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The State of Missouri vs Francy, James 1864

634/3

Vaillaire R

MO(R)(P)

Davis, Evans, & McBride A

June 1864

v

Oct 64

Francy (A)(D)

St Louis

Crim

John Mynihan → assault in bldg

Dismiss

In the Saint Louis Criminal Court.
September Term. 1863.

The State of Missouri. }ct.

At a term of the Saint Louis Criminal Court, begun and held at the city of Saint Louis, within and for the County of Saint Louis, on the first monday of September being the Seventh day of said Month in the year of our Lord one thousand eight hundred and sixty three, were present the Hon Henry a. Clover, Judge. Seymour Voullaire Esq. Circuit attorney. Joseph P. Vastine Esq. Assistant Circuit attorney, James Coff Esq. Marshal of St. Louis County, and Frederick Kretschmar, Clerk of said Court.

Tuesday September 8th 1863.

The Marshal returns here into Court the venire facias to him directed, with a panel of grand Jurors endorsed thereon, who being called come as follows, to wit: —

Grand Jury. David Keith who is by the Court, appointed foreman Morris Langsdorff. Samuel B. Higgins. Henry a. Homyer, Thomas Richeson, Oliver Garrison. Amos Cutter; James Patrick; M. C. Teasdale; George L. Stansbury; George S. Drake, Charles F. Eggers; Theodore Salorgne, H. Weisenfels, Kennett Shotwell; David S. Thompson and T. B. Edger. Seventeen good and lawful men, who being duly elected, empannelled and Sworn and having received their charge from the Court, retire to Conside of

their presentments.

Monday September 14th 1863

The State The Grand Jury return to the bar and deliver the following indictment as a true bill, to wit:

Indictment.

State of Missouri } St. Louis Criminal Court.
County of St. Louis } September Term, 1863.

The Grand Jurors of the State of Missouri, within and for the body of the County of St. Louis, now here in Court duly empannelled, sworn and charged, upon their oath present: That James Franey, late of Saint Louis, in the County of St. Louis aforesaid, on the eighth day of August in the year of our Lord one thousand eight hundred and sixty three, at Saint Louis, in the County of St. Louis aforesaid: in & upon the body of one John Mynihin in the peace of the State then & there being, feloniously, wilfully, deliberately, premeditatedly & of his malice aforethought, did make an assault; & that the said James Franey, a certain pistol, then & there charged with gunpowder & one leaden bullet, which said pistol he the said James Franey in his right hand then & there had & held, then & there feloniously, wilfully, deliberately, premeditatedly & of his malice aforethought did discharge & shoot off, to, against & upon the said John Mynihan; & that the said James Franey with the leaden bullet aforesaid, out of the pistol aforesaid, then & there, by force of the gunpowder aforesaid, by the said James Freney discharged & shot off as aforesaid, then & there feloniously wilfully deliberately premeditatedly & of his malice aforethought, did strike, penetrate & wound him the said John Mynihan in & upon the belly of him the said John Mynihan, giving to him the said John Mynihan then & there, with

the leaden bullet aforesaid, so as aforesaid discharged & shot out of the pistol aforesaid by the said James Franey in & upon the belly of him the said John Mynihan one mortal wound of the depth of Six inches & of the breadth of half an inch, of which said mortal wound he the said John Mynihan, then & there instantly died. — And so the jurors aforesaid, upon their oath aforesaid, do say, that the said James Franey him the said John Mynihan in the manner & by the means aforesaid feloniously, wilfully, deliberately, premeditatedly & of his malice aforethought did Kill & murder, against the peace & dignity of the State.

Joseph P. Vastine. asst Cir atty.

Endorsed:

A True bill.

D. Keith Foreman

Wits: Dr Gregory, Thomas O'Donnell. Mich'l Mc Donald; John Goggins. Jeff Woodall, James Evans.

Filed September 14. 1863. Fred Kutschmar. Clerk

No. 2.

The State of Missouri vs. James Franey. } On Indictment for Murder in the first degree.

Issue.

Now Comes the Circuit attorney who prosecutes for the State, and the said defendant being brought into Court and having had hearing of the said indictment says he is not guilty as charged therein, and for trial puts himself upon the Country and the Circuit attorney doth the like.

Tuesday September 22d. 1864.

no. 2.

The State of Missouri vs. James Franey } On Indictment for Murder in the first degree. Continued on affidavit of the defendant filed herein.

Wednesday December. 16th 1863.

no. 2. The State of Missouri. vs. James Franey. } On Indictment for Murder in the first degree.

Continued on affidavit of defendant filed herein.

Thursday January 21st 1864.

no. 2. The State of Missouri vs. James Franey. } On Indictment for Murder in the first degree

Continued for the defendant on his affidavit filed herein for the absence of Patrick Cunningham and John Cavenaugh, witnesses for the said defendant.

Monday March 21st 1864

no. 2. The State of Missouri. vs. James Franey. } On Indictment for Murder in the first degree

Now Comes the Circuit attorney, who prosecutes for the State, and the said defendant is brought into Court in Custody of the Marshal, and the Counsel for the defendant also Comes, and the defendant here by his Counsel files a motion to quash the said indictment, and the Court here having duly heard and Considered the said motion to quash the said indictment and being thereof fully advised, doth order that the said motion be overruled. Thereupon, Come a Jury, to wit: Edward P. Herrick, Albert Tennent. Henry W. Kuhs, John Fredorn, Alexander Smeathers, Frank A. Lane, Bernard McKeever, Fred W. Blanke John S. Rhodes, William P. Thayer, Joseph Hackman and Jeremiah Morrissey twelve good and Lawful men, who being duly elected, tried and Sworn

motion to quash overruled

Trial.

the traverse between the parties aforesaid, well and truly to try and a true verdict render according to the law and the evidence the trial of the Cause progressed and not being finished at the hour of adjournment it is ordered by the Court that further proceedings herein be deferred until the meeting of the Court on to-morrow morning.

Tuesday March 22d. 1864.

The State of Missouri.
no. 2. vs. } On Indictment for Murder in the first degree.
James Traney.

Trial

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

Wednesday March 23rd 1864.

The State of Missouri.
no. 2. vs. } On Indictment for Murder in the first degree
James Traney.

Now again Come as well the parties as aforesaid, as also the jurors aforesaid, and thereupon the trial of the
Submitted. Cause progressed and being now fully Concluded, the jurors aforesaid retire to Conceider of their verdict

Friday March 25th 1864

The State of Missouri.
no. 2. vs. } On Indictment for Murder in the first degree
James Traney } Now again at this day Come as well

Conviction

the parties as aforesaid as also the Jurors aforesaid, and the jurors aforesaid being agreed upon a verdict, and upon their oath aforesaid say, they find the said defendant guilty of Murder in the first degree, as charged in the said indictment.

Monday March 28th 1864.

The State of Missouri. }
vs. } on Indictment for Murder in the 1st degree.
no. 2. James Franey. }

Motion for a new trial filed by the Counsel of the defendant.

Tuesday April 19. 1864.

The State of Missouri. }
vs. } On Indictment for Murder in the First degree.
no. 2. James Franey. }

New trial, Refused

Now again Comes the Circuit attorney who prosecutes for the State, and the said defendant is brought into Court, and thereupon the Court here having duly heard and Considered the defendants motion for a new trial herein, and being thereof fully advised doth order that the same be overruled.

Thursday April 21st 1864.

The State of Missouri }
vs. } On Indictment for Murder in the first degree
no. 2. James Franey. }

By leave of Court, the defendant by his Counsel files a motion in arrest of judgment herein.

Friday April 22d 1864

The State of Missouri }
v. } On Indictment for Murder in the first degree
James Franey }

No. 2.

Now again 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 in arrest of judgment herein, and being thereof fully advised doth order that the same be overruled;

Motion in arrest overruld.

Judgment.

Thereupon the said defendant being demanded by the Court, if he hath or knoweth anything to say, why the Court should not here now proceed to pass sentence of death upon him in accordance with the verdict rendered against him, and having nothing to say except that which he hath before said. Therefore it is Considered by the Court, that the said defendant James Franey be taken from this Court to the place from whence he Came, there to remain until Friday the tenth day of June 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 three o'clock in the afternoon of said day be hanged by the Neck until he be dead: and it is further directed by the Court, that the Clerk of this Court make out a Warrant Commanding the County Marshal to Carry this sentence into execution.

Thursday April 28th 1864.

The State of Missouri }
v. } On Indictment for Murder in the first degree
James Franey. }

no. 2.

Appeal Granted.

Now Comes the defendant and prays an Appeal to the Supreme Court from the judgment of this Court rendered against him, and the Court here being of opinion, that

there is probable Cause for said appeal, doth grant the same, and on motion — days time is given the defendant to file his bill of exceptions herein.

Wednesday May 25. 1864.

The State of Missouri
v.
James Franey. } On Indictment for Murder in the first degree.

no. 2.

Bill of Exceptions filed by Consent.

Bill of Exceptions

Which Bill of Exceptions, is in the words and figures following, to wit:

The State of Missouri. } In the St Louis Criminal Court.
March Term. 1864. St. Louis County.
v.
James Franey. } On Indictment for Murder in the first degree.

no. 2.

Be it Remembered that on the Calling of the above entitled Cause for trial, which was on the Sixteenth day of March eighteen hundred and Sixty four. the defendant by his Counsel, moved the Court to quash the indictment herein for the following reasons, set down in writing, to wit:

Motion to Quash

..... The defendant moves the Court to quash the indictment in the above Styled Cause for the reasons following:

1st. Because the Indictment is not written in English words as by law it should be written.

2d. Because the indictment is defective, faulty and insufficient in law in this; that it does not charge the offence of Murder with sufficient legal technical and artificial Certainty.

3rd. Because the indictment Contains the character "&", which the pleader who drew and the grand Jury who found it, have

Substituted in the place of the particle "And", in several parts of the indictment where the said particle "And" is legally necessary to be used to make the Charge in the said indictment good and sufficient in law, to make the defendant punishable even if the evidence to be offerred in the Cause be in all respects sufficient to warrant a Conviction,

4th And especially because the said Character is substituted for the said particle and after the word "premeditatedly" and before the words, "of his malice aforethought", and between the word "powder" and the words "one leaden bullet", and between the words "penetrate" and the word "wound", and also between the word "discharge" and the word "Shoot", and between the word "discharged" and the word "Shot", and between the word "Kill" and the word "Murder" and between the word "then" and the word "there" in several lines and parts of the said indictment.

Davis & Evans (an) McBride. attorneys for deft.

Which motion to quash the indictment, the Court overruled and the defendant then and there excepted.

Challenges. John C. Albring, a regular venire man, was Called and Sworn on his voire dire, and said that he had resided in this Country Seventeen years, Could read English newspapers, but Could not read sufficiently well english writing nor Could not write english, and would like to sit as a juror very well, but thought that he did not know english enough to try a Case of this kind, knew English enough to do business as a porter, where American is spoken, never was in a Court before this week, never sat on a Jury, never was in a Justice's Court, was then a porter in an American house,

The said Albring upon being examined in Chief by State

had said already that he spoke and understood the english language, and throughout his examination by the State and defence, answered readily in the english language, all questions propounded to him, and upon being examined by the Court as to his knowledge of speaking and understanding said language, answered and understood readily all questions so propounded to him and spoke well the english language.

The defendant Challenged the above named venire man for Cause, that he was not qualified to sit as a juror in the Case, for not understanding and knowing sufficiently the english language; but the Court disallowed said Challenge and the defendant then and there excepted to the decision of the Court and then Challenged said venire man peremptorily.

Challenge (Ryan.)

On the eighteenth day of March eighteen hundred and sixty four. Michael Ryan, a venire man, who had been elected and accepted by the State and defence on the Sixteenth day of March, to be a juror in said Cause was, at his request and instance of the State, and without the Consent and against the will of defendant discharged by the Court upon the ground that he was not a Citizen of the United States but an unnaturalized Irishman, on his oath, he demanded to be excused and discharged from the jury for the reason just stated; he nor no one of the venire men already elected by both sides, had as yet been sworn nor Charged as jurors to try said Cause.

And the selecting of twelve venire men to act as jurors in the Case, occupied from the said Sixteenth day to the said eighteenth day of march eighteen hundred and sixty four, on which

last day the State having yet left, three peremptory Challenges; before said twelve venire men were Sworn and Charged to try said Cause, (and not yet jurors) but had been accepted and Chosen both by the State and defendant to try said Cause, the State through the Circuit Attorney Challenged peremptorily two of said venire men. viz: Peter Foster and Robert H. Ross and asked that they might be discharged from said Case,

Challenge (Foster) and (Ross)

The defendant objected to the State so challenging said two venire men and objected to their being so discharged, — but the Court overruled the objection of defendant, and the defendant then and there excepted to the ruling of the Court, and said two venire men weresdischarged from said Cause

The Court proceeded with the selecting of other venire men to fill up the full number which occupied to the Nineteenth of March, on which day, the defendant not having yet exhausted his twenty peremptory challenges, peremptorily challenged two venire men. viz: William H. Taylor and William T. Gay, who had been accepted and elected to try said Cause, both by the State and defendant between the sixteenth and Seventeenth day of march eighteen hundred and sixty four, and they were accordingly discharged from said Cause upon said peremptory challenge of defendant.

Challenge (Taylor) and (Gay)

The State then introduced Thomas O'Donnell, who being duly sworn, testified as follows:

Testimony of for State.

I live in Hannibal, Missouri, and am a journeyman tailor; I knew John Minihan for about three years before he died, I knew James Franey seven years ago, I went to Hannibal on the Sixteenth of October last (1863)

O'Donnell

Iresided at St. Louis before that time, when I Catch Cold I Cannot hear well; I worked at the tailors bueiness when I was here. I was not working at all on the eighth day of August last; I was sick, I remember the time Minihan was killed, I was in Thomas Roach's saloon No 72 Cheenut Street, between Third and Fourth Streets on the south side where he was killed; I know the alley near the saloon, I never noticed but one alley to get out of that house, it leads in by the side of the house; I know Kennetts building, and the alley between it and Coyne's, it is a public alley, the buildings are very high, at the time of deceased's death he boarded at Roach's, the same place where he was killed. I do not know exactly where defendant boarded, some where on St. Charles Street, deceased and defendant were journeymen tailors; defendant and deceased were working in Kennetts building, up stairs, pretty high up; this building is next west of this public alley on Cheenut Street, and second house west of Roach's; this Killing took place very near three (3) o'clock in the afternoon about the tenth day of August 1863. in Saint Louis County; at that time I lived on Ninth street and Geyer avenue; I Came up town about two o'clock that afternoon and was going up to Kennetts building, where I usually worked, and having been sick two or three months before, and the stairs to go up being very long, the room being very high up, I sat down on the steps on the sidewalk leading up stairs; I rested there about three or four minutes; my head was down and my hands on my knees, James Haney came close by me, and asked me how I did. and shook hands with me, I said I am well I thank you, how do you get along Jim? He spoke and said I wish you had been here two hours ago; I asked him if there was any thing up. he said yes!

O'Donnell.

that black son of a bitch Minihin called him a fop; - so he commenced to tell me what happened him in the City in the forenoon. - He said they went into a saloon in the forenoon, Minihin, Potinger, himself and some more persons; they went in to take a drink together; they had some drinks together and treated one another. - Franey said that Minihin asked him for the loan of two dollars till he would go to the shop; Potinger said there was a negro in the crowd and he, Franey, said, if there was a negro in the crowd he would give him no money; He said Minihin made sixteen dollars the week before and ought to have some of it then; he then said to me that Minihan had insulted him upstairs in the shop that morning and Franey said then to me if he don't fight me I'll shoot the head off the damned black son of a bitch. - I told him, Minihin and him were friends of mine and that whatever happened in a beer saloon he ought to let pass; he said he was a little excited; I said I had nothing to say on either side. With that, James Maloney came down stairs, he worked in the same shop with Franey and deceased, he said, Jim I will see nobody impose on you. - I put one foot on one step, to go up stairs, when Patrick Evans who was sitting on one side of the step at Tom Roach's saloon close by the door thereof, pointed his finger at me to come down there. - I was going down, when he came up to meet me. - He said, Mr O'Donnell will you take a glass of beer? I said I did not come for any at that time. - He asked me if I would take a cigar? - I said Yes; so I walked slowly towards Roach's saloon

O'Donnell.

door and Mr Franey walked slowly towards the same place as I thought but Mr Evans and he turned back and left me, so I went in to Tom Roach's saloon and saw John Minihin sitting with Mike McDonald on a box or trunk, I cant say which, in the saloon.— I said Minihin you ought to be at work, he said he would go work in an hour or two; with that James Franey opened the door and came into the saloon and Patrick Evans came in too before the door was closed.— Franey walked up with his hands in his pockets and asked Minihin, if he didn't call him a fop up stairs, + supoing if I did, says Minihin, did that hurt you? You son of a bitch, said Franey, I am a better man than you are. Franey said he would fight him for one hundred dollars.— Minihin made answer and said he had no money Franey then said, he would fight him for fifty dollars.— Franey then said he would lend him ten dollars and would fight him for it.— he said something else about the size of the ring but I cant remember.

Minihan said, for God's sake let me be, You are too small a man for me to fight.— Franey said I am a better man than you are; so with that Minihin got up and Franey was standing close by him I went over and put a hand to them, like that, to put them apart, and said for God's sake, you are both friends of mine and I dont want you to quarrel; so Minihin sat down, and James Franey and I went a little to one side, say two or three feet, and I said Jim, you are a

C Donnell

friend of mine and you had better keep still and he said Yes, Tom, so I walked around close by the door I did not go out; I saw Franey coming back to the same place, where Minihin was sitting down and he said to deceased, you son of a bitch, I am a better man than you are; so Minihan got up and was taking off his coat when Franey kicked at him; Minihan let his coat remain on his body and made a slap at Franey's head or face with his open hand, so they were, both facing each other standing about the middle of the floor and Franey kept his hands in his pocket all the time, one in each pantaloon pocket; I saw him pull a pistol out of his right hand pantaloon pocket; I said Jim dont shoot him and the first I heard or saw was the report of the pistol, and after deceased was shot, he bent forward, He said to me Thomas I am shot, and kicked at Franey with his left foot after he was shot. — And I saw Franey's hand shake like he was going to shoot at him again, and I ran and caught him, Franey, by the shirt collar and caught the pistol with my right; I pushed him back against a chair that was there, the chair fell and he tipped over it and came down, I thought he was trying to shoot at me, but I could not say positively that he was. — James Malaney was in the house at this time; he ran up and kicked me in the side, I fell on one of my knees, when he kicked me again; I was in dread and held on to the pistol and took it

O'Donnell.

away from Franey and put it into my pocket.— The side door was open and I ran out in the alley way to call a policeman, At the time I ran out there was a door in the alley I could not open, so I ran back again and then I saw John Minihan have Franey down in the alley, some men and women jumped out of the saloon over Minihin and Franey and I saw James Malaney kick Minihan in the side, so I catched him by the collar and pulled him back and I told them they were beating a dead man and Mallaney said when I pulled him back that he had it in for me, that is to say malice.— There were two strange men there, who caught me by my arms.— Malaney said he would break my testicles and commenced to kick at me, he made two kicks at me when I got my right arm free and put my hand in my pocket.— I pulled a pistol out of my pocket, the same I took from Franey.— I struck Malaney with the butt end of it as he made a kick at me, he went away and I put the pistol back in my pocket.— So the first thing I next noticed was Patk. Evans struck at me and two fellows I did not know had me by the hair of my head.— I hollowed out to let me go, and save the man that was shot, so I got away, and went up the alley where Minihin and Franey were.— Minihin was lying on his face and hands in the alley.— I saw Franey, I thought he was sitting down at the time, cant say exactly, he had hold of

Minihin's Coat tail.- I caught him by the collar and said get out and I think I struck him in the face or head but, I know I struck him.—

A person then came up and arrested me and I just kept still.- Minihin called on Pat Evans to lift him and said my leg is broke; Evans helped him up against the fence and when Evans took his hands from Minihin, he fell down again on the alley.- The officer took me down to the police office.- I saw Patrick Evans there, Mike McDonald and James Franey; we were all ordered to go home except Franey and when I went to leave there, I took the pistol out of my pocket and gave it to them and said to the officer, that is the pistol Franey shot the man with and Franey said "that's all right Thomas"- When I saw the officer arrest Franey before I went to the station house I saw said officer pull a big bowie knife like this one here in Court out of Franey's pocket, breast and inside pocket left side- I saw the officer when we got out taking the knife out of Franey's pocket- Don't know whether that is the knife or not, (It is admitted that at the revolver here in Court is the pistol spoken of by witness.—

Minihin died about twelve o'clock at night, it was the same night he was shot; he died at the sisters Hospital.- I saw the hole that was made in his body; all this happened in St. Louis County.- John Minahan is his

O'Donnell

name; this is all I know"; I did not see anything angry in Minihans manner when he said "you are too small a man for me to fight"; deceased was sitting down when he so spoke; Franey kicked at Minihan before he deceased attempted to take off his Coat. Minihan was an Irishman; Don't know what was meant by a Nigger in the Crowd; I Could not see whether Minihan touched Franey or not when he slapped at him.

Cross-examined on the part of Defendant.

I am friendly to the defendant. I have always been so, I never said to any body that I intended to hang the defendant; I know a Gentleman of the name of Stretch, a tailor; I got acquainted with him last Summer some time, dont know his first name; I don't know of what Country Stretch is; I have dined there about two months ago; the last time I was here I dined with him at his own house; his wife was there and some other lady; I saw two ladies there; I did not tell them, I intended to hang the defendant; I said my testimony was enough to hang him; I did not tell Mr Strecht at that time that I would sell my Coat to get means to hang him (defendant.) He, Stretch and I were talking the same day on the side walk, I did not tell Stretch I would hang the defendant; I said I would sell my Shirt to get money to Come down and give evidence in the Case; I never said I would sell my Shirt to get money to Come down to hang the defendant; I said this. (I would sell my Shirt to get money to Come down and give evidence in the Case) because it had been said, that I had been bought off to leave St. Louis, and I wanted to Show to the people of the City that I was not bought off, nor Could not be bought off. I never said I would sell my Shirt or Coat to get money to Come down to give evidence to

hang the defendant; I saw John Murphy at his own house and had Conversation with him; I never talked to him about this matter to my knowledge; I never, that I know of, talked about the Killing of Minihan; I never to my knowledge talked to him about the evidence I would give in this Cause; I never talked to any body in his hearing about the evidence I would give in this Cause; I don't think I ever talked to Mr Stretch in the hearing of Murphy about the evidence I would give in this Cause; I dont think I talked with Stretch at the bar-room where we took a drink in the hearing of Murphy about the evidence I would give in this Cause; I never said at the bar-room where we took a drink, to Mr Stretch, in the hearing of Murphy, that I would sell my Shirt or Coat to get money to Come to St. Louis, to give evidence against the defendant to hang him; I never said to Mr Stretch at his house at dinner, so help me God, I would hang this defendant; Nobody paid me anything for Coming here to give evidence; I was Subpoenaed at Hannibal, I live in Hannibal 168 miles by river; I Came by the Cars; the Sheriff gave me the subpoena; I told the States attorney I expected mileage; I Stayed here five days; John Goggin and many others said they had heard I was bought off to go to Hannibal

Re-Examined by the Circuit Attorney.

I was Sworn and put under bond to Come here as a witness in this Case; I have been informed of the fact, that if I Came here to testify I would be killed.

Testimony of

The State, next introduced on its behalf Dr Elisha Gregory, who being duly Sworn, testified as follows:

Dr Gregory

I am professor of anatomy at Pope's College; I remember John Minihan. he is dead. he died at the Sister Hospital. I dont remember the date of his death, it was in hot weather; I saw him in his life time, after he was wounded, I then examined him, when I first saw him he had a wound in his abdomen and was almost pulseless, the abdomen is commonly called belly; It was a gun shot wound or pistol wound; I stimulated him only, he died in a few hours after I visited him, I suppose I gave him opiates; I held a post mortem examination upon him after he was dead; the ball penetrated his bowels, wounding one of the principle vessels in the abdomen; I dont think I found the ball; I did not look after it; If I noted the direction the ball had taken I have forgotten it; the injuries were very palpable.—

The wound was necessarily mortal; but the immediate cause of death was, hemmorage internal, which was caused by the wound.—The wound produced death.—It occurs to me that his leg was broken.—

The bullet that made the wound was small.—I suppose the bullet would fit that pistol here in court, it was a very small hole.—

all this was in St Louis City and County

Cross Examined on the part of the defendant.—There was but one wound on the person of the deceased and was made by a pistol shot.—

Testimony of

The State next introduced Michael McDonald, who being duly sworn testified as follows:—

I am now working at Barnums Hotel; I was acquainted with both Minihan and defendant; I remember the shooting of Minihan.— I was sitting by Minihan on a goods box in the Saloon, and Franey came in and said, you called me a fop up stairs in the back Shop; Franey came over to him and said, you son of a gun I will fight you.— Minihan got up and said he could not insult him, and Thomas O'Donnell told them for Gods sake to have nothing to do with with each other, they were both friends of Thomas O'Donnell.— Franey at that said to Minihan put on your Coat you Son of a Gun, and Minihan put his Coat on and sat down again on the box. Then Franey walked around about the room and came back again and called Minihan a son of a bitch, that he would fight him for some money; dont know how much; and Minihan got up and said he would fight him in Lincoln's name,— they both walked about the Bar room and I saw no strokes.— And Franey pulled a pistol out of the right hand pocket of his pantaloons and then he pointed and levelled it at Minihan. Then Minihan bent forward like that (stooping from the belly) and Franey fell across a chair behind him.— That is all Sir, that I saw.—

I heard the report of a pistol.— I heard the

report just before Minihan bent himself forward and after Franey had pulled out the pistol.- I did not see what took place in the Alley.- I went and got the police; I know nothing else. Franey was walking round the bar room with his hands in his pocket ahead of deceased, deceased walking behind him; they were walking about there quarrelling, and Franey pulled out the pistol, leveled it at him and fired.

Cross-Examined on behalf of the defendant; I had been in the Saloon fifteen or sixteen minutes before I saw Franey; I found Minihan in the Saloon when I went there; He was doing nothing; I took a drink, I can't say with whom; I cannot say how many times I drank; I was only a day or so out of business at that time; I donot know any body who was there besides Thomas O'Donnell.- I had known him three or four years.- I was in the Saloon a few minutes before Thomas came in.- I sat there on the box all the time Thomas O'Donnell was there;- Minihan was a stout man, a great deal larger than defendant; I dont know whether Minihan was an older man than defendant or not.—

Minihan did not say a word while he was taking off his coat; I never saw a fight in the whole course of my life either at home or abroad.- I did not see Minihan square

himself off at the defendant; Minihan did not have his coat entirely off; he did not have a sleeve off; he only made an effort to take it off; Minihan said he could not insult him in his boarding house and he got off the box and then commenced taking off his coat, and he did that because Franey insulted him; I do not know if Minihan intended to fight or not; Minihan did not follow Franey through the bar, but they walked around through the bar; I watched the two going around the bar; this was after Franey had called deceased a son of a bitch; the shooting took place somewhere towards the back end of the counter, not by the box; I do not know if they had been drinking anything that day; Minihan was not drunk that day; I did not see Minihan strike Franey nor Franey strike Minihan; I cannot tell how many minutes Franey and Minihan were walking around the barroom; I could not say whether deceased's manner was like a dog when he commences to snarl; It was when Minihan said he would fight in Lincoln's name that he walked around the barroom with Franey; I did not heed them more particularly than I heed dogs and men; I did not see Franey do anything to Minihan except what I have told you.—

Testimony of John Goggin

The State next introduced as a witness John Goggin who testified as follows:

I am a tailor, I know Franey and I knew Minihan; I am and was last August boss of the Kennett building tailor shop; Franey worked there last August and so did Minihan; I remember the difficulty on the tenth day of last August in the morning.- James Franey was sitting at his work about ten o'clock and John Minihan came in and demanded of James Franey why he called him a nigger; James Franey said that he did not call him a nigger, and Minihan said, that he was a liar and he could prove it, that he did call him a nigger; and said Minihan to Franey, I asked you for a loan of a dollar or two, till I went to the shop, and I believe said Minihan, you were going to give me the money when Pottinger caught you by the ~~arm~~ elbow, and said at the same time, there was a nagger in the crowd; Minihan then said to Franey you said you did not want to have anything to do with a nigger as Minihan made two coats last week.- Franey said to Minihan, why do you come and accuse me; why do you not accuse the other man Pottinger?- Minihan said he did not want to have anything to do with a cripple, Pottinger was lame; Franey got off the board

where he was sitting at work and put on his boots and said he could whip him in twenty minutes and offered to fight him in a twenty four feet ring for one hundred and fifty dollars. Minihan said he did not want to go into a twenty four foot ring but any part of the United States would do him; that he had no money; and that if he had money with him, he Franey would not have insulted him; Minihan said I've got no money to fight you.— Franey said he would fight him for less than one hundred and fifty; and said he would fight him for ten dollars and give him the money; I then told them if they had difficulties, they must settle them outside of the shop; Franey sat down to his work and both said they would have no difficulty in my shop; Franey said to Minihan I am in a hurry with this job, I want to get it through, I dont want to borrow money from you or loan you any money says Franey and I wish you would let me alone;— said Minihan, if you are in a hurry with that job, I'll help you out of the drag (that is help you to get through with the job,) but, said Minihan, I suppose my workmanship wouldnt suit you; I don't believe it would, said Franey, and Minihan said he was a better tailor than Franey; Franey said he believed not; and that he

Goggin. Cont?

did not have the capacity of a gentleman like him, Franey. I suppose not says Minihan, as I am not a conceited fop like you, Franey said you are nothing but a bloody louse any how; Franey said do not bother me as I want to get through with my job, stating at the same time he would rather not have anything to do with him or borrow or loan money to him; Minihan said he never asked him but once for the loan of money and would not again; he said he thought there was no difference between journeymen tailors, which one had the money; Minihan said he was under a compliment to Franey for two treats and had the money now to pay it back if he would accept; Franey declined to go with him; Minihan then asked any man in the shop to come out and have a drink; He left the shop with two others Pat Evans and Lorenzo.

Franey remained at his work after Minihan left, for some time; when he left his job one side and said at the same time, that he would prepare himself to meet that fellow and if he would not fight him in ten minutes, by Christ he would kill him. — I told Franey not to have anything to do with him, Minihan, as he had left the shop, and to finish that job, he said he did not care about that job so he left the shop. —

That is all the conversation that I heard; I heard a pistol shot after dinner about two o'clock; I was then at work at the window; I went down stairs to Rochs after I heard the pistol shot, and saw Mini-

han prostrate in the Alley and saw him taken up stairs; Franey left the shop about twenty minutes after Minihan, Pat Evans and Lorenzo left, it was about eleven O'clock when Franey left; I don't know anything about the bowie knife and pistol, I never saw them; that's all I know. — I never knew the defendant to have any pistols or knives. —

Cross-Examined on the part of the defendant. — I first saw James Franey in December, Eighteen hundred and sixty one. — I have known him ever since that time intimately. — I never heard anything against Mr Franey as a Gentleman or as a peaceable man. — I got acquainted with Minihan 23d July last; I was well acquainted with him from the time I made his acquaintance down to the time of his unfortunate death; He was about thirty five years old at the time of his death; He was a good deal larger man than the defendant, he was I guess about five feet Eleven inches in heighth; He was a good deal stronger man than Franey and was apparently in good health at the time of the difficulty; I do not know whether deceased and defendant had been together that morning before deceased came into the shop. — They seemed to talk sensibly enough. They might have been drinking I don't know it, except from what they said; Minihan worked hard; Minihan and Franey apeared to be sober.

28.

Testimony of

The State next introduced as a witness Alexander Cutler, who first being duly sworn testified as follows:

I work in Bogy's nail Mill in the lower part of the City; I worked there last August; I remember to have heard of the matter; Mr O'Donnell and myself came up together, I was going to the Post Office to put therein two letters it was a pretty warm day and Thomas O'Donnell asked me to sit down at the steps that go up to Goggins shop in Kennett's building to rest ourselves; While we were sitting there Franey came up and shook hands with Mr O'Donnell and said I wish you had been here about two hours ago; and O'Donnell said what's up Franey? and Franey said that Black son of a bitch insulted me in the shop; O'Donnell said it is no use to mind that, Jim, it is only a beer scrape Franey said I am going to shoot the head off the damned black son of a bitch and if I do not do that I am no Irishman. – Then he said he would fight him for fifty dollars and if he had no money he would lend ten dollars to him and fight him for it. – That is all I can state, I went to the Post Office, after that and staid about five minutes and came back to Roachs and heard of the occurrance. – Franey and Malany started off together. – I did not pay much attention to them; that is all I know, the Post Office is about a couple of squares from Goggins

shop.-

Cross-Examined on part of the dependent I was not before the Coroner; I have lived in St Louis a year; I first made the acquaintance of Mr O'Donnell in Galena Illinois two years ago next April, he was then at Libkarts; I have seen Mr O'Donnell to day; I have had no conversation with him in regard to this matter at all; I was as well that day as this day; Mr O'Donnell was pretty sick at that time; He had no breath hardly; I had been up those stairs before, this was the second or third time I was on those steps; I had been up before to the place to see O'Donnell, I do not pretend to be able to state any recollection about faces; I never saw Mr Goggin in ~~there~~ there. I saw Mr Goggin about a week before that, down on St Charles Street at a big house No 43; I never told any body at all down what I knew in this case; Two men came and subpoena'd me last week; O'Donnell was the only one knew what I knew about it; I did not converse with O'Donnell about it; O'Donnell never said anything to me about the case; the first I knew about being a witness in this case was last Thursday; I was standing right there last Thursday (pointing to a spot in the court room) I only stopped in that day; I had no work on that day; I work at the rolling Mill boiling Iron; I fell in accidentally that day, and did not know that the court was sitting

Cutler Cont'd

or that Franey's case was for trial that day; I was not at the Police Office; O'Donnell told me he was at the Police Office and he told me he would give a hundred dollars to be out of it. — He said if he could get off for a hundred or two hundred dollars he would not appear in the case, as Franey was a friend of his; He never told me he would sell his shirt from his back to get money to come down. — Well no one coaxed me to come here to testify that is sure; I came up here and walked in that is all I can tell; I still adhere to the statement, that it was a mere accident that I got into Court; I did not know that the trial had commenced that morning. — I knew it was to take place in that week, but did not know what day; I did not swear that I did not know that the court was sitting when I came in; I could not tell whether I heard that you had been trying to get a Jury; I was up around the Court House, I heard a good many say Franey's case is about to come off and they are trying to get a Jury; I heard this down at the steps the same morning I came up here; I did not swear that I did not know that the trial was going on till I was subpoenaed. —

Mr O'Donnell did not agree to give me any thing for coming here to bolster him, nor no other man; I never spoke to James Franey in my life. — I never saw him before nor since

that day, till I saw him in Court; He had on a brown coat but I cant say what sort; I cannot say whether he had a Hat or a Cap on his head; I did not observe his feet, did not look at any of his clothes at all; It was about half past two o'clock when we went to the steps and sat down; I suppose we sat there two or three minutes before any one came; I was there about five minutes after the gentleman went away; I went to the Post Office and put in two letters, one addressed to my Mother, Elizabeth Cutler, Pittsburg, Pa; and one addressed to my brother, Jakob Cutler Pittsburg Pa; I dont know the day of the week or month on which it took place; I do not know whether I had work that day or the day before; I could not say whether it was Monday or Tuesday; It must be three miles from where O'Donnell lives to Goggin's Shop; we rested once or twice; once at Poplar Street; we did not stop anywhere to get refreshments; I did not drink at all that day; I never communicated what I would swear to, here, to any person; I am not the father of a family; I was born in Maryland; I was not born in Ireland.—

This was all the Evidence offered by the state.

The Defendant on his behalf introduced as a Witness

Testimony of James B. Stretch, who being duly sworn testified as follows:—

Jas P. Stretch

I am a tailor by trade; I have been in that business about sixteen years and have resided in this City about five years; I have been engaged in my trade during my residence here; I have known James Graney somewhere about two years by having been associated in the trade; I know Thomas O'Donnell who is also a tailor; I never knew him until after the last continuance of this cause; Mr O'Donnell introduced himself to me in Mr Goggins Shop; Mr O'Donnell then walked with me from Mr Goggins Shop to the corner of sixth and chesnut street; as near as I can recollect it was the second day after the last continuance of the cause; no one was with us; He went with me into a beer saloon at the corner of sixth and chesnut streets; this was the first place; He also went with me into John Murphys on Biddle Street near Seventh; it was between Eleven and twelve O'clock the same day; We went into a saloon underneath where Mr Murphy lives. He was with me at my house that day after twelve O'clock; my wife and another lady were present while he was at my house; I forget the ladys name; O'Donnell remained at my house one hour and a half, probably a little more, he never was at my house before or since that time; I had a conversation with him in relation to the testimony he would give; I had a conversation with him as to what he would swear, while going up from Goggins to the corner

of Chesnut and Sixth Street; Mr O'Donnell commenced the conversation; Mr O'Donnell said that he came from Cannibal as a witness against James Franey, saying, deceased was a friend of his for for several years; He told me, they had been in the army together; He said he would give evidence sufficient to hang him, and that he would hang him so help him his god; It was on the road between sixth, and Chesnut Streets and Biddle Street, where he made similar expressions twice after; Mr O'Donnell said no matter even where he was, even if in hell, if it were possible to get out, he would come to prosecute and would sell his shirt from his back to get money to come to prosecute him; It was as I was going up to my house that he said, this last language, it was previous to his coming to William Morans and between Murphy's and William Morans that he used this last language; In speaking again of Franey at my house, he said in less harsh language, that the evidence he would give would hang Franey. — In the Barroom O'Donnell said he could give evidence to hang Franey, he made use of "hanging" very often, and he also said in the barroom that it was reported that he had received money for a bribe, but it was not so; that as for money, he could sell his shirt to get money; Murphy was standing by at

Mr Stretch Cont.d

this time.— He talked a good deal; I cannot remember all he said.— Mr Murphy was standing by at one time.— We were in the act of taking a glass of beer at the time.— Mr Murphy spoke to him about Franey and said in these words: "The thing is done now and there is no use in hanging Franey, it won't better it; the O'Donnell said I have no ill feeling towards Franey, but my evidence will do it; I do not recollect any other words that he used in the hearing of Murphy; I am a native of Ireland from Ross Common; I was baptised in Ireland and brought up in the Catholic Church and am still in that Church; I do not belong to any other Church; Mr O'Donnell said he would come out of Hell if he could, to hang Franey because the other man was his friend; Defendants reputation here and elsewhere is good for peaceableness; it is good in all senses as a man and a gentleman.—

Cross-Examined on behalf of the state:—

I have given the words spoken by O'Donnell to me, to all that have asked me; I have a pretty good memory; I was not engaged in trying to get O'Donnell out of the way so as to keep him from testifying in this case; I was not wishing

all the time that O'Donnell would not come here to testify, I have not been engaged either directly or indirectly in trying to keep O'Donnell away from testifying; I have not been engaged in the spying and "pumping" business, I have always inquired after facts, but not engaged by persons so to do; I have not acted as a spy in this case nor in any case; the word "pumping" I do not understand; I am naturally of an inquiring disposition; I have not a particle of interest in this case; I think I have a good memory; I do not think that I remember every thing that passed by; I swear that on the very day Murphy and I spoke to O'Donnell, we were not trying to get O'Donnell away or prevent him from testifying.—

There was at one time a subscription taken up to supply necessaries for defendant to which I subscribed; I also subscribed and paid money for the burying of Minihan. I tried to collect money for Franey in Chicago but it fell through.—There was a ball got up here to get money for Franey; I paid one dollar towards it; I have not promised money to any body in case he should be cleared.—I have been to see him in Jail two or three times.—I have always taken an active part in subscribing in favor of any person that I thought needed it, if I thought him innocent; I never said

Mr Stretch Cont.

in Chicago that he was guilty, I would be glad to have the defendant acquitted by truthful evidence; I never asked the witness O'Donnell to tell me about the case; I cannot say that I can recollect all the words I heard.— The first conversation was on sixth street between Chesnut and Biddle, he said, Mr Stretch my evidence is sufficient to hang him and I will hang him, so help me or my God; I cannot say whether it was so help me or my God; he said either Mr Stretch or Stretch, I will swear he said Stretch, He said I know sufficient or I have sufficient evidence to hang him and I will, so help me or my God, outside of the words me or my God, and the word My; I remember the words I have given; He also said he had to swear to the truth, and that his evidence would hang him; he said I know enough, and I have sufficient evidence to hang him, and I will hang him so help me or my God! He also said several times that his testimony would hang him, but he had to tell the truth, but that the truth would hang him.— The last and next conversation was in the barroom beneath Murphy's residence; Murphy said whats the use of hanging Franey, now; were all taking a glass; O'Donnell said my evidence will be sufficient to hang him; He said something had been said about his being bribed to go away; he said he was too much of a man to do that.

if I had to sell my shirt off my back to ame I would do it, I myself told him that I had heard he had received five hundred dollars to stay away; That was principally all he said in the barroom to Murphy.— I was present I believe all the time that O Donnell was with Murphy; I think I had occasion to go out once from the barroom.— I recollect now I went out through a door; He only once said he would hang Feaney so help him God.—

The defendant next introduced on his behalf

Testimony of John Murphy, who being duly sworn testified as follows:—

I reside at No. sixty, Biddle street.— I have known the defendant about a year and a half, I have known Thomas O Donnell, a tailor, for about a year ago this Spring; It was at a Tailors meeting I made O Donnells acquaintance, While he was in town I have known him; he has been since, in Hannibal, Mr O'Donnell has never been at my house but once, He came in company with Mr Stretch, the time he came from Hannibal when Mr Feaney was to be tried before, He remained at my house twelve or fifteen minutes;— Down stairs in the Barroom we took something to drink, there were three of us, Stretch, O Donnell and me.— I had no conversation with O Donnell

Mr. Murphy cont'd

as to the evidence he would give on the trial of the case, We talked about coming down, I was working all the time, except when O'Donnell drank the beer, I did not pay attention to what Stretch and O'Donnell were saying; They were talking something about the evidence O'Donnell was to give; If there was a reply made I guess I would have heard it. — I asked about a young man I was acquainted with; I asked O'Donnell how many members of the tailors society they had at Chicago and if he was a member, he said, Yes; This conversation occurred in my Room and not in the Bar Room when they were going away I went down and treated in the bar-room; I believe that they went to Mr Stretch's house; They seemed to be going there. — I mentioned Franey, because, I knew he, O'Donnell, came as a witness in the case. — I don't recollect what I asked. — I knew he was a witness in the case. — I recollect he was talking about the Franey case and he said he was as much a friend to Franey as to Minihan. — I am an Irishman by birth. — I was twelve or thirteen years old when I left Ireland. — I dont recollect all the conversation I was in a hurry about my business. — I had no conversation with O'Donnell about the testimony he would give in the cause, he said nothing in my hearing as to what he would swear. — I said to O'Donnell that there was no use hanging Franey now, because the other

man was dead; when I said that; I donot re-
member whether I was up stairs or down stairs
in the Bar Room, don't recollect whether
O'Donnell made any reply to that or any
body else; think this language of mine was
used up stairs and not in the bar; I can re-
collect things pretty well; Stretch, my boy, (nineteen
years old), O'Donnell and my wife were present,
no one else, cannot say if my wife was present;
my boy was sitting along side of me working. I talked last sunday to my boy about this being present
when O'Donnell and Stretch were at my house; last
Sunday my boy and myself were at Stretch's, and
Stretch and I were talking together about this
matter; I donot recollect of O'Donnell saying that
his testimony would hang Franey or that he
knew enough to hang Franey; I donot remem-
ber O'Donnell saying the cause of his coming;
Stretch and O'Donnell were talking about
the matter of being a witness; if there had been
any reply made by O'Donnell such as he hang-
ing defendant or his testimony hanging defend-
ant, I think I should have heard it; if any
such reply had been made I should have heard
it; I donot think any reply was made; cannot
say positively; Stretch and O'Donnell were talking
about Hannibal and the Finian brotherhood; I do
not know how Franey's name came to be mentioned,
there was hardly any thing said about the Fra-
ney case; I recollect O'Donnell saying he was as
much a friend of Franey as Minihan.—

No Cross Examination —.

Testimony of

The Defendant next introduced on his behalf Lewis S. Jourdan, who being duly sworn testified as follows:—

I am a member of the legal profession. I have resided in St Louis since Eighteen hundred and fifty nine; I am a native of Virginia; I came directly from Ohio County; I know Franey; I have known him since the dificulty; Never saw him before to know him; It was about two O'Clock, I think it was the first days of August, just as I got into Roachs door way, I heard the report of a pistol, I looked into the Alley and saw Franey, O'Donnell and Minihan all in a lump fighting; O'Donnell had a pistol in his hand and struck Franey two or three times on the forehead, with the butt of the pistol.— I think officer Bates ordered me to assist; I took Franey with one hand and with the other I took O'Donnell; As soon as I caught hold of O'Donnell the deceased fell down, I am sure defendant did not return into the alley after we arrested Franey and O'Donnell.— The alley door was not fastened or locked; I had no difficulty in getting in, none whatever; I cannot be mistaken about O'Donnell beating Franey with a pistol.— They all appeared to me to be drunk.— There is no doubt in my mind of their being under the influence of liquor.— I should

say he, Franey, was well intoxicated; I think O'Donnell was intoxicated.- He acted so.- I cannot say they were drunk, because, I did not see them drink, but they looked and acted like they had been drinking

The defendant next introduced on his behalf

Testimony of Isaac Elworthy, who being duly sworn testified as follows:

I have resided in this City twelve years.- I am a tailor by trade.- I knew Minihan in Cairo one month or five weeks.-

The defendant by his counsel propounded to the witness the following question.- "Do you know what the character of deceased was for violence and blood thirstiness"

To the putting of which question the Circuit Attorney objected and the Court sustained the objection, and would not allow the question to be answered and the defendant duly excepted to the decission of the court.-

"The defendants counsel then offered to prove by this witness that the character of the deceased was that of a very violent and blood thirsty man and that the witness Isaac Elworthy made the defendant acquainted with the character of the deceased for violence and blood thirstiness before the deceased died, and before the fight took place which resulted in his death;" which was objected to by the Circuit Attorney, and was sustained by the Court, and the evidence was ruled out by the Court as incompetent, and the defendant then and there excepted to the

ruling of the Court. —

And the defendants Counsel offered to prove "that the deceased was a very violent and blood thirsty man" and that the witness made the defendant thoroughly acquainted with the fact, that he was so, violent and blood thirsty, and put the defendant on his guard against the deceased before the day on which the wound was inflicted upon the person of the deceased and of which he is supposed to have died". —

This offer was also objected to by the Circuit Attorney and the court sustained the objection, and excluded the evidence and the defendant duly excepted to the decision of the court by which this evidence was excluded. —

Testimony of William O'Connor

The defendant next introduced on his behalf William O'Connor, who stated that he knew Mr Franey and worked with Mr Franey about twelve months, knew his general character for peaceableness to be good.

The defendant ~~afterwards~~ proved by Adolph Filbert that his general character for peaceableness was good. He proved the same fact by James Montgomery who knew him well. — He proved by Warren Champlin that his character was good in all respects. — He made the like proof by David R Yates and Sampson O'Dell and a great many others. —

The depositions of two witnesses residing at Nashville, Tennessee, with the certificate of Governor Johnson of Tennessee, proving the good character of the defendant were read in evidence. —

Testimony of

The defendant next introduced as a witness Mrs Ann Stretch, who being duly sworn testified as follows:

I am the wife of James Stretch; I do not know James Franey; I know Thomas O'Donnell; I heard that he lived at Hannibal; It was on Friday he was at my house, I dont really know how long ago it is; he was there about two hours, it was in the afternoon after dinner; I got dinner for him. He said something about giving evidence against defendant while at my house, all I can remember is, that he said he would hang Mr Franey, if the law would; he said he would sell the shirt off his back to be here the time he was wanted; I do not remember any other expressions made use of by him; there was another lady in the house at the time; I really do not recollect the name, there was no other person there except my husband; my husband was there all the time O'Donnell came to the house with him, Mr O'Donnell and my husband conversed together while I was preparing dinner, so that I did not hear them; I was engaged in preparing dinner for Mr O'Donnell and my attention was fixed on that; I am certain Mr O'Donnell used those words; I cannot remember any other words that were used by O'Donnell; I told Mr O'Donnell he had'nt ought to use such words; I remember them because they made an impression on my mind; I am a native of Ireland, County Limerick; I was quite small when I left Ireland.

Cross-Examination by State

We then lived on O'Fallon street between Collins and Broadway; I have not a very good memory; I generally

recollect tolerably well; I have a pretty good memory; I dont know that there is any Change in my testimony, Concerning my memory; I understand the import or meaning of words; both of the expressions Concerning my memory are similar; I and my husband have talked about these words a few times, indeed several times since; one person spoke to me in the passage this morning, it was Mr. Wynn; Mr Gummersell also told me that I must Come and testify in this Case; I said I recollected only a few words; Those words were, that he, O'Donnell, would hang Mr Flaney if the law would do so; I am positive, I did not hear him say, his testimony would hang Flaney; I never heard him say, it was reported he was bought off, and he would sell his shirt to Come to prosecute Flaney; It might have been said, but I did not hear it; I felt uneasy about Coming here.

The Defendant next introduced as a witness Testimony of Franklin Woodall, who being duly sworn testified as follows:

I have been a police officer for two years past, I have known the defendant nearly two years; I was not present at the time Minihan was shot, but was there I suppose five or ten minutes afterwards; I saw the defendant and Minihan, but did not see O'Donnell there at the time, I arrested Mr Flaney; Flaney's face was bruised and skinned; He was in the alley or yard of Mr Roach, and was standing still; other persons were there who seemed to be in action; I did not see any fighting; Flaney seemed to be pretty drunk; When I arrested defendant I did not notice his Condition; after I got him to the Calaboose

I noticed his face Cut and Cheeks bruised, he seemed to be under the influence of liquor; face flushed without a hat and I remember his asking time to pick up his hat; I took him down and Committed him; I was present at the time the pistol was given up at the police office by O'Donnell; I do not recollect hearing defendant say "thats all right Thomas" at the time the pistol was handed up; He O'Donnell seemed to be excited by anger and he was talking a great deal; he was excited a great deal by anger, not by liquor at the time of so talking

The defendants Counsel offered to prove by this witness that when the witness O'Donnell gave up the pistol and defendant said "thats all right", as stated by the witness O'Donnell, defendant also said in the same Continued Conversation and as part thereof that the deceased Minihan had beaten him Cruelly, and that he shot him, while he was so beating defendant.

Which the Court did allow defendant to prove by said witness; but said witness Woodall went on and replied; "I do not remember what defendant said at the Police office; do not remember what Haney said at this time; I do not remember of defendants saying a word when the pistol was handed up; I do not remember his saying anything; I was searching him; defendant might have said something of the kind, as "thats all right, Thomas"; I was very much Confused."

Cross-Examination by Circuit Attorney.

Minihan's leg was broken and he was shot in the belly; I did not see any bruises about his face;

did not examine his body; I saw Minihan down in the alley, and a Crowd ran over him.

Re-examined.

I saw Minihan down in the alley and the Crowd ran over and I believe they broke his leg.

The Defendant, next introduced as a witness.

Testimony of William O'Connor, who being duly sworn testified as follows:

I was present and at work in Mr Goggin's Tailor's shop in the morning about ten o'clock, when Franey came in and sat down to work, it was not long afterwards when Minihan came in; Minihan seemed to be greatly excited and sat down by the side of Franey; this was the morning of the day on which Minihan was wounded; I did not pay much attention to them then, as I was working some angry words passed between them and Minehan accused Franey of calling him a nigger; I heard Minihan call Franey a fop or fup, and that he would break his face; Minihan threw off his Coat and Franey said damn you, if you will let me put on my boots I Can fight you, then Franey put on his boots, sat down and seemed afraid of Minihan

Cross-examination by the Circuit Attorney.

I was at one end of the Shop and they were pretty near the other end; the shop is pretty long; it takes pretty nearly all the building; only one room is taken off the length or depth of the building; the room has three windows front and is deeper than the room of the Court of Common Pleas, I was at the street end and they were at

the back alley end of the room; I was pressing at the time with a large "goose," and when we press we bring the goose down pretty hard, making Conciderable noise; some times I Can hear better than at others; I should not wonder but I have a little impediment in hearing; I dont always Catch the Sound of the voice; Mr Goggin was there.

Re-examined

I have no Constitutional defect in hearing; I did not tell the whole Conversation at the Shop as I was not asked, I am very sure that I heard what I have detailed to the jury.

This was all the evidence in the Case.

Whereupon the Case closed, and thereupon the Court on its own motion and at the request of the Circuit Attorney, instructed the Jury, as follows:

Instructions Given

The defendant James Franey is charged in the indictment with murder in the first degree, for having feloniously wilfully, deliberately, premeditatedly, and of his malice aforethought killed John Moynihan, by shooting him with a pistol.

By the word "Wilfully" is meant intentionally, purposely not accidentally.

By the word "Deliberately" is meant in Cool blood, that is not in a heat of passion Caused by a lawful provocation.

By the word "Premeditatedly" is meant thought of beforehand, any length of time however short.

By the words "Malice Aforethought" is meant, the wilful doing of an unlawful act without just Cause or lawful provocation.

"Passion", in law, means a heated State of the blood, Caused by a lawful provocation and nothing else, and unless there is a lawful provocation, there Cannot be any passion.

"Wilfulness", "Deliberation", "Premeditation" and "Malice aforethought", may be proved directly, or be inferred from the Circumstances Connected with the killing.

If the jury find and believe from the evidence, that at any time before the finding of the indictment, in Saint Louis County, defendant, wilfully, deliberately, premeditatedly and of his malice aforethought, killed John Mynehan, by shooting him with a pistol as charged in the indictment, then you will find him guilty of Murder in the first degree. And if you find him guilty of murder in the first degree, you will simply say so in your verdict.

The Jury are instructed that when it appears that the killing was done with an intent to take life, and there are no Circumstances of justification, excuse or extenuation recognized by law, the Crime is murder in the first degree; that the intention is the essence of Crime, and that killing a person with Circumstances that evidence a depravity of heart, is murder in the first degree; that the intention is the essence of the Crime, and its guilt Consists in taking away the life of a human being with Circumetances which show a Cool depravity of heart, or a mind fully Conscious of its views and designs; whenever this is the Case, - whenever it appears from the whole evidence that the Crime was at the moment deliberately and intentionally executed, the killing is murder in the first degree. It is sufficient to Constitute this Crime if the Circumstances show the existence of a wicked and depraved disposition of mind, or as it is expressed in the law, if wilfulness and deliberation are proved, though they

arose and were generated at the period of the transaction.

On the question of intent to kill, or to take life, the jury ought to Conceider the Character of the weapon used, the nature of the wound, the probable result thereof, and the statement if any made by the party at the time of or before the killing, in fact all the Circumstances Connected with the Case. Where an unlawful act is Committed, deliberately, and is likely to be attended with dangerious Consequences, the malice requisite to Murder will be presumed, for the law infers that the natural or probable effect of an act deliberately done is intentioned by its actor.

Malice is shown in a Condition of the mind and heart void of social duty, and fatally bent on mischief; which Condition is evidenced by former grudges, antecedent menaces and preconcerted schemes to do the party injured some bodily harm; and if you find that defendant unlawfully, wilfully and without Cause shot and killed John Moynihan as alleged in the indictment and that the weapon used was Calculated to produce death, the law presumes defendant shot and killed him in malice.

No words however insulting or opprobrious will justify an assault much less the use of a deadly weapon: so that if the jury find from the evidence, that defendant shot and killed deceased, as charged in the indictment, because deceased may have used insulting language towards defendant, and that defendant wilfully, deliberately, premeditatedly and of his malice aforethought, shot and killed deceased as charged in the indictment for such reason, then the defendant is guilty of Murder in the first degree, and so the jury should find.

No language however insulting or opprobrious, is in law a lawful provocation to put a person in a heated State of the

blood or passion as already defined in another instruction.

"An attempt to give a blow with the open hand or the giving of a blow with the open hand to a person about the face or head, will not justify the use of a deadly weapon by the party so assailed upon the person so assailing him, particularly if the party so assailed brought the same upon himself by any unlawful and wilful act of his."

"If the jury find from the evidence that defendant and deceased had a difficulty which resulted in the death of deceased, and that defendant commenced the difficulty or brought it on by any wilful and unlawful act of his or that he voluntarily and of his own free will and inclination entered into the difficulty and whilst so being in such difficulty he wilfully, deliberately, premeditatedly and of his malice aforethought killed deceased by shooting him with a pistol as charged in the indictment, then the defendant is guilty of murder in the first degree, and so the jury should find."

Evidence of good character when before a jury, may be considered by them in passing upon the guilt or innocence of the defendant, but in cases free from doubt as to guilt, evidence of good character, cannot avail, and the jury should not acquit a defendant on the ground of his having proved a good character alone.

If the jury find from the evidence that defendant did wilfully draw a pistol and kill the deceased Hynihan in the manner charged in the indictment on account of any previous grudge as a matter of revenge or retaliation therefor and that he thought of the killing any length of time, however short, before such killing, then the offence is murder in the first degree, and so the jury should find.

The jury are the judges of the weight, character and Credibility of all the testimony in the Cause; and if they believe from the testimony that any witness has wilfully, Knowingly and Corruptly testified falsely to any fact material in the Cause, they may reject the whole of the testimony of such witness, or reject only such part as they may disbelieve, and Credit such part thereof as they believe to be true.

If from the whole evidence in the Cause, the jury entertain a reasonable doubt of the guilt of the defendant, they will give him the benefit of that doubt and acquit him. But in order to acquit him on the ground of doubt alone, the doubt must not be a mere guess or Conjecture, that the defendant may by possibility be innocent, but it must be a doubt of his guilt arising from a Careful review and Consideration of all the facts in evidence and the law as given to them by the Court.

To the giving of which instructions and every part thereof the defendant then and there excepted.

The defendant requested the Court to instruct the jury as follows, which was done.

Instruction given

The Court charges you as matter of law that Murder in the first degree as charged in the indictment in this Case Cannot be Committed without deliberation and premeditation and also a Specific intention to Kill at the time and by the blow or act as charged in the indictment to have been inflicted or done by the defendant upon the person of Myrihan.

The defendant also requested the Court

to give to the Jury the following instructions:

Istructions Refused

If you believe from the evidence in this Case that the defendant Killed John Mynihan with malice aforethought, but without premeditation or deliberation, and without excuse or justification in the law, you ought to find the defendant guilty of murder in the Second degree, and fix his time of Confinement in the Seniteniary of the State for a period not less than ten years, and not exceeding his Natural life.

If you have a reasonable doubt arising upon the whole of the evidence in this Case, whether the defendant Killed John Mynihan by shooting him with the intention to Kill him the said Mynhan by the act of so shooting, you ought to find the defendant not guilty of Murder in the first degree.

The Court Charges you that if you believe from all the evidence in this Case, that the State has not proved, that the defendant wilfully, deliberately, premeditatedly, and of his malice aforethought Killed and murdered John Mynihan as charged in the indictment, you Cannot find the defendant guilty of murder in the first degree.

If you believe the evidence in this Case is nearly balanced upon the question of murder in the first degree as charged in the indictment, and that the defendant has proved a good character for peaceableness and quiet as well as a good general Character in all respects, you ought to give him the benefit of such proof and acquit him of Murder in the first degree.

Criminal justice should be administered in the spirit of mercy rather than in a spirit of vengeance and with a view to the reformation rather than with a view to the extermination of mankind, and you should be governed by the above principle

in finding your verdict in this Case.

Which instructions the Court refused to give to the jury, to which refusal the defendant then and there excepted.

Thereupon the jury retired to Consider of their verdict and ~~having~~ after having deliberated in their retirement upon the Subject Committed to their Charge, for many hours, they Came into Court and in the presence of defendant and his attorney, asked of the Court the following questions in writing: dated March 24. 1864.

Questions asked by the Jury

To the Honorable Judge of the St Louis Criminal Court:

The Jury in the Case of the State of Missouri vs James Finney, find themselves deficient in Knowledge of their duty as jurors, whether they are to be governed alone and entirely by the law as given in our instructions from the Court and the evidence, or whether they Can exercise discretion as dictated by their own Convictions of the wilful intention of the act Committed,

Further than this, the jury wish some instructions as to what Constitutes the Crime of Murder in the second degree, and whether the jury in this Case have the power to render such a verdict regardless of the instructions.

St Louis March 24th 1864. Respectfully: Albert Tennent Foreman.

And the Court thereupon in the presence of said jury, the defendant and his attorney gave the said jury in reply to their said questions, the following instructions:

Reply of the Court Instruction Given

.... Gentlemen of the Jury:

your foreman having propounded to the Court the questions hereto annexed, Concerning your duties and rights as jurors, the Court gives you the following additional

instructions in answer to those questions:

First: It is the office of the jury to try the facts in this Cause as developed by the evidence and affected by the law applicable to these facts. It is the duty of the Court, to instruct the jury on all the law arising in the Case, and this the Court has done in the instructions already given to the jury. And it is the duty of the jury to respect the instructions of the Court as the law of the Case and to find the prisoner guilty or not guilty according to the law as delivered by the Court, and the evidence as they have received it from the witnesses.

Second: The Court declines to instruct the jury on the question of murder in the second degree, and instructs them, that if they find from the evidence that the defendant committed the act charged upon him in the indictment and committed it wilfully, deliberately, premeditatedly and with malice aforethought, then the offence is murder in the first degree and not murder in the second degree.

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

The Jury then again retired and after deliberating several hours returned into Court, and thereupon were asked if they had agreed upon a verdict, to which inquiry the foreman of the jury answered. Yes! and the foreman then handed the Clerk, the following verdict or finding: viz:

Verdict

We the Jury in the Case of the State of Missouri vs. James Franey, find the defendant guilty of Murder in the First degree, unanimously and earnestly recommending him to

mercy. by Commuting the sentence of death to imprisonment, in Consideration of the slight atrocity of his Crime, barely bringing it by the law in the Case within the Statute provision of "Murder in the first degree."

St Louis march 25. 1864. Albert Tennent Foreman

Which verdict the clerk of the Court in the presence of and in the hearing of the Court, Jury, defendant, and his attorney, and the Circuit attorney read out in the following manner viz: (The clerk addressing himself to the Jury and holding the verdict in his hand) "Gentlemen of the Jury. hear your verdict read. Your foreman for you says. (here the verdict is read in full by said Clerk), And after he had read the verdict he addressed the jury by asking them the following question: Gentlemen of the Jury is this your verdict?, Whereupon the entire jury assented, that it was their verdict, then the Clerk said: "Do the Jurors all say".

Polling of the Jury

Whereupon the defendant through his attorney requested that the jury might be polled which was accordingly done by the Clerk, by Calling each juror by his name and asking him. "Is this your verdict?. (addressing the juror by his name, — the clerk still holding the said verdict in his hand and referring to it.), to which all so addressed by the clerk answered. "yes", till about half of the Jury was polled, when the defendant's Counsel objected to that manner of polling the jury and moved the Court, that each juror should be asked by the Clerk. "Is this your verdict and are you now satisfied with it". but the Court refused defendants motion, and would not allow the jury to be so polled, And the defendant excepted to such refusal of the Court and in not

allowing the jury to be polled in the manner requested by defendant. And the Clerk proceeded to poll the remaining jurors in the manner he had polled the other jurors and each of them answered as the others had answered viz: "Yes," excepting only Jeremiah Morrissey, the twelfth and last juror on the pannel. (and who had been last called by the Clerk whilst so polling the jury.). He said Morrissey whilst so being polled by the Clerk said, "it was not, unless the Governor would Comply with the Contents of the same, - Commute the punishment." The Clerk again asked him, "Is this your verdict"? and offered to read the same to him again. Morrissey said he knew the Contents thereof and had agreed to it (the verdict), "but it was not his verdict unless the Governor would Comply with the Contents of the same." Whereupon the Court ordered that the jury should retire to Consider of their verdict, whereupon said Juror Morrissey said "I accept the verdict, it is my verdict, The Clerk being then directed by the Court asked said juror Morrissey, "Is this your verdict, which has just been read"? (pointing and referring at the same time to the verdict which the Clerk still held in his hand.), and said Juror Morrissey said "Yes, that is my verdict", whereupon (all of said Jurors being all so polled), the Clerk answered as follows: loking still at the Jury and holding the verdict in his hand, "And so the Jurors all say", whereupon the Court ordered the verdict to be recorded, and the jury discharged,

The Court here states that the practice has always been to receive and read the verdict of a Jury in the manner done in this Case, and always the practice of polling a Jury and propounding the questions put by the Clerk to the Jury in the form and manner in said Case done and propounded —.

On the twenty eighth day of March eighteen hundred and Sixty four. the defendant filed his motion for a new trial, as follows:

Motion for New Trial

The defendant by his Counsel J.G. Davis and James J. McBride moves the Court in the above Styled Cause for a new trial for the reasons following.

1st — Because the verdict is Contrary to Law.

2d — Because it is against evidence

3rd — Because the verdict is against both the Law and the evidence in the Case

4th — Because the verdict is not a legal, good and sufficient verdict upon which the Court Can Sentence the defendant.

5th — Because the verdict was only Conditionally assented to by the Juror John Morrissey

6th — Because when the jury was polled and the Juror Morrissy said he had Consented to the verdict Conditionally, the Court did not send the jury out to reconsider their verdict, but allowed it to Stand.

7th — Because the Court ruled out legal and proper evidence offered by the defendant.

8th — And allowed the State to give illegal evidence against the defendant.

9th — Because the Court misdirected the Jury as to the law of the Case at the instance of the State

10th — Because the Court refused to give legal and proper instructions asked for by the defendants.

11th — Because the Court refused to instruct the Jury as to the law of Murder in the Second degree.

12th — Because the Court did not instruct the Jury on the law of Self defence.

13th — Because the Court did not instruct the Jury upon the law of manslaughter.

14th — Because the Court after the jury had retired to Consider of their verdict, and not being able to agree, having Come into Court, misdirected them as to the law of the Case so as to neutralize the only Charge which it had given at the instance of the defendant.

15th — Because the jury misbehaved in their retirement

Davis & Evans & J. J. McBride

attys for defendant.

The said motion for a new trial Came on to be argued and was heard by the Court and overruled by it, and the defendant then and there excepted to the ruling of the Court upon his motion for a new trial.

Motion in arrest of Judgment

The defendant then entered his motion in arrest of judgment, and filed reasons in support thereof, viz: .... And now Comes the said defendant and moves the Court to arrest the judgment in the above Styled Cause for the following reasons:

First: — Because the indictment does not charge, with legal and sufficient Certainty, the defendant with the Crime of murder in the first degree, of which Crime he is Convicted, —

Second: — Because the indictment Contains the Character "&" after the word "in", and before the word "upon" and after the word "then" and before the word "there" and after the word "premeditatedly" and before the words "of his malice aforethought", and before the word "that" and which follows the word "assault" punctuated with a semicolon, and again after the word "then" and before the word "there" and after the word "gunpowder", and before the

word "one", and between the words "then and there", and between the words "had and held", and between the word "premeditatedly" and the words "his malice aforethought", between the words "discharge" and "shoot" and between the word "against" and the word "upon", and after the word "Mynihan" punctuated with a simicolon, and before the word "that," and again between the word "then" and the word "there" and between the word "discharged" and the word "shot" and again between the word "then" and the word "there", and again between the word "premeditatedly" and the words "of his malice aforethought", and between the word "penetrate" and the word "wound", and again between the words "then and there", and after the word "penetrate" and before the word "shot", and after the word "in" and before the word "upon" and after the word "inches" and before the word "of", and between the words "then" and "there", and after the word "manner" and before the word "by", and after the word "premeditatedly" and before the words "of his malice aforethought", and after the "peace" and before the word dignity, which character is not of the English language and is substituted in place of the english word "And" by the pleaded who drew the indictment, and without the use of which english word "And" between the word "premeditatedly" and the words "of his malice aforethought" the Crime of murder in the first degree is not charged in the indictment, but only the Crime of murder in the second degree.

Third: — Because the verdict ought to be taken and construed as a special verdict upon which only jiogment of murder in the second degree can be pronounced, and

Fourth: — Because the finding of the jury, which has been received by the Court and recorded is not a verdict in the sense of the law of murder in the first degree

Davis & Evans and McBride attys for Deft.

Motion in arrest of Judgment overruled

Which motion in arrest of judgment was Considered by the Court and was overruled by it: and the defendant duly excepted to the decision of the Court in overruling the motion to arrest the judgment and the Court then and there sentenced the defendant to be executed according to the verdict of the jury.

The defendant then prayed an appeal to the Supreme Court which was allowed by the Court, and the Court then and there ordered that the defendant have ... days to prepare and file his bill of exceptions; and the defendant prays that this his bill of exceptions may be signed, sealed and allowed by the Court and made a part of the record in the Case, which is done accordingly.

Wilson Primm Judge (seal)

State of Missouri
County of St Louis } ss. I. Fred Kutschmar Clerk of the St Louis Criminal Court, in and for said County. Certify the foregoing to be a full, true and Complete transcript of the record and proceedings had in the foregoing entitled Cause of the State of Missouri vs James Franey, as fully as the same remains of record ~~and~~ on file in my office.

Witness my hand and the seal of said Court, hereto affixed this 28th day of May A.D. eighteen hundred and Sixty four, at office in the City of St Louis

Fred Kutschmar
Clerk

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In the 30
October T. 1864
St Louis Criminal Court

(3)

Appeal

The State of Missouri
D.E. Respondent
M.

vs } Transcript &c
Stay refused

James Franey
Appellant

Filed June 8. 1864
S. Voullaire
Appeal
for Respondent

Davis, Evans & McBride
for Appellant

1864 June 8. Motion for stay of Exn vs Ct
1864 Oct 25 appl. died Op 289
Op 281

Statement of the case

The State of Missouri }
vs. }
James Feaney Charged } with murder in the first degree }

James Feaney was indicted for murder in the first degree in the Criminal Court of St. Louis County at the September Term 1863 of said Court. The cause was continued from term to term at the instance of the defendant; and was finally called on for trial in the March Term 1864 and on the 16th day of the month of March at which time the defendant entered his motion, in writing, to quash the indictment, which motion the Court over-ruled and the defendant excepted.

John C Albring was called as a juror upon whose examination it appeared that he could neither read nor write English, though he had English enough to enable him to serve as a porter in an American House. The Defendant challenged the juror for cause, but the Court decided that the challenge was not well taken, and that the juror was qualified; upon which the defendant duly excepted to the decision of the Court: and ~~then the defendant~~ challenged the juror peremptorily.

The defendants Counsel ~~are~~ are, under a necessity imposed by a sense of duty and of the obligation resting upon them to state the case of the defendant as it was in the Criminal Court; and by

so stating it, they are sensible that they place themselves in conflict with some of the statements contained in the Record; especially such statements as have reference to the action of the Court upon the answers no less than to the answers themselves of Venire-men examined in Court touching their qualifications to sit as jurors in the cause.

~~The record shows~~

Two Jurors, Foster and Ross were challenged by the State and discharged by the Court, more than Twenty four hours after they had been accepted as Jurors by the State and the defendant; they were so discharged without the consent of the defendant and ~~against~~ notwithstanding his earnest remonstrance against it and he excepted.

In the progress of the trial, the defendant offered to prove that the deceased was a violent, blood-thirsty man and that the witness made the defendant thoroughly acquainted with the fact and put him upon his guard against the deceased, but the Court rejected the evidence and the defendant excepted.

The evidence shows that the deceased commenced a quarrel with the defendant in the shop where the defendant was at work (see the record from 24 to 26 inclusive) and that the defendant endeavoured to decline a difficulty with him. It also shows that the deceased pulled off his Coat to fight the defendant in the Saloon (see McDonald's tes-

=timony page 21), it also shows that the deceased fol=
=lowed the defendant around the Barroom (see pages 22 & 23)
quarrelling with him. It also shows that the deceased
slapped the defendant on his head or face (see page 15)

The evidence in the cause clearly shows that the deceased commenced the quarrel and lost his life in a Barroom brawl.

Under the facts and circumstances of the case as given in evidence, it was the plain unmistakable duty of the Court, to charge the Jury on ~~the~~ the Law of the degrees of Murder ~~and~~ on the Law of Self defence and on the Law of Man Slaughter and yet the Court refused, stubbornly refused, strangely and monstrously refused, even when begged by the Jury to charge them on the law applicable to the case, ~~usurping the~~ assuming the right in effect, of deciding both the law and the fact.

The verdict cannot stand; Morrissey never assented to it, except only conditionally (see record page 56). It is not necessary to multiply words here, we only beg the attention of the Court to this page of the Record.

A new trial ought to have been granted, for the reasons among others, that the Court excluded proper evidence; misdirected the jury; received and recorded a verdict which was not assented to by the juror Monnissey, but upon condition subsequent, to wit: That the Governor would commute the punishment of death

The judgment ought to have been arrested for the reasons stated in the motion for arrest

1st. The Court erred in overruling the defendants motion to quash the Indictment, the character "&" is not an English word, nor an abbreviation of an English word, any more than the character # is an English word Revised Statutes 1855 Vol. 1. page 538 Sec. 34.
Goodall vs Harrison 2nd Mo. R. 153.
Worcester's Dictionary page 1775, under the head of Miscellaneous.

2nd. The action of the Court, in allowing the State to discharge Foster and Ross ~~[illegible]~~, was illegal; and the same may be said, in relation to the Courts decision on John C Albring's competency

3rd. The Court manifestly erred in rejecting evidence that the deceased was a ~~man of~~ violent and blood-thirsty ~~character~~ man and that the defendant was made acquainted with the fact and put on his guard against the deceased before the difficulty occurred in which the deceased was killed. ~~Monroe vs The State 5th Georgia 137 & 8~~

There is evidence preserved in the Record which shews that the deceased commenced the difficulty, and that the defendant appeared to be afraid of him; that the deceased ~~appeared to be~~ was a much larger and stronger man than the defendant; that he wholly or in part stripped himself to fight the defendant; that he followed the defendant through Roach's Saloon; that he struck the defendant a blow or slapped him; that when he went into Goggins' Shop where the defendant was then at work, he sought a difficulty with him, and was willing and in Lincoln's name to fight the defendant any where in the United States; that the defendant endeavoured to decline a quarrel with the deceased; that the defendant was and always had been a peaceable and highly reputable young man.

Upon these facts we insist that it was the duty of the Court to allow the defendant to make the proof which he offered in relation to the violence and bloodthirstiness of the deceased. In support of this view of the Law see 5 Georgia 136 - 137 & 138. Monroe vs. The State.

In the case of Howell vs The State also in the 5th Georgia page 54 the Court say, "a threat to drive the defendant from the place or take his life" was legal evidence and ought to have been answered by the witness whether the threat was brought home to the knowledge of defendant or not.

Howell, was, indicted for an assault with intent to commit Murder and the threat which the defendant offered to prove was competent evidence upon the question of intention. So in this case, the fact which the defendant offered to prove was competent and proper to be considered by the Jury upon

the question of intention: for Murder in the first degree under our Statute can be committed only where the slayer has a specific intention to kill. Now it was for the Jury to say, what effect the evidence offered should have in determining the question of intention, as well as that of malice - [redacted] See also page 55 same case -

State vs. Jacket 1st Hawks 210. Payne vs. the Commonwealth 1st Mutty R. 370.

Queensbery vs. The State 3 Stewart & Porter 315.

Keener vs. The State 18th Georgia 194. 220. 221. 222.

Commonwealth vs. Seibert. Wharton on Homicide pp 227. 228.

Dukes vs. The State 11th Indiana 557. Campbell vs. the People 16 Ills. 17. p. 539

State vs. Hicks 27th Mo. R. 588. Cornelius vs. Commonwealth 15th Ben Monroe.

In the case of the State vs. Zellers 2nd Halsted 230. The Chief Justice says "Every circumstance which goes to shew the feelings of the parties toward each other, may be proper. That temper which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and therefor it may be received by the jury, to shew the state of mind of the parties."

4th The Criminal Court grossly erred in giving and refusing Instructions. It charged the jury in relation to the Law of Murder in the first degree only, even ~~although~~ when solicited by the Jury to give them the Law of Murder in the second degree, ~~and the Law of Manslaughter~~; it stubbornly adhered to, its original charge upon the authority it is believed of Schoenwald's case, in the 31st Mo. R. 147. which is wholly unlike Haney's case, and is in fact to be regarded with disfavor; and it is destined in the opinion of Counsel to be shaken, if not wholly overruled, whenever it comes to be maturely and deliberately considered by this Court. (see the Record at pages 53 & 54.) The jury requested the Court to inform them, whether they could "exercise discretion as dictated by their own convictions of the wilful intention of the act committed", by which they plainly meant to say to the Court, "we want to know whether if we are not satisfied from the evidence that the defendant wilfully killed Minihin, we may, notwithstanding the instructions given by the Court, acquit ~~him~~ him". And the Court refused to tell them, what it was its plain duty to tell them, to wit: "Murder in the first degree can be committed only in a case in which the slayer intends to kill, when he does an act which results in death". The Court had charged the jury at the close of the argument and before their retirement to consider of their verdict, that they must find the defendant guilty of Murder in the first degree or acquit him. There was evidence before them which satisfied them, that the defendant killed Minihin without full justification. From the facts and circumstances before them they felt constrained to believe that the homicide deserved some degree of punishment, and were not willing by their verdict to exonerate him from punishment; but at the same time would not have found him guilty of Murder in the first degree, if the Court had answered their inquiry in relation to wilful intention &c.

State vs Bower 5th Mo. page 379 - State vs Dunn 18 Mo. p. 424 State vs Jennings 18 Mo.

(12)

The Court commented upon the evidence in such a way, as to brake the force and effect of the most material part of it for the defendant (see Record page 50)

The Defendants Counsel confidently appeals

5th. The finding of the Jury, is itself sufficiently indicative of the extreme reluctance with which they brought in a verdict of Murder in the first degree; and it is perfectly manifest that they were induced to do so under judicial pressure — "We the Jury in the Case of the State of Missouri vs. James Haney find the defendant guilty of Murder in the first degree, unanimously and earnestly recommending him to mercy, by commuting the sentence of death to imprison=ment in consideration of the slight atrocity of his crime, barely bringing it by the law in the case within the Statute provision of Murder in the first degree".

The above finding was brought into Court by the Jury after thirty six hours deliberation and even then without the full concurrence of the twelve gentlemen constituting the jury, for Morrissey consented to it only upon condition that the Govenor would commute the punishment &c &c, as will be seen by refering to the Recon at page 56. We say without hesitation that no such verdict has been permitted to stand in Modern times, and it is doubted if such a verdict ever was permitted to stand at any period in English or American Judicial history.

14th Ohio Rep. page 511 - John Kirk vs. The State

State vs Shule 10th Iredell 154.

Donston vs. The State 6th Humphreys Tennessee Rep. 275.

4th Yerger 111 -

6th The Court also erred in over-ruling the motion for a New Trial,

Rejecting proper evidence; misdirection of the jury by the Court; refusing to give proper instruc-tions asked for by the defendant; partial and incom-plete direction; a finding against the evidence, or with-out sufficient evidence; are stated as reasons for a new trial in the defendants motion, and are uni-versally recognized by the Courts as authorizing and requiring a venire de novo; and to cite authorities in support of which would imply distrust of the Court

7th The Court ought to have arrested the judgment. The Indictment was not written in the English lan-guage.

The Defendants Counsel confidently expect a supersedeas to stay the Execution of the Judgment of the Criminal Court until they can be heard before the Supreme Court upon the several points made by them. It is due to themselves to say, that though considerable time has elapsed since the trial of the case; ~~they~~ though they have anxiously and earnestly urged the Criminal Court and the Circuit Attorney to complete the Record so as to enable them to present the case to the Supreme Court, (having done all that could be required of them) yet, they could not get the Judge of the Criminal Court and the Circuit Attorney to settle the Bill of Exceptions, till within a few days past, after which the record has to be made out by the Clerk; and it came to the hands of the defendants Counsel on Saturday the 28th ~~day of~~ inst. at about 3. o. clock P. M.

T. B. & Davis & John B. Evans
Counsel for James Finney

State of Missouri

vs.

James Franey

Application for super sedeas.

T. B. C. Davis &
John B. Loans
attys for Defts

(6)