Filed Dec. 9/1904
Jas. Tinney
Clk.

State

-vs-

MT
1493

John Winters.

Assignment of Errors, and Brief.

-o-

Reverse for newly discovered evidence.

Appellant, defendant below, respectfully assigns as error in the trial of this case in the Court below:-

1. There is no evidence to support the verdict of the jury.

2. The evidnce is not sufficient to establish as required by law, beyond a

reasonable doubt, or by a preponderance of the evidence, the guilt of the plaintiff in error, the defendant below.

4. The motion for a new trial, record pages 27 to 30, should have been sustained. Appellant asks that the said motion, as a whole, be taken as a part of this assignment of errors.

5. The officers of the jury were not properly sworn as provided by law, as shown by the affidavit filed in support of same, and other affidavits.

6. That the jurors were not kept in a body together as required by law, but were allowed to be separated often, contrary to Statute.

7. That a number of times, from one to a large number of jurors were allowed to leave the room and kept separate from the other jurors.

8. That two of the jurors, to-wit, Ab Page and G. D. Hook, during the trial of the case, became very sick, had to leave the room, suffered very severely, and finally the trial of the case had to be delayed for a long time before they could be gotten in any condition to sit up in the Court Room and attend to the evidence and argument. Defendant says they were not in such condition as gave him the benefit of their careful consideration of the case, which should be given in a matter of as much importance to defendant as this case.

9. That owing to the confusion and sickness and suffering among the jurors, this case could not have had the careful consideration to which it was entitled, and these causes had at least tendency to distract the attention of the jury, even those who were not sick; especially when they were allowed indiscriminately to

leave the room, separate, and in other ways have their attention distracted from the matter in hand.

10. The verdict of the jury is against the weight of the evidence.

11. Because of the fact that the Clerk did not properly swear the officers in charge of the jury.

12. Because of newly discovered evidence, which defendant did not know of before the trial of this case; to-wit, the evidence of Richard Dill and C. R. Evans, as shown by affidavits filed with the said motion, to the effect that the statements made by the main witness for the prosecution, Ed Bell, colored, were false and contrary to statements made by him immediately after the killing. This testimony being uncontradicted, unknown to defendant until after the trial, and being of itself sufficient to insure an acquittal.

13. Because of error in the charge, in this, that the whole tendency of the charge is to mislead the jury as to this point, to-wit, that there must have been actual danger to defendant, before he would be justified in firing the shot that killed the deceased. Defendant insists that the appearance of danger imminent, and great, is sufficient, and the charge of the Court was of such nature as to be likely to mislead the jury on this point.

14. Because of error in the charge of the Court, as follows:-

"The right of self defense is the right of every human being to defend his own person when he finds himself in imminent danger of death or great bodily harm. The danger must be apparently imminent, that is, impending at the moment, and the person who slays his adversary must have reasonable ground for thinking it is

necessary for him to act at once in order to save himself from death, or great bodily harm." Defendant insists that this is error because of it's tendency to distract the attention of the jury or mislead them as to the true rule, which is that the danger may not only be apparently imminent, but the danger itseld may be apparent, that will justify the killing in self defense.

"The legal doctrine of self defense is not difficult to understand, if each of the jurors here will appeal to his own sense of fairness and justice and right. Did this defendant, at the time he shot and killed Wooten have reasonable ground for thinking he was in great and imminent danger, and that it was necessary for him to take life to avert this danger.

Defendant insists this is error, from the tendency to mislead the jury, as to the point that the danger must have been actual danger, and further, it is error to tell the jury that their own experience, and what they would have done in the same case, is the standard of what the defendant should have done. This is not the true rule as the defendant insists.

15. Because the record fails to show a prosecutor, or the indictment that there was a prosecutor at all.

16. There is nothing in the record showing how the Criminal Court obtained jurisdiction of the case.

17. There is no certificate of the Circuit Clerk of Montgomery County, as to the correctness of the entries from the Circuit Court of Montgomery County.

18. The record shows there was no certificate, as required by law, from the Circuit Court of Montgomery County to the Criminal Court of Montgomery County, the papers, indictment, &c., in

this case.

All of which appellant respectfully submits, as error in the record in this case.

Respectfully submitted,

Daniel & Daniel,

Attorneys for Appellant.

In Supreme Court at Nashville.

State of Tennessee,

-vs- On appeal from Montgomery County Criminal Court.

John Winters.

Attorneys for appellant, defendant below, respectfully submit the following brief.

-o-

Statement of the case.

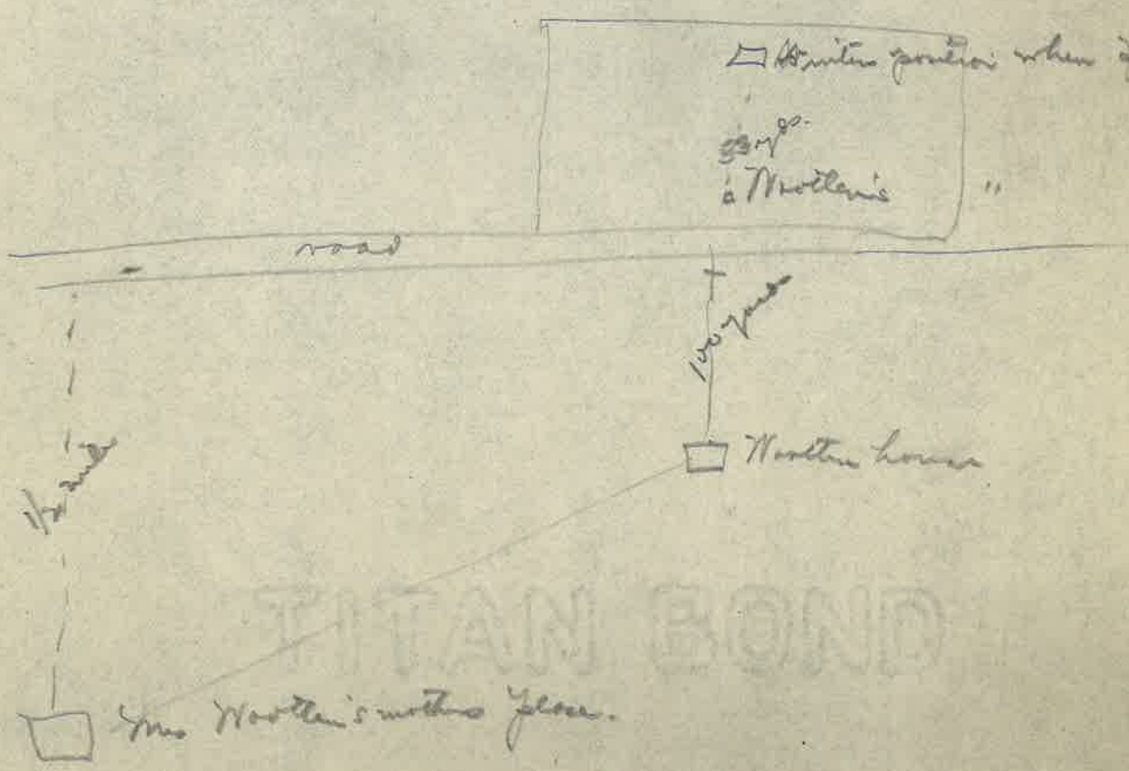
-o-

Duncan Marr owned a farm in District No. 8, of Montgomery County, Tennessee, and had employed Wootten, the deceased, to run it, furnishing him mules, &c., for that purpose. Becoming dissatisfied and alleging that Wootten was not keeping his contract, demanded the stock, &c., and on Wootten's refusal to deliver them, brought suit before a justice for them; a trial resulted in the stock being given to Marr, and he retained possession of the mules, and placed in charge of his interests on the place, the defendant, Winters, the deceased, Wootten still continuing for a short time to live on the place across the road from where the crops were raised.

The trial, its result, and the taking charge of the stock and the place by Winters, after the judgment of the justice, resulted in very bitter feeling on the part of Wootten against Marr and Winters; and Wootten made frequent threats against the defendant, Winters, carried a shot gun nearly all the time, was seen hanging around Winter's place at night with his gun, and stated that if Winters came on the place to cut Marr's corn, or came around there any more at all, he was going to kill him; these threats being made in the presence of numerous witnesses, and were all over the ng hborhood, and were common talk; and there was general expecation of

trouble.

Marr directed Winters to get Wootten come down and divide the corn, and to cut his, Marr's,share, and let Wootten do as he wished with his share, Wootten being entitled to part of the of it, as a share cropper, and Marr the balance. Winters, in the regular employ of Marr, mindful of the threats against him, with his brother and Ed Bell, a negro, went to the field to cut the corn, and laid his Winchester rifle in the bottom of the wagon. The following diagram shows the relative positions of the field where the trouble occurred, Wootten's house, the road, and the path leading to the place of Mrs. Wootten.s mother.



When they got into the field, he sent Wootten word to come on down there and divide the corn, but not to bring that gun with him, referring to the shot-gun that Wootten had been carrying around for several days, as the proof shows, and with which he had threatened repeatedly to soot Winters. The messenger started to Wootten's house, and about that time, Wootten came to his door and re-

marked to his wife, "They are going to cut that corn, anyhow," then picked up his gun, crossed the road, climbed the fence, and advanced toward Winters with the gun in his hand. Winters called out to him to halt. Up to this point there is no dispute as to the facts.

At this point, according to the state witness, Bell, deceased threw up his hands and said, "I am not after you" and "kinda turned his head; Winters, crying out, "He threatens to kill me", fired one shot, which killed Wootten instantly. Will Winters, the brother of the defendant, and indicted with him, went to the body of deceased, at the request of Mrs. Wootten, who had come into the field immediately after the shot, and found the gun cocked, took it up, and leaned it against the fence. Will Winters was killed a short time ago by a crazy man, and the suit abated as to him.

Defendant says, that when Wootten was climbing over the fence toward him, or about that time, he called "Halt", and Wootten raised his gun, and said something about killing him, or "being after him"; that he had heard the threats against him, some of them being made in his presence, and believing himself to be in imminent and deadly peril, raised his rifle and fired.

The jury found him guilty of manslaughter, whether voluntary or not, the jurybdid not say, and fixed the punishment at ten years.

-o-

Argument.

-o-

There are a number of errors in the record, as assigned, and appellant's attorneys take them up without reference to the order in which they are assigned.

Before taking up the first assignments of error, which deal with the testimony in the case, appellant insists that he is entitled to a new trial, because, as stated in the 5th assignment of error, the officers in charge of the jury were not sworn as pre-

scribed by law, as shown by the oath which is set out in the record verbatim, on page 38, and is as follows:-

"Do you, as officer appointed by the Court, solemnly swear that you will take charge of the jury, and keep them separate and apart from all other people, not allow them to communicate with any one, and perform all duties required of you by law, to the best of your skill and ability, so help you God?"

Appellant submits this not the oath prescribed by law, and the new trial should have been granted.

Sanders vs State, Shannon's Cases, 2, page 608, bottom.

Says this Court, in Duncan vs State, Shannon's cases, Vol. 3, page 597, top, "It is the unviersal practise and the law, that the officer in charge of the jury shall be sworn "to keep the jury separate and apart from other citizens, that he will suffer none to speak to them, nor will he speak to them himself, upon the subject of their considerations, further than to ask them whether they are agreed". It is the duty of the Court not only to see that this oath has been administered, but to instruct the officer as to his duty in the premises."

In that case, as in this, the officers were not sworn not to speak to the jury themselves, or himself. And the Court reversed the case, saying, page 599, top ", It is our province to se not only that justice has been done, but to see also that it has been done according to the forms and requirements of law. The question discussed meets us at the threshhold of the case, and is conclusive of our duty."

Says this Court, in Buxton vs State, 5 Pickle, 217, "The record shows the following entry as to the oath administered to the officer in charge of the jury:- "The officer was sworn according to law, to keep them together, separate and apart from all other persons, not to talk with them about the cause, nor allow others to do so, until he returned them into Court tomorrow morning". While

it is said he was sworn according to law, the oath is set out, and this Court has repeatedly held that such an oath is insuffiecient. An impartial jury, selected and kept free from all outside or improper influences, has always been regarded by our courts as necessary to a fair and impartial trial. In fact without it, the administration of the Criminal laws would become a farce. The officer should be sworn to keep the jury separate and apart from all persons, and not allow them to communicate with any person, or any person to communicate with them, and not to communicate with them himself, about the trial of the case, further than to ask them if they have agreeed."

"In every felony case, the record should show affirmatively that the requisite oath was administered to the officer or officers in charge of the jury, pending the trial. This may be done by spreading the oath at large, &c. ** ** **** ** The record before us purports to set out the whole oath given, and no presumption can be indulged in that a full or sufficient oath was in fact taken."

Lea vs State, 10 P., 497, bottom, and 498.

"The law prescribes a certain oath, and if the oath administered is set out in the record, to be good, it must show all the requisites".

7 P., 286, just below middle.

The 6th assignment, that the jurors were not kept together as required by law, but were allowed to separate often, defendant insists, entitled him to a new trial.

The rule is clearly set down by this Court, in King vs State, 7 Pickle, 624, bottom, and 625. Says the Court:- "The well settled rule in felony cases requires that the jury shall be kept together, &c., &., &c. ** *** * "While there is no uniformity in the decisions of the Courts of England and America as to the legal effects of a separation, without more, yet the weight of authority

elsewhere, and the unbroken line of authority ~~elsewhere~~ in this State, is, that, prima facie, the verdict is vitiated by the fact of the separation. If however, it is made to appear that the misconduct could not have been harmful to the defendant, then it is not ground for a new trial." In same case, page 626, the Court further says:- "Where all that occurred during the separation is fully explained, and it can be clearly seen that there was no opportunity for improperly influencing the jury, or that the communication had with the jury, was not calculated to improperly affect them, then to set aisde the verdict, otherwise sustained, would be to sacrifice substance to form."

In this case, it is not attempted to be shown by the affidavits introduced in opposition to new trial on this ground, except by the affidavit of R. L. Black, alone, what occurred during the separation. And surely the affidavit of one of the officers in charge of a part of the jury, when they were separated a number of times, cannot be sufficient to fully explain all that occurred ~~it~~ during the separation, nor does it seem to us sufficient to make it "clearly seen","that there was no opportunity", as requierd by the decisions above cited; especially when the undeniable fact is taken into account that this officer could not be in more than one place at one time, and could not know what was being done when he was absent from a part of the jury, looking after another part. Two jurors were sick and out of the room at one time, and in different places for a time, from each other, and a number were allowed to leave the Court room from time to time, with other officers. See affidavits R. L. Black, Winters, Staton, and others, record page 35 to 41, inclusive.

The 8th assignment, presents the question, as to whether, owing to the sickness of two of the jurors, so serious as to require the attendance of a physician several times during

the argument, their absence from the room several times, and finally the entire suspension of the case for something like a day and night, till they could recover so as to be able to take their positions on the jury, as shown by the affidavits of Winters, Black, and others, record, page 35 to 41; is submitted to the Court without argument, save to suggest that certainly these jurors were in no condition to carefully attend and give that cool consideration to the case the arguments and the charge of the Court, that so serious a charge deserved.

The 12th assignment is as to newly discovered evidence that defendant did not know of before the trial, was ended, or in time to use it at all at the trial; said evidence being that of the two affiants, Richard Dill and Charles Evans, the first being set out on record page 35, the former, page 34; and being to the effect that the main state witness, and in fact, the only living eye witness of the killing, save defendant, stated to the affiants that he had seen the trouble, a few days or a short time after the killing, and that the deceased was advancing on Winters with his gun raised as if to shoot, and threatening to kill Winters, and that Winters then fired; and that that witness further stated to them that the brother of the deceased was trying, even at that early time, to get the witness to state that Wootten had thrown up his hands and said he was not after Winters, when Winters shot; but that he, Bell, was not going to state that, <u>for it was not the truth.</u> That the brother of the deceased, or some one else, did finally succeed in tampering with the witness, Bell, is sufficiently shown by the fact that he testified on the witness stand as he had said the brother of deceased was trying to get him to do, and as he had said he was not going to do, <u>as it was not the truth.</u>

The Court can easily see that this testimony will in-

evitably result in the acquittal of the defendant, on another trial, as it bears out to the letter, almost, the statements of Winters as to how the difficulty occurred, and shows clearly that he was acting clearly within his rights, and in self-defense. Especially strong is this, taken with the statements of John Chester, page 18, and following, Lee Bartee and Newt Shepard, page 19, Brad Martin, page 20, Will Armstrong, (a state witness), page 22, John Bartee, page 18, all going to show statements and threats made by Wootten to kill the defendant, to shoot him with a shot gun, lying around Winter's house at night, the bitterness and ill-feeling that he had toward Winters, &c. Supplemented with the facts also, that Mrs Wootten knew there was going to be trouble, and begged her husband not to go into the field or across the road where Winters was, when Winters had never made the slightest threat, or said anything that was aught but friendly of Wootten, and was engaged in doing what his duty led him, in the carrying out of his employers wishes, within the law; with the fact also that Wootten, as proven by the above named witnesses, had been going armed constantly; his bitterness toward the defendant, as shown by Wootten's wife, record page 10, bottom, and top of page 11. A significant fact bearing on this point, the fact that Mrs. Wootten knew her husband was gozz ing to have a row when he went toward Winters with the gun, although she says he was going down to her mothers, which was back of hervhome, On the same side of the road, that he crossed the road, into the field, in an exactly opposite direction from where her mother's place was, when it was very muddybin the road, and there was a well-beaten path, the usual way to go to her mother's place from Wootten's, leading back in an exactly opposite direction from the way Winters was, and being the shortest and usual way to go. See cross-examination James Lee (a state witness), record page 14. This route was about a mile or more longer than the one usually taken in going from the one place to the other, as appears from Lee's testimony, and the

diagram on page 2, of this brief. To go this way, Wootten would have to go from his house to the road, about a hundred yards, cross the road, go down through the fields on the other side, in muddy weather, cross the road again, then go back across the fields to his mother-in-laws place, a half mile or more frther from the road than the placed he had started from, on the same side. Defendant submits, the mere statement of this fact, and the fact that Mrs, Wootten begged her husband not to go down there, as she was afraid there was going to be trouble, shows that she knew, and deceased knew, that he went that way, toward Winters, not to go a roundabout way on an errand, but to carry out the threats he had made to defendant, and openly all over the neighborhood. To overcome this, Mrs. Wootten says there was a wire fence to climb, if you went the back way; but Lee, page 18, says that this was the usual way and much shorter.

Another significant fact, bearing on the importance of the newly discovered evidence of Dill and Evans, is, the statement of the witness, Bell, that he was not summoned to be at the trial, was in Kentucky, yet came down the evening before to be present, to tell the tale he did, went direct to the jail and spent the night, letting no one know anything about his being in town, and Winters knowing nothing of his presence till the trial came up. Bell was a negro, a stranger to all the parties, a non-resident; he seems to have displayed a warm interest, in any event, in the conviction of the defendant.

—o—

The assignments as to error in the charge are full, and appellant submits them without further argument.

-o-

The assignment, that the record does not show a prosecutor, nor that there was a prosecutor at all, is based on Section 7217, Shannon's Code, and the authorities cited thereunder, that while

any one of the defects therein mentioned, will not cause or authorize a reversal, yet any two of them will.

The record, page 3, shows that there was no prosecutor endorsed upon the indictment, and that there was no prosecutor at all. See indictment, record, page 3. The second and third sections of that Paragraph ZZZZZ 7217, exist in this record.

-o-

But even if the errors of law in the record were not so apparent, the judgment should be reversed, because the facts as shown by the State do not justify a conviction.

The proof by both state and defense, is that threats had been made by Wootten; that these threats were all over the neighborhood; that some of them were made in the presence of the defendant (see test. John Chester, record, page 18-19); that Wootten had been carrying his gun all the time, while making these threats; that he had met Winters in the road as the latter was going on up toward the field, or to get his wagon (test. Ed. Bell, page 11.) Winters was evidently afraid of trouble, as he sent to Wootten to ask him to come on down, and divide the corn, and not to bring that gun. (Test. Ed Bell, record, page 11). Wootten went out of his way, a half mile or mile, to get to Winters with the gun; and he did not go there in answer to message of Winters, as the messenger had not reached him (Ed Bell, record, page 11); and the proof of Mrs. Wootten is (record, page 9), that Wootten was very bitter toward Winters, and when he saw him, said he was going to gather the corn anyhow, that is, in spite of the threats that Wootten had made to Winters and others, to kill him if he came near the place, though he, Wootten did not own the place, and Marr had sent Winters there to take charge of his, Marr's, share of the crop; and Mrs. Wootten knew of this, and of the bitterness, for she asked him not to have any trouble. (See her testimony, record, page 9, 10, 11). Wootten went on

toward Winters, going out of his way to do so, with his gun loaded; and Mrs. Wootten, record page 10, will not deny that on a former time she testified, when motion was made for bond, that Will Winters picked up the gun, let the hammers down, and stood it up in the corner of the fence; we respectfully submit, what was Wootten going to do, going that distance out of his way, into the cornfields, on a muddy day, toward Wootten, the man whom he had threatened repeatedly, with his gun cocked ? And loaded?

These facts are undisputed; in fact, mostbof them are proven by the State's witnesses, as shown above.

Another factthat is not in dispute. Winters had absolutely no feeling toward the deceased; he never made any threats, had been his friend; and in order to avoid any chance of trouble, had sent to him not to bring any gun. There was absolutely no motive for any crime, no purpose, no sudden anger or provocation, nothing but the fear and excitement occasioned by the threats and the motions with the gun. The state witness, Ed Bell, says that no threateningmotion was made, though Wootten did raise his arms. He does not say that he did not raise the gun with them. And he does say, record, page 13, that he was afraid he was going to be shot; who did he expect was going to shoot him, with the defendant Winters out of the wagon on the ground, between him and Wootten, armed with a Winchester? Certainly not the defendant, for he was looking the other way toward Wootten; the only possible conclusion is that he knew Wootten was going to shoot, or thought he was, and he was afraid some of the stray shot from the shot-gun would strike him. Any other conclusion was absurd.

In comclusion, on this point, we submit, if Mrs. Wootten, who knew her hsuband's intentions, was afraid that there would be shooting when her husband went out with the gun toward the Winters boys, who were cutting the corn anyhow, and besought him not to have any trouble; and Ed Bell, the state witness, standing behind

the defendant, was afraid he was going to be shot; is it unreasonable for us to think that the defendant should have been afraid Wootten was after trouble, and was going to shoot, independent of the witneess (defendant) own testimony, and in dependant of the affidavits of Dill and Evans, showing that the witness Bell is not worthy of belief in this case, having evidently succumbed to entreaties or bribes of a very bitter prosecution from among the members of deceased's family?

We submit, again, that the defendant, after repeated threats, some of them made to his face, told to almost any one anywhere in the neighborhood, so that they had become common talk; and after seeing the deceased coming toward him with the deadly weapon, which he had said would be the means of his killing of defendant, loaded and cocked, was defendant required to wait till the deceased raised the gun and pulled the trigger, even if the state witness Bell is telling the truth and his version (the version told on the witness stand by him, not tht told before he was tampered with) is correct? At close range, Winters would have been absolutely at the mercy of Wootten, and even at the range he was at when he fired, he was at a great disadvantage.

Appellant says that independent of the legal questions involved, there is no evidence, and not enough evidence, under the law, to establish his guilt, even by a preponderance of the testimony, and in fact, the evidence shows he was cleraly justifiable in shooting when he did, and to protect his own life.

Filed Nov 30-1901
Jas Tunney
clk

-:- JOHN WINTERS,

-vs-

THE STATE OF TENNESSEE -:-

-:- MONTGOMERY LAW -:-

-:- CONVICTED OF VOLUNTARY MANSLAUGHTER -:-

-:- CRIMINAL COURT OF MONTGOMERY COUNTY, TENNESSEE -:-

-:- JUNE TERM, 1901 -:-

-:- HONORABLE C. W. TYLER JUDGE -:-

-:- DANIEL & DANIEL, ATTORNEYS FOR PLAINTIFF IN ERROR -:-

-:- INDEX -:-

-:- AFFIDAVITS -:-

oooooooooooooooooooooooooooooooooo

-:- COUNTER AFFIDAVITS -:-

-:- DEPOSITION -:-

oooo[redacted]oooooooooooooooooooo

-:- STATE OF TENNESSEE - MONTGOMERY COUNTY -:-

Be it remembered that at a regular term of the Circuit Court begun and held for the said County on Monday morning Sept. 3, 1900, it being the first Monday in September 1900, and it being the time fixed by law for holding the said Court for the said County; when the Honorable A. H. Munford the Regular Judge for the 10th. Judicial Circuit being present and presiding the following proceedings were had and entered of record, to-wit:----

-:- EMPANELLING OF GRAND JURY -:-

The entry on the Minutes on September 3, 1900 is as follows, to-wit:-

Grand Jury Empanelled # Grand Jury. # # A. C. Stafford Sheriff of Montgomery County returned into open Court with the following Venire Facias, to-wit;

"State of Tennessee, Montgomery County.
County Court, July term 1900.

To the Sheriff of Montgomery County--Greeting:-

By order of the County Court, you are hereby commanded to summons the following named persons to serve as Jurors at the September term 1900, of the Circuit Court for said County, to be held on the first Monday in September 1900, to-wit, Dist. No. 1 Frank Polk, No. 2 A. Harris, No. 3 J. H. Wilson, No. 4 H. W. Moss, No. 5 W. R. Rosson, No. 6 Jno. S. Lowe, No. 7 J. W. Morris, No. 8. Ross Evans, No. 9 Geo. Williams, No. 10 I. W. Watson, No. 11 Wm. Anderson, No. 12 C. L. Bradley, Ernest Beach and Milton Blair, No 13.
1. W. S. Potter, No. 14 J. E. Ransdell, No. 15 J. W. Pace, No. 16 J.

M. Green, No. 17 R. T. Wyatt, No. 18 Gill Baggett, No. 19 S. B. Powers, No. 20 B. F. Bryant, No. 21 T. L. Oneal. Herein fail not and returns make to the Clerk of the Circuit Court of said County.

Witness my hand at office in Clarksville, Tenn., on first Monday in July, 1900.

C. D. Bailey Clerk,

By Alex Davidson D. C."

Endorsed; Issued July 9, 1900-----C. D. Bailey Clerk."

Came to hand when issued and executed in full, this August 1900.

A. C. Stafford Sheriff.

Out of the above the Court for good and sufficient reasons excused the following named persons to-wit: J. S. Lowe, C. L. Bradley, Neil Frey, and Milton Blair. From the number summoned in the Venire Facias the following named persons were empanelled and sworn according to law, as Grand Jurors, Ernest Beach, J. M. Pace, William Anderson, Jno. Morris, W. R. Rosson, Frank Polk, Gill Baggett, J. M. Green, Tom Oneal, George Williams, W. S. Potter, Sterling Payne and E. V. Harrison. From among whom the Court appointed Ernest Beach Foreman of said Grand Jury, and the said Grand Jurors having been sworn according to law and instructed by the Court retired to the Grand Jury room to consider of Indictments and Presentments. And the Court thereupon appointed J. T. Shelby as Officer of said Grand Jury and he being sworn as required by law retired with said Grand Jurors. A. C. Stafford and G. L. Welker were appointed by the Court, to wait on this Sept. term 1900 of said Circuit Court.

A. Harris and J. W. Watson after failing to answer or to furnish sufficient excuse for not answering to the Sheriff's summons on the regular Venire Facias as regular Jurors for said term of the said Circuit Court were ordered fined $25.00 each. Said fines were

released by the Court on presentation of sufficient reasons for not appearing as summoned.

R. L. Black and G. L. Welker were fined by the Court $5.00 each for failing to keep proper order in the Court room while Court was in session. Said fines were later released by the Court.

-:- INDICTMENT -:-

The entry on the Minutes on September 15, 1900 is as follows:-

State of Tennessee # Murder.
#
-vs- # The Grand Jurors returned into open Court
#
John & Will Winters # in a body with the following indictment, to-wit:-

State of Tennessee

Montgomery County Circuit Court

Sept. Term 1900.

The Grand Jurors for the State upon their oaths present that John Winters heretofore to-wit on the day of September 1900 in the State and County aforesaid unlawfully and feloniously made an assult in and upon the body of one Torrence Wooten inflicting a deep, dangerous and mortal wound from and on account of which the said Torrence Wooten then and there almost instantly died. So the Grand Jurors aforesaid upon their oaths aforesaid do present and say that the said John Winters on the day and year aforesaid in the State and County aforesaid and in manner and form as aforesaid, unlawfully, maliciously, wilfully deliberately, feloniously, premeditatedly and of his malice aforethought did kill and commit the crime of murder in and upon the body of said Torrence Wooten against the peace and dignity of the State.

And the Grand Jurors further present that Will Winters

heretofore to-wit on the 14th. day of September 1900 in the State and County aforesaid was unlawfully and feloniously present aiding, abetting, encouraging and assisting said John Winters in manner and form as alleged in the first count, feloniously, maliciously, unlawfully, wilfully, deliberately, premeditatedly and of his malice aforethought to kill and commit the crime of murder in and upon the body of the said Torrence Wooten to the evil example of all others in like cause offending and against the peace and dignity of the State.

H. C. Carter,

Atty. Genl.

Witnesses, Ed. Bell, Mrs. Torrence Wooten, A. M. Caroland, James Leigh. A True Bill W. E. Beach Foreman Grand Jury.

-:- ORDER FIXING BOND -:-

The entry on the Minutes on September 19, 1900 is as follows:-

State of Tennessee # Murder.
# #
-vs- # # Came the Atty. Genl. on behalf of the State
John & Will Winters # and the defendants in person and it is ordered by the Court that defendant, John Winter's, bond be fixed at $1500.00 and Will Winter's bond was fixed at $500.00 and the cause was continued until the next term of this Court, and in default of bail the defendants were remanded to jail.

And, be it remembered that at the January term, 1901, of the said Court for the said State and County; present and presiding the Hon. H. N. Leech, Special Judge, &c., he being duly and legally elected to preside during the said term, the Hon. A. H. Munford, Regular Judge of the said Court being unable to attend on account

of sickness, the following proceedings were had and entered of record, to-wit:-

-:- CONTINUANCE AND ORDER BOND -:-

The entry on the Minutes on January 11, 1901 is as follows:-

State of Tennessee # Murder.
#
-vs- # This cause was continued upon application
#
John & Will Winters # of the State until the first Wednesday of the next term of this Court. And upon motion of the defendants attorneys the Court ordered that defendants bond be reduced to ($500.00) five hundred dollars. Thereupon came the defendants and together with them, D. Marr and Tom Dorrity sureties, who acknowledge themselves bound and indebted to the State of Tennessee in the sum of five hundred dollars, and agree to pay over same unless the said defendants shall appear from day to day at the next term of this Court to answer to the charge of murder and do not depart without leave thereof and abides by and performs the judgment of the Court in the premises. Thereupon the Court ordered that the State of Tennessee recover of the said defendants and their said sureties the said sum of five hundred dollars unless the said defendants do appear from day to day at the next term of this Court.

And at the Regular June term, 1901, of the Criminal Court for the said State and County; same being begun and held on the first Monday in June, 1901; it being the time fixed by law for holding the said Court for the said County; when, the Hon. C. W. Tyler, Judge &c., being present and presiding, the following proceedings were had and entered of record, in the said above styled case of the State of Tennessee vs. John and Will Winters, to-wit:-

5.

-:- RESPITE -:-

The entry on the Minutes on June 11, 1901, is as follows:-

State of Tennessee # Murder.
-vs- #
John Winters et al # Came the Atty. Genl. on behalf of the State and the defendant John Winters was brought to the bar of the Court, he being arraigned and charged upon the indictment in this cause plead not guilty, and for his trial puts himself upon the Country and the Atty. Genl. doth the like. Thereupon came a jury of good and lawful men, citizens of Montgomery County to-wit: W. H. Burgess, H. A. Norfleet, J. N. Robinson, J. H. Moss, Ab Page, G. D. Hook, Geo. Nolen, J. R. Harris, J. A. Tucker, Albert Green, William Batson and Bob Page who being duly elected empanelled and sworn well and truly to try the issue joined in this cause, took their seats in the jury box, and it appearing to the satisfaction of the Court that there is not sufficient time to finish the trial of this cause today, the further hearing thereof is continued until tomorrow morning at nine o'clock.

And R. L. Black an officer of the Court was duly sworn and took charge of the jury until that hour.

And in default of bail.the defendant was remanded to jail.

-:- RESPITE AND ORDER JURORS -:-

The entry on the Minutes on June 12, 1901 is as follows:-

State of Tennessee # Murder.
-vs- #
John Winters et al # Came the Atty. Genl. on behalf of the State and defendant was brought to the bar of the Court, and again came the jury heretofore em-

panelled and sworn in this cause, took their seats in the jury box, and it appearing to the satisfaction of the Court that there is not sufficient time to finish the trial of this cause today, the further hearing thereof is continued until tomorrow morning at nine o'clock.

And owing to the fact that two of the jurors in this case, viz; Ab Page and G. D. Hook were sick and needed special attention, the Court appointed W. T. Perry an officer of this Court to take charge of and wait on said sick jurors, he was then duly sworn according to law and entered upon his duty.

R. L. Black who had been duly sworn and previously instructed and placed in charge of this jury, again took charge of the remaining ten jurors.

And in default of bail the defendant was remanded to jail.

-:- VERDICT -:-

The entry on the Minutes on June 13, 1901 is as follows:-

State of Tennessee # Murder.
#
-vs- # Came the Atty. Genl. on behalf of the State
#
John Winters et al # and the defendant was brought to the bar of the Court, and again came the juryheretofore empanelled and sworn in this cause, and said jurors upon their oath do say they find the defendant guilty of manslaughter and fix his punishment at (10) ten years imprisonment at hard labor in the State Penitentiary at Nashville Tennessee.

The defendant was then remanded to jail.

-:- APPLICATION TO CORRECT MINUTES AND ORDER -:-

7. The entry on the Minutes on July 6,

1901 is as follows:-

State of Tennessee # Murder.
#
-vs- # The application, on motion of defendant,
#
John Winters # to have the minutes corrected, so as to show the oath administered to the officer to take charge of the jury during the trial, as written out by Clerk, and set out in his affidavit filed, is by the Court denied and overruled, to which ruling of the Court defendant excepts, and tenders his bill of exceptions, which is signed by the Court, sealed and ordered to be made a part of the record.

-:- MOTIONS, SENTENCE AND APPEAL -:-

The entry on the Minutes on July 6, 1901 is as follows:-

State of Tennessee # Murder.
#
-vs- # This day came the Atty. Genl. on behalf of
#
John Winters # the State and the defendant was brought to the bar of the Court. Defendant moved the Court to grant him a new trial in this cause, which motion was overruled by the Court. Defendant also moved the Court in arrest of judgment, which motion was also overruled.

Whereupon it was demanded of the defendant if he had anything further to say why the Court should not proceed to a judgment and execution in this cause, "He nothing saith than as before he has said", whereupon it is considered by the Court that the defendant John Winters be taken to the State Penitentiary at Nashville Tennessee, there to be confined at hard labor for the period of (10) ten years, and that he pay the costs of this cause for which execution may issue.

 The defendant then excepted to all the action of the Court

in this cause, and tendered his bill of exceptions which is signed and sealed by the Court and ordered to be made a part of the record in this case, and the defendant then prayed an appeal to the next term of the Supreme Court at Nashville Tennessee which is granted.

-:- BILL OF EXCEPTIONS -:-

The bill of exceptions in this cause is as follows to-wit:--

-:- EVIDENCE OF THE STATE -:-

On the trial of this case the State introduced the following testimony:-

-:- MRS. LAURA WOOTEN -:-

Mrs. Laura Wooten, first witness sworn, testified as follows:-

I am the widow of Torrence Wooten who was killed on the day of , 1900; I know the defendant, John Winters; he formerly stayed at our house and worked with my husband. On the morning of the killing my husband and myself were in the front room of the house, near the door; I asked my husband to go to my mother's after some meal; he picked up a sack and his gun saying he might kill a squirrel and started. When he got to the door he saw Winters in the field, the two of them, and said those fellows are going to gather that corn anyhow. I asked him not to have any trouble with them and he promised that he would not. I asked him not to go to the field. He promised me he would not go out to the field where they were with the wagon, and that he would go down the road to my mother's and get the meal and took a little sack to put it in; he took the small bag and went out the front way. I was sitting

down near the door with my baby in my lap. In a few minutes I heard some one holler halt; I ran and laid my baby down and heard my husband say I am not after you, and the gun fired. I ran out of the house across the yard and saw my husband lying in the field dead; the gun was lying by him. It was about fifty yards from the house door to the gate. This was in Montgomery County. The road is a tolerably wide one along there.

-:- CROSS-EXAMINATION -:-

I dont know how far it is from the fence around the field to where the corn was. When I git into the field and found my husband, I called for some one to come and held me; William Winters a brother of the defendant came from the gap in the fence up the road; I do not remember about his taking the gun and sitting it in the corner of the fence; I do not remember seeing him let down the hammers of the gun. I was a witness at the investigating trial and testified.

Q. Did you not say then, that after your husband left you, the only word you heard was, somebody hollered halt-?

A. I dont know, I was then in great trouble.

Q. Do you now deny that you stated at the investigation before Judge Munford, when an application for bail was made, that you heard some one holler halt, that you jumped up and ran back to lay your baby in the crib, and that while doing so you heard a gun fire, and that you heard no one say anything, except halt-?

A. I do not remember, I was in great trouble then.

Q. Did you not say, that Will Winters picked up the gun, which was lying by your husband, let the hammers down and put it up against the fence-?

A. I cant say whether I did or not.

Q. Why did you beg your husband not to go where Winters was-?

A. I did not want any trouble.

Q. Why did you think there would be trouble-?

A. I was afraid there would be.

Q. Was your husband very angry about Marr taking the mules and stock from him, and employing Winters to take charge of them-?

A. He did not think it was right.

There is a way from where we lived to my mothers, the back way. This is a considerably shorter distance and we usually go that way; but there is a barbed wire fence to go through. I think there had been a rain the day before, or shortly before the day of the shooting.

-:- ED BELL -:-

Ed Bell, next sworn, testified as follows:-

My people live in Kentucky and I live where-ever I can get work. At the time of the killing I was working for the two Winters. On the morning of the killing, John and Will Winters and myself went up to Mr. Cherry's after some hogs. On our way back we met the deceased in the road and he had a gun. Mr. John Winters, the defendant, had a talk with the deceased. We went from there home and got our corn knives. Mr. John Winters put a Winchester Rifle in the wagon and covered it with some boards, saying he might have to kill a damn squirrell. On the way to the field he shot the rifle at a tree. When we reached the field, Mr. John Winters told his brother, Will, to go up and tell Mr. Wooten, the deceased, to come down to the field as they were ready to divide the corn, but not to bring his gun with him. Before Mr. Will Winters got out of the field the deceased came out of his house with a shot gun under

 his arm. He came to the road and across the road into the field in

which we were. Just as he came into the field John Winters, the defendant, ordered him to halt and jumped out of the wagon, as he said this and grabbed his gun as he jumped. The deceased threw his hands above his head and said "don't shoot I'm not after you." At the same time he turned his head from the defendant as though he was going to leave the field, the defendant said, "you have threatened my life", and fired while the deceased's hands were above his head, and his face was partly turned from the defendant. I was standing the wagon when the shot was fired and saw it all. I am now living in Kentucky. The deceased was about sixty yards from the defendant when he fired the shot. I do not know what became of the shot gun, when the deceased threw his hands above his head.

-:- CROSS-EXAMINATION -:-

I was with Mr. Winters the morning Mr. Wooten was shot; Mr. John Winters, defendant, his brother, Will Winters, and myself went into the field with the wagon to cut some corn to feed the stock. After we got to the corn, Mr. Winters and myself were in the wagon, when Mr. Wooten came into the field with his gun; he was coming towards us; Mr. Winters hollered to him to halt and not come there with his gun. Mr. Winters reached down and got his gun and jumped out of the wagon saying he threatens to kill me; Wooten threw up his hands and said I'm not after you and turned to go away, when Winters fired. It was fifty or sixty yards from where we were to where Wooten was.

Q. Where was Wooten's gun when he threw up his hands-?

A. I do not know.

Q. Did the gun fall when he threw up his hands-?

A. I do not know.

Q. Did you not jump out of the wagon and between the mules, when you saw Wooten, and when Winters Jumped out-?

A. No sir.

Q. Were you frightened-?

A. I would have been glad to be some where else.

Q. Why-?

A. Was afraid I would be shot.

Q. What was Wooten doing when Winters jumped out of the wagon-?

A. He was coming towards us.

Q. Was Winters scared-?

A. He seemed to be excited, I suppose he was.

Q. When Wooten threw up his hands where was his gun-?

A. I do not know.

Q. Was it in his hands-?

A. I dont know.

Q. Did it fall to the ground-?

A. I do not know.

Q. DO you not know that Wooten was shot in the face, about the corner of the Cheek bone-?

A. I do not know.

Q. Where did you stay last night-?

A. At the jail; I came in on the train, met the Sheriff and went to the jail with him.

-:- ANDREW CHERRY -:-

Andrew Cherry, next witness sworn, testified as follows:-

I did not tell defendant of threats made against him by Wooten. I did have a talk with defendant before the shooting, but did not tell him that I heard Wooten make any threats as to him. I saw the gun Wooten had at the time of the shooting and drew the loads. It was loaded with squirrell shot. The hammers were down when I got

it. I got to where Wooten was shot not very long after he was shot, cant say how long. I did have a talk to Winters before the killing. (Objected to by the State.)

-:- JAMES LEE -:-

James Lee, next witness sworn, testified as follows:-

Early on the morning of the shooting I saw deceased on the road; he and defendant met at the place; they were by a large tree. Defendant was talking to deceased and put his hands on the deceased while talking. There were no angry words used. I cannot say what was said between them. Wooten had his gun at the time. William Winters was near the wagon, 30 or 40 feet from them.

-:- CROSS-EXAMINATION -:-

There is a path across the field from where Wooten lived to where Mrs. Wooten's mother lived, that they generally travelled; it is nearer than by the road. Mrs. Waters, Mrs. Wooten's mother, lived about half a mile from the road, on same side with Wooten.

-:- JOHN STATON -:-

John Staton, next witness sworn, testified as follows:-

I am the Coroner for this County. I held the inquest upon the body of Wooten. He was shot apparently with a rifle ball; the bullet struck him in the face, entering at the point of the cheek bone, on the left side. I do not know the range of the bullet; I think it ranged inward, and would have come out back of the right ear probably; but I did not probe it at all, only saw from the surface.

-:- DEFENDANT'S TESTIMONY -:-

The defendant introduced the following testimony on the trial of this case, to-wit:--

-:- JOHN WINTERS -:-

John Winters, the defendant, being first sworn, testified as follows:-

I am defendant in this case. Shortly prior to the shooting of Wooten, Mr. D. Marr, of Clarksville, employed me to take charge of his stock on his farm, in district No. 8. He had had a contract with Torrence Wooten for the year. Mr. Marr claimed that Wooten had failed to keep his contract and had not planted, or raised any crop of any value; and he had had replevied his mules and wagon, and perhaps other personal property, from Wooten, and had placed them in my charge. After this I heard of threats made by Wooten to various persons, that he would kill me, indeed these threats were told to me by a number of persons I met in the neighborhood. I was directed by Mr. Marr to cut some green corn in a field just opposite the house where Wooten lived, on the other side of the road, to feed the stock; there was four or five acres of this corn, it being all there was of crops on the farm; it had not been cultivated and was valuable, only to be fed in this way; there were no ears on it. In company with my brother and Ed Bell, my brother being now dead, I went into the field to cut and haul one half of the corn, and to the place where it was standing; my brother had let down the gap in the fence and remained to put it up. I dont remember exactly where he was at the time of the shooting, but suppose he was between the gap and the wagon. When I left home I put a rifle into the wagon; I did this because I had heard so much of

15. the threats of Wooten and of his carrying a shot gun; I thought it

prudent to do so that I might be in a position to protect myself, if attacked. This I covered with some boards, so that it would not have any appearance of hostility or apprehension. I saw Wooten come into the field with his shot gun; hollered to him not to come to me with the gun; Wooten had his gun on his arm, and about in a shooting position. Wooten did not stop, but said I intend to kill you. I then reached down, picked up my rifle, and jumped to the ground; Wooten was coming towards me and had raised his gun in a position to shoot, when I fired the rifle. When Wooten fell, I went away. The witness, Ed Bell, was in the wagon when I called to Wooten to halt and got out of the wagon, in front, between the mules. Wooten did not throw up his hands, except with the gun in them, and in a position to shoot. He did not say he was not after me, if so, I did not hear it, but he did make the threat, then, to kill me, and I felt certain he would do so, unless I could prevent it by shooting. Wooten and I had formerly been friendly, and I had no feeling against him. I had never made any threat towards him. When the stock was replevied by Marr, I was given a written order and carried it to Mr. Wooten; he was angry, and I said to him, I had nothing to do with the controversy between him and Marr, that I was only directed to bring the order and that if he gave me the mules, I would take them, but that it was a matter for him; Mr. Chester was present at the time. After the shooting, I went, in a day or two, to Crofton, Kentucky, near Hopkinsville, where some relatives lived, and was there until arrested. When I was arrested, I was on my way to the depot to go to Clarksville. During the time I was away, I was endeavoring to arrange for a bond and for my attorney fees; and was almost every day in communication with my attorneys at Clarksville. I wanted to arrange these matters so I would not have to lie in jail. I had no purpose to stay away, except tempo-

16. rarily.

prudent to do so that I might be in a position to protect myself, if attacked. This I covered with some boards, so that it would not have any appearance of hostility or apprehension. I saw Wooten come into the field with his shot gun; hollered to him not to come to me with the gun; Wooten had his gun on his arm, and about in a shooting position. Wooten did not stop, but said I intend to kill you. I then reached down, picked up my rifle, and jumped to the ground; Wooten was coming towards me and had raised his gun in a position to shoot, when I fired the rifle. When Wooten fell, I went away. The witness, Ed Bell, was in the wagon when I called to Wooten to halt and got out of the wagon, in front, between the mules. Wooten did not throw up his hands, except with the gun in them, and in a position to shoot. He did not say he was not after me, if so, I did not hear it, but he did make the threat, then, to kill me, and I felt certain he would do so, unless I could prevent it by shooting. Wooten and I had formerly been friendly, and I had no feeling against him. I had never made any threat towards him. When the stock was replevied by Marr, I was given a written order and carried it to Mr. Wooten; he was angry, and I said to him, I had nothing to do with the controversy between him and Marr, that I was only directed to bring the order and that if he gave me the mules, I would take them, but that it was a matter for him; Mr. Chester was present at the time. After the shooting, I went, in a day or two, to Grofton, Kentucky, near Hopkinsville, where some relatives lived, and was there until arrested. When I was arrested, I was on my way to the depot to go to Clarksville. During the time I was away, I was endeavoring to arrange for a bond and for my attorney fees; and was almost every day in communication with my attorneys at Clarksville. I wanted to arrange these matters so I would not have to lie in jail. I had no purpose to stay away, except tempo-

16. rarily.

-:- CROSS-EXAMINATION -:-

On the morning of the killing I met the deceased in the road as I was going to Mr. Cherry's. He had his shot gun with him. I stopped and had a talk with him. My brother was between me and the deceased. I put my gun in the wagon because I was afraid there would be danger. I hid it under the boards because I did not wish to have any trouble with him and thought if he saw me with the gun it might bring on trouble. I shot it at a tree on the way down there. When we reached the field the wagon started across the field, and when we stopped at the corn the back of the wagon almost pointing towards the house of the deceased. I was sitting in the back of the wagon looking towards the house of deceased. The deceased came out of his door, some two hundred yards away, he had a shot gun on his arm, and he came towards the road which was between the field the house was in and the field I was in, went down the road a short distance and crossed it and got over in the field. When he got into the field, I hollered to him not to come over there with his gun. He ran up an embankment on this side of the road and came on in the field saying I am going to kill you. He raised the gun and aimed at me and I jumped out of the wagon and fired at him. He had threatened my life and I believed that he would kill me. Mr. Cherry, Mr. Chester, Mr. Shepard and Will Armstrong told me that he would kill me. I was afraid that he would kill me, he had threatened my life. I lived with the deceased for a good while. When I was arrested before, I do not know whether he sold his horse to secure a bond for me or not, never heard of it. The last time I was at his house was a short time before the killing. I was not armed, I went after a pair of suspenders. I passed his house often and was never armed. I killed him because he had threatened my life and was coming on me with a gun, and I was afraid he would kill me.

17.

-:- JOHN BARTEE -:-

John Bartee, next witness sworn, testified as follows:-

I knew deceased, Wooten, and know the defendant, Winters; I saw Wooten and talked to him shortly before the shooting, a few days. He was talking to me about Marr having replevied the mules, &c., from him; said he, Marr, had given them to Winters; said he had been a good friend to Winters and now he had taken sides with Marr against him; he further said that if Winters put his foot on the place, or came about it, he intended to shoot his damned head off. I did not tell this to Winters before the shooting. I did tell it to others. There was much talk in the neighborhood about the threats being made by Wooten to shoot and kill Winters. I never heard Winters make any threats about Wooten.

-:- JOHN CHESTER -:-

John Chester, next witness sworn, testified as follows:-

I know the defendant, and knew Torrence Wooten, deceased. Wooten was very angry about the stock being taken from him by Marr and talked very bitter. I was present when Winters presented an order to Wooten for Marr's mules. I think the order or note was from the Magistrate who decided the replevin suit. Wooten asked me what I would do if in his place; I asked to see the order or note and read it; I then told him I would let them go. Winters said he had nothing to do with the controversy between Wooten and Marr, and only brought the order, as directed, and if Mr. Wooten did not give them to him it was allright with him. Wooten did give them up and Winters took them and left. While there, and before I left, Wooten

said if Winters came about the place, or if he undertook to cut the corn on the place, he would shoot him. I talked to Winters of this, afterwards, on the same day. On one occasion after the above incident, I had an engagement to see Wooten, and, as I went up the road towards where Wooten lived, he met me at the corner of the yard, at the place where Winters stayed, he, Wooten, coming out of a little plum grove; he had his gun and remarked, that Winters was too damned smart to poke his head out of the house; this was about 8 o'clock in the evening. I had heard of the threats made against Winters from others in the neighborhood; they were talked about a good deal.

-:- LEE BARTEE -:-

Lee Bartee, next witness sworn, testified as follows:-

I knew Torrence Wooten and I know Winters. Shortly before the death of Wooten, I heard talk in the neighborhood of Wooten's threats against Winters. I did not hear Wooten say anything, himself; but the facts of the threats being made seemed to be general in the neighborhood, and that there would be trouble. I never talked to Winters of the matter, or told him anything about it. I dont remember seeing Winters for several days before the shooting.

-:- NEWT SHEPARD -:-

Newt Shepard, next witness sworn, testified as follows:-

That, on one occasion, shortly before the shooting, he met deceased, Torrence Wooten, on the road, he had his shot gun with him; he spoke of Winters and seemed to be quite bitter towards him;

19. he said that he had told his wife, that, if Winters came on the

place, and he was there, he would shoot him, and that if he was not there, for her to do it. The threats being made by Wooten were common talk in the neighborhood.

-:- DEPOSITION OF BRAD MARTIN -:-

The defendant of Brad Martin, as taken in this case, was then read by the defendant, same being as follows:-

Q. 1. State name, age, occupation & residence, and any office you hold-?

A. Brad Martin, age 45, am a farmer, live in Dist. 21, am a Justice of the Peace, and an extra good man all round.

Q. 2. Did you have any conversation with "Tons" Wooten, the man whom Winters is charged with murdering in this case, before the difficulty-?

A. I did.

Q. 3. State when and where it was, and all about it-?

A. It was on the Dover road in this County down in the part of the County in which Wooten lived, and it was a day or two before he was shot by Winters; dont remember the exact date, but the next thing I heard about them was that the killing had taken place; it may have been a day or several days before, but I know it was a very short time.

Q. 4. Tell all about the conversation-?

A. I was going out of town and Wooten caught up with me, and said that he was having a lawsuit with Marr about some mules, and that Winters was the cause of it; and that he (Wooten) was the only friend that Winters had; "I sold the only horse

20. that I had" said Wooten "and bought him a suit of clothes from skin

out." And then he said, "If Winters don't stay away from there, I will shoot him." I remarked that if I were he, I would not make such threats, that Winters might get him into trouble about them. We were together only a few minutes, and that is about all that occurred, and I turned off into the Palmyra road to go to my home.

Q. 5. That was the Wooten whom Winters in this case is charged with killing and he was talking about the defendant-?:

A. Yes.

Q. 6. The Marr mentioned is the man on whose place Wooten was living and where Wooten was killed-?

A. Yes, Dunc Marr.

Q. 7. Did he (Wooten) seem very bitter towards Winters-?

A. Yes, used right smart abusive language about Winters.

Q. 8. Did he say anything about Winters having been coming there before-?

A. No, just said what I stated, on that point, nothing more.

-:- CROSS-EXAMINATION -:-

Q. Esq. Martin, did you say this might have been a week or 10 days prior to the killing-?

A. I dont know exactly how long, it might have been a week or 10 days, it was a very short time.

Q. Did you tell Winters what Wooten had said about him before he killed him-?

A. I did not.

Q. Esq. do you know the reputation of John Winters in the neighborhood in which he lived-?

A. I did not.

Caption, certificate, notice and all formalities waived.

Jos. D. Tyler.

Sworn to and subscribed before me June 10 1901

C. W. Staton, Clerk.

-:- REBUTTAL TESTIMONY -:-

The State then introduced the follow- testimony in rebuttal, to-wit:-

-:- WILL ARMSTRONG -:-

Will Armstrong, being first sworn, testified as follows:-

I knew Wooten and know defendant, Winters. I did not tell Winters of threats made by Wooten to kill Winters. I did know of these threats; they were common talk in the neighborhood, but I did not tell Winters of them. If I did, I dont remember telling him and dont think I did.

-:- ANDREW CHERRY -:-

Andrew Cherry, recalled in rebuttal, testified as follows:-

I did not tell defendant of threats made against him by Wooten. I did have a talk with defendant before the shooting, but did not tell him that I heard Wooten make any threats as to him. I did have a talk to Winters before the killing. (Objected by State.)

This was all the testimony in the case.

-:- CHARGE OF THE COURT -:-

The Charge of the Court in this case

 is as follows:-

is as follows to-wit:-

Gentlemen of the Jury;

Under this indictment the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter. The punishment for murder in the first degree upon conviction is death by hanging, unless the jury trying the case find mitigating circumstances, in which case the judge of the Court may commute the punishment to imprisonment for life in the penitentiary. The punishment for murder in the second degree is imprisonment in the penitentiary for not less than ten nor more than twenty years at the discretion of the jury trying the cause. The punishment for voluntary manslaughter is imprisonment in the penitentiary for not less than two nor more than ten years at the discretion of the jury trying the cause.

In all criminal prosecutions the defendant on trial is entitled to the benefit of every reasonable doubt that may arise in the progress of the investigation. The proof on the whole taken altogether, and fairly weighed, must lead easily and naturally to the conclusion of the prisoner's guilt as charged; must satisfy and convince the minds of the jurors beyond a reasonable doubt that the person on trial has committed the offense set out in the indictment, of there should be no conviction. This does not mean that the State's case must be made out to an absolute certainty before the jury would be justified in rendering a verdict of guilty against the defendant. It is sufficient if all the facts taken together point so strongly to the guilty of the accused that they exclude every other reasonable supposition from the minds of the jury. Where the facts are not thus conclusive of guilt an acquittal should be rendered, but wherever in any case all the material averments in

 the indictment are established fully as the law demands conviction

and punishment should follow. If you find the evidence conflicting on any point you should look to the motives which the various witnesses may have for falsifying, their interest in the case, the extent to which they are contradicted or corroborated by other testimony, and to any other facts and circumstances that may aid you in reaching a correct conclusion from the whole proof. Previous threats of the deceased whether communicated to the defendant or not are proper to be weighed by the jury in deciding the issue here; if communicated, or if a matter of general notoriety, they were probably in the mind of the defendant at the time of the homicide, and to some extent may have properly influenced his conduct; if uncommunicated they may tend to show the feeling of the deceased towards the defendant, and may throw light on his conduct at and before the time he and the defendant met. No threats however, even if communicated to the defendant, will in themselves justify the taking of life. There must be some demonstration indicating a present intent to carry the threats into execution. The person against whom the threats were made would have the right to prepare himself to resist attack, but when he and his adversary met it would be his duty to wait for some hostile act, though slight, or some angry words before taking the life of the latter.

You should first inquire here whether the defendant shot and killed Wooten as charged in the bill of indictment. If this be so you may next ask whether under the proof the defendant committed the crime of murder in the first degree, murder in the second degree, or manslaughter.

To substantiate a charge of murder in the first degree the proof must show that the killing was wilfull, that is on purpose; deliberate, that is of cool purpose; malicious, that is with evil intent and in malice; and premeditated, that is considered and de-

termined upon in advance of the act. Wherever an unlawful homicide is shown to have been committed in this deliberate, malicious, and premeditated way, the offense is murder in the first degree.

In murder in the second degree the deliberation and premeditation are wanting, but the proof must show the killing to have been done with malice, and unlawfully; While voluntary manslaughter is the unlawful killing of another in sudden anger upon reasonable provocation. If you find the defendant killed Wooten unlawfully, and wilfully, then he is guilty of murder in the first degree, murder in the second degree, or manslaughter. If the killing was malicious and prompted by an evil and wicked heart, and was also deliberate and premediated then the defendant is guilty of murder in the first degree. If the killing was malicious and prompted by an evil heart, but was not deliberate and premeditated, then the defendant is guilty of murder in the second degree. If the killing was done in sudden anger upon reasonable provocation, and without malice or premeditation, then the defendant is guilty of voluntary manslaughter. I have already stated to you the punishment which the law affixes to each of these three different grades of unlawful homicide.

It is insisted here that while the defendant shot and killed Wooten he was acting at the time in his own proper self defense and therefore is not guilty of any crime. The right of self defense is the right which every human being has to defend his own person when he finds himself in imminent danger of death, or great bodily harm. The danger must be apparently imminent, that is impending at the moment, and the person who slays his adversary must have reasonable ground for thinking it is necessary for him to act at once in order to save himself from death, or great bodily harm.

25. To determine whether reasonable ground exists must be decided from

all the facts and circumstances in the case, but there must be a probability of imminent danger to justify a homicide in any case. Human life is not to be taken recklessly, or hastily. A man is not to commit an act which would deprive another of life unless the situation in which he was placed seemed to demand this extreme course on his part. The jurors are supposed to be practical and conscientious men, and you will endeavor to fix in your minds here from the evidence the precise situation of the defendant and the deceased at the moment of firing, and ask yourselves whether the defendant then had reasonable ground for thinking he was in great and imminent danger, and that it was necessary for him to take life in order to ward off this danger. It is not sufficient that he thought himself in great and imminent danger, he must have had reasonable ground for thinking so; and if there was any other proper method of averting the danger than by taking life then he should have chosen that other method. He was not required to flee before his adversary; he was required to act with prudence, to use all other proper methods of averting danger from himself, and not to slay his adversary unless placed in a situation which seemed to imperatively demand it at the time. The legal doctrine of self defense is not difficult to understand if each of the jurors here will appeal to his own sense of fairness, and justice, and right. Did this defendant at the time he shot and killed Wooten have reasonable ground for thinking he was in great and imminent danger, and that it was necessary for him to take life in order to avert this danger. If so he is excusable on the ground of self defense, for any other prudent man in his place would have done just what he did. But if the proof satisfies you as the law demands that he, the defendant, was not in such a situation as justified the killing at the time it was done then he cannot be excused here on the ground

of self defense.

Gentlemen of the jury, the responsibility resting upon you is a very grave one, and I hope you will give this case the serious consideration that it undoubtedly deserves at your hands. I have endeavored to instruct you fully as to all the questions of law that seemed to me to be applicable to the facts here, and it becomes your duty now to apply the law to the facts, and to draw a proper conclusion from them. The judge testifies to you as to what the law is, the witnesses testify as to the facts, and you cannot arbitrarily reject the statements of either the one or the other. Weigh all the facts carefully, reconcile conflicting statements as far as you can, discard what you think to be the least credible testimony if you must discard any, apply the law to the facts as you understand them to exist, and render finally a candid and honest verdict based upon both.

-:- MOTION FOR NEW TRIAL -:-

The motion for a new trial, as made by the defendant in this case, is as follows:-

In this case the defendant comes and moves the Court to grant him a new trial in this case, and for cause says:-

1st. That officers of the jury were not properly sworn as provided by law, as shown by affidavit of John Winters filed in support hereof, and other affidavits filed herewith.

2nd. That the jurors were not kept together in a body as required by law, but were allowed to be separated often, contrary to statute, as shown by said affidavits herewith filed.

3rd. That a number of times, from one to a large number of jurors were allowed to leave the room and kept separate

the other jurors.

4th. That two of the jurors, to-wit, Ab Page and G. D. Hook, during the trial of the case, became very sick, had to leave the room, suffered very severely, and finally the trial of the case had to be delayed for a long time before they could be gotten in any condition to sit up in the Court room and attend to the evidence and argument. Defendant says they were not in such condition as gave him the benefit of their careful consideration of the case, which should be given in a matter of as much importance to defendant as this case.

5th. That owing to the confusion and sickness and suffering among the jurors, this case could not have had the careful consideration to which it was entitled, and these causes had at least tendency to distract the attention of the jury, even those who were not sick; especially when they were allowed indiscriminately to leave the room, separate, and in other ways have their attention distracted from the matter in hand.

6th. There is no evidence to support the verdict of the jury.

7th. There is not sufficient evidence to support the verdict of the jury.

8th. The verdict of the jury is against the law as charged by the Court.

9th. The verdict of the jury is against the weight of the evidence.

10th. Because of the fact that the Clerk did not prop-

28. erly swear the officers in charge of the jury.

11th. Because of newly discovered evidence, which defendant did not know of before the trial of this case; to-wit, the evidence of Richard Dill and C. R. Evans, as shown by affidavits filed herewith; to the effect that the statements made by the main witness for the prosecution, Ed Bell, colored, were false and contrary to statements made by him immediately after the killing.

12th. Because of error in the charge, in this, that the whole tendency of the charge is to mislead the jury as to this point, to-wit, that there must have been actual danger to the defendant, before he would be justified in firing the shot that killed deceased. Defendant insists that the appearance of danger imminent, and great is sufficient, and the charge of the Court was of such nature as to be likely to mislead the jury on this point.

13th. Because of error in the charge of the Court, as follows:-

1. "The right of self defense is the right of every human being to defend his own person when he finds himself in imminent danger of death, or great bodily harm. The danger must be apparently imminent, that is, impending at the moment, and the person who slays his adversary must have reasonable ground for thinking it is necessary for him to act at once in order to save himself from death, or great bodily harm." Defendant insists this is error because of it's tendency to distract the attention of the jury or mislead them as to the true rule, which is that the danger may not only be apparently imminent, but the danger itself may be apparent, that will justify the killing in self defense.

2. "The legal doctrine of self defense is not difficult to understand, if each of the jurors here will ap-

 peal to his own sense of fairness and justice and right. Did this

defendant, at the time he shot and killed Wooten have reasonable ground for thinking he was in great and imminent danger, and that it was necessary for him to take life to avert this danger."

Defendant insists this is error, from the tendency to mislead the jury, as to the point that the danger must have been actual danger, and further, because it is error to tell the jury that their own experience, and what they would have done in the same case, is the standard of what the defendant should have done. This is not the true rule, as the defendant insists.

3. But if the proof satisfies you as the law demands, that he, the defendant, was not in such a situation as justified the killing at the time it was done, then he cannot be excused here on the ground of self defense." Defendant insists this was error.

4. "Gentlemen of the jury, the responsibility resting upon you is a very grave one, and I hope you will give this case the serious consideration that it undoubtedly deserves at your hands." Defendant assigns this as error in the charge.

5. That the Court did not charge the jury upon all grades of homicide contained in the indictment.

Defendant asks that the affidavits filed herewith, to-wit, the affidavits of himself, Richard Dill, C. R. Evans, W. D. Howser, W. M. Daniel, C. W. Staton and R. L. Black, be taken as a part of this motion, as a whole, the facts stated therein being grounds for this motion.

-:- AFFIDAVIT JOHN WINTERS -:-

The affidavit of John Winters, as

30. filed in support of the motion for a new trial, is as follows:-

Affiant states - That he has never sought to avoid a trial and investigation of this case, that any delay in giving himself up was caused by a desire to arrange a bond and with his attorneys. That at the September term of the Circuit Court he had a preliminary trial - when his bond was fixed at $1500.00 - which he gave. That at this trial Mrs. Wooten, wife of deceased, was a witness, and testified, among other things, that she was sitting near her door when deceased left the house with his gun, having promised her not to go where affiant was at work, that she heard some one say halt, that she got up and ran to the baby crib, to lay her baby down, and while at the crib she heard the gun fire, and went out of the house, and through the yard, and across the road, and found her husband lying in the field. That she heard no conversation, and no other word spoken - this he will abundantly show on another trial.

That at the January term the Attorney General stated to the Court,-that without the testimony of Ed Bell he could not try the case; that with the testimony of Mrs. Wooten he could not ask a verdict, and that it would be useless to try the case. The Court continued the case for him, and reduced the bond to $500.00. The State then had all the proof it had at this trial time, with only the addition of Ed Bell.

Again - He states that Ed Bell is a negro who lives in Kentucky. That both the State and defense have sought to get his testimony, although affiant had not seen him since the morning of the shooting, but believed that he would make him a good witness, if he would state the truth. That this witness came to Clarksville the night before the trial and went to the jail. Affiant had no opportunity to find out anything of his testimony, indeed did not know of his presence until sworn as a witness.

He states that he is informed that Ed Bell had previously

 made statements contradictory of those on the witness stand, but of

this he did not know until after the trial. He is informed and believes that he can show on another trial that said Ed Bell is a man of bad character and unworthy of credit on his oath - but this proof he must make in Kentucky where said Ed Bell has lived - that he had been in Tennessee but a few days or was only temporarily in the State - he did not know of these facts until after the trial.

He states that his case was tried in very hot weather, that as many as three jurors were sick and suffering great pain during the trial, two of them with physicians with them - that the jury was not kept together, but frequently retired, sometimes one and sometimes more, leaving a part of the jury from whom they were separated - that the trial, with jurors in the condition named, would not conduce to a fair trial and the calm and deliberate and cool judgment of the jury in making up it's judgment. He states that the oath administered by the Clerk to the officer to take charge of and keep the jury according to law, as he understood it, was not as the law requires - he has requested the Clerk to write out the oath as administered.

Affiant states - That upon another trial he can show that the testimony of Mrs. Wooten was not the same as at the preliminary trial, but very different, upon the main issue in the case - and he is informed he can show abundantly her statements made to different persons, to the same effect as her statements on the preliminary trial.

That he can show contradictory statements of Ed Bell, as to the main facts in the case, contradicting his assertion that Wooten threw up his hands, saying I am not after you, and he asks a new trial that justice may be done him.

Affiant had no malice toward Wooten, but was governed alone by a desire to protect his life, which he believed then and now was in imminent danger, and that he would have been killed if he had not fired when he did.

He further states he is informed and believes he will be able to show upon another trial that John Wooten a brother of deceased, saw witness Ed Bell and threatened him in regard to what his testimony must be, and that Ed Bell told several parties of these threats of Wooten toward him if he did not testify as Wooten desired him.

John Winters.

Sworn to and subscribed before me this July 2 1901.

C. W. Staton Clerk.

-:- AFFIDAVIT OF C. W. STATON -:-

The affidavit of C. W. Staton, filed in support of the motion for a new trial is as follows:-

I am the Clerk of the Criminal Court, was present at the trial of case of State vs. Winters - the weather was extremely hot and some of the jurors two or more of them not well and were complaining during the trial and two of them under the care of physicians, Dr. Johnson and Dr. Hughes. The two Jurors, Page and Hook, were not able to be with the jury at all times - but where absent while ten of the jury were at the Court room, or their room at the Court House. Jurors frequently retired and separated from the other jurors, sometimes one and sometimes more, with the officers. The trial begun June 11th. and ended on the 13th. - it being suspended on the 12th. because of the illness of jurors. I heard the preliminary trial of Winters before Judge Munford - Mrs. Laura Wooten was a witness - she stated that she was sitting in a chair near the door, when her husband left the house with his gun, that after he went out a few moments she heard some one holler"halt", that she ran to the crib with her baby to lay it down, when she heard a gun fire - that this was all she heard and she ran out and found her husband