the instructions of the Court & the Law of the Land. —

III — The Court refused to instruct the Jury as to the law of Manslaughter — charged in the Indictment, manslaughter being one of the issues of the cause — the Jury were sworn to try. —

IV. — This Instruction is wrong — "And Malice is implied in the law from any cruel deliberate act, done without justification or excuse in the law. Words of reproach or contempt how grievous soever are not provocation sufficient to give the party killing you the guilt of Murder."

The Jury are to determine what is "Justification or excuse in the Law." —

If the matter of "excuse"

was before them, they should have been told not only what would not, but also, what would be an "excuse in the law" - If the matter of excuse was not before them, the instruction should not have been given at all - for it could only mislead. —

The instruction could only be made harmless by giving the last asked by Defendant — but that was refused (see page 26) —

V — The instructions asked by Defendant as to the law, touching a case of a single witness — requiring ability & integrity — ought to have been given —

It was not a commenting upon evidence — but a demand for the legal quality of evidence to support conviction — The instruction was analogous to what is always given touching the evidence of accomplices.

One witness may be enough for conviction if his ability & integrity be above suspicion — but not otherwise —

VI— The Court ought to told the Jury as the instructions asked—

" That it is not necessary that the defendant should prove by positive testimony that the killing of McCoy (if he did it), was done in lawful self defence — If from the whole circumstances in the case the Jury can infer that before the killing — McCoy in striking distance & in anger, raised the Iron Hoop shown in evidence, to strike Defendant therewith — that Defendant had reasonable cause to apprehend a design upon the part of said McCoy to do him some great personal injury, or some great bodily harm & that defendant also had reasonable cause to apprehend that said design would be immediately executed & under such circumstances shot & killed said McCoy to prevent the execution thereof, such killing was justifiable." —

~~If murder can be proved by circumstances so can self defence — the courts with alacrity instruct the former proposition & they should never refuse the latter. —~~

Quickdrin this part for the instruction given on self defence, cured the error —

VII. The refusal of the court to give the instruction, asked as to the law of a single witness, was not cured by the essay on testimony made by the court. — That essay made no distinction betwn, a single witness, and twenty — Juries always judge of credibility — but I wished them to be informed as to the legal consequences, which attached to disability or want of integrity in the sole eyewitness of a transaction —

Stale
v
O Strander

Points by Ns
G T Wright
for Deft

Filed 18th Decr. 1860.
W L Glanville
Ck

State of Missouri } In the Supreme Court
vs } of the State of Missouri
Levi Ostrander } Oct. Term 1860 —

I believe the Supreme Court has already passed upon all the points now raised, in its late decision in the same Case and filed 31 May 1860 with the exception of the 1st point stated in Deft's brief relating to the Conduct of the Jury in procuring the Revised Code of this State —

To this last point I refer the Court to the following decisions = State vs Bird 1 Mo. p 585 — State vs Upton 20 Mo p 397 — U.S. vs Reid 12 Howard U.S. Rep. 361.

As to the other points raised in Deft's brief and upon which I have declined that the Supreme Court has already passed upon I will add the following authorities — Cass vs the State 13 Ga. 328 — Wickersham vs The People 1 Scam. 130 —

Seymour Vallandé
Circ. Atty.

Supreme Court

State
vs
Ostrander

Brief for State

S. Voullaire.
Cirt. Atty

Filed 18 Decr. 1860
W. Glanville Ck