

No. 13063

# Supreme Court of Illinois

Maher

---

vs.

People

STATE OF ILLINOIS,  
SUPREME COURT,  
Third Grand Division.

No.

~~10~~ 29

PROPERTY CAUSES.

29

Maker  
B

Page

(Signed)

1860

3063



State of Illinois  
La. Salle County ss.

Came before the Honorable  
Madison E. Hollister Judge of the ninth Ju-  
dicial District of the State of Illinois and  
the Presiding Judge of the La. Salle County  
Circuit: at a term of said Court-commenced  
and held at the Court-house in Ottawa in  
said County and State, on the second  
Monday in the month of June, the same being  
the thirteenth day of June, in the year of our  
Lord One thousand eight hundred and fifty  
nine, and of the Independence of the United  
States of America the Eighty third

The Honorable Madison E. Hollister  
Presiding Judge.

John F. Wash. Clerk  
Washington Bushnell, States Attorney  
Francis Warner, Sheriff.

Be it remembered that on the 20<sup>th</sup> day of June 1859  
the Court being out of the day of the first term of said  
Court for said year, the Grand jury at said time  
returned into open Court an Indictment in  
the words and figures following to wit:



State of Illinois } Of the June Term of the  
LaSalle County } ss. said LaSalle County Circuit  
Court in the year of our  
Lord Eighteen Hundred and fifty nine =

The Grand jurors Chasent, selected  
sworn in and for the said County of LaSalle  
in the name and by the authority of the people  
of the State of Illinois, upon their oaths present  
that Daniel Maher late of said County, not having  
the fear of God before his eyes but being moved  
and seduced by the instigations of the devil on  
the twelfth day of June in the year of our  
Lord one thousand Eight Hundred and fifty nine,  
with force and arms, at and within the County  
of LaSalle aforesaid in and upon one James  
Maher in the peace of God and the said  
people, then and there being, feloniously and  
wilfully and of his malice aforethought did  
make an assault, and that the said Daniel  
Maher, with a certain club of wood of the length  
of four feet and of the thickness of two inches,  
and of the value of one cent, which he the said  
Daniel Maher in his right hands then and there  
had and held, the said James Maher in and  
upon the right side of the head of him the said  
James Maher, then and there feloniously, wilfully  
and of his malice aforethought did strike and  
beat, giving to the said James Maher then and



then with the club aforesaid, in and upon the  
 right side of the head of him the said James  
 Maher one mortal wound of the length of three  
 inches and of the breadth of one inch, of which  
 said mortal wounds, the said James Maher,  
 then and there died, and so the jurors aforesaid  
 upon their oaths aforesaid in the name  
 and by the authority of the people aforesaid  
 do say, that the said Daniel Maher the  
 said James Maher, in manner and form aforesaid  
 feloniously, wilfully and of his malice  
 aforesaid 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 same people of the State of Illinois.

Washington Bushnell

States Attorney  
 9<sup>th</sup> Circuit.



LaSalle Circuit Court  
24

The People  
vs  
Daniel Maher

Indictment for Murder  
a True Bill.

James Wiener  
Foreman.

Witnesses  
Daniel Maher  
Ann Maher  
Julia Maher  
Jeremiah Maher  
Chester Hard  
Robt McArthur  
John Dobson  
Thos McManara  
L. W. Knowles.



And afterwards to wit: at the second term of said  
Court for the year 1839 certain orders were made  
and entered of record in said cause in the words and  
signs following to wit:

"Tuesday November 29<sup>th</sup>"

The People v. }  
24 v. 3 } Indictment for Murder  
Daniel Drake } This day the People came by  
the States Attorney and the Defendant in his own  
proper person as well as by Glover & Cooke his  
attorneys. The defendant is now furnished  
with a copy of the Indictment; and a list  
of the names of the petit jury, and defendant  
caused move the Court to quash the Indict-  
ment herein, which motion is overruled by the  
Court. The defendant is now arraigned and  
the Indictment read to him by the Clerk  
of this Court; after which he is inquired of  
and concerning the premises how he would  
acquit himself herein. For a plea says he is  
not guilty in manner and form charged in  
the Indictment.

Wednesday November 30<sup>th</sup>



6

The People vs

24 23

Indictment for Murder

Daniel Maher } This day the People again  
came by the States Attorney, and the Defendant  
in his own proper person as well as by Glover  
& Cook his Attorneys, and thereupon came  
the following jurors of a jury to wit:

John Smith, Ezra B Howe, Isaac Thome,  
Jacob H Row, John F Lamb, James W Kelley,  
J. M. Brooks, Edwrick Hupf, Edrick Davis,  
Joseph Marshoffer, C. C. Brewster, and Edwase  
Wright who are duly elected tried and sworn  
to well and truly try the issue herein, and a  
true verdict render according to the law  
and the evidence: And after hearing a part  
of the evidence the further hearing of the cause  
is postponed until the coming in of the  
Court to morrow morning

The jury are now placed in charge of a  
sworn officer.

Thursday December 1st.

The People vs

28.

Indictment for Murder.

Daniel Maher } This day the parties hereto again came, the  
People by the States Attorney, and the defendant in his own  
proper person as well as by Glover & Cook his Attorneys  
together with the jury sworn herein and after



hearing the ballance of the evidence and the arguments of counsel. the jury retire to consider of their verdict. in charge of a sworn officer.

Friday December 2<sup>d</sup>

The People &c }

24. 28

} Indictment for Murder

Daniel Maher } This day the People again came by the States Attorney, and the defendant in his own proper person as well as by Glover & Cook his Attorneys, together with the jury sworn herein, who return into Court the following verdict to wit: We the jury find the defendant guilty of manslaughter and give the time for his imprisonment in the Penitentiary at one year.

Defendants Counsel move the Court for a new trial.

Sunday December 3<sup>rd</sup>

The People &c }

24. 28

} Indictment for Murder

Daniel Maher } This day The People again came by the States Attorney, and the defendant in his own proper person as well as by Glover & Cook his Attorneys, and after



Hearing the arguments of counsel, the Court overrule the defendant's motion for a new trial. The Court now sentence the defendant to be imprisoned in the penitentiary at Joliet for one year, the first day to be spent in solitary confinement on a diet of bread and water, the balance of the term at hard labor; and it is further ordered that the Sheriff deliver the body of said defendant to the warden of said prison within ten days from and after the adjournment of the present term of this Court.

And afterwards to wit on the 7<sup>th</sup> day of December AD 1837 the same being one of the days of said November term of said Court: the defendant filed his bill of exceptions in the words and figures as following to wit:



The People &c }  
 vs } Indictment for Murder  
 Daniel Maher }

Be it remembered that when this cause was called for trial and a jury sworn the prosecuting Attorney in his opening address to the jury stated to them that he should not insist to them that the prisoner was guilty of Murder but that he should insist that he was guilty of Manslaughter. The counsel for the defendant stated in his opening to the jury that he believed it probable that the prosecution would prove that defendant did kill James Maher, but he believed that it would appear from the proof that if he did so that it was justifiable homicide. The People called Julia Maher who testified as follows, I am the daughter of James Maher deceased. He died June 12<sup>th</sup> 1857 in La. Salle County, I was home in the afternoon & evening of the day before that. The defendant & my father came home together, they had been in Ottawa, they came from Ottawa together, got there about five o'clock P.M. they came in a wagon, when they came there Daniel got out of the wagon first - he came into the house with his hat in one hand and a bottle in the other. Father put



(2)

up his horses into the stable before he came in. They eat supper together after which I told Daniel to go home, he said he would not for he was drunk & his wife would kill him. That she had abused him the Sunday before. Then Pa told the boys to do something they did not do it & he was going to whip them. Dan jumped up and caught hold of Pa. Pa said let me go. Deft. said if I let you go you will put it into me. Father told him to go home & mind his own business. said that if Deft. don't slide not let go of him he would strike him if he did not let go of him he would strike him. They went out of the house and struggled together. I got hold of father. Deft. struck Dan in the mouth. I let go and then the boys jarred them. Then the boys and I put Dan over the fence to go home, then they argued and Pa told Dan not to come around there him or his talking wife again. Dan said if Pa had got so great he had made too free eating supper then. We all ordered Dan off. He staid about fifteen minutes and then went off about 30 rods. Then he turned and came half way back. I went into the house I heard him halloo. I went into the house I heard the boys halloo. when I came out father was lying down. I ran down to where he was



Defendant stood over him & said aint I  
 able to fight you now. It was down 2 or 10  
 rods from our house, towards defendant's  
 house. This was after 7 in the evening. I saw  
 no clubs there or any other weapon. He did not  
 see my father strike left: saw no difficulty  
 between my father & mother that  
 night. I went out and milked on cow, while  
 they were eating. Deft used some profane  
 language not much. cursed by his God  
 & his Jesus two or three times. My Pa told  
 Dan that he was too drunk to fight then said  
 he would come back tomorrow morning. They  
 shook hands upon that and agreed to it.  
 When I saw my father on the ground there  
 was a wound in the back part of his head  
 he died at five o'clock next morning. I  
 did not see my father go. Dan when I last  
 saw him had gone across the pasture. Not  
 when he had come back about half the distance  
 he stood over my father when I came down  
 to him & afterwards went off home.

Louise Examined

I saw deft: when he was over father. did  
 not see whether he had anything in his hand  
 I am not sure I should have seen it if he  
 had it. I did not look at him. He was stand-  
 ing over Pa when he said now aint I able



12

to fight you. I was about as far from him then as I am from you (8 feet) I don't know to whom that map handle belongs. don't know that I ever saw it before ~~at~~ about the house. when I went in the house father was standing inside the door yard fence not 20 feet from the house. I was in the house about five minutes during that time. I suppose he went down where Deft was. I did not see him go. Deft was intoxicated when he came home. Pa was not drunk but drank some. He was in his ordinary state of mind. both set down to supper Deft had a bottle he said was brandy. both drank, some of the boys and my mother set down to supper. I milked the cows while they were eating. They were done supper when I came back. when I came back father told the boys to see to the horses. He said he would whip them. they were not much afraid he never whipped them. He started to whip them had a riding whip such as bought at the stores. There was five rooms in the house down stairs 3 sleeping rooms kitchen & sitting room. They were eating in the sitting room. door opens from sitting room to kitchen. I sat at the table but did not wait on it. There was no meat on the table. when it was set, Deft said he wanted some meat. I cooked some for him in the kitchen.



Was in the kitchen long enough to cook some  
 meat for Deft: while they were eating. I did not  
 hear father say anything that evening about  
 whipping mother. I did not see him strike her  
 with a whip that evening. He was going to  
 strike brother Dan. & Jerry. I don't know that  
 mother started for the door when father got the  
 whip. Deft. did not go out of doors but shoved  
 Pa out: then they began to struggle & the boys  
 & I pushed them out so that they would not  
 break anything. I don't know whether mother  
 was out of doors at that time or not: when I  
 had milked the cow & come in they had just  
 commenced their pulling. I don't know what  
 had been done before. when I saw Pa on the  
 ground the boys were there. when I got out  
 of the house the boys were half way down to  
 where Pa was. I saw my two brothers Dan. &  
 Jerry. before that I saw one of the boys don't know  
 which one bring a bottle of liquor to Deft: after he  
 had left: he stood at the bars and said he  
 wanted his bottle and would not go until he  
 got it: Father did not say in my hearing to  
 mother that she would not go to bed until he  
 had whipped her. I have not talked much  
 about what was going to prove as to. I have  
 not talked with any one about the case  
 since Court adjourned for glimmer. I did not  
 see my Father have a mop handle in his



hand that day. I saw him drink once after he got home. I was in the kitchen and out-milking all the time they were eating. Father had the whip in his hand when I came in. I could not hear from the kitchen if the door was shut. I don't know whether it was closed or not. When I came in the boys were just going out. Father was going after them with a whip. He was going out of doors as I came in. He was following them with a whip when he told them to feed the horses. Deft caught father by the collar. The boys were near by.

Jeremiah Walker sworn.

I was present on the evening spoken of. I saw that Deft came home about sun down a little before or a little after. They came in father's wagon both went into the house. I unharnessed the horses and put them out. Father had a whip & was going to lick us. He licked Mother too below & across her shoulders. He had not given us any directions what to do. Deft got up and took hold of Father. They scuffled. Then the Deft took hold of Father and told him he wanted him to put it onto him. I saw Deft strike Father in the face or make an offer to. I don't know whether he hit him or not. Deft



tore fathers shirt at the time. Left-went-off over  
 the fence. he picked up a club. went away a  
 piece 2 or 3 rods then turned & came back a  
 piece. he then leaned on the stick. he came back  
 two or three times I dont know which. I think  
 he went away farther the first time than the  
 last; I was going out to the barn to take care of  
 the horses. I heard a stroke down where Left-  
 & father were. I went down there. father was  
 lying on his back on the ground with one foot  
 under him. Left-was 4 or 5 rods off going to-  
 wards his house. I did not hear him say anything  
 This was in Lea. Halle County. I saw my father  
 have the mop handle. he took it from the house  
 I saw Daniel pick up the stick he had. I  
 did not see my father when he first picked  
 up his. I saw Left have a club before I see  
 my father have one. cant say whether my  
 father had the mop handle when Left picked  
 up a club. I did not see him have it there.  
 Left-had a club when he turned back towards  
 the bars. the stick my father had was a mop  
 handle. The sound of the blow was like you  
 would strike a stone with a stick. I did  
 not hear Left say anything then. Cant say  
 who father struck first with the whip. he  
 tried to strike me. did strike Dan. my mother  
 was present when he tried to strike me. it was  
 a store whip in the shape of a black snake.



16

I did not hear any father threaten my mother not as I remember he might have done it: my brother Daniel & I run close to my mother when father struck her.

Cross Examination

Father went to the house with Daniel & brother & I put out the horses. Father did not tell me to do anything at all that evening I don't know what he whipped us for. I forget whether he struck mother first or not. He struck her two blows across the shoulders with that whip. I don't know why he whipped her. Neither I or father seemed the worse for liquor. They both knew what they were saying. Father was not in the habit of whipping us for nothing. as soon as I eat my supper I went out to see to the horses. when I returned they were sitting by the fire. they were talking before father got his whip. I don't remember what they said. Father might have <sup>threatened</sup> ~~mentioned~~ mother for all I know. I was about as near to mother when father struck her as I am to you (almost & yet). brother Dan was about as far off. both went into the house when father struck her. I left got up & took hold of father Julia was somewhere in the house. I don't know whether mother went into the house fast or slow. I did



not do anything or say anything but Daniel took hold of him & said he wanted him to put on to him now. Father told him to let go. they then commenced scuffling. Left then said wait until tomorrow morning, then I will fight you I am not able to fight you now. Father said well & both let go. they said they would meet in the prairie to fight next day. they then shook hands and Dan started off. when he got over on the outside of the fence he picked up the club, he was in the pasture field. he then went about two rods & then turned back again. he <sup>was</sup> off four or five rods from the fence when father told him he did not want him or his wife around him any more to clear off the place. Left said he had made too free to eat supper there. He then went off about a rod & turned & they talked about something I don't know what. Left started off again and Galloose & said that the family helped father to whip him. I did not hear what father said. He started at that time from the house. Left was then walking away. Father had the crop stick in his hands. it was not broken then. I saw father run up to Left. Left did not run up to him. Father had the crop stick drawn in both hands when he came up to Left. I did not see father strike it was too dark to see distinctly from where I was down to where Left was. I did



not see any stroke. I heard a stroke did not see it. I left father on the ground and run over to a neighbors (Mr Barthys), when I come back I saw the upper end of the mop handle lying at the place where father was. the mop stick was broken. Left: was about 12 rods off when father started after him with the mop stick. He was walking away at the time. Father lived until next morning, when I got down to where father <sup>was</sup> lying Left: was going away. I had seen the mop stick at the house before that day, it stood at the kitchen door. had seen Julia use it:

Direct resumed

My father lay in the pasture field when I saw Left: going away he had a club. I did not hear any shout about the time of the blow. I did not go into the barn. I went towards it. Left: was going away when my father went up to him. they had a difficulty a year or two before that time but it did not amount to anything. Daniel did not come back to the fence when he turned the first time. When he turned the second time father told him to go home to his talking wife. I heard this stroke as soon as father got down there. it was about a minute after when I was there. I saw my



Father going down with the stick drawn in both hands. I don't know whether Deft: said anything about being able to fight or not. I don't know whether Julia was there as soon as I was or not.

Cross Examined

I was 5 or 6 rods off when I heard the stroke. I run down immediately. I did not halloo. I was nearer to father than the house was and I run down as quick as I could. Daniel my brother was down there at the time I went down with father, and was there when father came down where Deft: was. When father was coming down towards Deft: with the mop stick my brother Dan. hallooed to Deft: run down run.

Doct: The Striker called by People

I'm coroner, examined deceased. Found a contused wound on the right side of the head. (5) Found the skull fractured. I suppose the wound was inflicted with a heavy club. (club shown) This club was then some blood on it, a blow from such a club might produce death. Think deceased was killed by a blow from such a club. before I held the inquest I went to Deft: house & found this club. Deft: was not at home went back in the evening. went to Deft: house



20

he was not there. boy came in & said Lept: was at O'Donnells house, went there did not find him. found Lept: in a slough heard Hall tell him to stop. Lept: run about 30 rods. Hall shot, not at him I suppose. I halloed at him & he stopped. he said he had been down in the slough = he lives on Buck Creek in this County  
Cross Examined

The snap stick here shown is a deadly weapon. The prosecution here rested. the prosecution at the time it's witnesses were sworn called Daniel Maher & he appeared and was duly sworn as a witness for the People. after the Prosecution had closed its evidence not having examined said Daniel Maher the defense demanded the right to cross examine the said Daniel Maher who was then & there in Court. which was objected to by the Prosecuting Attorney. and the Court decided that defendant could not cross examine the said Daniel Maher. that if defendant examined him it must be as his own witness. To which decision of the Court the defendant then and there ~~it~~ excepted. Lept then called John Murray who testified as follows. That he had known James Maher the deceased 17 Years. That he was a larger man than Lept: he would weigh



I should think 180 lbs.. am acquainted with the general character of James Maher deceased as to his being a peaceable or quarrelsome man. His character was that of a quarrelsome violent man when he was under the influence of liquor.

Wm J. Kil called by Deft: testified as follows. I have known James Maher deceased about 9 years. He was larger than Deft: James Maher would weigh I suppose about 160 lbs. am acquainted with his character among his neighbors as to his being a quarrelsome man or otherwise. His character was that when under the influence of liquor of a violent quarrelsome man.

Wm Morris called by Deft: testified.

I have known James Maher deceased for a good many years. He was a larger man than I am would weigh from 170 to 200 lbs. I think.

Wm Glover called by Deft: testified as follows.

I have known James Maher deceased for about 20 years. I knew his character as to being a peaceable man or otherwise. His character was that he was a very violent & quarrelsome man when he was in liquor.

E L Watmon was then sworn by People and testified that he had known deceased 17 years.



22

always thought him a peaceable and quiet man. have seen him drunk several times. did not think him quarrelsome when intoxicated. I think I knew deceased's reputation. think it was that of a quiet man. only a little noisy at times.

This was all the evidence. The Court at the request of the Prosecuting Attorney instructed the jury as follows.

1<sup>st</sup> If the jury believe from the evidence that the Deft: within the County of La. Falls in the month of June in the Year 1859 struck James Maher with a club upon the head, and that in consequence of such blow the said James Maher within a Year and a day died. the Law presumes if such club was a deadly weapon that the Deft: maliciously & intentionally killed the deceased, and that such killing was Murder and it is necessary for the defendant to excuse himself to show to the satisfaction of the jury that such killing was necessary in order to prevent the deceased from inflicting great personal violence upon Deft: or that the Deft: at the time he struck the fatal blow upon the deceased actually believed under all the facts and circumstances that it was necessary for him to protect himself by killing the deceased.



Which the Court qualified as follows at the request of Def<sup>t</sup>: <sup>and</sup> however upon the proof introduced by the People facts and circumstances are developed which show that the killing was in self-defence that is sufficient to acquit the prisoner even if he offers no testimony.

2<sup>nd</sup> If the jury believe that Def<sup>t</sup>: was pursued by the deceased James Baker with a deadly weapon and that the deceased intended to strike Def<sup>t</sup>: Yet the Def<sup>t</sup>: would not be justified in killing the deceased unless in necessary self defence and if the jury believe from the evidence that Def<sup>t</sup>: courted a combat with deceased and endeavored to irritate & wear the deceased for the purpose of having a fight with deceased and then killed the deceased in such fight: the Def<sup>t</sup>: is guilty and the jury should so find. which instruction the Court qualified as follows at Def<sup>t</sup>'s request But the agreement must be to fight at that time. an agreement to fight at another time would not have any effect upon the case.

3<sup>rd</sup> If the jury believe from the evidence that Def<sup>t</sup>: and deceased got drunk together and that a fight ensued in the house of Def<sup>t</sup>: and also believe that the parties were so drunk as to have lost their reasoning faculties & all fear of danger & that while in such state of intoxication



24

the Deft: coveted a fight with deceased and seized hold of deceased & struck him in the face & that the deceased then followed the Deft with a club & Deft: struck deceased with a club and killed him when the Deft: might have avoided further combat but did not then the Deft: is guilty of manslaughter, which instruction the Court at the request of Deft: qualified as follows.

If after the struggle in the house some time had elapsed and Deft: left the house and James Maher then followed him and assailed him with a deadly weapon Deft: had the same right to defend himself as if the struggle in the house had never occurred.

4<sup>th</sup> If the jury believe that the Deft: struck deceased in the face in the house of deceased then the deceased had a right to order the Deft: off of his premises and to use all necessary force to put Deft: off, and if the Deft: resisted the deceased in his reasonable efforts to put Deft: off from his the deceased's premises and killed the deceased in such contest then the Deft: is guilty of manslaughter, and the jury will so find, which instruction the Court at the request of Deft: qualified as follows.

If Deft: was in the pasture lot of James Maher



7 #

and James Mahu ordered him off and he did not go. James Mahu had no right to attack him in the first instance with a deadly weapon, and if he did Deft: had a right to defend himself.

5<sup>th</sup> The jury are instructed that every man has a right to defend his own family and property and to order off all assailants, and if after such order the trespasser refuses to leave may use all necessary force to put him off, and if the trespasser kill the owner of the property in such reasonable efforts, he is guilty of manslaughter.

6<sup>th</sup> The jury are instructed that where two persons agree to fight and a fight thereby ensue and one of the parties thereto kills the other in such conflict: the party killing the other is guilty of manslaughter.

7<sup>th</sup> The jury in determining the question of the guilt or innocence of Deft: are at liberty to take into consideration all the facts and circumstances surrounding the case, the facts if proven of their having previous quarrels, their peculiar habits and customs, the peculiarity of their notions in relation to disputes and quarrels, the fact that each



26

knew the peculiar habits of the other if proven the fact if proven that the Deft. was in a position where he might have left the premises of deceased, and avoided further trouble, the fact if proven that Deft. refused to go home, the fact if proven that Deft. returned after he went away, the fact if proven that Deft. first seized a deadly weapon and retained the same, and the further fact if proven, that Deft. knew of the gurglesome nature of deceased, <sup>if proven</sup> which instruction the Court at the request of Deft. qualified as follows. The jury should also consider the facts if proven, that the Deft. was going away, and that James Maher followed him up, with a deadly weapon and attacked him before he used violence to James Maher.

8<sup>th</sup> The jury are instructed that a bare fear of personal violence being committed upon a man will not justify the killing of a human being, but that it must appear from all the circumstances that the effort made by deceased to inflict violence upon the Deft. were sufficient to arouse the reasonable fears of a reasonable man, and that the Deft. acted upon those fears, and not from the stimulus of the liquor Deft. had drunk if any, or from the revenge of Deft.



9<sup>th</sup> Before the jury can acquit the Deft: on the charge of manslaughter it must appear that the danger to him was so great and urgent that the Deft: in order to ~~save~~ have his own life or to prevent great bodily injury believed it necessary to use the weapon he did, and it must also appear that the person killed was the assailant in good faith or that the Deft: being then assaulted in good faith endeavored to decline any further combat before the mortal blow was given.

10<sup>th</sup> If the jury find the Deft: guilty of manslaughter they will fix his imprisonment in the Penitentiary for any term of time during his natural life.

To the giving of each of which instruction the Deft: then and there objected without particularly specifying the reasons for such objections, and after they were qualified at Deft's request as above set forth.

For the Deft: the Court was requested to instruct the jury as follows.

1<sup>st</sup> If James Maher made an attack upon the Deft: with a deadly weapon at a time when the Deft: was going away from him, and the circumstances of the attack were sufficient to excite the



fears of a reasonable person, <sup>that</sup> the said James Maher intended to do the Deft. some great bodily harm, and Deft. acted under the influence of such fears, and at the time struck the said James Maher and killed him, such killing is neither murder nor manslaughter but justifiable homicide, and the prisoner should be acquitted. Which instruction the Court refused to give as asked and qualified as follows. Provided the jury believed the Deft. used no more force than was necessary to prevent such bodily harm. To which decision of the Court in refusing to give said instruction as asked, and in qualifying the same the Deft. then and there excepted, at the time in the manner he objected to the People's instructions

2<sup>nd</sup> Daniel Maher cannot legally be punished for killing James Maher if at the time of such killing James Maher had made an attack upon him, and was there assailing him with a deadly weapon, and if Deft. killed James Maher while trying to defend himself by the use of reasonable and proper means, and if the circumstances of the attack made by James Maher were sufficient to excite the fears of a reasonable person that he would do the Deft. some great bodily harm, and if Deft. at the



time acted under the influence of such fear.

3<sup>rd</sup> If the jury have a reasonable doubt from all the evidence whether the Deft: is guilty of any offence, they should acquit him.

4<sup>th</sup> If all the facts established by the evidence may be true, and the Deft: be innocent of any offence the jury should acquit him. Before they can ~~acquiesce~~ acquit the Deft: they should believe from the evidence beyond a reasonable doubt that the facts proven are inconsistent with any reasonable hypothesis of the prisoners innocence.

5<sup>th</sup> The law does not measure nicely the degree of force which may be employed by a person attacked, and if he employ more force than is necessary in his defence he is not responsible for it unless it is so disproportionate to his apparent danger, as to show mere wantonness, revenge, or a malicious purpose to injure the assailant, or that there was no apparent reason for it.

6<sup>th</sup> If the Prosecution have called and sworn a witness belonging to the family of James Maher who was present and saw all that happened at the time James Maher was killed and have declined to examine him, the jury have a right



to consider this fact in arriving at a conclusion as to whether the Deft. was acting in self defence.

7<sup>th</sup> By the law of this State if a person is assailed by another he may defend himself in the very place where he is attacked, and is not bound to retreat, but in the place where he is attacked he may use all the force necessary to defend his own person even if it should result in the death of the assailant; which instruction the Court refused to give as asked and qualified as follows.

Provided he is attacked in a place where he has a lawful right to be. To which decision of the Court in refusing to give said instruction as asked, and in qualifying the same the Deft. then and there excepted at the same time, and in the same manner, as the People's instructions were objected to.

The Court gave Deft's 6<sup>th</sup> instruction as asked as above stated, and also qualified the same by adding thereto.

But the jury may take into consideration the question of the youth and inexperience of the witness to be called. To which qualification the Deft. then and there excepted, in the manner stated in the 7<sup>th</sup> instruction above.



Upon the return of the verdict of the jury the  
 Deft; moved the Court for a new trial which  
 motion was overruled by the Court; to which  
 decision of the Court in overruling said motion  
 the Deft. then and there accepted and  
 prays this bill of exception may be signed  
 sealed and made a part of the record  
 which is done

Be it also remembered that all of the fore-  
 going instructions in behalf of the People  
 and also all of the qualifications given to  
 the defendant's instructions were objected  
 to after they were read to the jury gross and  
 not to each one in particular, and just  
 before they retired in general terms & without the  
 Deft; by his counsel pointing out to the Court  
 the reasons for such objections & without  
 specifying the points in which they were objec-  
 tionable, and without argument.

All of which is signed and sealed and direct-  
 ed to be made a part of the records of this Court  
 M E Hollister



State of Illinois I John F. Stebbins Clerk of the  
 Sadale County Circuit Court in and for  
 said County and State do  
 hereby certify that the above foregoing comprises  
 a true, full, perfect and complete record in  
 the case of the People vs Daniel McLean  
 on the same appears of record & exists in  
 my office.

In Testimony Whereof I have ~~hereby~~  
 hereunto set my hand & seal of  
 said Court this 29<sup>th</sup> day of December  
 AD 1869

J. F. Stebbins

Filed May 22. 1860  
 J. F. Stebbins  
 Clerk

29  
 Motion  
 People vs  
 McLean





"If the defendant was pursued or assaulted by the deceased in such a way as to induce in him, a reasonable and well grounded belief, that he was actually in danger of losing his life or suffering great bodily harm, when acting under the influence of such reasonable apprehensions, he was justified in defending himself, whether the danger was real or only apparent, actual or prospective danger is not indispensable to justify self defence"

In *Hopkins vs The People* 18 Illinois 264 this Court say, if the circumstances attending the assault were such as to justify a reasonable conclusion in the mind of Hopkins of impending danger of serious bodily injury from Cummings, and he acted from the instincts of self preservation and not from motives of malice + revenge, he could not be guilty of the crime charged although in fact there was no actual danger.

The law upon this question does not admit of dispute - The Circuit Court laid down an entirely different rule of law to the jury. The 2<sup>d</sup> instruction given for the People page is in terms a statement of the proposition that to justify a man in standing



in his own defence. Such self defence must be necessary - In relation to a similar instruction this Court say in *Samphell vs The People* 16 Illinois 19, "This instruction if not absolutely wrong, was at least liable to misconstruction and to be understood by the jury as depriving the defendant of the right of self defence, unless his danger was not only apparently imminent but was real and positive. If so understood the instruction was wrong."

But the error of the Court appears most manifest upon this point, in refusing to give the 1<sup>st</sup> instruction asked by defendants as asked, and in qualifying the same. The qualification is clearly and certainly in conflict with the doctrine laid down in the cases above cited.

The 9<sup>th</sup> instruction given for the People assumes that defendant did kill the deceased and takes that question away from the jury entirely. This is error

*Sherman vs Dutch* 16 Illinois 283

*Hall vs Gordon* 16 Ills 415

If that instruction is the law then if no evidence whatever had been given in the case the defendant should have been convicted



The 3<sup>d</sup> instruction given for the People is not law. If Defendant had lost his reasoning faculties from any cause, he is not responsible. Even if Defendant did count a fifth with deceased and struck deceased once, then retired and was going off and deceased followed defendant with a club, the circumstances may have been such as to excite the reasonable fear of Defendant that he would receive great bodily harm unless he struck deceased as he did and he may have acted under the influence of those fears, and struck deceased, when in fact he might have avoided further ~~combat~~ combat, but did not think of himself.

The 5<sup>th</sup> instruction was based upon an assumed state of facts which had no existence and only tended to mislead the jury.

The 6<sup>th</sup> instruction given for the People as applied to this case is not law and misled the jury. It is clear from the evidence of Perambial Maher that Dft was going away & had got 12 Rods off



that deceased followed him rapidly up with a deadly weapon and assaulted him. While he was retreating. If this be so and Defendant was endeavouring to decline further combat in good faith, the fact that he had before that agreed to fight, would not affect the character of the blow given —

The Court should have allowed us to cross examine Daniel Maher, he had been called and sworn by the prosecution, he was the son of deceased, and all his feelings were against Defendant he alone saw the fatal struggle. He saw the 1<sup>st</sup> blow given and he only knew who gave that first blow.

I hold the law to be that the prosecution should have been compelled to have called and sworn the witness if they had not done so in the 1<sup>st</sup> instance,

|                |               |                    |
|----------------|---------------|--------------------|
| Drummonds case | 1 Car & Payne | 84                 |
| Bodles case    | 6 " " "       | 186                |
| Harris "       | 7 " " "       | 581, 32 E.C.R. 640 |
| Whitbread "    | 25 Eng C.L.R  | 347                |

Being called by the people his competency was endorsed and Defendant had a right



7  
to Crof examine

Mankley vs Secretary Landre & Matter & Sarg 172

Brooks case 2 Storke 472

3 " 437

Dickinson vs Shu 4 Esp 67

1 Harbair Evidence 162, 2 Edition

Red vs Brooke 2 Storke R 472

Phillips vs Eamer 1 Esp 357

2 Phillips Evidence 397-398

Moody vs Powell, 17 Pick 490 498

Jackson vs Varick 7 Cowell 238.

Hulton Bank vs Stafford 2 Wend 483

The whole case is one where it seems to me that the error in the ruling of the Court did prevent the acquittal of the prisoners, an acquittal to which he was entitled under the evidence if the law had been fairly administered, it is true that the testimony of Julia Baker bears more strongly against the prisoners, than that of her brother, but she had not as good opportunities of seeing as he had, she was out milking during the scene in the house, and she was in the house when deceased started after defendant.



Deceased at the time the fatal blow was given, was the assailant — Defendant was going off, was walking away when he was pursued, Deceased attacked defendant with a deadly weapon —

Deceased was much the strongest & heaviest man

The whole character of deceased was that of a violent dangerous quarrelsome man. There was therefore reason for the defendant to fear that he was in danger of receiving great bodily harm. There could have been no other purpose, in the pursuit made by deceased

There was no time to choose weapons or to measure exactly the might of the blow, when the deceased was advancing with a deadly weapon raised in the act of striking —

The judge of the Circuit Court has introduced into the bill of exceptions a statement that the instructions for the People; and the qualifications given to the Defendants instructions were objected to after they were read to the jury, in gross and not to each



and in particular just before they retired, in general terms and without specifying the points of objection -

I don't know why this was inserted I never saw or heard the People's instructions till they were given. I had to take exception then, or never. I chose to except in gross, as is the usual custom for the reason that in hearing them read once only - I had no other safe course, no man could consider ten separate instructions in hearing them read once, sufficiently to rest his cause upon his first impression of the instructions, I did not point out the specific objection. The judge knows very well that he does not allow argument upon instructions, by the rule of the Court I could not be heard.

This Court can not say that I did not take the exceptions in a proper time, and take them in a proper manner, will this Court presume that I saw those instructions before they were given, or that I could have argued them when given -

P. L. Cook



<sup>29 #2</sup>  
Daniel Maher

<sup>200</sup>  
The People

Argument for  
Pett

Filed May 28: 1860

Le Leland  
Clerk



STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION.

APRIL TERM, 1860.

DANIEL MAHER,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

} Error to La Salle.

Page of Rec.

ABSTRACT OF THE RECORD.

- 3 This was an indictment for murder.
- 5 Motion to quash the indictment. Motion overruled by the Court and exception by the defendant.

9 BILL OF EXCEPTIONS.

Be it remembered, that when this cause was called for trial and a jury sworn, the prosecuting attorney, in his opening address to the jury, stated to them that he should not insist to them that the prisoner was guilty of murder, but that he should insist that he was guilty of manslaughter.— The counsel for the defendant stated, in his opening to the jury, that he believed it probable that the prosecution would prove that defendant did kill James Maher, but he believed that it would appear from the proof that if he did so, that it was justifiable homicide.

The People called *Julia Maher*, who testified as follows: I am the daughter of James Maher, deceased. He died June 12th, 1859, in La Salle county. I was home in the afternoon and evening of the day before that. The defendant and my father came home together; they had been in Ottawa. They came from Ottawa together; got there about five o'clock p. m. They came in a wagon. When they came there Daniel got out of the wagon first. He came into the house with his hat in one hand and a bottle in the other. Father put up his horses into the stable before he came in. They eat supper together, after which I told Daniel to go home. He said he would not, for he was drunk and his wife would kill him; that she had abused him the Sunday before. Then pa told the boys to do something; they did not do it and he was going to whip them. Dan jumped up and caught hold of pa. Pa said, let me go. Defendant said, if I let you go you will put it into me. Father told him to go home and mind his own business; said that if defendant did not let go of him he would strike him if he did not let go. They went out of the house and struggled together. I got hold of father. Defendant struck deceased in the mouth. I let go, and then the boys parted them. Then the boys and I put Dan over the fence to go home. Then they argued, and pa told Dan not to come around there, him or his talking wife again. Dan said if pa had got so great, he had made too free eating supper there. We all ordered Dan off. He staid about fifteen minutes and then went off about 30 rods; then he turned and came half way back. I went into the house. I heard him hollow. I went into the house. I heard the boys hollow. When I came out father was lying down. I ran down to where he was. Defendant stood over him, and



*Page of Rec.* said, a'n't I able to fight you now? It was down 9 or 10 rods from our house, towards defendant's house. This was after 7 in the evening. I saw no clubs there, or any other weapon. Did not see my father strike defendant. Saw no difficulty between my father and mother that night. I went out and milked one cow while they were eating. Defendant used some profane language, not much; cursed by his God and his Jesus two or three times. My pa told Dan that he was too drunk to fight then; said he would come back to-morrow morning. They shook hands upon that, and agreed to it. When I saw my father on the ground, there was a wound in the back part of his head. He died at five o'clock next morning. I did not see my father go. Dan, when I last saw him, had gone across the pasture lot; when he had come back about half the distance. He stood over my father when I came down to him, and afterwards went off home.

*Cross Examined.*—I saw defendant when he was over father. Did not see whether he had anything in his hand. I am not sure I should have seen it if he had it. I did not look at him. He was standing over pa when he said, now a'n't I able to fight you? I was about as far from him then as I am from you, (8 feet.) I don't know to whom that mop handle belongs. Don't know that I ever saw it about the house. When I went in the house, father was standing inside the door yard fence, not 20 feet from the house. I was in the house about five minutes during that time. I suppose he went down where defendant was. I did not see him go. Defendant was intoxicated when he came home. Pa was not drunk; had drank some. He was in his ordinary state of mind. Both set down to supper. Defendant had a bottle he said was brandy; both drank. Some of the boys and my mother set down to supper. I milked the cow while they were eating. They were done supper when I came back. When I came back father told the boys to see to the horses. He said he would whip them. They were not much afraid; he never whipped them. He started to whip them; had a riding whip, such as bought at the stores. There were five rooms in the house down stairs, three sleeping rooms, kitchen, and sitting room. They were eating in the sitting room. Door opens from sitting room to kitchen. I sat the table but did not wait on it. There was no meat on the table when it was set. Defendant said he wanted some meat. I cooked some for him in the kitchen. I was in the kitchen long enough to cook some meat for defendant while they were eating. I did not hear father say anything that evening about whipping mother. I did not see him strike her with a whip that evening. He was going to strike brother Dan and Jerry. I don't know that mother started for the door when father got the whip. Defendant did not go out of doors, but shoved pa out; then they began to struggle, and the boys and I pushed them out so that they would not break anything. I do not know whether mother was out of doors at that time or not. When I had milked the cow and come in they had just commenced their pulling. I don't know what had been done before. When I saw pa on the ground the boys were there. When I got out of the house the boys were half way down to where pa was; I mean my two brothers, Dan and Jerry. Before that I saw one of the boys, don't know which one, bring a bottle of liquor to defendant. After he had left, he stood at the bars and said he wanted his bottle, and would not go until he got it. Father did not say in my hearing, to mother, that she would not go to bed until he had whipped her. I have not talked much about what I was going to swear to. I have not talked



with any one about the case since Court adjourned for dinner. I did not see my father have a mop handle in his hand that day. I saw him drink once after he got home. I was in the kitchen and out milking all the time they were eating. Father had the whip in his hand when I came in. I could not hear from the kitchen if the door was shut. I don't know whether it was closed or not. When I came in the boys were just going out; father was going after them with a whip. He was going out of doors as I came in. He was following them with a whip, when he told them to feed the horses. Defendant caught father by the collar; the boys were near by.

*Jeremiah Maher* sworn.—I was present on the evening spoken of.—Father and defendant came home about sun down; a little before or a little after. They came in father's wagon. Both went into the house. I unharnessed the horses and put them out. Father had a whip and was going to lick us. He licked mother, too, below and around her shoulders. He had not given us any directions what to do. Defendant got up and took hold of father. They scuffled. Dan, the defendant, took hold of father and told him he wanted him to put it onto him. I saw defendant strike father in the face, or made an offer to. I don't know whether he hit him or not. Defendant tore father's shirt at the time.—Defendant went off over the fence. He picked up a club, went away a piece, two or three rods, then turned and came back a piece. He then leaned on the stick. He came back two or three times, I don't know which. I think he went away farther the first time than the last. I was going out to the barn to take care of the horses. I heard a stroke down where defendant and father were. I went down there. Father was lying on his back on the ground, with one foot under him. Defendant was four or five rods off, going towards his house. I did not hear him say anything. This was in La Salle county. I saw my father have the mop handle; he took it from the house. I saw Daniel pick up the stick he had. I did not see my father when he first picked up his. I saw defendant have a club before I see father have one. Can't say whether my father had the mop handle when defendant picked up a club. I did not see him have it then. Defendant had a club when he turned back towards the bars. The stick my father had was a mop handle. The sound of the blow was like you would strike a stone with a stick. Did not hear defendant say anything then. Can't say who father struck first with the whip. He tried to strike me; did strike Dan. My mother was present when he tried to strike me. It was a store whip, in the shape of a black snake. I did not hear my father threaten my mother, not as I remember. He might have done it. My brother Daniel and I run close to my mother when father struck her.

*Cross Examined.*—Father went to the house with Daniel, and brother and I put out the horses. Father did not tell me to do anything at all that evening. I don't know what he whipped us for. I forget whether he struck mother first or not. He struck her two blows across the shoulders with that whip. I don't know why he whipped her. Neither defendant or father seemed the worse for liquor. They both knew what they were saying. Father was not in the habit of whipping us for nothing. As soon as I eat my supper I went out to see to the horses.—When I returned they were sitting by the fire. They were talking before father got his whip. Don't remember what they said. Father might have threatened mother for all I know. I was about as near to mother when father struck her as I am to you, (almost 8 feet.) Brother



Dan was about as far off. Both went into the house when father struck her. Defendant got up and took hold of father. Julia was somewhere in the house. I don't know whether mother went into the house fast or slow. I did not do anything or say anything, but Daniel took hold of him and said he wanted him to put onto him now. Father told him to let go. They then commenced scuffling. Defendant then said, wait until to-morrow morning, then I will fight you; I am not able to fight you now. Father said, well, and both let go. They said they would meet in the prairie to fight next day. They then shook hands and Dan started off. When he got over on the outside of the fence he picked up the club. He was in the pasture field. He then went about two rods, and then turned back again. He was off four or five rods from the fence when father told him he did not want him or his wife around him any more; to clear off the place. Defendant said he had made too free to eat supper there. He then went off about a rod and turned, and they talked about something, I don't know what. Defendant started off again and hollowed, and said that the family helped father to whip him. I did not hear what father said. He started at that time from the house. Defendant was then walking away. Father had the mop stick in his hands. It was not broken then. I saw father run up to defendant. Defendant did not run up to him. Father had the mop stick drawn in both hands when he came up to defendant. I did not see father strike; it was too dark to see distinctly from where I was down to where defendant was. I did not see any stroke. I heard a stroke; did not see it. I left father on the ground, and run over to a neighbor's, (McCarthy's.) When I came back I saw the upper end of the mop handle lying at the place where father was. The mop stick was broken. Defendant was about 12 rods off when father started after him with the mop stick. He was walking away at the time. Father lived until next morning. When I got down to where father was lying, defendant was going away. I had seen the mop stick at the house before that day. It stood at the kitchen door. Had seen Julia use it.

*Direct resumed.*—My father lay in the pasture field. When I saw defendant going away he had a club. I did not hear any shout about the time of the blow. I did not go into the barn. I went towards it. Defendant was going away when my father went up to him. They had a difficulty a year or two before that time, but it did not amount to anything. Daniel did not come back to the fence when he turned the first time. When he turned the second time, father told him to go home to his talking wife. I heard this stroke as soon as father got down there. It was about a minute after when I was there. I saw my father going down with the stick drawn in both hands. I don't know whether defendant said anything about being able to fight or not. I don't know whether Julia was there as soon as I was or not.

*Cross Examined.*—I was 5 or 6 rods off when I heard the stroke. I run down immediately. I did not hollow. I was nearer to father than the house was, and I run down as quick as I could. Daniel, my brother, was down there at the time. He went down with father, and was there when father came down where defendant was. When father was coming down towards defendant with the mop stick, my brother Dan hollowed to defendant, run, Dan, run.

*Dr. McArthur called by People.*—Am coroner. Examined deceased; found a contused wound on the right side of the head; found the skull



fractured. I suppose the wound was inflicted with a heavy club. [Club shown.] This club was then some blood on it. A blow from such a club might produce death. Think deceased was killed by a blow from such a club. Before I held the inquest I went to defendant's house and found this club. Defendant was not at home. Went back in the evening. Went to defendant's house. He was not there. Boy came in and said defendant was at O'Donnell's house. Went there; did not find him. Found defendant in a slough. Heard Hall tell him to stop. Defendant run about 30 rods. Hall shot, not at him, I suppose. I hollowed at him and he stopped. He said he had been down in the slough.—He lives on Buck Creek, in this county.

*Cross Examined.*—The mop stick here shown is a deadly weapon.

The prosecution here rested. The prosecution, at the time its witnesses were sworn, called *Daniel Maher*, and he appeared and was duly sworn as a witness for the people. After the prosecution had closed its evidence, not having examined said *Daniel Maher*, the defence demanded the right to cross examine the said *Daniel Maher*, who was then and there in Court, which was objected to by the prosecuting attorney, and the Court decided that defendant could not cross examine the said *Daniel Maher*; that if defendant examined him it must be as his own witness. To which decision of the Court the defendant then and there excepted.

Defendant then called *John Murray*, who testified as follows: That he had known James Maher, the deceased, 19 years; that he was a larger man than defendant; he would weigh, I should think, 180 pounds. Am acquainted with the general character of James Maher, deceased, as to his being a peaceable or quarrelsome man. His character was that of a quarrelsome, violent man, when he was under the influence of liquor.

*M. G. McNeil* called by defendant, testified as follows: I have known James Maher, deceased, about 9 years. He was larger than defendant. James Maher would weigh, I suppose, about 160 lbs. Am acquainted with his character among his neighbors, as to his being a quarrelsome man or otherwise. His character was that, when under the influence of liquor, of a violent, quarrelsome man.

*Wm. Norris*, called by defendant, testified: I have known James Maher, deceased, for a good many years. He was a larger man than I am; would weigh from 190 to 200 lbs., I think.

*J. O. Glover*, called by defendant, testified as follows: I have known James Maher, deceased, for about 20 years. I knew his character, as to being a peaceable man or otherwise. His character was that he was a very violent and quarrelsome man when he was in liquor.

*E. L. Waterman* was then sworn by people, and testified, that he had known deceased 17 years. Always thought him a peaceable and quiet man. Have seen him drunk several times. Did not think him quarrelsome when intoxicated. Think I knew deceased's reputation. Think it was that of a quiet man, only a little noisy at times.

This was all the evidence. The Court, at the request of the prosecuting attorney, instructed the jury as follows:

1st. If the jury believe from the evidence, that the defendant, within the county of LaSalle, in the month of June, in the year 1859, struck James Maher with a club upon the head, and that in consequence of such blow the said James Maher within a year and a day died, the law pro-



sumes, if such club was a deadly weapon, that the defendant maliciously and intentionally killed the deceased, and that such killing was murder; and it is necessary for the defendant to excuse himself, to show to the satisfaction of the jury that such killing was necessary in order to prevent the deceased from inflicting great personal violence upon defendant, or that the defendant, at the time he struck the fatal blow upon the deceased, actually believed, under all the facts and circumstances, that it was necessary for him to protect himself by killing the deceased.

Which the Court qualified as follows, at the request of defendant:

If, however, upon the proof introduced by the people, facts and circumstances are developed, which show that the killing was in self defence, that is sufficient to acquit the prisoner, even if he offers no testimony.

2d. If the jury believe that defendant was pursued by the deceased, James Maher, with a deadly weapon, and that the deceased intended to strike defendant, yet the defendant would not be justified in killing the deceased, unless in necessary self defence. And if the jury believe from the evidence, that defendant courted a combat with deceased, and endeavored to irritate and vex the deceased, for the purpose of having a fight with deceased, and then killed the deceased in such fight, the defendant is guilty, and the jury should so find.

Which instruction the Court qualified as follows, at defendant's request:

But the agreement must be to fight at that time. An agreement to fight at another time would not have any effect upon the case.

3d. If the jury believe from the evidence, that defendant and deceased got drunk together, and that a fight ensued in the house of defendant; and also believe that the parties were so drunk as to have lost their reasoning faculties and all fear of danger; and that while in such state of intoxication the defendant courted a fight with deceased, and seized hold of deceased and struck him in the face, and that the deceased then followed the defendant with a club, and defendant struck deceased with a club and killed him, when the defendant might have avoided further combat but did not, then the defendant is guilty of manslaughter.

Which instruction the Court, at the request of defendant, qualified as follows:

If, after the struggle in the house, some time had elapsed, and defendant left the house and James Maher then followed him and assailed him with a deadly weapon, defendant had the same right to defend himself as if the struggle in the house had never occurred.

4th. If the jury believe that the defendant struck deceased in the face in the house of deceased, then the deceased had a right to order the defendant off of his premises, and to use all necessary force to put defendant off; and if the defendant resisted the deceased in his reasonable efforts to put defendant off from his, the deceased's, premises, and killed the deceased in such contest, then the defendant is guilty of manslaughter, and the jury will so find.

Which instruction the Court, at the request of defendant, qualified as follows:

If defendant was in the pasture lot of James Maher, and James Maher ordered him off and he did not go, James Maher had no right to at-



fact him in the first instance with a deadly weapon, and if he did, defendant had a right to defend himself.

5th. The jury are instructed that every man has a right to defend his own family and property, and to order off all assailants; and if, after such order, the trespasser refuses to leave, may use all necessary force to put him off, and if the trespasser kill the owner of the property in such reasonable efforts, he is guilty of manslaughter.

6th. The jury are instructed, that where two persons agree to fight, and a fight thereby ensue, and one of the parties thereto kills the other in such conflict, the party killing the other is guilty of manslaughter.

7th. The jury, in determining the question of the guilt or innocence of defendant, are at liberty to take into consideration all the facts and circumstances surrounding the case; the facts, if proven, of their having previous quarrels, their peculiar habits and customs, the peculiarity of their notions in relation to disputes and quarrels, the fact that each knew the peculiar habits of the other, if proven; the fact, if proven, that the defendant was in a position where he might have left the premises of deceased, and avoided further trouble; the fact, if proven, that defendant refused to go home; the fact, if proven, that defendant returned after he went away; the fact, if proven, that defendant first seized a deadly weapon and retained the same; and the further fact, if proven, that defendant knew of the quarrelsome nature of deceased, if proven.

Which instruction the Court, at the request of defendant, qualified as follows:

The jury should also consider the facts, if proven, that the defendant was going away, and that James Maher followed him up with a deadly weapon, and attacked him before he used violence to James Maher.

8th. The jury are instructed that a bare fear of personal violence being committed upon a man will not justify the killing of a human being, but that it must appear from all the circumstances that the effort made by deceased to inflict violence upon the defendant were sufficient to arouse the reasonable fears of a reasonable man, and that the defendant acted upon those fears, and not from the stimulus of the liquor defendant had drank, if any, or from the revenge of defendant.

9th. Before the jury can acquit the defendant on the charge of manslaughter, it must appear that the danger to him was so great and urgent that the defendant, in order to save his own life or to prevent great bodily injury, believed it necessary to use the weapon he did; and it must also appear that the person killed was the assailant, or that the defendant, being then assailant in good faith, endeavored to decline any further combat before the mortal blow was given.

10th. If the jury find the defendant guilty of manslaughter, they will fix his imprisonment in the penitentiary for any term of time during his natural life.

To the giving of each of which instruction the defendant then and there excepted, without particularly specifying the reasons for such objections, and after they were qualified at defendant's request, as above set forth.

For the defendant, the Court was requested to instruct the jury as follows:

1st. If James Maher made an attack upon the defendant with a deadly



weapon, at a time when the defendant was going away from him, and the circumstances of the attack were sufficient to excite the fears of a reasonable person that the said James Maher intended to do the defendant some great bodily harm, and defendant acted under the influence of such fears, and at the time struck the said James Maher and killed him, such killing is neither murder nor manslaughter, but justifiable homicide, and the prisoner should be acquitted.

Which instruction the Court refused to give as asked, and qualified as follows :

Provided the jury believe the defendant used no more force than was necessary to prevent such bodily harm.

To which decision of the Court in refusing to give said instruction as asked, and in qualifying the same, the defendant then and there excepted at the time, in the manner he objected to the people's instructions.

2d. Daniel Maher cannot legally be punished for killing James Maher, if at the time of such killing James Maher had made an attack upon him, and was there assailing him with a deadly weapon; and if defendant killed James Maher while trying to defend himself by the use of reasonable and proper means; and if the circumstances of the attack made by James Maher were sufficient to excite the fears of a reasonable person that he would do the defendant some great bodily harm; and if defendant at the time acted under the influence of such fear.

3d. If the jury have a reasonable doubt, from all the evidence, whether the defendant is guilty of any offence, they should acquit him.

4th. If all the facts established by the evidence may be true, and the defendant be innocent of any offence, the jury should acquit him. Before they can convict the defendant, they should believe, from the evidence, beyond a reasonable doubt, that the facts proven are inconsistent with any reasonable hypothesis of the prisoner's innocence.

5th. The law does not measure nicely the degree of force which may be employed by a person attacked, and if he employ more force than is necessary in his defence, he is not responsible for it, unless it is so disproportionate to his apparent danger as to show mere wantonness, revenge, or a malicious purpose to injure the assailant, or that there was no apparent reason for it.

6th. If the prosecution have called and sworn a witness belonging to the family of James Maher, who was present and saw all that happened at the time James Maher was killed, and have declined to examine him, the jury have a right to consider this fact in arriving at a conclusion as to whether the defendant was acting in self defence.

7th. By the law of this State, if a person is assailed by another, he may defend himself in the very place where he is attacked, and is not bound to retreat, but in the place where he is attacked he may use all the force necessary to defend his own person, even if it should result in the death of the assailant.

Which instruction the Court refused to give as asked, and qualified as follows :

Provided he is attacked in a place where he has a lawful right to be.

To which decision of the Court, in refusing to give said instruction as



asked, and in qualifying the same the defendant then and there excepted at the same time and in the same manner as the people's instructions were objected to.

The Court gave defendant's 6th instruction as asked as above stated, and also qualified the same by adding thereto,—

But the jury may take into consideration the question of the youth and inexperience of the witness to be called.

To which qualification the defendant then and there excepted, in the manner stated in the 7th instruction above.

Upon the return of the verdict of the jury the defendant moved the Court for a new trial, which motion was overruled by the Court, to which decision of the Court in overruling said motion the defendant then and there excepted, and prays this bill of exception may be signed, sealed, and made a part of the record, which is done.

Be it also remembered, that all of the foregoing instructions in behalf of the people, and also all of the qualifications given to the defendant's instructions were objected to after they were read to the jury gross, and not to each one in particular, and just before they retired in general terms, and without the defendant, by his counsel, pointing out to the Court the reasons for such objections, and without specifying the points in which they were objectionable, and without argument.

All of which is signed, and sealed, and directed to be made a part of the records of this Court.

M. E. HOLLISTER. [SEAL.]

And now comes the said Daniel Maher, plaintiff in error, and says that in the record and proceedings aforesaid, and in the rendition of judgment aforesaid, there is manifest error, in this, to wit :

1. The Court erred in overruling the motion to quash the indictment.
2. The Court erred in refusing to allow the plaintiff in error to cross examine Daniel Maher, a witness called and sworn by the prosecution, and in deciding that if plaintiff in error examined said Maher, it must be as his own witness.
3. The Court erred in giving each of the instructions asked by the prosecuting attorney severally.
4. The Court erred in giving the second instruction given for the prosecution.
5. The Court erred in giving the third instruction asked for the prosecution.
6. The Court erred in giving the fifth instruction for the prosecution.
7. The Court erred in giving the sixth instruction asked for the prosecution.
8. The Court erred in giving the ninth instruction asked for the prosecution.
9. The Court erred in refusing to give the seventh instruction asked by the plaintiff in error, as asked, and in qualifying the same.
10. The Court erred in qualifying the sixth instruction asked by the plaintiff in error.
11. The Court erred in overruling the motion for a new trial.

GLOVER, COOK & CAMPBELL.



## POINTS.

1. The prosecution having called Daniel Maher, son of the deceased, and having had him sworn, his credibility was thereby admitted, and it was competent for plaintiff in error to cross examine him.

2 Starkie on Evidence.

2. By the law of this State, if a man is assailed under circumstances sufficient to excite the fears of a reasonable person that his assailant intended to do him great bodily harm, to prevent which the killing of the assailant was necessary, and acting under the influence of such fear he killed his assailant, such killing is justifiable homicide.

The Court laid down an entirely different rule of law to the jury.

*See 2 instruction*

*" 1 instruction as to Rule of duty & qualifications*

3. By the ninth instruction the Court assumes that the defendant killed the deceased; a fact which it was for the jury to find, and which it was not competent for the Court to assume.

4. The instructions asked by the defendant should have been given without the qualifications affixed to them by the Court.

5. The evidence in this case comes from the family of the deceased, and should be taken with great caution, and yet taking it most strongly against the prisoner, it failed to make out a case against him.



<sup>29</sup>  
Waher  
<sup>23</sup>  
The People  

---

Abstract & Points

Filed May 25, 1862  
S. L. Loomis  
Clerk