

State us Mary a slave

67/12

Old 547

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State of Missour } of The State of Missouri
County of Crawford } To the Constable of Memmace Township
in Crawford County. Greeting

We command you to summon six good and lawful men
householders of your County forthwith to appear me
Gideon Frost one of the Justices of the Peace in Memmace
Township in said County to inquire into the cause of the
death of an Infant child of John B Brunker found
dead and by whom the child came by her death
Given under my hand this 15th day of May 1837

Gideon Frost Justice of
the Peace

The Constable of the Township not ~~being~~ ^{thus} convenient I authorize
Obadiah Key to execute and return this warrant
Gideon Frost J. P.

I hereby certify that I executed the within as the law
directs this 15th May 1837 O. Key Dep't Const
John Lamb Samuel Myers Carter Hawkins James
Moore Joseph Palmer Joseph Denison

State of Missouri } of The State of Missouri
County of Crawford } An Inquisition Inducted at J. B

Brunkers in the County of Crawford on the 15th day of
May 1837 Before me Gideon Frost Justice of the Peace
and acting as Coroner of the County aforesaid upon
the body of an infant daughter of J. B Brunker then
and there lying dead upon the oath of John Lamb
Samuel Myers Joseph C. Hawkins James Moore
Joseph Palmer Joseph Denison good and lawful
men householders of the Township of Memmace in
said County who being sworn and charged

diligently to inquire and true present^{ment} make how and
in what manner and by whom the said infant
child came to her death upon their oath do say that
the said child come to her death by violence and
do say we have discovered visible marks of the same
and that the act of violence was committed by a
negro mulatto of J B Brunker named Mary
for witness whereof as well the aforesaid coroner
as the jurors aforesaid have to this Inquisition
put their seals at the day and the year afore
said

Simon Frost J. C.	Seal
John Lamb	Seal
Samuel Rogers	Seal
Joseph C. Hawkins	Seal
James Moore	Seal
Joseph Palmer	Seal
Joseph Purison	Seal

State of Missouri
County of Crawford } I William Blackwell after
being duly sworn to testify the truth of my knowledge
touching the death of a child of John B Brunker
being found dead and now before an inquest this 15th
day of May 1835 this deponent saith I was at Mr
Brunkers loading my waggon to start to St Louis
after I had been there some time there was some
Inquiry made about the child and the reply was that
we knew nothing about her and Mrs Brunker said that the
negro girl had just went after wood and had spoken to the
child as she started after wood and Mrs Brunker said to
Mr Brunker that she had taken her forth her and made her
go and find the child Mr Brunker then said to the said
negro go and bring the child and she said she had
not seen the child but started down the hill towards
the branch in a run and Mr Brunker came back to the

house to hunt the child but did not find it he went on
the course the negro went called to she answered him down
towards the branch then Mr Brinker and myself started
down towards branch and I said to Mr Shirley let us
hunt the branch for the child for I said I believed that
the negro had drowned the child we then went down
to the branch together and Mr Shirley went up
the branch and I went down the same and
Mr Shirley found the child in a few minutes
in the branch dead he took it up and ran
towards ~~and~~ the house he raised the alarm
I started to Mr Shirley when I got to him Mr
Brinker was trying to bleed the child in the
arm but it would not bleed I then took the child
from Mr Shirley when I took the child I ^{discovered}
It had received a blow on the right temple after
some time I took the negro from Mr Brinker and
took her out to a log and tied her fast I then comm
enced pulling up her coat as if I was going to whip
her she then said If I would ^{not} whip her she would
tell the truth I told her then out with it she then
told me she had thrown it in that hole of water
I then accused her of striking ^{it} with a stick before she
threw the child in the water she then said she did
not strike the child before she threw it in, she threw
it in the branch and it rose and she then struck
it with a stick

Sworn and subscribed
So before Amos Frost

Justice of the Peace

William Blackwell

I Thomas Shirley after being duly sworn to testify
the truth of my knowledge of the death of a child
of John B Brinker being found dead and now
before an Inquest this 15th day of May 1838

this deponent I come up to ^{J. B.} Mr. Brunker in the time that
he was loading the waggon to start to Saint Louis
after I had been there some time there was some
Inquiry made about the child and the reply was
that we knew nothing about her and Mrs Brunker
said that the negro girl had just started after
wood and had spoken to the child as she started
after wood and Mrs Brunker said to Mr Brunker
that she had taken her off with her and make her
go and find the child Mr Brunker then ^{said} to the ^{negro} said
negro and bring the child and she said she had
not seen the child but started down the hill toward
the branch in a run and Mr Brunker came back
to the house to hunt the child but did ^{not} find it
he then went on the course the negro went and
called to her she answered him down toward the
branch then Mr Blackwell and myself started
down toward the branch and Mr Blackwell said
to me let us hunt the branch for the child for he
said he believed that the negro had drowned the
child we then went down to the branch together
and Mr Blackwell went down the branch and
I went up the branch and I found the child in a few
minutes in the branch and took it up and ran
toward the house when I first saw the child
raised the alarm and Mr ~~Blackwell~~ ^{Brunker} met me in
a few yards from the branch we then tried to
reach the child in the arm but it would not bleed
I gave up the child to them and ran up to the house and
warmed some water to try to bring it to as soon as they
brought it to the house I saw that the child had
received a blow on the right temple

Sworn & Subscribed to before { Thomas J. Shirley
Simon Frost Justice of the peace
and acting as coroner

State of Mysoun $\equiv$ § State of Mysoun
County of Crawford $\equiv$ To the Constable of Merrimac
Township County of Crawford

Greeting Whereas Information has been given
the undersigned one of the Justices of the peace for
Merrimac Township in Crawford County that
from the evidence adduced before an Inquest
sworn to examine the dead body of a child of J. B.
Brunker that signs of violence was executed on said
child that proved the death of said child and
that a negro girl of said Brunkers named
Mary committed the base act

There are therefore to command
you to apprehend and take the body of said
negro and safely keep and bring her before the und-
signed forthwith to answer to the charge

Given under my hand this 15th day of May
1834 Simeon Frost Justice
of the peace

Executed the within by taking the body of
said Negro May 16th 1834

Samuel Cox Const

State of Mysoun $\equiv$ §
County of Crawford $\equiv$ The Examination of Mary
a Mulatto girl of J. B. Brunkers named Mary of
Crawford County taken before Simeon Frost one
of the Justices of the peace within and for the County
of Crawford on the 16th day of May 1834

The said Mulatto negro Mary being charged
with having feloniously drowned or murdered a certain
child daughter of J. B. Brunker upon her Examination
now taken before me now says

She picked up the child at the Kitchen door and took it
down to the branch and threw it in the branch with the
intention to drown it but it rose she then took a stick

and struck it on the head

Simon Frost Justice of the
peace

I Simon Frost one of the Justices of the peace within
and for the county aforesaid do certify that the foregoing
Examination of Mary Mulatto negro charged before
me with having drowned and murdered an Infant
daughter of John B Brinker by an Inquest held on
said child also the evidence of William Blackwell
and Thomas J Shirley by me taken down and reduced
to writing on the day and year aforesaid.

Simon Frost Justice of
the peace

State of Missouri 3
County of Crawford 3 Set

The Information of William Blackwell taken before me Simon Frost one of the Justices
of the peace within and for the County of Crawford the
16th day of May 1837

I William Blackwell after being sworn to testify the
truth of my knowledge touching a case the State of Missouri
against Mary a Mulatto negro of J B Brinker and now
Before Simon Frost Justice of the peace within and
for Crawford County this 16th day of May 1837

This deponent saith I was at Mr Brinkers loading
my waggon to start to St Louis after I had been there
some time there was some enquiry made about the child
and the reply was that we knew nothing about her
and Mrs Brinker said that the negro girl had just went
after wood and had spoken to the child as she started
after wood and Mrs Brinker said to Mr Brinker
that she had taken her off with her and make her
go and find the child Mr Brinker then said to the said
negro go and bring the child and she said she
had not seen the child but started down the

hill toward the branch in a run and Mr Brunker
came back to the house to hunt ~~for~~ the child but did
not find it he then went on the course the negro went
called to her she answered him down toward the branch
then Mr Brunker and myself started down toward the branch
and I said to Mr Shirley let us hunt the branch
for the child for I said I believed that the negro
had drowned the child we then went down to
the branch together and Mr Shirley went up the
branch and I went down the same and Mr Shirley
found the child in a few minutes in the branch
dead he took it up and ran toward the house he
raised the alarm I started to Mr Shirley when
got to him Mr Brunker was trying to bleed the
child in the arm but it would not bleed I then
took the child from Mr Shirley when I took the
child I discovered it had received a blow on the
right temple after some time I took the negro
from Mr Brunker and took her out to a log and
tied her ~~fast~~ I then commenced pulling up
her coat as if I was going to whip her she then
said if I would not whip her she ~~would~~ would
tell the truth I told ~~her~~ then to out with it
she then told me she had thrown it in that
hole of water I then accused her of striking
it with a stick before she threw the child
in the water she then said she did not strike
the child before she threw it in she threw it in
the branch and it rose and she struck it
with a stick

William Blackwell

Sworn & Subscribed
to Before Simon Frost
Justice of the Peace

State of Missouri³ Set
County of Crawford³ The Information of Thomas J Shirley
taken before me Simeon Frost one of the Justices of the
peace within and for the County of Crawford
the 16th day of May 1837

I Thomas J Shirley after being sworn to testify
the truth of my knowledge touching the case the
State of Missouri against Mary a mulatto negro
of J B Brinker and now before Simeon Frost
Justice of the peace within and for Crawford
County this 16th day of May 1837

This deponent saith I came up to Mr Brinkers in
the time he was loading the waggon to start to St Louis
after I had been there some time there was some inquiry
made about the child and the reply was that we knew
nothing about her and Mrs Brinker said that the negro
girl had just started after wood and had spoken to
the child as she started after wood and Mrs Brinker
said to Mr Brinker that she ^{had} taken her off with her
and make her go and find the child Mr Brinker then
said to the negro go and bring the child and she said
she had not seen the child but started down the hill
towards the branch in a run and Mr Brinker came
back to the house to hunt the child but did not
find it he then went on the course the negro went
and called to her she answered him down towards
the branch then Mr Blackwell and myself started
down towards the branch and Mr Blackwell said
to me let us hunt the branch for the child for he
said he believed that the negro had drowned the
the child ^{we} then went down to the branch together
and Mr Blackwell went down the branch and
I went up the branch and I found the child in
a few minutes in the branch dead I took it up

and ran towards the house when I first saw the child
I raised the alarm and Mr Brinker met me in a few
yards from the branch we then tried to bleed the child
in the arm but it would not bleed I give up the
child to them and ran up to the house and warm
ed some water to try to bring it too as soon as they
brought it too the house I saw the child had
received a blow on the right temple and further
this deponent saith not - { Thomas J Shurly
Sworn & Subscribed before

Samuel Frost Justice of the Peace

State of Missouri - {

County of Crawford } Be it remembered that on the
16th day of May in the year of our Lord Eighteen
hundred and thirty seven at the County of Crawford
aforesaid William Blackwell of Crawford County
came before me a Justice of the Peace within and
for the County aforesaid and in his proper person
acknowledged himself indebted to the State of
Missouri in the sum of one thousand ^{dollars} to be levied
of his goods and chattels lands and tenements
upon condition that If he shall personally appe
ar before the Circuit Court on the first day of
the term thereof to be holden for the County
of Crawford then and there to give evidence
in behalf of the said State against a certain
negro girl Mary on a certain charge of murder
where with the said Mary is charged and shall
not depart the said Court without leave
then this cognizance to be void other to remain
in full force

William Blackwell

Taken and certified
the day and ^{year} above written

Samuel Frost J. P.

State of Missouri }
County of Crawford } Be It remembered that on the
16th day of May in the year of our Lord Eighteen
hundred and thirty seven at the County of Crawford aforesaid
said Thomas Shirley of Crawford County came before
me a Justice of the Peace within and for the County
aforesaid and in his proper person acknowledged
himself Indebted to the State of Missouri in the sum
of one thousand dollars to be levied of his goods and
chattels lands and tenements upon condition that if
he shall personally appear before the Circuit Court
on the first day of the ~~term~~ next term thereof to be hold
en for the County of Crawford then and there to testify
and give evidence in behalf of the said State against
a certain negro girl Mary on a certain charge of
murder wherein the said negro girl Mary is charged
and shall not depart the said Court without
leave then this recognizance to be void otherwise
of full force

Thomas J Shirley

Taken and certified
the day and year aforesaid
Amos Frost, J. P.

State of Missouri }
County of Crawford } The State of Missouri
To the Sheriff of Crawford County and the Keeper
of the Jail of Washington County Greeting
These are to command you the said Sheriff forth
with to convey and deliver into the custody of the
Keeper of the Jail of the County Washington aforesaid
the boy of Mary a Mulatto girl the property of
J B Brunker taken and brought before ^{me} a Justice
of the Peace within and for the County of Crawford
and charged before me upon the oath of Wellman

Blackwell and Thomas J Shirley with having
willfully thrown an infant of John B Brinkers
into a branch with intent to drown said child
and then and there aid murder said child with
a stick or club and you the said keeper of the said
Jail are hereby required to receive the said Mary
into your custody in said Jail and ^{her} there ~~keep~~
Keep until she shall be discharged by law
given under my hand ^{and seal} at the bounty afore
said this 16th day of May in the year of our
Sord Eighteen hundred and thirty seven

James Frost Seal
Justice of the peace

Receipt of Mark Sullivant Sheriff of Crawford
County State of Missouri the body of the within
named defendant in the Jail of Washington
County Mo May the 22nd 1837

J B Briskey
Jailer of W. County
Mo

To Mary a black Girl now confined in the Jail
at Potosi Washington County State of Missouri
who is charged with having committed murder
in Crawford County in said State you will
take notice that the 16th day of August next
is appointed for your trial by a Special Term
of the Circuit Court to ^{be} holden in said County of
Crawford for that purpose

Done this 18th July
1837

James Evans Judge
of the Court Judicial
Cir State of Missouri

I appoint John B Briskey to serve this notice

Done this 18th July 1837

James Evans Judge of

Potosi July 21st 1837 Served this notice on ^{to} the 9th Ju^d Cir State of

Mary the within named negro girl in the Jail of Washington County & S. Missouri
by means of to her J B Briskey

To David Stenger Esqr
Cir atty 9th Judicial Cir State of Missouri

Sir please to take notice
that I have ordered a special Term of the Cir Court of
said Cir to be holden in Crawford County in said
State on Wednesday the 16th day of August next for the trial
of a Negro girl now confined in Jail who is charged
with murder

Done this 18th day of
July 1837

I appoint John C Bricey Esqr to serve this notice
Done this 18th day of July
1837

James Evans Judge
of the 9th Judicial Cir State
of Missouri

James Evans Judge of
9th Judicial Cir State of
Missouri

Served the within on D Stenger Esqr by giving a true
copy of the within at Lexington State of Missouri on the
18th day of July 1837

J C Bricey

The State of Missouri

To the clerk of Crawford County

Whereas ~~has been~~ Information
has been given me that there is now confined ⁱⁿ the Jail of
your County a Negro girl who is charged with murder
Now I James Evans Judge of the ninth Judicial Circuit
of said State do hereby notify you that a special
Term of the Cir Court will be held at the Court house
or place of holding Court in Crawford County on
Wednesday the 16th day of August next for the trial
of the said Girl you will cause a Grand Jury
to be summoned to attend the Court at that time
Done this 18th day of July 1837

James Evans Judge of the
9th Judicial Cir State of Missouri

I authorize & appoint John C Bricey Esqr to serve this notice.
Done this 18th July 1837

James Evans Judge of the 9th Judicial
Cir

State of Missouri
To the Sheriff ~~of~~ ^{or} Keeper of the Jail of Washington
County in said State you are hereby commanded
to have the body of Mary a Negro Girl detained in
your custody as it is said under safe and secure
conduct together with the day and cause of her being
taken and detained by whatsoever ~~name~~ name she
shall be called in the same before James Evans
Judge of the 9th Judicial Circuit in the State of
Missouri at the Court-house or place of holding
Court in the County of Crawford in said State
on the sixteenth day of August next to do &
receive all & singular those things which the said
Judge shall then and there consider concerning her
in this behalf and have there this writ
Witness James Evans Judge of the 9th Judicial
Circuit aforesaid this 19th day of July A D 1837

James Evans *Seal*
Served the within writ by delivering the body
of the within named Negro Girl Mary to Mark
Gillivant Sheriff of Crawford County
at Steelville this 16th day of August
A D 1837

A C Thompson
of W. C

State of Missouri }
Crawford County } The State of Missouri
To the Sheriff of Crawford County Greeting
You are hereby commanded to summon twenty
four good and lawful men of the body of your
County to make a Grand Jury at a Special
Term of our Crawford Circuit Court to be holden
in the Town of Steelville on Wednesday the six
teenth day of August ~~next~~ in the year of our

Sord Eighteen hundred and thirty seven by ten o'clock
in the forenoon of said ^{day} wherein you are not to fail
and fail not at your peril and have you then
and there this writ

~~recd~~

[S]

Witness J. E. Davis Clerk of the circuit
court within and for the county
of Crawford with the seal of
said court affixed at office in
the Town of Steelville this 26th
day of July in the year of our
Sord Eighteen hundred and
thirty seven

J. E. Davis Clerk
By C. J. Wood Deputy
Clerk

State of Missouri ss The State of Missouri
Crawford County } To the Sheriff of Crawford County
Greeting

You are hereby commanded to summon William
Blackwell and Thomas J. Shirley that all excuses and
delays set aside they be and appear before the
Honorable Judge of our Crawford Circuit Court at
a Special Term to be holden in the Town of Steelville
on Wednesday the sixteenth day of August in the year
of our Sord Eighteen hundred and thirty seven to give
testimony in a case before our said Judge depending
and undecided wherein the State of Missouri is
Plaintiff and Mary a Mulatto Slave is defendant
on the part and in behalf of the State of Missouri
wherein you are not to fail and fail not at your
peril under the penalty of the Law and have you
then and there this writ

Witness J. E. Davis Clerk of the
Circuit Court within and for

S.S.

the bounty of Crawford with
the Seal of said Court affixed
At office in the Town of Steelville
this 26th day of July in the year
of our Lord eighteen hundred and
thirty seven

J. E. Davis Clerk

Served the within on Thomas J. Shirley & By C. J. Wood Deputy Clerk
on the 15th & William Blackwell on the 16th day of August 1837 Mark Gulleratt Shff. C. C.
Washington County ss

The State of Missouri

To the Sheriff of Washington County Greeting
You are hereby commanded to Summon John C. Bricker
to be and appear on the 16th day August Inst - at a spec-
al Term of the Circuit Court of the County of Crawford to be
held at the Court house in the Town of Steelville in
and for said County on the 16th day of August Inst
then and there to testify and the truth to speak in
behalf of the State in a certain matter of controversy
now pending and undetermined before said Court
wherein the State is Plaintiff and Mary a black
Girl defendant and this he shall in himself
omit under the penalty of what the Law directs
and have you then there this writ

Witness John Bricker Justice of
the Peace this 11th

day of August 1837

John Bricker Justice
of the Peace

Served the within Subp on the within named John C.
Bricker in Washington County by reading the
same in his hearing August 11th 1837

A. C. Thomson Shff
of W. C.

The Circuit Court for the County of Crawford met at the Court-house in Steelville on Wednesday the 16th day of August A.D. 1834 agreeable to the order of James Evans Judge for the trial of Mary a Negro Girl charged with murder

In pursuance of a writ of venire facias to him directed the Sheriff returned into court the following panel of a grand Jury summoned within and for the body of the County of Crawford To wit, James Steel whom the court appointed foreman Hayes & McKean William Matlock Melburn Britton William Ramsey Robert S Ramsey Thomas Randolph Louis Pinnell William Johnson John M A England Caleb Harris Jun James Davis Joseph Collins Matthew Gorman De Sa Fayette Ramsey Joseph G England Abner McKean Elias Matlock Joseph Palmer John Carrou William Carrou Jesse Harris Mark Benton Henry Benton good and lawful men who being ^{and} impaneled and sworn received a charge from the court and retired from the bar to consider of their presentments

The Grand Jury returned into court the following bill of Indictment

The State of Missouri } Indictment for Murder
vs } A True Bill
Mary a Slave }

State of Missouri } To wit } In the Circuit Court
Crawford County } At a Special Term begun and
held on the sixteenth day of August 1834

The grand Jurors of the State of Missouri impaneled and sworn and charged to inquire for the body of the County of Crawford aforesaid upon their oath present that Mary a Slave late of the

county of Crawford aforesaid not having the
fear of God before her eyes but being moved
and instigated by the Devil on the fourteenth day
of May in the year of our Lord one thousand eight
hundred and thirty seven with force and arms
at the county of Crawford aforesaid in and upon one
Vienna Jane Brinker in the peace of God and
the State then and there being feloniously
wilfully and of her malice aforethought did
make an assault and that the said Mary a
Slave did then and there with force and
arms and with a certain piece of wood which
she the said Mary in her right hand then
and there had and held her the said Vienna
Jane Brinker in and upon the head of her the
said Vienna Jane Brinker feloniously wilfully
and of her malice aforethought did strike and
beat giving her the said Vienna Jane Brinker
By such striking and beating divers mortal
bruises and contusions in and upon the head
of her the said Vienna Jane Brinker of which
said mortal bruises and contusions she the said
Vienna Jane Brinker did then and there instan-
tly die and so the Jurors aforesaid upon their
oath aforesaid do say that the said Mary a
Slave her the said Vienna Jane Brinker
in manner and form aforesaid feloniously
wilfully and of her malice aforethought did
kill and murder contrary to the form of
the Statute in such case made and provided
and against the peace and dignity of the
State

And the Jurors aforesaid upon their oath aforesaid
do further present That Mary a Slave late of the

bauntty of browford aforesaid not having the fear of
God before her eyes on the fourteenth day of May
in the year of our Lord one thousand eight hundred
and thirty seven with force and arms at the bauntty
of browford aforesaid in and upon ~~the~~ Vienna Jane
Brinker in the peace of God and the State then
and there being feloniously wilfully and of her
malice aforethought did make an assault and
that the said Mary a Slave did then and there
with force and arms feloniously wilfully and of
her malice aforethought did cast and throw
the said Vienna Jane Brinker into a large branch
filled with water by means of which said
casting and throwing of her the said Vienna
Jane Brinker into the large branch filled
with water aforesaid she the said Vienna Jane
Brinker in and with the waters ~~aforesaid~~ thereof
then and there was suffocated and drowned of wh
ich said suffocation and drowning she the said
Vienna Jane Brinker did then and there instan
-tly die And so the Jurors aforesaid upon

their oath aforesaid do say that the said Mary
a Slave her the said Vienna Jane Brinker in
manner and form last aforesaid feloniously wilfa
-lly wilfully and of her malice aforethought did
kill and murder contrary to the form of the Statute
in such case made and provided and against
the peace and dignity of the State

Sarah Stenger Esq
Attorney

And the Grand Jury having no further business
before them were discharged

The State of Missoury Indictment For Murder
vs Mary a Slave } This day came as well the cur-
bustoy of the Sheriff and having heard the Indict-
ment read and whether being asked whether she
was guilty or not guilty of the charges in said Indict-
ment alleged pleaded not guilty to the same and
for her trial put herself upon the country and
the Circuit Attorney done the same like and on
motion of the Circuit Attorney a venire was awarded
directed to the Sheriff of Crawford County to summon
thirty two good and lawful men of his County
to appear immediately before the Court ~~at~~ venire
to try the issue of traverse between the said State of
Missouri and the said Mary the said Mary not
requiring a copy of the Indictment and the venire
Summoned forty eight hours before the trial as
by law she had the right but waves all legal
objections thereto

The State of Missouri Indictment For Murder
vs Mary a Slave } It appearing to the Satisfac-
tion of the Court that the prisoner is a Slave and una-
ble to employ Counsel to defend her Therefore the
Court assign to her as her Counsel for defending of her
Philip Cole Esqr John S. Buckley Esqr and
Mason Trisell Esqr

The State of Missouri Indictment For Murder
vs Mary a Slave } The Sheriff returned here into
Court the panel of the venire
by him Summoned for the trial of Mary ^{the} prisoner
which being called the prisoner selected the

following persons (by whom she was willing to be tried
who were sworn well and truly to try and true deliverance
make between the State of Missouri and the prisoner
at the bar according to the evidence) Court Wiley England
William Puckett Hiram Clay Michael Woolf Riley
Bartan James Eggers James Eggers Junior

The venire being exhausted and not having obtained
from ^{the} Pannell Jurors sufficient to try the said
Issue of traverse thereupon the court ordered the
Sheriff to summon and return into court immedi-
ately Twenty four talesmen

The court adjourn until 8 o'clock to morrow morning

James Evans

Thursday 14th August 1837

The circuit court met pursuant to
adjournment present the same Judge as yesterday

The State of Missouri 1 Indictment for Murder
vs 2 Now at this day came as
Mary a Slave 3 well the Circuit attorney as the
Defendants and thereupon came the Jurors
Court Wiley England 1 William Puckett 2
Hiram Clay 3 Michael Woolf 4 Riley Bartan 5 James
Eggers 6 James Eggers Junior 7 Bartan Gilbert 8
James Arthur 9 Baker Peacock 10 Peter Buckley 11
and Jonathan Ague 12 all good and lawful men
who being elected tried and sworn well and truly to
try the Issue of Traverse between the State of Missouri
and Mary the prisoner at the bar and a true deliverance
make

Judgment

of the Jury rendered by them in the above case. Therefore It is considered by the Court now here that the said Mary a Slave the prisoner be confined in custody until the thirtieth day of September Eighteen and thirty seven that on that day she be taken by the Sheriff of the County of Crawford between the hours of eleven o'clock in the forenoon and Two o'clock in the afternoon of said ^{day} to the place of execution in the Town of Steelville and there to be hung by the neck until she is dead and the prisoner in mercy &c

The State of Missouri

vs

Indictment For Murder

Mary a Slave } The prisoner having filed affidavits and prayed an appeal for the above cause to the Supreme Court the appeal is granted accordingly

State of Missouri

vs

Indictment for Murder

Mary a Slave } Be it remembered that on this 19th day of August in the year of our Lord 1837 personally appeared in open Court the defendants in the above cause who being duly sworn depose and say that her appeal from the Judgment of the court in the above cause is not made for the purpose of rescission or delay but because the appellants believe that she is aggrieved by the Judgment of the court sworn to in open Court } Mary ^{her} a Slave
August 19th 1837 } mark

J. E. Davis, Clerk

The State of Maryland Indictment For Murder
vs In the Crawford Circuit Court
Mary a Slave 3 Special Term August 16th 1837

I H E Davis Clerk of the Circuit Court within
and for the County of Crawford

Do certify that the annexed and foregoing
is a true copy of the Records and papers
on file in my office in the above cause

In testimony whereof I have here
unto set my hand and affixed
my Seal of office at office in
the Town of Steelville this 31st
day of August 1837.

H E Davis Clerk

Cost Aug 8. 17

Ordered that Court adjourn until tomorrow
morning 9 o'clock

James Evans

Friday 18th August 1837

The Circuit Court met pursuant to adjournment
present the same Judge as yesterday

The State of Mississippi

vs

Mary a Slave

Indictment For Murder

This day again came as well
the circuit attorney as the said Mary who being again
brought to the bar and there upon came also the Jurors
of the Jury, to wit. Wiley England 1 William Puckett 2
Hiram Clay 3 Michael Woolf 4 Riley Britton 5 James Eggers
6 James Eggers Junior 7 Nathan Gilbert 8 James
Arthur 9 Baker Peacock 10 Peter Bruckey 11 Jonathan
Ague 12

1st Instruction That the confessions of the accused as detailed
in the evidence of Shirley Blackwell Bruckey Bruckey
and Sullivan to be received by the Jury as legal
evidence against her must have been made by her
of her own free will and not under the influence
of hope or fear, torture or pain

2nd Instruction That if such confessions were made by
the accused under the influence of present or future
suffering or by the inducement of present or future
hopes or fear then all such confessions so made by
her are not legal evidence against her and are not
to be considered by the Jury

3rd Instruction If the Jury shall find from the evidence
that the accused wilfully maliciously and feloniously

threw the deceased into the branch and at the same time struck it on the head with a stick the effect of which causes together pronounced death.

Then there being no count in the indictment upon such a state of facts the Jury must find for the Defendant.

5th Instruction If the Jury have a reasonable doubt with regard to the guilt or innocence of the accused they are bound to find the defendant not guilty.

6th Instruction If the Jury shall find from the evidence that Mary the accused person was under the age of fourteen years when she committed the offence alleged in the indictment then unless they shall also find from the evidence that at the time when said offence was committed the said Mary had sufficient mind to know what act would be a crime or otherwise they shall find for the defendant.

Who not having agreed upon the verdict retired who returned into court with the following verdict
We of the Jury find the prisoner guilty in manner and form as she stands charged in the indictment of murder in the first degree.

State

Indict for Murder
Mary a Slave } Be It remembered that on the trial of the above case Evidence on the part of the State in order to sustain the indictment was heard and introduced and the evidence closed on the part of the State and on the part of the defendant there being no evidence offered wherefore the Court was continued until the next day upon the condition that the defendants.

Evidence was closed, the State having closed the evidence on her part as aforesaid the Jury here is assembled again in pursuance of arrangement made aforesaid. The State by her attorney asked leave of the court to examine witnesses again that had not been before examined and to reexamine a witness that had been examined in the above case in order to sustain in the same on the part of the State which was allowed by the court to which opinion of the court the defendant excepts and prays this her bill of exceptions to be signed and sealed and made a part of the record which is accordingly done.

James Evans Seal

The State of Missouri }
vs } Indictment For Murder
Mary a Slave } The defendant by her
counsel moves the court for a new trial and ^{in this case}

files their reasons

State of Missouri } In the Circuit Court
of Crawford County } At a Special August
Term 1837.

State of Missouri }
vs } Indictment for Murder
Mary a Slave } Be It remembered that
on the trial of the above cause after the
Jury had returned their verdict of guilty into
court the prisoner the above named defend-
ant by her counsel move the court to set
aside the verdict found by the Jury in this
cause and to grant the defendant a new
Trial which motion is in the words and
figures following To wit

State

v

Indictment for Murder

Mary a Slave } The defendant in the
above cause moves the
court for a new trial for the following reasons

1st The verdict returned by the jury is against law

2nd It is against evidence

3rd It is against the instruction of the court

4th Because illegal evidence was permitted to go
to the jury and ought to have been excluded

5th Because witnesses were permitted to give evidence
on behalf of the State after the prosecuting Atty
had closed the evidence on behalf of the
State and the deft had offered no evidence
and declared she had none

Mary a Slave

By her counsel

which motion being seen and heard by the
court the said motion was by the court
overruled and refused to which opinion
of the court in overruling and refusing the
said motion for a new trial the said
defendant by her counsel here objects and
excepts and thus objecting and excepting
prays the court that this her bill of
exceptions may be by the ^{court} signed sealed
and made a part of the record in this
cause which is here done accordingly

James Evans (Clerk)

State

v

Indictment for Murder

Mary a Slave } The defendant by her counsel
makes a motion in arrest of Judgment and files
their reasons

State } Indict for
vs } Murder August 1837
Mary a Slave } Be It remembered that on this
day the above defendant by her counsel filed
here the following motion in arrest of Judgment
in the above cause

State } Indictment for Murder
vs } The defendant moves the court to
same } arrest the Indictment in the above cause
for the following reasons

- 1st The Indictment ~~is~~ found in the above cause
at a special term of the circuit court is not
warranted by any law of the land and is
therefore null and void
- 2nd The Indictment is illegal because in neither of the
counts thereof is it averred that the acts charg-
ed to have been committed by the defendant
were done with an intent to kill and murder
- 3rd Because said Indictment does not pursue
the words of the Statute
- 4th Because said Indictment does not set forth and
show to whom said Slave belongs
- 5th Because the verdict is general upon counts that are
contradictory and incompatible with each other
- 6th Because the offence charged in the Indictment
does not appear by any averment therein to have
been committed in the State of Missouri

Mary a Slave by her
counsel

which has been heard and considered by the Court
is overruled to which opinion of the Court the defendant
by her counsel excepts and prays this her bill of excep-
tions to be signed and sealed and made a part of the record
which is done

James Evans Chas

Ordered that Court adjourn until tomorrow
morning 6 o'clock

James Evans

Saturday 15th August 1834

Court met pursuant to adjournment
present the same Judge as yesterday

State of Indiana }
vs }

Indictment for Murder

Mary a Slave } This day came the prisoner by
her counsel and submitted their motion for
a new trial which was overruled by the court
Thereupon the counsel filed a bill of Exceptions
to the opinion of the court

State of Indiana }
vs }

Indictment for Murder

Mary a Slave } This day came the prisoner
by her counsel and submitted their motion
in arrest of Judgment to the court which was
overruled by the court

Thereupon the counsel filed a bill of excep-
tions to the opinion of the court

The State

vs

Indictment for Murder

Mary a Slave } Now at this came as well
the circuit attorney as the prisoner who being
again brought to the bar and the court now
being sufficiently advised of and concerning
the motions of the prisoner for a new trial
and a motion in arrest of Judgment upon
the verdict and having overruled said motions
do now render Judgment upon the verdict

(7)

831

State of Mysore

or

Marg a Slave

831

India August

4th 1837

J M Guady

Ch. M. Guady.

Mary a Slave app^l vs On Indictment for
State of Missouri Murder, Inf^{ty} and
appell^{er}. Special Term of Circuit
Court held for Crawford
County. Aug 1834

Mary the above appellant, was indicted,
tried and convicted of Murder, at a special
Court held for Crawford County in August 1834
and thereupon appealed her cause to this
Court. Upon an examination of the record
several important questions present themselves
for the consideration of the Appellate Court,
important because I believe they are unsettled
by any former adjudications, and because
the life of a human being is dependent upon
the issue. In order to the proposed exami-
nation, I shall consider first the Jurisdiction
assumed by the Judge of the Circuit Court in
this case. Secondly, The Indictment
and the offence as a statutory offence, of
which the defendant stands convicted and
in the third, and last place Whether it
be legal or illegal, after the state had closed
her evidence and the accused has and
the case had been submitted to the jury and
the jury adjourned over upon the condition
that the defendant would introduce no more
evidence for the state to introduce witnesses to
the jury and examine them in the course, some
of whom had been examined before, and others
not?

And first as to the Jurisdiction assumed by
the circuit Judge in this case.

L.M. 137 Our Law provides, That the Judge of any cir-
S. 48. - cuit Court may at any time hold a special

term for the trial of persons charged with crime,
and confined in jail, by making out a written
order to that effect and transmitting it to the
Clerk, who shall enter the same upon the records
of the Court. The Law provides that the ordinary
terms of the circuit ^{court} for Crawford County, shall be
M.L. held on the first Mondays, March, July and
1863. § 15. November. The Trial in the above cause was
had in August, as appears from the record
and appears to be at a special term of the cir-
cuit court held for that purpose. It appears
also that the Judge at this special term caused
a Grand Jury to be empanelled for the purpose
of finding the Indictment upon which the ap-
pealant has been convicted, and condemned to
suffer death. — In the first place I assume
the ground, that this whole case as presented
by the record, was a case Coram non Judge,
for the want of a Legal Order. There is a notice
to the Clerk of the Circuit Court of Crawford
County, that a Court will be held for the trial
of the defendant, with a request or direction
to him to cause a Grand Jury to be summoned
&c. But I ask where is the written order that
a court be held for the specific purpose as is
provided by law. There is no such order on the
record, and there never was such an order made
by the circuit judge. And if there was no legal
order to hold the Court that was held then all
the above proceeding is coram non Judge and
void. If a special jurisdiction is given by Law
to do a particular thing, in a particular way, and
under particular circumstances, now in order

to the lawful and unexceptionable exercise of this authority, the Law giving the power must be strictly pursued. To authorize a Judge of the Circuit Court to order a special Term, a certain state of facts must ^{first} exist, first there must be some person charged with crime who is ready for trial in a legal sense, and secondly that person must be in jail. Now there is no Order or affidavit to this effect, but in the place of an order, the Judge notifies the Clerk that a special Term will be held &c and directing him to have a Grand Jury summoned &c. The Law does not authorize nor warrant any such proceeding. A Legal order of a Court, as I understand it, is a Command that a particular thing be done, in the terms prescribed by Law. The Judge's notice to the Clerk, is merely intended to inform him that a particular thing will be done, and requiring his cooperation in its accomplishment. Again whenever a certain state of facts exists, as has been stated before, the Judge of a Circuit Court is authorized by law to hold a special Term of his Court. Now the evidence of the existence of a lawful cause and that the Judge has taken upon himself the exercise of this authority, can only be proved in one way, and that is by the record evidence of a legal order and there is none such in this record. Then it follows, that although a Court may have been held, yet as there exists upon the record no lawful warrant or authority of law for holding the same, that the whole proceedings are a nullity. —

But there is another view of this subject, which is

anomalous and striking. Our statute says
that a special Term may be ordered for the
trial, &c., and that a notice shall be served
M.L. 139 on the person about to be tried, & Circuit-attorney
S. 49. - By what authority, I would respectfully
ask, was a Grand Jury empannelled at this spe-
cial term. By what authority does the circuit
direct the clerk, to cause a Grand Jury to be sum-
moned, thus making the clerk his deputy in
the discharge of his official duties, and by
what authority does such a body, convened
together in a mode unknown to the law pro-
pound an indictment jeopardizing the life of a
human being? I confess after an anxious
search, I can find no Law that will admit
the exercise of this authority. Our statutes
authorize the empannelling of a Grand Jury other
than at the regular terms of the Circuit-Courts, but
in one solitary case, and that is when the
Grand Jury has been discharged, and an offence
is committed ^{thereafter} during the sitting of the same
M.L. 480. Court that court may by an order entered on
S. 13 - their minutes direct another Grand Jury to
be empannelled for the purpose of enquiring
into the offence. But a special Term of the
circuit Court is not ordered for the purpose
of making an enquiry through the interven-
tion of a Grand Jury, whether or no, a crim-
inal offence has been committed by any
one, but to try an offender for an offence
that has been enquired into, and ascertained
as far as was necessary in order to put the
offender upon a traverse Jury, or in other words
upon his Trial.

Trial per Trial is a technical term well known
 Pao. 6 to the Law. The Indictment is the accusation,
 1 Ch. C. 2 and the trial is to ascertain in a legal
 407. 457 manner the truth of it.

4. B. C. 342 The Legislature certainly did not mean in the
 1. Co. Lit. 155: — passage of the Law authorizing special terms, that
 Indictments or accusations, as well as Trials,
 should be had at them. The Statute says
 no such thing, and therefore intends no such
 thing. If the Law did intend, that Indictmen-
 -ents should be found at a special Term, why
 is there a notice of trial to be given to the
 accused as well as circuit-attorney, the
 provisions of the Law still harmonizing, which
 gives the circuit-judge power to order a term
 for the trial in? If the Grand Jury have
 to indict it will often happen there will be
 no trial. But how does the Order of Court
 and Law agree with such a state of things?
 The Judge orders a term of the Circuit-Court
 to be held for the trial in, and there has
 not been the preliminary enquiry by a
 Grand Jury to ascertain whether there is any
 person to be tried or not. This appears to me
 a great absurdity. I consider the notice re-
 quired by Law to be given to the accused, to also
 mean what it says, it is to warn him that
 his Trial is at hand and to prepare for it.
 So likewise of the circuit-attorney. Such
 a notice would be, with submission, but a
 simple and unmeaning affair, if delivered
 to a person before Indictment found, it would
 be incomprehensible, and wholly incompatible
 with the nature and functions of a Grand Jury

who are sworn to secrecy.

It is humbly submitted therefore that the circuit Judge has greatly erred, not only in the legal explication of the special Term of the Circuit Court of said but has also erred in refusing a grand jury at said illegal term, in a manner and under an authority unknown to the law. Having then disposed of the preliminary question, I shall now in the second place consider the Indictment itself and the offence as a statutory one. —

archb. An Indictment is a written accusation of a
Cr. Plea. crime presented upon oath by a Grand jury.
1 — The Indictment in this case is founded upon
M. L. 187 the first section of the second article of our Law
§1 — with regard to crimes and punishments, which reads thus "every murder which shall be committed by the means of poison, or by lying in wait, or by any other kind of wilful deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any armed rape robbery burglary or other Felony shall be deemed Murder in the first degree. In order to sustain this Indictment it must be shown that it is in strict accordance ^{with} the following branch of the above law because no other part of the section applies to the state of facts as set out in the Indictment. The part of the section I refer to is in these words "or by any other kind of wilful deliberate and premeditated killing."

I do not see any particular exception to this Indictment as an Indictment at common Law. The conclusion to be sure is contra formam Statuti, but yet it might be good, for in every

case of Homicide, there was a presumption in
 virtue of that Law that the slayer was guilty
 of a felonious killing, and the onus invol-
 ved upon him to extenuate the offence or
 prove his innocence. But not so in the case
 under consideration. Our offences, with the excep-
 tion of some misdemeanors are statutory, and
 the offence with which the appellant is charged
 is an offence created and defined by statute.
 I consider the above Indictment defective, because
 it does not pursue the statute. It contains
 two counts, and in neither of them is it avowed
 that the acts charged to have been done by the
 accused, were done with intent to kill. The
 acts are charged to have been done wilfully mali-
 ciously and feloniously, but neither of these
 words, nor all of them together will cure this
 fatal defect in the indictment, this departure
 from, and abandonment of the statute. The
 acts charged might have been maliciously
 done, and death not intended, they might
 have been done wilfully ~~and feloniously~~, and
 the offender ^{be} exempt from capital punish-
 ment, death might not have been intended,
 and the offence a Penitentiary one, or in the case
 of a slave, stripes. Upon the Trial of this offen-
 ce, was it not material to prove on the part
 of the state, that the killing was premeditated,
 and was it not also material for the jury
 to find the fact so to be in order to the conviction
 of the defendant? I think so. Well, if
 such proof must be proposed to the jury,
 it must be done upon the ground that it
 is necessary to establish the offence, or some

1836.
 page 60.

feature of it. Yet when you come to examine this Indictment, you would find no averment there that would authorize its introduction. In other words the premeditated killing under our statute, is the gist of the offence. This Indictment leaves out this necessary averment, and proof is introduced to the Jury to supply that defect, and make out a case dehors the record.

The Law with regard to Indictments on statutes -
Archb. C. -ry offences is this. It must charge the defendant -
plea 8. 23 with certainty and precision to have committed
2 East 333 the acts under the circumstances and with the
2 Hale 170 intent mentioned in the statute, and if any
one of these ingredients be omitted, the defendant may demur, move in arrest &c. The defect will not be aided by verdict, nor will the conclusion "contra formam statute" cure it. To illustrate this, I will state the following case from the Reports. An Indictment was holden bad, that
Rex was preferred on a law that makes it Felony
Davis "wilfully and maliciously" to shoot at any
Leach person in a dwelling house or other place, vice
556. - use it charged the offence to have been done
"unlawfully and maliciously" omitting the
Archb. word wilfully. Some of the Judges thought
Crim. plea that "maliciously" included "wilfully" but
23 - the greater number held that as "wilfully and
maliciously" were both mentioned in the
statute as descriptive of the offence, both must
be stated in the Indictment. Our statute says,
"wilful deliberate and premeditated killing"
The Indictment alleges that the defendant, wilfully

maliciously and feloniously do but does not
 aver that either of the acts charged, were done
 with intent to kill, or that the killing was preme-
 ditated. Chitty lays down the rule to be, that
 1. Chitty
 Cr. Law
 282. all Indictments upon statutes, especially the
 286. 289. most penal, must state all the circumstances
 that constitute the definition of the offence
 in the statute, so as to bring the defendant
 precisely within it. -

This Indictment being then deficient in this
 necessary and all important averment requir-
 ed by the 1st section of our Law before referred
 to, cannot be sustained, and the Judgment
 thereupon, must be vacated and annulled
 for that defect.

The third and last point only now remains to
 be considered. The bill of exceptions presented
 upon the record shows, that the cause was
 closed on the part of the state and defendant,
 and submitted to the jury for their consideration.
 That the jury was adjourned over to the next
 day upon the condition that defendant would
 introduce to the jury no more testimony. -
 That on the next day the jury having come
 together, the state by her counsel asked leave
 of the court to examine witnesses again in the
 case, which was granted by the court, and
 witnesses were accordingly examined on the
 part of the state. To which opinion of the court
 the defendant excepted. This proceeding of
 the circuit court involves a question of
 practice in the first instance. In trials of
 all kinds in Courts of Justice, the party who
 holds the affirmative of the issue, begins.

after he has concluded the dependant commen-
ces and concludes, then counsel are heard, the
Court instructs, the case is then left with the
Jury for their consideration and verdict. The
Jury may hear again a witness in open
Court, or ask questions of the Judge for their
direction. But after a case is submitted to
a jury, neither the court nor a party has
any right to introduce to them further or
any evidence in the case. The Jury themselves
1. Ch. Brim have the right to re-examine a witness in
Law 517. open Court, but with this exception, the matter
is at an end, the parties to the cause have
or determined it in open Court. And this is
right for if it were otherwise a trial would
last forever. In this proceeding I believe the
Circuit Judge erred, and violated the establish-
ed practice and law of the Court in such
cases. But there is another view of this affair
that is if possible worse than that we have
just examined. The Jury was adjourned
over upon condition that the dependant
would offer no more evidence. The Prosecutor
also closes his case, but in the morning there-
after when the Jury come together, behold
the prosecutor has in the meantime procured
other and new evidence on the part of the
state and gets it before the Jury. This was
a foul proceeding where life was the
stake played for, it was an unworthy trick,
an unholy trap and snare for the un-
wary, for the presumption is, that if the accu-
sed had rebutting testimony, it was fore-

from the court under the agreement aforesaid which was made in presence of the court.

In Conclusion I have only to say to this Hon. Court that it is conceded that Guilt should be punished, but it is respectfully submitted, that punishment neither can, nor ought to be inflicted upon the most atrocious offender in virtue of our Laws, unless his or her guilt has been ascertained and made manifest in conformity with them. Because an illegal trial and conviction, leaves the presumption of innocence just where it was, and neither can nor does prove any thing in a legal point of view, for or against the accused. Such a Trial is in truth the mere shadow of the substance, a theatrical representation of the most important the most solemn of ^{all} our Judicial proceedings, toward the trial, conviction and condemnation of a Human Creature to death.

O. P. Holt
Attorney at
Law for
Mary the
appellant

"Additional points"

The verdict in this case is repugnant and as the Court would not award a *novus facias de novo* in a capital case, the accused was entitled to her acquittal. 1 Ch. Crim Law 647. 648. —

O. P. Holt
Att.

2

The sentence of the court pronounced upon the accused as appears by the record, is unintelligible. It reads "that the said Mary a slave the prisoner be confined in custody until the thirtieth day of September eighteen and thirty seven" de M.L. 494. 816 - this sentence is void for uncertainty. -

P. Holt
att^r

3 -

again, The court is directed to cause a warrant to issue to the sheriff reciting such conviction and sentence. There is no evidence on this record that the court has complied with the statute in this particular M.L. 494. 816. -

P. Holt of
Council de

Mary a Slave
appellant

vs

The State of Mississippi
app^{ee}

Appellants

Brief.

P. Holt

State
vs.
Mary

Indictment for Murder.

Authorities. for Defendant

1. Judgment will be arrested, for want of sufficient certainty in setting forth either, the person, the time, the place, or the offense - 4. Blk. Com. page 375.

And the Statute of Jeofails, does not apply to indictments or proceedings in Criminal ^{Cases} proceedings, and therefore a defective Indictment is not aided by a verdict, as defective pleadings in Civil Cases - Same Book & page.

- 2^d. - If a person be indicted for one species of Killing as by poisoning, he can not be convicted of a species of death entirely different, as by shooting, starving, or strangling. - See Russell on Crimes - page 439. and following.

In this indictment there are two counts, one for killing with a piece of wood, and the other by drowning: there is a manifest incompatibility and inconsistency between those two counts - they can not both be true, and yet there is a general finding of the jury - Russell on Crimes 349. and following -

- 3^d. As to the strictness required in Criminal Cases and especially when they are Capital - See 1. Vol. Mo. Reps. page 548. State vs. Cooke, 1. Vol. Chitty Crim Law. page 222.

Also see, Mo. Reps. (1830) page 227:8. State vs. Hardwick,

State
29. } Murder.
Mary a Slave

Authorities,

- 4. Blk. Com. 375.
- 1. Russell on Crim. 439.
- 1. Chitty Crim. Law. 222.
- 1. Vol. Mo Reps - 547.
- Mo. Reps. (1830.) .. 227.

Geo S. Bunting atty

Mary a Slave
vs
The State of Missouri

Opinion of Mr. Justice
Judge

At a special term of the circuit court for the county of Crawford held on the 16th day of August 1837 The grand jury of that county found an indictment^{ment} against Mary for the Murder of a ~~child~~ ^{man} ~~the~~ ^{man} ~~Prisoner~~ Then on two counts in the indictment the first lays the killing to be done with a ^{stick} ~~stick~~ of wood by beating The second charges the killing to be done ~~by~~ by drowning On not guilty pleaded the jury found a verdict of guilty generally on both counts and judgment of death was pronounced on the prisoner by the court. The case is brought here by Appeal The first objection taken to the proceeding is that the Order of the Circuit Judge for the holding the special court is erroneous and void

The Act requires the Judge on being informed that there is a person in custody charged with ~~the~~ ^{crime} to make an Order for holding a special term of the circuit court The Act does not say to whom the Order is to be directed nor on whom to be made

In this case Judge Evans made the Order to the clerk It is to be remarked however that the Writing in this case does not expressly Order that a court shall be holden but only says a court will be holden I am of Opinion that the Substance of the law has been complied with Though the Order is not entirely formal

The next Objection taken by Buckley & Cole for the appellant is That by law the court had no power to cause a grand jury to be summoned to the special term but that the Indictment must be found by a grand jury summoned to the regular

term of the circuit court & that ^{when} an indictment is so found
and the prisoner is afterwards arrested and committed ~~to~~
the judge can only make an order to hold a special
term of the court To dispose of the objection it becomes necessary
to look into the law authorizing the special term of the court

By the 48th ~~section~~ sect of the 1st Act, of the Act
respecting courts (Revised code 189) It is enacted that -
"~~if~~" The judge of any circuit court may at any
time hold a special term for the trial of persons charged with
crime and confined in jail by making out a written order
to that effect and transmitting it to the clerk who shall enter
the same upon the records of the court, The act then makes
some other provisions preparatory to the holding the court -
but says nothing about summoning either a grand or
petit jury In the case at bar the clerk on the reception
of the judges Order made out a writ to the Sheriff of the county
requiring him to summon a grand jury which was done
This grand jury found the indictment on which the pris-
oner was convicted I am of opinion this grand jury was
a legal one And my reason is this The words and substance
of the 48th sect above named require this interpretation to
give effect to the obvious intent of ^{the} Legislature

The section says, "The judge of any circuit court may at any
time hold a special term for the trial of persons charged with
crime and confined in jail by making an order"

The argument of counsel is that the words, "charged with crime
and confined in jail," mean that the court can only
be ordered when the person is charged on the oath of a
grand jury [&] is arrested and in jail on that charge

I admit that an indictment by a grand jury is a charge
of crime But it also seems to me that where a person is
charged on the oath of some witnesses and a warrant is
issued and the party brought before a magistrate and
by him committed to prison for safe keeping

That such person is charged with crime in very solemn form of law although it is true that a charge by indictment makes the charge still more solemn.

The ^{statute} law nowhere expressly declares to what court the grand jury shall come. But I think the grand jury must come to the court having power to try the offence. And in this case the law having given the power to the Special Court to try the person charged with crime all the means necessary to accomplish the end are necessarily given. It seems to me therefore there is no error on this point.

The next objection taken by counsel is that the court erred in refusing to arrest the judgment. One count in the indictment charges that the ^{offence} was accomplished by the prisoner beating the child to death with a piece of wood and the other count charges that the death was occasioned by drowning and the jury have found both charges to be true. Which the counsel say is a repugnancy and that the verdict is therefore void. I am of opinion that the child could not come to its death by both these modes. If the child were beaten with the stick in such manner that it must inevitably die in a short time by the wounds. Yet if it were in that condition thrown in water deep enough to drown it and it thereon strangled and drowned. I should say the drowning was the mode of the death. For as long ~~long~~ as the child lived after the beating the death could not be said to have yet ^{been} produced by the beating. If two causes be operating at the same time on a subject either of which is entirely sufficient to produce a given end in time and one gets in advance of the other and the result then takes place the approximate cause may safely be supposed to produce the ^{end}. I think the jury in this case should have been sent back to make up their mind on which count of the indictment the defendant was guilty as she might be guilty on either but could not have murdered by both modes.

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The Court however is not not entirely satisfied that for this reason the judgment should be reversed

The next and only remaining point is one arising out of the bill of exceptions taken on the trial

It appears by the bill of exceptions that the ~~plea~~ State by the prosecuting attorney closed her evidence and that the defendant gave none and that then the court was about to adjourn till next day before the argument could take place whereon it was agreed between the Circuit attorney and the prisoners counsel under leave of the Court that the jury might disperse till next morning on the condition that the defendant should not and would not offer any testimony at all. The Court adjourned till next morning and the jury dispersed. On the opening of the Court the next day the jury came and the State offered to reexamine some of the witnesses examined the day before and to examine some others not before examined at all. The prisoners counsel objected to this the Court overruled the objection and the witnesses were examined. What the witness deposed to does not appear nor do I consider it material it should appear. The objection goes against the danger of the practice.

It seems to me that on this point the Court erred. I never have yet seen a case that goes so far as this case goes when the plaintiff has closed his evidence in chief of the defendant gives none he cannot merely on the ground that he forgot something be allowed to examine new witnesses nor to reexamine the old ones. This is not allowed for two reasons First because there must be an end of the examination and Secondly because to reexamine a witness after he has been discharged and after the evidence is closed is to allow ~~them~~ ^{him} an opportunity to fill up gaps by perjury and call others on the same after they have mingled with the crowd is of most dangerous consequence to truth and justice. This is the general rule.

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After the plaintiff has closed his case he cannot give testimony after rebutting testimony but that can only take place when the other ^{party} gives some evidence. Otherwise there can be nothing to rebut. In the case at bar the defendant had no testimony at all consequently the evidence the ^{State} gave afterwards was not of that character. There is no reason given in the record why the prosecution asked leave and was permitted to give the amendatory evidence. It is possible there may be cases in which it might be allowed but I cannot now think of them. The case stands then on the ground that the prosecution discovered some defect in the evidence that might be supplied and had leave as matter of right to amend his hold. If this is permitted what is to hinder parties from manufacturing evidence overnight to fit the case. After perhaps too they may have some hint from some unwary juror as to the opinion of the jury. If such a door is ever opened both good and bad men will enter the same. I admit good ^{men} would not take unlawful advantage of the privilege but bad ones would and as the law is not wise enough to distinguish between the bad and the good it forbids both good and bad from the use of the privilege. If this door were ever opened I venture to believe that life and property would be more and more insecure and perjury become more than ever an article of purchase.

For these reasons I am of opinion the judgment of the circuit Court of Braxford County ought to be reversed.

M. M. Gurne

We concur in opinion,

George Tompkins

John C. Edwards.

May
19
The State

Opinion

Filed September 28
1839 J. M. Guady
Clerk