themselves constrained to declare, that upon no ground stated by the counsel for the prisoner can they conceive themselves authorized to set aside the verdict. As to the manner of summoning the venire, the Court think that inasmuch as the defendant or his Counsel not only might have had, but actually had notice of it, & could have availed themselves of any defect or error in the venire facias (if any did exist) either by putting off the trial to the ensuing Court, or by challenging the array, that their having neglected to do so must so far bind them as to prevent them from taking any advantage of it in arrest of Judgment. And the Court cannot conceive the case in Leach, page 105, wholly inapplicable to the present. But the Court consider this question as freed from all doubt, when they recollect that they expressly asked the defendants Counsel whether they wished to make any challenge to the array, or whether they objected to the same & were answered in the negative, they being at that time fully possessed of every objection to the Venire facias. 2. The objection to Gillehan, the Juror residing in Livingston, the Court cannot think ought to be supported, because he was a tales man, & was accepted & chosen by the defendant, & after he was sworn was objected to by the attorney for the Commonwealth, who moved to have him discharged from the Jury, which motion was opposed by the defendants counsel. Therefore, they then being apprized of the objection to him which they now state, they must be precluded from taking any advantage from the circumstance of his being a resident of another County, if it was sufficient to disqualify him, but of which the Court are by no means satisfied. 3. As to the declarations of the Jurors. — The Court conceive that as the bare expression of an opinion unfavorable to the cause of the defendant, where there appeared to be no marks of maliciousness or ill-will towards him would not be a sufficient cause of challenge, so

then

there not appearing any indications of maliciousness or ill will towards the defendant accompanying the declarations of the two Jurors, either by the affidavits, or by their conduct after they were summoned, the Court cannot think this a sufficient ground to set aside the verdict, especially as the Court from the most mature deliberation, & from the best examination they have been capable of giving the law & the Testimony in this case, are not only of opinion that the Jury were authorized from the law & the testimony to find the defendant guilty of manslaughter, but that they do believe that the defendant was guilty of murder. If therefore, they have a right to exercise a discretion in granting a new trial in such cases, they cannot help believing, that under all the circumstances of this case it would be improper in them to exercise this discretion. 4th As to the instructions of the Court relative to the charge to the Jury - Upon the point of Justification the Court gave it as their opinion that in this case there must have been an assault to excuse the defendant in killing Fisher: That an assault was any attempt to injure the person of another, & whether it existed or not the Jury were to infer from the evidence, & that if the defendant had no other possible, or at least probable means of escaping from great bodily harm he had a right to kill in his own defence, but that if he had any probable means of escaping without killing Fisher, he was not justifiable upon the principle of se defendendo, & they are still of opinion from the circumstances of the present case, that this direction was not only [illegible]ect, but necessary. The Court are still of opinion that Puffendorff is not law, and as they told the Jury, can no further bind them than as far as the reason of it goes, & that if any part of Puffendorff is contradicted by the Common law, that the Common law ought to prevail. 5. Upon all the other points stated the Court are of opinion that they are insufficient. — N.B. In the Course of the

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argument a great time of the Court was taken up in relying, as the Court conceived, not so much on the general principles in Puffendaf, as on particular cases, by the defendant's Counsel. The Counsel for the Commonwealth was proceeding to answer all those cases. The Court, to save time, observed in the presence & hearing of the Jury, to the Counsell for the Commonwealth, that he might proceed, but that the Court would instruct the Jury that that book was not law, which the Court forgot to do, til the Jury had returned into Court with an informal & incomplete verdict. The subject was then mentioned by the defendants Counsel, upon which the Court gave the Jury the directions above stated, & they then retired from the bar."

Wherefore it is ordered that the said motion for a new trial be overruled. And the said Michael Dillingham was again led to the bar in the custody of the Sheriff, & it again being demanded of him if any thing for himself he had or knew to say, why the Court Judgement against him ought & upon the premises should not proceed to pronounce, he said he had nothing but what he had before said. Therefore it is considered by the Court, that he undergo confinement in the Jail & Penitentiary House for the term of two years in manner & form as the Jurors aforesaid in their verdict aforesaid have decided, and that the Sheriff of this County forthwith cause the said Michael Dillingham to be conveyed to the Jail & Penitentiary House of this Commonwealth. And that he, the said Dillingham, pay the costs attending this prosecution.

A Copy Test

Jas. H. M'Laughlin, Clk of
Christian Circuit Court.