No. 13318

Supreme Court of Illinois

Lee

---

vs.

People

Supreme Court, of the State of Illinois,
APRIL TERM, A. D. 1861.

CHARLES LEE vs. THE PEOPLE. } **Error to the Circuit Court of Bureau County.**

The Plaintiff in Error was indicted and convicted in the Court below of an assault with a deadly weapon.

The Plaintiff in Error plead not guilty to the indictment which is as follows, to-wit:

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State of Illinois, Bureau County, ss:

Of the December Term of the Circuit Court of said County, in the year of our Lord one thousand eight hundred and fifty-nine.

The Grand Jurors, chosen, selected and sworn, in and for said County of Bureau, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Charles Lee, late of said county, on the first day of November in the year of our Lord, one thousand eight hundred and fifty-nine, and within the County aforesaid, in and upon one Thomas Horton, in the peace of said People, then and there being, did make an assault, with the intent to inflict upon

Page 1 said Thomas Horton a bodily injury; and him the said Thomas Horton, then and there, with a piece of a fence board, said piece of fence board being then and there a deadly weapon, did beat, bruise, wound and ill-treat, so that his life was greatly despaired of, and other wrongs then and there did to him the said Thomas Horton, and that the circumstances attending said assault showed a wicked and abandoned heart upon the part of him, the said Charles Lee. Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of

Page 3 the same People of the State of Illinois. And the Jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the People aforesaid, do further present: That Charles Lee late of said County, on the first day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at and within the County aforesaid, in and upon one Thomas Horton, then and there being in the peace of God and said People, did make an assault, with a Gun with the intent to inflict upon him, the said Thomas Horton, a bodily injury, the said Gun being then and there a deadly weapon; and him, the said Thomas Horton, then and there did beat, wound

Page 1 and ill-treat, and then and there the Gun aforesaid, did shoot at said Thomas Horton, with intent to inflict upon him serious bodily injury; there then and there appearing no considerable cause or provocation for said assault, 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.

W. BUSHNELL, State's Attorney, Ninth Circuit.

There appears on the back of the Indictment the following:

THE PEOPLE, &c., vs. CHARLES LEE, } *Indictment for an assault with a deadly weapon.* { A True Bill. ASA BARNEY, Foreman.

WITNESSES, THOMAS HORTON, JAMES AIKEN, ELI HORTON, GEO. LEE, PATTERSON BROWN.

Filed Dec. 20, 1859. E. M. FISHER, Clerk.

W. BUSHNELL, St's Atty, 9th Circuit.

Page 8 The defendant, on the 19th Sept., 1860, filed in the Court below the following bill of exceptions, to-wit:

THE PEOPLE, &c., vs. CHARLES LEE. } *Indict. for Assault to commit bodily injury.* { Circuit Court, Bureau county, Illinois, September Term, A. D., 1860.

Be it remembered upon the trial of this cause, that the people, to sustain the issue on their part, called Thomas Horton as a witness, who testified that his name was Thomas Horton, that in November, A. D., 1859, within the said county, the defendant, Charles Lee, committed an assault

Page. 1 upon said witness,—that he went to the house of the defendant to collect some school tax of the defendant and his tenants,—that the defendant was in his stable to work near to his, defendant's, house, that in going from the house to the stable he saw a bur oak log which he was certain was

out from the premises of the witness,—that he went into the stable where the defendant was at work digging a hole. He asked the defendant what that was for, he said to bury all the damned Dutch in. Witness said that he could not mean him as he was not Dutch. Witness then asked
Page 9 defendant where he had got that log of wood. Defendant replied, in Black Walnut Grove. Witness said that defendant had got it on his land, to which defendant replied that he might get recompense the best way he could. Witness then said that he had got that off his land, and that he told him now, as he had before, that if he ever knew of his cutting any timber off of his lands, he would beat him with some of it so that he could not get it away, and that thereupon the defendant picked up a dry pine board, three feet long, six inches wide, and one inch thick,
Page 11 and struck witness upon his side so as to break two of his ribs, and broke the board to pieces, which knocked the witness senseless and up against the horses, though he did not fall, and that before the witness recovered from his partial fall, the defendant gigged or punched the witness in the face with another piece of board five feet long, of the same breadth and thickness, knocking him down, and making his mouth and nose bleed considerable; and after the second blow, the witness made at the defendant,—defendant run, and witness after him to lick the defendant; defendant got out of the stable, and witness in attempting to follow him, defendant's son
Page 10 George caught hold of his, witness' coat tail, and he fell down over a rail, and defendant escaped; witness did not follow him farther, as he knew defendant would get into some of his hiding places where witness could not find him; — that defendant's son George then came to the witness and brought him his hat and besought him to leave,—that witness then started to leave, and had not proceeded far in a south-western direction from the house and barn of the defendant, when he heard the report of a gun—that he did not see the defendant fire the gun, but it came from the
Page 6 direction of the defendant; he did not know that the gun was fired to hit him,—that he was not hit. Witness then turned around and saw defendant, who told him to leave; that he, witness, was leaving, and got some sixty steps when the defendant fired; the gun was a shot-gun, and loaded with shot, and the shot went over his head and all around him, and some of the shot fell at his feet, but none struck him; that the ground was descending from where he stood to where the defendant was standing; that the witness then left. Witness said further, that he did not
Page 11 know of the defendant ever before having taken any of his timber; that he had not had any difficulty with the defendant; that before defendant made the first assault upon the witness, he had not struck or grabbed the defendant, nor offered to do so; that he might have thrown out his hands towards the defendant while talking; that he was in the habit of throwing out his hands when talking, and if he threw out his hands towards defendant before defendant struck him, it was with no intention of striking defendant; that defendant the first time he struck witness the
Page 11 first blow said, hands off, and then immediately struck witness. Witness said his timber land and the defendant's joined. The defendant by his counsel on cross-examination, asked the witness if he had not some two or three weeks before choked the defendant about the same stick of timber; to which question the State's Attorney objected. The Court sustained the objection and refused to permit the witness to answer the question; to which said ruling of the Court the defendant then and there excepted. The witness further said that George Lee, Patterson Brown, and another man called crazy John, were present during said difficulty and assault about which
Page 12 he had testified, and thereupon the State's Attorney rested his cause. The defendant by his counsel then moved the Court to require the State's Attorney to place upon the stand as witnesses, George Lee, Patterson Brown, and others whose names were on the back of the indictment as witnesses for the people, and who are now present in Court, in order that the defendant might cross-examine them as witnesses; but the Court over-ruled said motion, and refused to require the State's Attorney so to do; to which the said ruling of the Court, the defendant then and there excepted.

Page 13 The defendant then called George Lee, a witness whose name was on the back of the indictment as a witness for the people, who testified that he was the sonof the defendant, and was present at the time spoken of by Thomas Horton. That Mr. Horton charged his father with stealing his timber, and that his father denied it, that Mr. Horton told his father that if he ever took another stick of

timber off of his land, he would beat him to death with some of it, and at the same time grabbed his father by the right cheek, and witness saw the blood run down his father's cheek, and that his father then pushed Mr. Horton with a pine board, but not in the side, but in the face, and that
Page 13 Mr. Horton again made at his father and he pushed Mr. Horton again in the face with the same board; that he was about five feet off from Mr. Horton when this occurred; that his father then run, and Mr. Horton after him, and that he seized hold of Mr. Horton's coat tail and he fell over a rail, and his father got away.—That he requested Mr. Horton to leave, and that he did so; that he
Page 14 heard the report of a gun, but saw no one fire; that the ground in the direction Mr. Horton left was descending from the house and stable. Witness further said, upon cross-examination, that had never since had any conversation with his father about the difficulty, nor had his father and he ever had one word about what he could or would swear to; all his father had ever said to him was after the subpœna had been served upon him by the People, and all his father then said was that he would have to go to Court. The boy further stated that he had lived with his father ever since the said difficulty with Horton occurred, living in the same house with his father all the time.

Page 15 The defendant then called Patterson Brown, as a witness, whose name was also on the back of the indictment as a witness for the People. He stated that he was a tenant of the defendant; that he had the stable rented where the difficulty occurred; that he was present when Mr. Horton first came into the stable. Horton bid Lee the time of day, and then they commenced joking each other. Witness then stepped away a few moments; when he returned high words were passing. Horton told Lee that if he ever took another stick of timber off of his land he would beat him to death with it, and at the same time grabbed for Lee's face. Lee then struck Horton with a piece of board, but witness could not see just where, as he was just behind Horton, but
Page 11 knows that Horton must have been struck, as he fell back against him; that at the same time he saw that Lee's face was bloody, as though it had been scratched. Horton made at Lee again, and Lee punched Horton in the face with a pine board. He saw this blow strike Horton in the face; he did not see where the other blow of defendant took effect, but this one he did. Horton staggered back, but again made at Lee. Lee run, Horton pursued. Lee's boy caught hold of Horton's coat tail and he fell over a rail, and Lee escaped. Lee's boy then told Horton he had
Page 4 better leave; Horton started to leave; witness heard two reports of guns; he did not know how far off Horton had got when the first report was heard. Horton was about twenty-five rods from the stable, in a south-west direction, when the second report was heard. From where Lee was
16 supposed to be at the house, was east of the stable, still further off. From the house to where Horton was when the second report was heard, was a descent of some twenty-five feet, and a picket fence between the house and where Horton was. Witness further said that the board with
Page 17 which Lee struck Horton was not broke to pieces, in his opinion, and if it was broken to pieces he thinks he would have known it, as he remained in the stable after the parties had left, and picked up all the boards there, and every thing else that would have been likely to get under his horses' feet and hurt them, and that there were no pieces of boards there, that he saw; and he nailed on the boards on the stable. The witness further stated: that he knew the log about which Mr. Horton testified, was cut by the witness on the land of the defendant, by the marked trees to designate the lines of defendant's land, and by what the defendant and others had told him was the line; that he had, though, no personal knowledge of the lines himself. This witness also stated that
Page 17 after the first report of the gun, and before the second report, Horton hoisted his coat tail and turned his butt towards the defendant, and said, fire at that.

The defence then called as a witness, Miss Brown, who testified that she was living at the time of this difficulty with her brother, at the house of Mr. Lee, her brother occupied the same as
Page 18 a tenant of Mr. Lee,—that she did not see who fired the first gun,—but it was from the house, she saw Mr. Lee fire the second gun,—he held it straight out when he fired,—he appeared to hold it level when he fired.

The above was all the testimony in the case. The Court, at the instance of the State's Attorney, gave the following *Instructions to the Jury, for the People:*

Defendant excepted to the Court's refusal to give his #4 & 5 Instructions, and also excepted to Court's refusal to give Defendant's 1st Instruction for a new trial, because the verdict was contrary to law and evidence which the Court overruled and Defendant excepted

Page 21-22

Given. 1st—The Jury are instructed for the People, that if they believe, from the evidence, that the defendant within the County of Bureau, in the month of November, 1859, assaulted and struck Thomas Horton with a piece of fence board, and that such piece of fence board was a deadly weapon, with intent to inflict a bodily injury upon said Thomas Horton, and that the circumstances of such assault showed a wicked and abandoned heart, upon the part of defendant, or if the

Page 18 defendant made such assault without any considerable cause or provocation, then the Jury will find defendant guilty.

Given. 2d—If the Jury believe that defendant assaulted Thomas Horton in manner and form as charged in the indictment, with a gun, and that such gun was a deadly weapon, and that such assault showed an abandoned and malignant heart, upon the part of the defendant, or that no considerable cause or provocation existed for such assault, then the Jury will find the defendant guilty.

Page 18 Given. 3d—The mere speaking of words, however opprobrious or insulting, are no justification for an assault.

Given. 4th—The Court fixes the degree of punishment in this case; the Jury will therefore simply say by their verdict, Guilty or Not Guilty.

To the giving of which the defendant objected, at the time they were so given. But the Court over-ruled the defendant's objections, and gave the same to the Jury. To which the defendant then and there excepted. The defendant then asked the Court to give the following instructions to the Jury:

Page 19 THE PEOPLE, *vs.* CHARLES LEE. } *The Court instructs the Jury for the Defendant:*

Given. 1st—That in order to convict the defendant, the Jury must be satisfied that the defendant made an assault upon the said Thomas Horton with a deadly weapon, with the intent to inflict upon him a serious bodily injury, without any considerable provocation on the part of the party alleged to have been assaulted; or where all the circumstances show an abandoned and malignant heart.

Page 20 Given. 2d—If the Jury have any reasonable doubt about the board or boards with which it is alleged the defendant struck the prosecuting witness, being a deadly weapon, they should find the defendant not guilty on that charge, for that reason alone.

Given. 3d—That a deadly weapon is an instrument likely to produce death, as used by the defendant in the manner charged.

Refused. 4th—That if the prosecutor made the first assault, or attempted to make an assault upon the defendant, and the defendant under such provocation, immediately assaulted the plaintiff, the defendant is not guilty, as charged in the indictment, though defendant used more force than was necessary for his self-defence.

Page 21 Refused. 5th—That under this charge, the People must have proved that the circumstances under which the alleged assault was made was such, that if death had ensued, the crime would have been murder on the part of the defendant, and if only manslaughter if death had ensued, then the defendant must be acquitted on this indictment.

Given. 6th—That if the firing of the gun by the defendant was such that it did not clearly appear the

Page defendant intended to actually shoot the prosecutor, then the Jury should not regard that part of the case.

It is assigned for error:

1st—That the Court erred in refusing to permit witness Horton to state whether he had not shortly before, choked the defendant about the same matter.

2d—That the Court erred in not requiring the State's Att'y to put on the stand the People's witnesses whose names were on the back of the indictment, so as to give the defendant the right of cross-examination.

Page 3d—That the Court erred in giving People's 1st and 2d instructions.

4th—That the Court erred in refusing Defendant's 4th and 5th instructions.

5th—That the Court erred in refusing the defendant a new trial; the verdict being against the *evidence and the law.*

POINTS AND AUTHORITIES:

Page

It was proper that Horton should have been permitted to have stated whether he had not just before choked the defendant about this timber, because if so, the defendant had good reason to expect violence from Horton on this occasion, from his demonstrations, and justified the defendant in promptly resorting to force to repel the attack.

The first count of the indictment is for making an assault with a fence board, where the circumstances showed a *wicked and abandoned heart.* The 2d is for making an assault with a gun, *where no considerable provocation appeared.*

Page

People's 1st instruction is wrong because by it the Jury are told that it is sufficient if the assault with the board was made under such circumstances as showed a wicked and an abandoned heart, *or if no considerable provocation appeared.*

The People's 2nd instruction is wrong because the Jury are told by it that it is sufficient if the circumstances were such that no considerable provocation appeared, or if *they showed an abandoned and wicked heart.*

Page

Defendant's 4th instruction should have been given: If Horton made an assault or attempted it, and the defendant under the provocation made the assaults charged, the defendant, though not justified entirely, the grade of the offence was reduced to common assault and battery, because this Indictment is for committing the assault under such circumstances as would imply *malice* the same as in assaults to murder—and there an assault made under the provocation of an assault and battery, or attempted assault and battery upon the defendant, reduces the crime to common assault and battery.—Hopkinson *vs.* People 1S. Ill. 264.

Page

Defendant's 5th instruction should have been given: Because the circumstances from which malice could be implied under this indictment, is the same as in case of murder.—Sec. 24 of chap. 30 of Revised Statutes, entitled Criminal Jurisprudence.

Page

The verdict was clearly against the law and evidence. The evidence showed the defendant was not guilty, and the Court should have given a new trial.

PETERS & WINSLOW, Att'ys for LEE.

The Court gave 1st, 2d, 3d, and 6th of defendant's instructions, but refused to give defendant's 4th and 5th instructions; to which said refusal of the Court to give the said 4th and 5th instructions, the defendant then and there excepted. The Jury retired, and under the instructions of the Court and the testimony, found the defendant guilty, as charged in the indictment. The defendant moved the Court for a new trial, for the reason that said verdict was contrary to law and evidence, and for the reason that the Court had given wrong instructions to the Jury, on the part of the People, and had refused legal instructions asked for by the defendant. But the Court over-ruled the motion for a new trial made by the defendant; to which the said defendant then and there excepted.

The Court then passed Judgment on the Defendant, that he pay a fine of One Hundred Dollars and be imprisoned in the County Jail for three months, and until the fine and costs were paid; to which said decision of the Court the defendant then and there excepted, and prayed the Court to sign and seal this his bill of exceptions, and make the same a part of the record, which was done accordingly.

M. E. HOLLISTER,

Judge of the 9th Judicial Circuit of Illinois.

149 6 P.D.

Supreme Court of the State of Illinois

Charles Lee
vs
The People

Error to the Bureau Co Circuit Court

Abstracts - Points & authorities for pltff in Error

Filed Apr 17, 1861
L. Leland
Clerk

1318

Supreme Court of the State of Illinois
April Term A.D. 1861

Charles Lee
vs
The People &c } Error to Bureau

Argument submitted by Attorney
for the People

The plaintiff in error was
indicted for an assault upon
Thomas Horton with a deadly
weapon with intent to inflict
a bodily injury. On the trial
Horton was introduced as a
witness on the part of the people
and was asked on the cross
examination if he had choked
the defendant in a Controversy
occurring some two weeks or
three weeks before about a certain
stick of timber. to which
interrogatory the states attorney
objected and the objection was
sustained by the court. This
ruling of the court is assigned
for error. If the object of the
testimony was to make a case of

provocation for the purpose of justifying the assault. It was certainly incompetent. The injury which constitute such a reasonable provocation as to justify an assault with a deadly weapon with intent to inflict a bodily injury must occur at the time and constitute the exciting cause of the assault. No previous injury however great will justify one person in making an attempt to inflict a bodily injury upon another with a deadly weapon If the testimony was sought to be introduced for the purpose of showing that the defendant acted under the influence of fear, it was equally objectionable The fear which would ~~excuse~~ excuse the act must be reasonable and not such as arises from cowardice The simple fact that Horton on a former occasion had choked the defendant was not sufficient to induce the belief in the mind of any reasonable person that the assault made by the defendant was necessary in self defense.

To justify an assault in self defense the danger must be imminent and and pressing and whether it is so can only be determined by the bearing of the party at the time and all the surrounding circumstances as they then exist

The first and second instructions for the people were properly given. The first count in the indictment charges an assault with a fence board (alleging it to be a deadly weapon) with intent to commit a bodily injury and that the circumstances attending the assault showed a wicked and abandoned heart & the second count charges an assault with a gun (also alleging it to be a deadly weapon) with the same intent & without any considerable provocation. The first instruction given on the part of the people direct the jury to find the defendant guilty if they believe from the evidence that the defendant made the assault with a fence board and that the same was a deadly

weapon with intent to inflict a
a bodily injury if the circumstances
of such assault show a wicked &
abandoned heart or if such assault
was made without any considerable
cause or provocation. The second
instruction is, that if the jury
believe that defendant assaulted
Thomas Hartley in manner and
form as charged in the indictment
with a gun & that such gun
was a deadly weapon & that such
assault showed an abandoned and
malignant heart, upon the part
of the defendant, or that no
considerable cause or provocation
existed for such assault,
then the jury will find the
defendant guilty. It is contended
that because these instructions
Each refer to and include the two
conditions one of which is
necessary to constitute the offence
and the counts to but one Each,
that, therefore the law a given by
the Court was not applicable to the
case In indictments for assault
and attempts to commit
offences in themselves indictable

The same particularity is not necessary as is required in indictments for the commission of the offense itself, Whart, Am. Crim Law 80 The manner and means of committing the offense need not be specifically set out and it is only necessary to follow the language of the statute defining the offense 1 Iowa (Greene) 488 Whart Crim Law 81 The ~~description~~ of the instruments might therefore have been properly left out of this indictment it being mere surplusage. The description of the instrument being immaterial if it was not necessary to be proved as laid but it was sufficient if so much of the charge was sustained by the evidence as constitutes an offense punishable by law Whart Crim law 105-8 S&R 576, 11 Foster (N.H.) 521- Even in indictments for murder an allegation that the death was produced by a knife will be sustained by proof that it was produced by a dagger or other instrument capable of producing the same effect. Evidence of an assault with a board or gun

could have been properly introduced under either of the counts in this indictment and as one alleged that there was no considerable provocation & the other that the circumstances showed a malignant and abandoned heart the instructions containing these clauses in the alternative were properly given It has moreover been held that the assault it need not be alleged that the assault was committed without considerable provocation inasmuch as it is a bare negative qualification 4 Cal. 341 If such is the law the law as given by the Court was certainly applicable That the fourth instruction asked by the prisoner was properly refused cannot admit of a doubt It lays down the proposition that if the prisoner made the first assault, however insignificant it might be, or even attempted it the defendant was justifiable in inflicting a bodily injury with a deadly weapon and using more force than was necessary for self defence

The assault which would justify an assault with a deadly weapon with intent to inflict a bodily injury, must amount to a "considerable provocation" It also ignores the fact that the defendent might have made the assault under such circumstances as show an abandoned and malignant heart and was calculated to mislead the jury in that regard

The court refused to instruct the jury on the part of the people must have proved that the circumstances under which the alleged assault was made was such that if death had ensued the crime would have been murder on the part of the defendent, and if only manslaughter if death had ensued, then the defendent must be acquitted on this indictment" and it is alleged the court erred because malice is necessary to constitute this offense as well as murder, Admitting malice to be a necessary ingredient of the offense yet the instruction includes more than this proposition and asserts in effect, that the only distinction between

the offense charged in the indictment and murder is that death ensues in the latter, whereas there is this important difference, that in one case there must be an intent to inflict a bodily injury and in the other an intent to kill, A person who makes an assault with intent to inflict a bodily injury, from which death ensues, is not guilty of murder if the law is properly laid down in this instruction no person can be convicted of this offense unless he intended to commit a murder, The evidence in the case was amply sufficient to authorize the conviction. It is corroborated and not conflicting except as to some immaterial points and clearly shows a malicious intent to commit the injury as charged

D P Jones
States Attorney

No 6 V. D.

Charles Lee

vs

The Pepl &c

Arguments & Authorities

of Defendant in Error

Filed May 4 - 1861

L. Leland

Clerk

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The Plaintiff in Error plead not guilty to the indictment which is as follows, to-wit:

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The Grand Jurors, chosen, selected and sworn, in and for said County of Bureau, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Charles Lee, late of said county, on the first day of November in the year of our Lord, one thousand eight hundred and fifty-nine, and within the County aforesaid, in and upon one Thomas Horton, in the peace of said People, then and there being, did make an assault, with the intent to inflict upon

Page 〃 said Thomas Horton a bodily injury; and him the said Thomas Horton, then and there, with a piece of a fence board, said piece of fence board being then and there a deadly weapon, did beat, bruise, wound and ill-treat, so that his life was greatly despaired of, and other wrongs then and there did to him the said Thomas Horton, and that the circumstances attending said assault showed a wicked and abandoned heart upon the part of him, the said Charles Lee. Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of

Page 3 the same People of the State of Illinois. And the Jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the People aforesaid, do further present: That Charles Lee late of said County, on the first day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at and within the County aforesaid, in and upon one Thomas Horton, then and there being in the peace of God and said People, did make an assault, with a Gun with the intent to inflict upon him, the said Thomas Horton, a bodily injury, the said Gun being then and there a deadly weapon; and him, the said Thomas Horton, then and there did beat, wound

Page 〃 and ill-treat, and then and there the Gun aforesaid, did shoot at said Thomas Horton, with intent to inflict upon him serious bodily injury; there then and there appearing no considerable cause or provocation for said assault, 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.

W. BUSHNELL, State's Attorney, Ninth Circuit.

There appears on the back of the Indictment the following:

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WITNESSES,

THOMAS HORTON,
JAMES AIKEN,
ELI HORTON,
GEO. LEE,
PATTERSON BROWN.

Filed Dec. 20, 1859.

E. M. FISHER, Clerk.

W. BUSHNELL, St's Atty, 9th Circuit.

Page 8 The defendant, on the 19th Sept., 1860, filed in the Court below the following bill of exceptions, to-wit:

THE PEOPLE, &c., vs. CHARLES LEE. } *Indict. for Assault to commit bodily injury.* } Circuit Court, Bureau county, Illinois, September Term, A. D., 1860.

Be it remembered upon the trial of this cause, that the people, to sustain the issue on their part, called Thomas Horton as a witness, who testified that his name was Thomas Horton, that in November, A. D., 1859, within the said county, the defendant, Charles Lee, committed an assault

Page. 〃 upon said witness,—that he went to the house of the defendant to collect some school tax of the defendant and his tenants,—that the defendant was in his stable to work near to his, defendant's, house, that in going from the house to the stable he saw a bur oak log which he was certain was

cut from the premises of the witness,—that he went into the stable where the defendant was at work digging a hole. He asked the defendant what that was for, he said to bury all the damned Dutch in. Witness said that he could not mean him as he was not Dutch. Witness then asked
Page 9 defendant where he had got that log of wood. Defendant replied, in Black Walnut Grove. Witness said that defendant had got it on his land, to which defendant replied that he might get recompense the best way he could. Witness then said that he had got that off his land, and that he told him now, as he had before, that if he ever knew of his cutting any timber off of his lands, he would beat him with some of it so that he could not get it away, and that thereupon the defendant picked up a dry pine board, three feet long, six inches wide, and one inch thick,
Page " and struck witness upon his side so as to break two of his ribs, and broke the board to pieces, which knocked the witness senseless and up against the horses, though he did not fall, and that before the witness recovered from his partial fall, the defendant gigged or punched the witness in the face with another piece of board five feet long, of the same breadth and thickness, knocking him down, and making his mouth and nose bleed considerable; and after the second blow, the witness made at the defendant,—defendant run, and witness after him to lick the defendant; defendant got out of the stable, and witness in attempting to follow him, defendant's son
Page 10 George caught hold of his, witness' coat tail, and he fell down over a rail, and defendant escaped; witness did not follow him farther, as he knew defendant would get into some of his hiding places where witness could not find him; — that defendant's son George then came to the witness and brought him his hat and besought him to leave,—that witness then started to leave, and had not proceeded far in a south-western direction from the house and barn of the defendant, when he heard the report of a gun—that he did not see the defendant fire the gun, but it came from the
Page " direction of the defendant; he did not know that the gun was fired to hit him,—that he was not hit. Witness then turned around and saw defendant, who told him to leave; that he, witness, was leaving, and got some sixty steps when the defendant fired; the gun was a shot-gun, and loaded with shot, and the shot went over his head and all around him, and some of the shot fell at his feet, but none struck him; that the ground was descending from where he stood to where the defendant was standing; that the witness then left. Witness said further, that he did not
Page 11 know of the defendant ever before having taken any of his timber; that he had not had any difficulty with the defendant; that before defendant made the first assault upon the witness, he had not struck or grabbed the defendant, nor offered to do so; that he might have thrown out his hands towards the defendant while talking; that he was in the habit of throwing out his hands when talking, and if he threw out his hands towards defendant before defendant struck him, it was with no intention of striking defendant; that defendant the first time he struck witness the
Page " first blow said, hands off, and then immediately struck witness. Witness said his timber land and the defendant's joined. The defendant by his counsel on cross-examination, asked the witness if he had not some two or three weeks before choked the defendant about the same stick of timber; to which question the State's Attorney objected. The Court sustained the objection and refused to permit the witness to answer the question; to which said ruling of the Court the defendant then and there excepted. The witness further said that George Lee, Patterson Brown, and another man called crazy John, were present during said difficulty and assault about which
Page 12, he had testified, and thereupon the State's Attorney rested his cause. The defendant by his counsel then moved the Court to require the State's Attorney to place upon the stand as witnesses, George Lee, Patterson Brown, and others whose names were on the back of the indictment as witnesses for the people, and who are now present in Court, in order that the defendant might cross-examine them as witnesses; but the Court over-ruled said motion, and refused to require the State's Attorney so to do; to which the said ruling of the Court, the defendant then and there excepted.

Page 13 The defendant then called George Lee, a witness whose name was on the back of the indictment as a witness for the people, who testified that he was the sonof the defendant, and was present at the time spoken of by Thomas Horton. That Mr. Horton charged his father with stealing his timber, and that his father denied it, that Mr. Horton told his father that if he ever took another stick of

timber off of his land, he would beat him to death with some of it, and at the same time grabbed his father by the right cheek, and witness saw the blood run down his father's cheek, and that his father then pushed Mr. Horton with a pine board, but not in the side, but in the face, and that Page 13 Mr. Horton again made at his father and he pushed Mr. Horton again in the face. with the same board; that he was about five feet off from Mr. Horton when this occurred; that his father then run, and Mr. Horton after him, and that he seized hold of Mr. Horton's coat tail and he fell over a rail, and his father got away.—That he requested Mr. Horton to leave, and that he did so; that he heard the report of a gun, but saw no one fire; that the ground in the direction Mr. Horton left Page 14 was descending from the house and stable. Witness further said, upon cross-examination, that had never since had any conversation with his father about the difficulty, nor had his father and he ever had one word about what he could or would swear to; all his father had ever said to him was after the subpœna had been served upon him by the People, and all his father then said was that he would have to go to Court. The boy further stated that he had lived with his father ever since the said difficulty with Horton occurred, living in the same house with his father all the time.

Page 15 The defendant then called Patterson Brown, as a witness, whose name was also on the back of the indictment as a witness for the People. He stated that he was a tenant of the defendant; that he had the stable rented where the difficulty occurred; that he was present when Mr. Horton first came into the stable. Horton bid Lee the time of day, and then they commenced joking each other. Witness then stepped away a few moments; when he returned high words were passing. Horton told Lee that if he ever took another stick of timber off of his land he would beat him to death with it, and at the same time grabbed for Lee's face. Lee then struck Horton with a piece of board, but witness could not see just where, as he was just behind Horton, but Page " knows that Horton must have been struck, as he fell back against him; that at the same time he saw that Lee's face was bloody, as though it had been scratched. Horton made at Lee again, and Lee punched Horton in the face with a pine board. He saw this blow strike Horton in the face; he did not see where the other blow of defendant took effect, but this one he did. Horton staggered back, but again made at Lee. Lee run, Horton pursued. Lee's boy caught hold of Horton's coat tail and he fell over a rail, and Lee escaped. Lee's boy then told Horton he had Page " better leave; Horton started to leave; witness heard two reports of guns; he did not know how far off Horton had got when the first report was heard. Horton was about twenty-five rods from the stable, in a south-west direction, when the second report was heard. From where Lee was 16 supposed to be at the house, was east of the stable, still further off. From the house to where Horton was when the second report was heard, was a descent of some twenty-five feet, and a picket fence between the house and where Horton was. Witness further said that the board with Page " which Lee struck Horton was not broke to pieces, in his opinion, and if it was broken to pieces he thinks he would have known it, as he remained in the stable after the parties had left, and picked up all the boards there, and every thing else that would have been likely to get under his horses' feet and hurt them, and that there were no pieces of boards there, that he saw; and he nailed on the boards on the stable. The witness further stated: that he knew the log about which Mr. Horton testified, was cut by the witness on the land of the defendant, by the marked trees to designate the lines of defendant's land, and by what the defendant and others had told him was the line; that he had, though, no personal knowledge of the lines himself. This witness also stated that Page 17 after the first report of the gun, and before the second report, Horton hoisted his coat tail and turned his butt towards the defendant, and said, fire at that.

The defence then called as a witness, Miss Brown, who testified that she was living at the time of this difficulty with her brother, at the house of Mr. Lee, her brother occupied the same as a tenant of Mr. Lee,—that she did not see who fired the first gun,—but it was from the house, she Page 18 saw Mr. Lee fire the second gun,—he held it straight out when he fired,—he appeared to hold it level when he fired.

The above was all the testimony in the case. The Court, at the instance of the State's Attorney, gave the following *Instructions to the Jury, for the People:*

Deft excepted to the Courts refusal to give his 4 & 5th instructions, and after verdict of guilty motioned the Court for a new trial because the verdict was contrary to law and evidence, which the Court overruled & Deft excepted

Given. 1st—The Jury are instructed for the People, that if they believe, from the evidence, that the defendant within the County of Bureau, in the month of November, 1859, assaulted and struck Thomas Horton with a piece of fence board, and that such piece of fence board was a deadly weapon, with intent to inflict a bodily injury upon said Thomas Horton, and that the circumstances of such assault showed a wicked and abandoned heart, upon the part of defendant, or if the defendant made such assault without any considerable cause or provocation, then the Jury will find defendant guilty.

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Given. 2d—If the Jury believe that defendant assaulted Thomas Horton in manner and form as charged in the indictment, with a gun, and that such gun was a deadly weapon, and that such assault showed an abandoned and malignant heart, upon the part of the defendant, or that no considerable cause or provocation existed for such assault, then the Jury will find the defendant guilty.

Page "

Given. 3d—The mere speaking of words, however opprobrious or insulting, are no justification for an assault.

Given. 4th—The Court fixes the degree of punishment in this case; the Jury will therefore simply say by their verdict, Guilty or Not Guilty.

To the giving of which the defendant objected, at the time they were so given. But the Court over-ruled the defendant's objections, and gave the same to the Jury. To which the defendant then and there excepted. The defendant then asked the Court to give the following instructions to the Jury:

Page 19

The People, vs. Charles Lee. } *The Court instructs the Jury for the Defendant:*

Given. 1st—That in order to convict the defendant, the Jury must be satisfied that the defendant made an assault upon the said Thomas Horton with a deadly weapon, with the intent to inflict upon him a serious bodily injury, without any considerable provocation on the part of the party alleged to have been assaulted; or where all the circumstances show an abandoned and malignant heart.

Page 20

Given. 2d—If the Jury have any reasonable doubt about the board or boards with which it is alleged the defendant struck the prosecuting witness, being a deadly weapon, they should find the defendant not guilty on that charge, for that reason alone.

Given. 3d—That a deadly weapon is an instrument likely to produce death, as used by the defendant in the manner charged.

Refused. 4th—That if the prosecutor made the first assault, or attempted to make an assault upon the defendant, and the defendant under such provocation, immediately assaulted the plaintiff, the defendant is not guilty, as charged in the indictment, though defendant used more force than was necessary for his self-defence.

Page 21

Refused. 5th—That under this charge, the People must have proved that the circumstances under which the alleged assault was made was such, that if death had ensued, the crime would have been murder on the part of the defendant, and if only manslaughter if death had ensued, then the defendant must be acquitted on this indictment.

Given. 6th—That if the firing of the gun by the defendant was such that it did not clearly appear the defendant intended to actually shoot the prosecutor, then the Jury should not regard that part of the case.

Page "

It is assigned for error:

1st—That the Court erred in refusing to permit witness Horton to state whether he had not shortly before, choked the defendant about the same matter.

2d—That the Court erred in not requiring the State's Att'y to put on the stand the People's witnesses whose names were on the back of the indictment, so as to give the defendant the right of cross-examination.

Page

3d—That the Court erred in giving People's 1st and 2d instructions.

4th—That the Court erred in refusing Defendant's 4th and 5th instructions.

5th—That the Court erred in refusing the defendant a new trial; the verdict being against the *evidence and the law.*

POINTS AND AUTHORITIES:

Page

It was proper that Horton should have been permitted to have stated whether he had not just before choked the defendant about this timber, because if so, the defendant had good reason to expect violence from Horton on this occasion, from his demonstrations, and justified the defendant in promptly resorting to force to repel the attack.

The first count of the indictment is for making an assault with a fence board, where the circumstances showed a *wicked and abandoned heart.* The 2d is for making an assault with a gun, *where no considerable provocation appeared.*

Page

People's 1st instruction is wrong because by it the Jury are told that it is sufficient if the assault with the board was made under such circumstances as showed a wicked and an abandoned heart, *or if no considerable provocation appeared.*

The People's 2nd instruction is wrong because the Jury are told by it that it is sufficient if the circumstances were such that no considerable provocation appeared, or if *they showed an abandoned and wicked heart.*

Page

Defendant's 4th instruction should have been given: If Horton made an assault or attempted it, and the defendant under the provocation made the assaults charged, the defendant, though not justified entirely, the grade of the offence was reduced to common assault and battery, because this Indictment is for committing the assault under such circumstances as would imply *malice* the same as in assaults to murder—and there an assault made under the provocation of an assault and battery, or attempted assault and battery upon the defendant, reduces the crime to common assault and battery.—Hopkinson *vs.* People 18. Ill. 264.

Page

Defendant's 5th instruction should have been given: Because the circumstances from which malice could be implied under this indictment, is the same as in case of murder.—Sec. 24 of chap. 30 of Revised Statutes, entitled Criminal Jurisprudence.

Page

The verdict was clearly against the law and evidence. The evidence showed the defendant was not guilty, and the Court should have given a new trial.

PETERS & WINSLOW, Att'ys for Lee.

The Court gave 1st, 2d, 3d, and 6th of defendant's instructions, but refused to give defendant's 4th and 5th instructions; to which said refusal of the Court to give the said 4th and 5th instructions, the defendant then and there excepted. The Jury retired, and under the instructions of the Court and the testimony, found the defendant guilty, as charged in the indictment. The defendant moved the Court for a new trial, for the reason that said verdict was contrary to law and evidence, and for the reason that the Court had given wrong instructions to the Jury, on the part of the People, and had refused legal instructions asked for by the defendant. But the Court over-ruled the motion for a new trial made by the defendant; to which the said defendant then and there excepted.

The Court then passed Judgment on the Defendant, that he pay a fine of One Hundred Dollars and be imprisoned in the County Jail for three months, and until the fine and costs were paid; to which said decision of the Court the defendant then and there excepted, and prayed the Court to sign and seal this his bill of exceptions, and make the same a part of the record, which was done accordingly.

M. E. HOLLISTER,
Judge of the 9th Judicial Circuit of Illinois.

6. B.D. 28

Supreme Court of the
State of Illinois

Charles Lee

vs

The People

Error to the Bureau Co
Circuit Court

Abstract points & authorities
for plff in Error

Filed Apr 17. 1861
A Adams
Clerk

Supreme Court of the State of Illinois
April Term A.D. 1861.

Charles Lee
vs
The People
} Error to Bureau

Argument submitted by Attorney for the People

The plaintiff in error was indicted for an assault upon Thomas Horton with a deadly weapon with intent to inflict a bodily injury. On the trial Horton was introduced as a witness on the part of the people and was asked on the cross examination if he had choked the defendant in a controversy occurring some two or three weeks before about a certain stack of timber - to which interrogatory the states attorney objected and the objection was sustained by the court. This ruling of the Court is assigned for error
If the object of the testimony

was to make a case of provocation for the purpose of justifying the assault, it was certainly incompetent. The injury which would constitute such a considerable provocation as to justify an assault with a deadly weapon with intent to inflict a bodily injury must occur at the time and constitute the exciting cause of the assault. No previous injury however great will justify one person in making an ~~assault~~ attempt to inflict a bodily injury upon another with a deadly weapon. If the testimony was sought to be introduced for the purpose of showing that the defendant acted under the influence of fear, it was equally objectionable. The fear which would excuse the act must be reasonable and not such as arises from cowardice. The simple fact that Hooten on a former occasion had shocked the defendant was not sufficient to induce the belief in the mind of any reasonable person that the assault was

made by the defendent was
necessary in self defense. To
justify an assault in self defense
the danger must be imminent &
pressing and whether it is so
can only be determined by the
~~belief~~ reasonable of the party at the time
and all the surrounding circumstances
as they then exist
The first and second instructions
for the people were properly given
The first count in the indictment
charges an assault with a fence
board (alleging it to be deadly
weapon) with intent to inflict
a bodily injury & that the
circumstances attending the
assault showed a wicked and
abandoned heart & the second
count charges an assault with
~~a gun~~ a gun (also alleging it
to be deadly weapon) with the same
intent & without any considerable
provocation. The first instruction
given on the part of the people
direct the jury to find the
defendent guilty if they believe
from the evidence that the
defendent made the assault

with a deadly weapon, fence board and that the same was a deadly weapon with intent to kill inflict a bodily injury, if the circumstances of such assault showed a wicked and abandoned heart or if such assault was made without any reasonable cause or provocation The second instruction is, that if the jury believe that defendant assaulted Thomas Horton, in manner & form as charged in the indictment with a gun & that such gun was a deadly weapon and that such assault showed a abandoned and malignant heart, upon the part of the defendant, or that no reasonable cause or provocation existed for such assault, then the jury will find the defendant guilty It is contended that because these instructions each refer to and include the two conditions one of which is necessary to constitute the offense & two grounds to but one each, that therefore the law as given by the court was not

applicable to the case, In indictments
for assaults & attempts to commit
offences in themselves indictable
the same particularity is not necessary
as is required in indictments for
the commission of the offense
itself Whart. Am. Crim. Law § 2
The manner and means of committing
need not be specifically set out
and it is only necessary to follow
the language of the statute
defining the offense. Lamb (Greene)
418 Whart Crim Law 81. The
description of the instrument
might therefore have been
properly left out of this
indictment it being mere
surplusage, The description
being immaterial it was not
necessary to be proved as laid but
it was sufficient if so much
of the charge was sustained by the
evidence as constituted an offense
punishable by law Whart Crim
Law 165. 85 & Mc 76. 11 State (N H) 62.
Even in indictments for murder
an allegation that the death
was produced by a knife, will
be supported by proof that it was

pruduced by a dagger or other instrument capable of producing the same effect, evidence of an assault with a board or gun could have been properly introduced under either of the counts in this indictment and as one alleged that there was no considerable provocation & the other that the circumstances showed a malignant and abandoned heart the instructions containing these clauses in the alternative were properly given It has moreover been held that it need not be alleged that the assault was committed without considerable provocation: inasmuch as it is a bare negative qualification 4 Leal, 341 If such is the law the law as laid down given by the court was entirely applicable That the fourth instruction asked by the prisoner was properly refused cannot admit of a doubt It lays down the proposition that if the prosecutor made the first assault however unprovoked it might be or even attempt it the defendant

was justifiable in inflicting a bodily injury with a deadly weapon and using more force than was necessary in self defense. The assault which would justify an assault with a deadly weapon with intent to inflict a bodily injury must amount to a "considerable provocation" It also ignores the fact that the defendant might have made the assault under such circumstances as show an abandoned and malignant heart and was calculated to mislead the jury in that regard The court refused to instruct the jury on the part of the defendant "that the burden must have proved that the circumstances under which the alleged assault was made was such that if death had ensued the crime would have been murder on the part of the defendant and if only manslaughter if death had ensued, then the defendant must be acquitted on this indictment" and it is alleged the court erred because malice is necessary to constitute this offense

as well as murder admitting
malice to be a necessary ingredient
of the offense yet the instruction
includes more than this
proposition. and asserts
in effect, that the only
distinction between the offense
charged in the indictment and
murder is that death ensues in
the latter whereas there is this
important difference, that
that in one case there must be
an intent to inflict a bodily
injury and in the other an
intent to kill A person who
makes an assault with intent
to inflict a bodily injury, from
which death ensues. is not
guilty of murder, If the is
proper, laid down in this
instruction no person can be
convicted of this offence unless
he intended to commit a murder
The evidence in the case was
amply sufficient to authorize the
conviction. It is corroborated and
& not conflicting except as to some
immaterial points and clearly shows a malicious
intent to commit the injury as charged

D. P. Jones
States Atty

No 6 P.D.

Charles Lee

vs

The People &c

Argument & authorities

of Ds Defendeds Coun

Filed May 4-1861

L. Leland

Clerk

Supreme Court, of the State of Illinois,
APRIL TERM, A. D. 1861.

CHARLES LEE vs. **THE PEOPLE.** } **Error to the Circuit Court of Bureau County.**

The Plaintiff in Error was indicted and convicted in the Court below of an assault with a deadly weapon.

The Plaintiff in Error plead not guilty to the indictment which is as follows, to-wit:

Page

State of Illinois, Bureau County, ss:

Of the December Term of the Circuit Court of said County, in the year of our Lord one thousand eight hundred and fifty-nine.

The Grand Jurors, chosen, selected and sworn, in and for said County of Bureau, in the name and by the authority of the People of the State of Illinois, upon their oaths present: That Charles Lee, late of said county, on the first day of November in the year of our Lord, one thousand eight hundred and fifty-nine, and within the County aforesaid, in and upon one Thomas Horton, in the peace of said People, then and there being, did make an assault, with the intent to inflict upon

Page

said Thomas Horton a bodily injury; and him the said Thomas Horton, then and there, with a piece of a fence board, said piece of fence board being then and there a deadly weapon, did beat, bruise, wound and ill-treat, so that his life was greatly despaired of, and other wrongs then and there did to him the said Thomas Horton, and that the circumstances attending said assault showed a wicked and abandoned heart upon the part of him, the said Charles Lee. Contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of

Page

the same People of the State of Illinois. And the Jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the People aforesaid, do further present: That Charles Lee, late of said County, on the first day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at and within the County aforesaid, in and upon one Thomas Horton, then and there being in the peace of God and said People, did make an assault, with a Gun, with the intent to inflict upon him, the said Thomas Horton, a bodily injury, the said Gun being then and there a deadly weapon; and him, the said Thomas Horton, then and there did beat, wound

Page

and ill-treat, and then and there the Gun aforesaid, did shoot at said Thomas Horton, with intent to inflict upon him serious bodily injury; there then and there appearing no considerable cause or provocation for said assault, 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.

W. BUSHNELL, State's Attorney, Ninth Circuit.

There appears on the back of the Indictment the following:

THE PEOPLE, &c., vs. CHARLES LEE, } *Indictment for an assault with a deadly weapon.* { A True Bill. ASA BARNEY, Foreman.

WITNESSES, THOMAS HORTON, JAMES AIKEN, ELI HORTON, GEO. LEE, PATTERSON BROWN.

Filed Dec. 20, 1859. E. M. FISHER, Clerk.

W. BUSHNELL, St's Atty, 9th Circuit.

Page

The defendant, on the 19th Sept., 1860, filed in the Court below the following bill of exceptions, to-wit:

THE PEOPLE, &c., vs. CHARLES LEE. } *Indict. for Assault to commit bodily injury.* { Circuit Court, Bureau county, Illinois, September Term, A. D., 1860.

Be it remembered upon the trial of this cause, that the people, to sustain the issue on their part, called Thomas Horton as a witness, who testified that his name was Thomas Horton, that in November, A. D., 1859, within the said county, the defendant, Charles Lee, committed an assault

Page.

upon said witness,—that he went to the house of the defendant to collect some school tax of the defendant and his tenants,—that the defendant was in his stable to work near to his, defendant's, house, that in going from the house to the stable he saw a bur oak log which he was certain was

cut from the premises of the witness,—that he went into the stable where the defendant was at work digging a hole. He asked the defendant what that was for, he said to bury all the damned Dutch in. Witness said that he could not mean him as he was not Dutch. Witness then asked
Page defendant where he had got that log of wood. Defendant replied, in Black Walnut Grove. Witness said that defendant had got it on his land, to which defendant replied that he might get recompense the best way he could. Witness then said that he had got that off his land, and that he told him now, as he had before, that if he ever knew of his cutting any timber off of his lands, he would beat him with some of it so that he could not get it away, and that thereupon the defendant picked up a dry pine board, three feet long, six inches wide, and one inch thick,
Page and struck witness upon his side so as to break two of his ribs, and broke the board to pieces, which knocked the witness senseless and up against the horses, though he did not fall, and that before the witness recovered from his partial fall, the defendant gigged or punched the witness in the face with another piece of board five feet long, of the same breadth and thickness, knocking him down, and making his mouth and nose bleed considerable; and after the second blow, the witness made at the defendant,—defendant run, and witness after him to lick the defendant; defendant got out of the stable, and witness in attempting to follow him, defendant's son
Page George caught hold of his, witness' coat tail, and he fell down over a rail, and defendant escaped; witness did not follow him farther, as he knew defendant would get into some of his hiding places where witness could not find him; — that defendant's son George then came to the witness and brought him his hat and besought him to leave,—that witness then started to leave, and had not proceeded far in a south-western direction from the house and barn of the defendant, when he heard the report of a gun—that he did not see the defendant fire the gun, but it came from the
Page direction of the defendant; he did not know that the gun was fired to hit him,—that he was not hit. Witness then turned around and saw defendant, who told him to leave; that he, witness, was leaving, and got some sixty steps when the defendant fired; the gun was a shot-gun, and loaded with shot, and the shot went over his head and all around him, and some of the shot fell at his feet, but none struck him; that the ground was descending from where he stood to where the defendant was standing; that the witness then left. Witness said further, that he did not
Page know of the defendant ever before having taken any of his timber; that he had not had any difficulty with the defendant; that before defendant made the first assault upon the witness, he had not struck or grabbed the defendant, nor offered to do so; that he might have thrown out his hands towards the defendant while talking; that he was in the habit of throwing out his hands when talking, and if he threw out his hands towards defendant before defendant struck him, it was with no intention of striking defendant; that defendant the first time he struck witness the
Page first blow said, hands off, and then immediately struck witness. Witness said his timber land and the defendant's joined. The defendant by his counsel on cross-examination, asked the witness if he had not some two or three weeks before choked the defendant about the same stick of timber; to which question the State's Attorney objected. The Court sustained the objection and refused to permit the witness to answer the question; to which said ruling of the Court the defendant then and there excepted. The witness further said that George Lee, Patterson Brown, and another man called crazy John, were present during said difficulty and assault about which
Page he had testified, and thereupon the State's Attorney rested his cause. The defendant by his counsel then moved the Court to require the State's Attorney to place upon the stand as witnesses, George Lee, Patterson Brown, and others whose names were on the back of the indictment as witnesses for the people, and who are now present in Court, in order that the defendant might cross-examine them as witnesses; but the Court over-ruled said motion, and refused to require the State's Attorney so to do; to which the said ruling of the Court, the defendant then and there excepted.

Page The defendant then called George Lee, a witness whose name was on the back of the indictment as a witness for the people, who testified that he was the sonof the defendant, and was present at the time spoken of by Thomas Horton. That Mr. Horton charged his father with stealing his timber, and that his father denied it, that Mr. Horton told his father that if he ever took another stick of

timber off of his land, he would beat him to death with some of it, and at the same time grabbed his father by the right cheek, and witness saw the blood run down his father's cheek, and that his father then pushed Mr. Horton with a pine board, but not in the side, but in the face, and that Page Mr. Horton again made at his father and he pushed Mr. Horton again in the face with the same board; that he was about five feet off from Mr. Horton when this occurred; that his father then run, and Mr. Horton after him, and that he seized hold of Mr. Horton's coat tail and he fell over a rail, and his father got away.—That he requested Mr. Horton to leave, and that he did so; that he heard the report of a gun, but saw no one fire; that the ground in the direction Mr. Horton left Page was descending from the house and stable. Witness further said, upon cross-examination, that had never since had any conversation with his father about the difficulty, nor had his father and he ever had one word about what he could or would swear to; all his father had ever said to him was after the subpœna had been served upon him by the People, and all his father then said was that he would have to go to Court. The boy further stated that he had lived with his father ever since the said difficulty with Horton occurred, living in the same house with his father all the time.

The defendant then called Patterson Brown, as a witness, whose name was also on the back Page of the indictment as a witness for the People. He stated that he was a tenant of the defendant; that he had the stable rented where the difficulty occurred; that he was present when Mr. Horton first came into the stable. Horton bid Lee the time of day, and then they commenced joking each other. Witness then stepped away a few moments; when he returned high words were passing. Horton told Lee that if he ever took another stick of timber off of his land he would beat him to death with it, and at the same time grabbed for Lee's face. Lee then struck Horton with a piece of board, but witness could not see just where, as he was just behind Horton, but Page knows that Horton must have been struck, as he fell back against him; that at the same time he saw that Lee's face was bloody, as though it had been scratched. Horton made at Lee again, and Lee punched Horton in the face with a pine board. He saw this blow strike Horton in the face; he did not see where the other blow of defendant took effect, but this one he did. Horton staggered back, but again made at Lee. Lee run, Horton pursued. Lee's boy caught hold of Horton's coat tail and he fell over a rail, and Lee escaped. Lee's boy then told Horton he had Page better leave; Horton started to leave; witness heard two reports of guns; he did not know how far off Horton had got when the first report was heard. Horton was about twenty-five rods from the stable, in a south-west direction, when the second report was heard. From where Lee was supposed to be at the house, was east of the stable, still further off. From the house to where Horton was when the second report was heard, was a descent of some twenty-five feet, and a picket fence between the house and where Horton was. Witness further said that the board with Page which Lee struck Horton was not broke to pieces, in his opinion, and if it was broken to pieces he thinks he would have known it, as he remained in the stable after the parties had left, and picked up all the boards there, and every thing else that would have been likely to get under his horses' feet and hurt them, and that there were no pieces of boards there, that he saw; and he nailed on the boards on the stable. The witness further stated: that he knew the log about which Mr. Horton testified, was cut by the witness on the land of the defendant, by the marked trees to designate the lines of defendant's land, and by what the defendant and others had told him was the line; that he had, though, no personal knowledge of the lines himself. This witness also stated that Page after the first report of the gun, and before the second report, Horton hoisted his coat tail and turned his butt towards the defendant, and said, fire at that.

The defence then called as a witness, Miss Brown, who testified that she was living at the time of this difficulty with her brother, at the house of Mr. Lee, her brother occupied the same as a tenant of Mr. Lee,—that she did not see who fired the first gun,—but it was from the house, she Page saw Mr. Lee fire the second gun,—he held it straight out when he fired,—he appeared to hold it level when he fired.

The above was all the testimony in the case. The Court, at the instance of the State's Attorney, gave the following *Instructions to the Jury, for the People:*

1st—The Jury are instructed for the People, that if they believe, from the evidence, that the
Given. defendant within the County of Bureau, in the month of November, 1859, assaulted and struck Thomas Horton with a piece of fence board, and that such piece of fence board was a deadly weapon, with intent to inflict a bodily injury upon said Thomas Horton, and that the circumstances of such assault showed a wicked and abandoned heart, upon the part of defendant, or if the
Page defendant made such assault without any considerable cause or provocation, then the Jury will find defendant guilty.

2d—If the Jury believe that defendant assaulted Thomas Horton in manner and form as
Given. charged in the indictment, with a gun, and that such gun was a deadly weapon, and that such assault showed an abandoned and malignant heart, upon the part of the defendant, or that no considerable cause or provocation existed for such assault, then the Jury will find the defendant guilty.

Page 3d—The mere speaking of words, however opprobrious or insulting, are no justification for
Given. an assault.

Given. 4th—The Court fixes the degree of punishment in this case; the Jury will therefore simply say by their verdict, Guilty or Not Guilty.

To the giving of which the defendant objected, at the time they were so given. But the Court over-ruled the defendant's objections, and gave the same to the Jury. To which the defendant then and there excepted. The defendant then asked the Court to give the following instructions to the Jury:

Page THE PEOPLE, *vs.* CHARLES LEE. } *The Court instructs the Jury for the Defendant:*

1st—That in order to convict the defendant, the Jury must be satisfied that the defendant made
Given. an assault upon the said Thomas Horton with a deadly weapon, with the intent to inflict upon him a serious bodily injury, without any considerable provocation on the part of the party alleged to have been assaulted; or where all the circumstances show an abandoned and malignant heart.

Page 2d—If the Jury have any reasonable doubt about the board or boards with which it is alleged
Given. the defendant struck the prosecuting witness, being a deadly weapon, they should find the defendant not guilty on that charge, for that reason alone.

Given. 3d—That a deadly weapon is an instrument likely to produce death, as used by the defendant in the manner charged.

4th—That if the prosecutor made the first assault, or attempted to make an assault upon the
Refused. defendant, and the defendant under such provocation, immediately assaulted the plaintiff, the defendant is not guilty, as charged in the indictment, though defendant used more force than was necessary for his self-defence.

Page 5th—That under this charge, the People must have proved that the circumstances under which
Refused. the alleged assault was made was such, that if death had ensued, the crime would have been murder on the part of the defendant, and if only manslaughter if death had ensued, then the defendant must be acquitted on this indictment.

Given. 6th—That if the firing of the gun by the defendant was such that it did not clearly appear the
Page defendant intended to actually shoot the prosecutor, then the Jury should not regard that part of the case.

It is assigned for error:

1st—That the Court erred in refusing to permit witness Horton to state whether he had not shortly before, choked the defendant about the same matter.

2d—That the Court erred in not requiring the State's Att'y to put on the stand the People's witnesses whose names were on the back of the indictment, so as to give the defendant the right of cross-examination.

Page 3d—That the Court erred in giving People's 1st and 2d instructions.

4th—That the Court erred in refusing Defendant's 4th and 5th instructions.

5th—That the Court erred in refusing the defendant a new trial; the verdict being against the *evidence and the law.*

POINTS AND AUTHORITIES:

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It was proper that Horton should have been permitted to have stated whether he had not just before choked the defendant about this timber, because if so, the defendant had good reason to expect violence from Horton on this occasion, from his demonstrations, and justified the defendant in promptly resorting to force to repel the attack.

The first count of the indictment is for making an assault with a fence board, where the circumstances showed a *wicked and abandoned heart.* The 2d is for making an assault with a gun, *where no considerable provocation appeared.*

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People's 1st instruction is wrong because by it the Jury are told that it is sufficient if the assault with the board was made under such circumstances as showed a wicked and an abandoned heart, *or if no considerable provocation appeared.*

The People's 2nd instruction is wrong because the Jury are told by it that it is sufficient if the circumstances were such that no considerable provocation appeared, or if *they showed an abandoned and wicked heart.*

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Defendant's 4th instruction should have been given: If Horton made an assault or attempted it, and the defendant under the provocation made the assaults charged, the defendant, though not justified entirely, the grade of the offence was reduced to common assault and battery, because this Indictment is for committing the assault under such circumstances as would imply *malice* the same as in assaults to murder—and there an assault made under the provocation of an assault and battery, or attempted assault and battery upon the defendant, reduces the crime to common assault and battery.—Hopkinson *vs.* People 18. Ill. 264.

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Defendant's 5th instruction should have been given: Because the circumstances from which malice could be implied under this indictment, is the same as in case of murder.—Sec. 24 of chap. 30 of Revised Statutes, entitled Criminal Jurisprudence.

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The verdict was clearly against the law and evidence. The evidence showed the defendant was not guilty, and the Court should have given a new trial.

PETERS & WINSLOW, Att'ys for Lee.

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Abstract Points and
Authorities for Plaintiff in
Error