



Tom Dillard

Butler Center

IN THE
SUPREME COURT OF ARKANSAS

ED. WARE, APPELLANT, V. STATE OF ARKANSAS, APPELLEE.

WILL WORDLOW, APPELLANT, V. STATE OF ARKANSAS, APPELLEE.

ALBERT GILES AND JOE FOX, APPELLANTS, V. STATE OF ARKANSAS, APPELLEE.

JOHN MARTIN, APPELLANT, V. STATE OF ARKANSAS, APPELLEE.

ALF. BANKS, JR., APPELLANT, V. STATE OF ARKANSAS, APPELLEE.

BRIEF FOR APPELLANTS.

STATEMENT AND ABSTRACT.

These cases, numbered respectively, 2449, 2450, 2451, 2452 and 2453, based on three indictments, one

against Ed. Ware, charging him with the murder of W. A. Atkins, murder in the first degree, one against John Martin, Alf. Banks, Jr., and Will Wordlow, charging them with the same murder, and one against Albert Giles and Joe Fox, charging them with the murder of James Tappan, murder in the first degree, are now here the second time, on appeals from death sentences imposed by the Circuit Court of Phillips County; and the grounds relied on for reversal in all the cases being very similar, they are, by the court's permission, jointly briefed.

On the first appeals, the judgments were reversed because of the failure of the jury (due, as we suppose, to their haste) to find the degree, as required by the statute.

The cases, after remand to the lower court, being again called for disposition, the defendants in each case, hereafter called appellants, filed a petition for removal to the Federal Court, stating among other things, that they were Negroes, and were charged with the murder of a white man; that the Grand Jury of Phillips County, which returned the indictments at the October term, 1919, was composed wholly of white men, all Negroes having been excluded therefrom solely because of their color; that the Negro population of that county exceeded the white population by at least five to one, and were qualified, a great many of them, under the laws of Arkansas, to serve as jurors, both grand and petit, their qualifications being equal to those of the whites; that in many other counties of the State,

the colored population greatly exceeded that of the whites, and possessed the requisite qualifications for grand and petit jurors; that by the laws of the State it was provided that the Circuit Courts should, at their several terms, select three jury commissioners to select grand and petit jurors for their next succeeding terms, and should swear them to discharge their duties as such faithfully, not knowingly to select any man as a juror whom they might believe unfit and not qualified; that it was made the duty of such commissioners to select from the electors of the county sixteen persons of good moral character, approved integrity, sound judgment and reasonable information, to serve as grand jurors at the next term of the court, and also to select from said electors, such number as the court might direct, not exceeding twenty-four, having the same qualifications, to serve as petit jurors, at said next term; that under said law it had been the custom, the unvarying practice of all the Circuit Courts of the State, for forty years or more, to appoint as jury commissioners only white men, excluding all Negroes solely on account of their color, and that for a like period it had been the unvarying custom and practice of such commissioners to select as grand and petit jurors only white men, excluding all Negroes on account of their race and color; that this practice and custom had been, during all of said period, and still was, systematically adhered to and followed in Phillips County; that it was so followed in the selection of the grand jury by which they were indicted, and was so followed in the selection of the

petit jury, then present in the court for their trial; that said custom had really become the law of said State for the selection of grand and petit juries; that the Circuit Courts, the judges thereof, regarded Negroes unfit, because of their color, to serve as jury commissioners, and that the jury commissioners regarded Negroes, because of their color, unfit and unqualified to serve on any jury, and that the appointments and selections were made with that view; that no inquiry was made into the intellectual or moral fitness of the Negroes, either for jury commissioners or for grand or petit jurors; that they were condemned to exclusion at the outset, solely on account of their color; that because of their color the circuit judges believed them unfit for jury commissioners, and the jury commissioners believed them unfit to serve as jurors—or at least thought that they so believed; that by said custom and practice all Negroes were denied the rights granted them under the first section of the Fourteenth Amendment to the Constitution of the United States, and by the Civil Rights Acts of Congress pursuant thereto—especially the right to due process of law and the equal protection of the law; that they, petitioners, were, by the exclusion of all men of their race from the grand jury that indicted them, because of their color, and from the petit jury by which they were to be tried, because of their color, denied their rights under said amendment and acts, and could not enforce said rights in the judicial tribunals of the state, or especially in any circuit court of the judicial circuit wherein their cases were pending;

that there was then in said county an intense prejudice against them on account of their color, and of their being accused of the murder of a white man; that they could not obtain a fair and impartial trial before any white jury in said county or in said circuit—all of said juries being and having been white for more than forty years; that for the deprivation of said rights they could get no relief through any of the courts of the state; that the circuit courts thereof interpreted and administered the jury system in accordance with said custom, and that the Supreme Court interpreted the law practically in the same way—holding that the only way the colored man could obtain relief against such discrimination was to prove to the satisfaction of the circuit judge, on motion to quash the indictment against him, that Negroes were excluded from the grand jury solely on account of their color; and that such proof was impossible, since the jury commissioners, who alone could furnish it, looked upon color as evidence of unfitness,—a belief based on no investigation of character or competency,—nothing beyond color. (All Recs., pp. 17, 18—23).

These petitions, which concluded with a prayer for transfer of the cases to the District Court of the United States for the Eastern District of Arkansas, for trial, being overruled, appellants excepted and filed, in each case, a petition for change of venue, sworn to by themselves and verified by the supporting affidavits of four Negro men, E. W. Warren, W. M. Jackson, Will Thomas and C. J. Versia. (All Recs., pp. 22, 24).

On motion of the prosecuting attorney all the supporting witnesses, or affiants, except Versia, were called before the court and examined as to their particular places of residence in the county, their acquaintance over the county, what parts of it they had been in since the trouble, and what they had heard said about the cases. Their answers showed that there were many parts of the county they had not been in since the trouble and from which they had heard little or no oral expression by any of the residents, but that they knew the alleged murder was universally understood or believed to have been the result of a conspiracy or uprising of the Negroes to murder the whites and take their property; that they also knew that only white men were allowed to sit on juries in Phillips County; that they read in the Helena World, the only daily newspaper published in the county, articles about the matter, one a long article in its issue of October 7th, stating, among other things, that the committee investigating the matter had found that the purpose of the Farmers and Laborers Household Union, a Negro organization, to which appellants belonged, was to excite insurrection on the part of the Negroes and murder white people, to kill them and take their property; that the paper had an extensive circulation among the white people of the county, and was taken by a good many Negroes, and that from reading it, from that article, and from the nature of the trouble, they firmly believed, at the time of making the supporting affidavits, and still believed, that it

was impossible for them, appellants, to get a fair and impartial trial in Phillips County.

The prosecuting attorney then read in evidence the affidavit of J. R. Dalzell, stating that he was deputy sheriff and deputy tax collector of Phillips County, had in his possession the records of the payment of poll taxes, and that they showed that C. J. Versia did not pay his poll taxes for the years 1918 and 1919. The appellants then introduced J. P. Burke, who testified that he was editor of the Helena World, a daily newspaper published in Helena, the only daily newspaper published in Phillips County; that it had a very general circulation, among the whites of the county; that it had a circulation every where over the country, also circulated among the Negroes; and that he published in it the article of the 7th of October, last. (All Recs. 24-59).

Appellants then introduced said article, which is copied on pages 60-68 of all the records. It is headed: "*Inward facts about the Negro Insurrection * * **"

THE COMMITTEE OF SEVEN.

It says, among other things:

The committee of seven, chosen to direct the operations in putting down the insurrection and to conduct investigations with the view to discovering and punishing the guilty, is composed of the following citizens:

Sebastian Straub, Chairman; H. D. Moore, County Judge; F. F. Kitchens, Sheriff; J. G. Knight,

Mayor; E. M. Allen, E. C. Horner, T. W. Keesee.
* * *

The following statement was given to the press here late yesterday afternoon by President E. M. Allen, of the Business Men's League and the committee of seven, but for some reason not explained. Editors of the various papers to which the statement was sent saw fit to substitute a different "lead", in most cases failing completely to identify Mr. Allen.

How the "ignorance and superstition of a race of children" was played upon for monetary gain and for the banding together of Negroes to slay whites was authoritatively revealed in a statement issued here today by E. M. Allen, a member of the committee of seven, who has heard virtually all of the prisoners' confessions following last week's uprising in this section of Arkansas.

The committee of seven is composed of leading Helena business men. It has been authorized to carry on the investigation both by the municipal and county authorities and by Governor Charles H. Brough of Arkansas. It is co-operating with the military authorities. Among its members is Sheriff, F. F. Kitchens.

Mr. Allen is considered by leading officials and citizens of Helena as being most competent to speak on the subject, because of his prominent part in the investigations which have taken place. * * *

Aside from being locally prominent as President of the Helena Business Men's League, and as the owner of considerable property, Mr. Allen is

President of the National Association of Insurance Agents, the headquarters of which are in New York City. His name was on the list of those the Negroes plotted to kill yesterday, as the signal for a general slaughter of whites, according to papers confiscated and confessions of leaders captured.

Mr. Allen's statement follows:

The present trouble with the negroes in Phillips County is not a race riot. It is a deliberately planned insurrection of the Negroes against the whites, directed by an organization known as the Progressive Farmers and Household Union of America, established for the purpose of banding Negroes together for the killing of white people.

This "Union" was started by Robert L. Hill, a negro 26 years old, of Winchester, Arkansas, who saw in it an opportunity of making easy money.
* * *

He started his first "union" work in April of this year. He organized the Ratio Lodge in May of this year. He chose Ratio because his mother happened to be living there. He told the darkies that he was an agent of the Government, and because the Senators and Representatives at Washington were white men, and in sympathy with the white men of the south, it was impossible for the Negroes to get the rights that had been promised them for service in the army, and so, the Government had called into existence this organization, which would be supported by the Government, in defense of the Negroes against the white people. He told them it was necessary for all members of the "union" to arm

themselves in preparation for the day when they should be called upon to attack their white oppressors.

The slogan of the organization is, "We battle for our rights." The pass word of all the lodges was "We have just begun."

He told them that those members who were unable to buy munitions would be supplied by the union from the Government storehouse at Winchester. * * *

He further told the Negroes that the plan of Secretary Lane, to provide homesteads for the soldiers had been carried out where the white soldiers were concerned, but the negroes had been refused participation in it. We found where negro soldiers at Elaine had sold their discharge papers for sums ranging from \$50.00 to \$100.00, on the theory that such discharge entitled the holder to forty acres of Government land. He produced Government maps of state lands, in the Elaine country (1600 acres), which he said could be bought for \$200.00. This amount was raised at one meeting. The land was all described, and certain Negroes had designated which part of the various farms, (all in cultivation) they desired to take over for themselves, after the white people had been driven off.

He urged all lodges to decide upon a plan of campaign when the day came to strike, and designate the part to be played by every man. He told them that the Government was erecting at Winchester three huge store houses where arms, ammunition and trained soldiers would be ready for instant

use. On Wednesday morning after the fight at Hoop Spur, the negroes crossed the track and lay in the weeds all day, waiting for Hill's army to materialize. They were within easy range of automobiles going to and from Hoop Spur all day, and could easily have fired into them, but they wished to wait for Hill's army, in order to clean up at one fell swoop.

The fight at Hoop Spur was unpremeditated as far as the negroes were concerned, as they were organizing their forces Wednesday morning to attack and capture Elaine, but when runners informed the leaders that white men were entering the woods at Hoop Spur, they decided to go up and wipe out the little gang that was reported there, before entering upon the more serious task of capturing Elaine. They underestimated the size of the force from Helena, and the battle resulted.

Every negro who joined these lodges was given to understand that ultimately he would be called upon to kill white people. Unquestionably, the time for attack had been set, but plans had not been entirely perfected, and the shooting of the officers brought on the insurrection ahead of schedule.

I have cross-examined and talked to at least one hundred prisoners at Elaine. They belonged to different lodges in that section, The stories they tell are almost identical, as to the promises and representations made by Hill. He even told them that probably some of the negroes would be called upon to die before "equal rights" could be assured, but they must look upon themselves as crusaders,

and die if necessary, to secure the freedom of the other members of their race.

A remarkable thing about the developments is that some of the ring leaders were found to be of the oldest and most reliable of the negroes whom we have known for the past fifteen years. He had made them believe that he had been intrusted with a sacred mission which had to be carried out regardless of consequences.

All lodge meetings were required to maintain an armed "outer guard" of six sentinals. Hill's usual expression was "Get your racks filled for the day to come."

The court then, after saying "alright", and asking and ascertaining the number of the cases, overruled the petition, giving no reason therefor, and appellant's excepted.

Appellants then filed, in each case, a motion to set aside, temporarily, their former plea of not guilty, to the end that they might file and present a motion to quash the indictments because the grand jury by which they were indicted was composed wholly of white members, selected in violation of the law, from which all negroes had been excluded, solely because they were Negroes,—in violation of the first Section of the Fourteenth Amendment to the Constitution of the United States. The motion further stated that they were and always had been unfamiliar with proceedings in judicial tribunals, and that at the time of entering their pleas, they had been given no opportunity to procure counsel of their own choice, and knew nothing of their rights

to move to quash the indictment because of said discrimination. (Recs. 70, 71).

Appellants in each case at the same time filed a motion to quash the indictment, and also to set aside the then present panel of the petit jury, stating as grounds the same as those set forth in their petitions to withdraw pleas, and further stating that the petit jury then present was selected in the same way, colored men being excluded from it solely on account of their color, and praying that the jury commissioners who made the selections of each jury be summoned to testify on the hearing, that the evidence be heard, that the indictment be quashed, and that the then present panel of the petit jury be set aside.

The motion and petition were by the court successively, in their order, overruled, and, to each ruling, appellants excepted. (Recs. 72, 74).

Appellants were then arraigned, and asked to plead guilty or not guilty to the indictments; they pleaded not guilty.

"The regular panel of petit jurors was composed wholly of white men, and only white men were returned by the sheriff as talesmen or jurors on any order or special venire for the summoning thereof."

The juries in each case were completed after the exhaustion by appellants of their twenty peremptory challenges. (Recs. No. 2452, pp. 74, 75).

In all the cases, except Martin's case, motions were made to quash and set aside the sheriff's return of talesman, nuder orders of the court, on the ground that they were colored men, of African

descent, and that the sheriff in summoning the talesman for the completion of the jury had discriminated against them on account of their race and color, by rejecting and refusing to summon any colored man, of whom there were many qualified to serve on the jury, solely because of their color, thereby denying to them the equal protection of the law, and due process of law, in violation of the rights guaranteed to them under the first section of the Fourteenth Amendment to the Constitution of the United States.

Each motion contained a prayer that the court hear evidence thereon, and that the sheriff's return to the order be quashed and the talesman discharged.

The court refused to hear evidence as prayed, overruled the motions, and appellants excepted. (Rec. 2449, pp. 75, 76; Rec. 2450, pp. 76, 77; Rec. 2451, pp. 74, 75; Rec. 2453, pp. 77, 78).

Following the foregoing preliminaries, appellants were put through, successively, the final proceedings called trials, and it is now our purpose to present a short abstract of the evidence in each case, in the order of procedure, as introduced before the several juries. In doing this, we adopt the direct, narrative form, and hope to include everything calculated to shed light upon the questions involved. *John Martin, Appellant, v. State of Arkansas, Appellee, No. 2452.*

STATE'S EVIDENCE.

1. CHARLES PRATT testified: I live in

Helena; am Deputy Sheriff of Phillips County, and knew W. A. Atkins. I was with him on the night of September 30th, last, going to Elaine. I was on official business, going after a white man in Elaine. Kid Collins, a Negro trusty, was with us, in the back seat; we were in the front seat. Elaine is about twenty miles from Helena, about four miles beyond Hoop Spur, which is on the same road. We left Helena about 10:00 o'clock p. m. Hoop Spur is on the left-hand side of the road, as we were going south. I was not familiar with the church there, but had been down there over the same road that afternoon. The church was east of the road. We were traveling in a Ford automobile. Before we got to the church we came to a culvert or bridge over a creek, which was then dry, and Atkins, who was driving the car, started to go over it. I told him to go around, and he said very well, and killed his engine. He said we will take a leak. I said alright, and we both got out. In just a few minutes, before we had leaked, several negro men, probably eight, came up from towards the church, which I judge was about 100 yards from us. They walked up along side the car, and one of them, a black negro, says, "What's the matter, is your car broke?" I asked him if it was any of his business. Then the fourth one down the line, a little yellow negro, who had a shot gun, and had it broke, whipped it back together, and I pointed my finer at him and said, "Don't do that, son," and about that time the lights in the church went out, and the thing started—the shooting started, by those parties. Neither Atkins, Kid Col-

lins nor I had fired any shots; our pistols were undrawn. Atkins was special officer for the I. M. railroad. The shots were coming so fast, I don't know how many were fired. The first shots came from directly in front of us; then it seemed like they were shooting all around. They killed Atkins, and I was hit in the knee. When it began, Atkins and I were to the left of the rear wheel of the car. He groaned and fell and I jumped around the car, on an embankment, and it hit me, and I fell in a ditch. The negro trusty jumped out of the car, almost ran over me, went underneath a wire fence between the railroad and the public road, and I crawled under there. That was the last I saw of him. Atkins was killed instantly. This occurred shortly after 12:00 o'clock. When going down there, I did not know they were holding a meeting in the church. It was very dark there, and I could see only the forms of the Negroes. The car was left there. I saw it about a month afterwards. While I was lying there in the weeds, another car passed along, and there was shooting. Atkins was with me that night because I asked him to go with me. He had been with me several times to places like that. I was going on official business.

CROSS EXAMINATION.

I was going to Elaine after a white man, named Clem, whom I did not know, who had been raising a disturbance there. The people there had telephoned the sheriff to send an officer. He was disturbing the peace. I was telephoned from the sheriff's office about it. The sheriff told me to go—told me about 9:00 o'clock. I was then at home or at

the county jail. He did not tell me why he wanted me to go—told me to take him in custody and bring him to Helena—sent me without a warrant. I don't know where Kid Collins is now. It is always customary to take a Negro in case of tire trouble. He was not a car expert. I engaged him, told him to go with me, before I asked Atkins to go. I didn't know there were lights in the church house, but take it for granted they were there. I didn't see lights through the windows; I wasn't close enough. The other auto I spoke of was going the same way we had started, and passed on. It stopped, and then it went ahead; it stopped just a few minutes. Kid Collins was a Negro trusty at the county jail. He was a convict, but I don't know of what court. I was just ready to start when I asked Atkins to go with me; met him on the street. I had known him several months. When I first saw the Negroes they were approaching the front end of the car. When the Negro asked me if the car was broke, I said, "No; what is it to you?" or something like that. He didn't shoot just then. I turned to the other one, the yellow Negro, and said, "Don't do that, boy," and just about that time he shot. Everybody shot. I didn't hear Atkins say a word. Kid Collins was then sitting in the rear seat of the car. I was down that road that afternoon, was below Elaine, on official business. Dr. James and Mr. Frazier were with me. We got back to Helena about 3:00 or 4:00 o'clock. I had never seen Clem. I don't know what condition the bridge was in. I have been down there since. The church house has been burnt down (Rec. 2452, pp. 75-103).

Key

2. W. K. MONROE testified: I am a civil engineer, employed as junior engineer for the United States, in charge of levee work in the White River Levee District, extending from Helena into Desha County,—was so employed on the 30th of September, last. I remember the occasion of the shooting of Atkins at Hoop Spur. I passed there that night about 12:00 o'clock. As I neared Hoop Spur, there was a Ford car standing in the middle of the road, and I pulled to one side to get by, and went on about forty or fifty feet, and saw an object, which turned out to be a coat lying in the road. I stopped to see what it was, and was fired upon, and two small shots hit me, one in the nose and one in the arm. I tried to move faster, but killed the engine. I then climbed out, and there was a volley of shots fired into the car and through it, approximately forty or fifty shots. I lay down by the car, then when the shooting was over cranked it, got in and started on, and there was another volley. I was going to the levee, near Countiss. I hadn't gotten quite even with the church house when the first volley was fired—was slightly north of it, possibly seventy-five feet from it. I didn't see any light in it. I was in a Ford car (Rec. 2452, pp. 104-111).

3. AMOS JARMON testified: I live in Helena; am County Treasurer, and knew Atkins,—had known him a short time. On the morning of the 1st of October, 1919, Mr. Dalzell, Chief Deputy Sheriff, called me up from the sheriff's office, informed me that there had been a shooting scrape at Hoop Spur, and said he wanted me to go there as

a deputy,—which I did. We left Hoop Spur about 1:30 a. m.,—Mr. Dalzell, myself, Mr. Schmiddy, and Mr. Jones. Mr. Jones was special agent of the Mo. Pac. system. When we got to the scene of the shooting, close to Hoop Spur, we came to a bridge, which had a bad approach, set up about five or six inches, and the road went around. The road runs north and south. There was a Ford automobile there. Dalzell stopped the car, and Jones and I ran to the automobile. We recognized it as belonging to the sheriff's office. Then Schmiddy came up. This auto had stopped at the bad approach of the bridge. We found the body of Mr. Atkins by the side of the car, on the right-hand side, about opposite the back wheel, between the railroad and the car. He was shot in the stomach, and was dead. It looked like he was shot with a load of buck shot. I judge the body was 25 or 35 yards from that church house. Between the church and the car there was a dense undergrowth. It was quite dense on the left of the railroad, all grown up, and we decided we had better go on to Elaine,—felt it useless to spend our time there. We couldn't see a thing. We found shot gun shells there, on the ground, and several pistol cartridges. I examined the car closely, about 5:30 or 6:00 that morning. It was badly shot up. The radiator was shot full of holes, the wind shield broken all to pieces, and the casings on the back full of shot holes. The church house sat about fifteen or twenty feet back from the road. I examined its condition next morning, in daylight. I found no bullet holes in it. Every bench was turned over, thrown over,

looked like they had gone away hurriedly, in disorder. Quite a number of the windows were broken out,—looked like they had jumped through them, in the back end. I found no bullets or shots in the church. We got quite a lot of literature, lodge business, these Negroes had left there. I found that the church had not been shot. There was a big hole in the end of the car.

CROSS EXAMINATION.

The windows in the church house were glass windows. The back window looked like the entire sash had been broken out. There were some panes broken out of the other windows.

RE-DIRECT EXAMINATION.

That church house faced west, faced the public road. The doors were in the west end. The pulpit was in the east end.

RE-CROSS EXAMINATION.

The literature we found in the church house was literature of that Farmers, Laborers and Household Union. There was quite a lot of it. We discovered it in the house about 6:00 or 7:00 o'clock a. m. in October. I don't know what became of it (*Id.* 112-124).

4. JOHN RATLIFF testified: I have known John Martin about a year and a half. Prior to October 1st, 1919, I was living on Mr. Dick Howell's place, about two miles from Hoop Spur. I belonged to the Farmers and Laborers Household Union of America, at Hoop Spur. It met there in a little church. I was there the night of that shooting. I got there pretty late. I saw John Martin there, in

the house once before. I saw him there that night. He was down towards the railroad bridge, with Will Wordlow, about 200 yards from the church. I saw guns there, but can't say who carried them—shot guns. I don't know that I saw John Martin in the house that night. Will Wordlow and another man was with him. I don't know that he had anything, can't say. I did not see any guns there with him and those who were with him. He came walking towards the railroad bridge, across the public road. He and Will Wordlow sat down on that bridge, and I turned and went back,—looked to me like they sat on the end of it. I went on back to the church. I saw no automobile down there at that time, but saw one come later on. It stopped about 20 feet of the bridge,—stopped just before it crossed it. Martin and Wordlow, the place where I saw them, was about 20 or 25 steps from it. I left them sitting there. When the car came up and stopped, they put out their lights, and were fooling around for a while, and after a while shooting began. The shooting began at the back of the car, came right from the back of the car; I can't say from which side. I saw no other shots. I saw John Martin there, in the church ground, after the shooting, but don't know where he came from,—probably 5 or 10 minutes after the shooting. Those boys that went down there to the car, he went with them. The crowd stood around there and walked around the far end of the car. After a little, I saw a white man lying there, off from the car a little, in the edge of the road. I reckon John Martin was there, in the crowd. He

went away with them. I can't say he was there, with them, after they went on. I wasn't close enough to specify him from any of the rest. I saw a flash light there; they were turning it around, looking across under the car. When they started away, I heard somebody say "stomp him"; and I said, "No, don't do that, you done done enough." It looked like they moved the body—like they moved his head. All of them came on back towards the church. I think Martin came back towards the church, but can't say positively that he did, or didn't. Then I left, and when I got into the road, a man and woman came running back down the road and said, you better not go up there. I didn't hear any more shooting out on the ground, but heard some more over in the field.

CROSS EXAMINATION.

The man and woman said to me, there are some white folks on the road there, and you better not go up there. I don't know who they were. Martin was not one of them. I reckon it was about 15 minutes after I saw Martin and Wordlow on the bridge that I saw the automobile. The first shooting occurred at the end of the automobile, the end towards Helena. I saw the flashes, but don't know who fired them. I was there in the road, just above the church. When I first saw the light of the car, it was up towards Wabash, and when it stopped, it looked like they were fixing the car, and some of them said let's go down to the car. I said, "No; I wouldn't go down there; it might be white folks, and they aren't bothering anybody." They thought it might be boys

coming from Wabash, as they were looking for some. A colored man came around to the front end of the car, struck a match and lit a cigar, or something, and I said, "Now see that is a car from Wabash, because some of the boys had promised to come there in a car." "Yes, let's go down there." I stood there 15 or 20 minutes. The car had been standing there 15 minutes or more when the first shooting occurred. I saw the flashes. The lights in the church were put out while the firing was going on. The firing lasted about two minutes and a half. The sound of the firing was different. I can tell the difference between the sound of a shot gun and a pistol. The first shots were pistol shots. I was brought here from the penitentiary. I am a convict there. I was sent there on a plea of guilty to shooting Atkins,—on a charge of murder in this court. When I pleaded guilty, I told what was not so, was untrue. If you compel me I will tell you, but I don't want to. Well, what I saw going on here, I didn't think I could stand it,—rather just plead guilty and go on, than to be punished like I saw others punished,—whipped like others were whipped. I saw them after it was done. I don't know whom I first told about this. It was in a room back around yonder somewhere. I think two or three were present when I first told it—three white men. I don't know who they were. They would take the men here in jail out, and the men would come back bleeding. They would send the turnkey, Kid Collins, after them. I didn't know him then, at first. I testified against Martin, Wordlow and Banks here at the last term of this court,

before I pleaded guilty. I was brought down here from the penitentiary last Sunday, and have talked to these officers here, about this case,—talked to them again about my testimony. I don't know that they are the same ones that I talked to about it before. I know that man's face (referring to the Prosecuting Attorney), but outside of him, I don't know any of the rest.

RE-DIRECT EXAMINATION.

It was about 20 minutes before the shooting, maybe longer, that I saw Wordlow and Martin at the place where I saw them before the shooting (*Id.* 125-151).

5. SYKES FOX testified: I have known John Martin about two years. I was a member of the Farmers & Laborers Household Union of America, Hoop Spur Lodge, and was there the night of this shooting, September 30th. I got there late. I saw John Martin there, inside the house. When the shooting occurred I got out and made it home. Just as I opened the door a bullet came from the north, like, and struck over the top of the door. Then I fell right out in the yard, and the bullets came ringing, and I crawled out. It looked like five or six shots came through the house. They hadn't made more than five or six shots through the house, when I made it out. I saw Martin the next morning, about sun-up. I hadn't seen any white men that morning. I saw him at his house. Mr. Nelson had told me to haul some cotton that day, and I was going to my work, going to haul it, but I met Sheppard Roach, and he asked me where I was going, and when I told

him, he said I had better not go up that road, that he had just come from the levee, and it looked like about 500 people out there, and about 12 men dead. I told him I couldn't believe that. He told me to ask John Martin. He said that the white folks said they were going to come through and kill the Negroes. I went to Martin's house and asked him what about that trouble last night. He said the white folks did some shooting out there last night, that there was a little shooting, and he thought old man Dick Howell got killed. Then I said, "I reckon I better shove my body away from here," and I went back and told my wife we better get away. Martin asked me what I was going to do, and I told him Nelson had told me to haul some cotton. He said he didn't think it was a good idea, that we had better stay around there a little while, and see what was going on. We went over, sat on my gallery a little while and then walked in back of the field. He didn't say anything about his being at the shooting; just said he thought old man Beck got killed. He didn't tell me where he was, or about seeing the dead man. I spoke of that, but was compelled to, was whipped up to it. I am telling the truth about it now. Martin must have been around there somewhere. I know Dick Howell; I worked with him on his place. He is a white man. The first shots went through the church house—north corner—windows. The first shots I heard went through there. I was in the house. When the balls commenced coming in, "everybody just squandered", and the next shot, the lights went out. They, the people, fell down on the floor—some fall-

ing on the floor, and got out the best way they could—some through the windows. There were a good many women and children there. Somebody was hollering, "All fall down on the floor." I didn't fall down, and can't say all fell down and scrambled out; some did, but I can't say all. There is no chance for me to be mistaken about the first shots going through the house. I was brought down here from the penitentiary to testify,—from the farm. They had me indicted for killing W. A. Atkins, and I pleaded guilty to second degree, because they compelled me to do it. I didn't know any other way—plead guilty or go to the electric chair. I pleaded guilty to second degree, after I had testified against Martin and Wordlow. They told me to plead guilty to the second degree. I told them I had killed nobody, but they said if I didn't plead guilty, I would have to go to the electric chair. I testified the way I did before because I was whipped up to it. I have the signs, the marks of it right here—they start here and go down (indicating parts of his body). I don't see the men here who whipped me. I think I would know them if I saw them. They took me out of the jail and into a lower room in this house, and whipped me. Kid Collins and two or three other Negroes held me, and a white man held his foot on my head, and whipped me with a strap, which must have had something on it; it burnt me every lick. I had to repeat after him every lick. He would say, "you know so and so," and I would say, "Yes, sir". I didn't go ahead and tell what was true, because I had no chance. It would have done

me no good to tell about the whipping. I didn't know what they would do with me up here. They did me so bad down there, until I thought if I came up here bucking around, they would kill me. That is how I came to testify what I did against these men. Kid Collins, a brown negro, was the turnkey. He unlocked the door to the jail and they brought me out. I don't know how many licks they "hit me, no more than about 150". I had to lay on my stomach about 5 days. I was scared to come back down here. I just told the words I had to repeat behind that man. It was not true on myself, when I pleaded guilty. What I have told about John Martin this morning, here in court, is true (*Id.* 152-172).

6. G. H. HADING testified: I served as stenographer here at the last term of this court, took down correctly the testimony of John Martin, who testified as a witness in his own defense,—being represented by an attorney. I afterwards transcribed it correctly, in long hand, and this is the testimony he gave: (The witness here read the transcribed copy of the former testimony, given by Martin, which we abstract as follows):

I am 55 years old; have been living in Phillips County 3 years. I was a member of the Union at Hoop Spur, and attended the meetings three times. I was there the night Mr. Atkins was killed, and had my gun. They put me out to guard. I didn't much want to guard, but they told me I had to, and I went. When the shooting came off, I was under the trestle, about 50 yards from the bridge and from the car. I didn't shoot a shot until near the last. I made three

shots, all air shots. I made them because I was under an obligation not to rebel against anything like that. I made them for a sham; "I was scared they would kill me if I didn't." I didn't want to go out there, but they told me I had to go or die. This old man Robinson and Ed. Ware told me that,—either obey the law or die. I didn't shoot in the direction of the car.

CROSS EXAMINATION.

I took my gun and 12 shells,—an automatic shot gun. I took no other gun, but my pistol, a Smith & Wesson. I went in the house for a few minutes, and they put me right out. Then Will Wordlow and 2 other men came over there. I didn't go up to that little bridge after the car stopped,—didn't leave from where I was. I was about 50 yards from the car,—south of it. I didn't shoot the man after he was down. After the shooting, I went up there because I wanted to see who it was, and was so close to him, I sort of moved his head with my foot. I wasn't robbing him. Whoever took his flashlight and pistol, took them before I got there. Will Wordlow and I were together, with two others I didn't know, when the shooting occurred. Wordlow had a shot gun. They had 2 single barrel shot guns. I saw Sykes Fox the next morning. They were around there, and said that they were going to kill all that didn't come and fight. I didn't have a conversation with Sykes Fox about the shooting at the church that night, because he already knew it. I didn't tell him that I had killed a man, and thought it was old man Dick Howell. I told Judge Burke that I fired

3 air shots, because I was under an obligation; told him I had taken an obligation 9 years ago, in another lodge, the K. of P.'s. "I didn't kill narry one in my young days, and didn't want to kill narry one in my old days."

CROSS EXAMINATION OF MR. HARDING.

The attorney representing Martin was appointed by the court. He had been appointed just a few days. They were arraigned and then he was appointed. The trial occurred on the 3rd or 4th of November, last (*Id.* 173-186).

H. F. SCHMIDDY testified: I knew W. A. Atkins; I was connected with him in work. I saw his dead body at Hoop Spur, down at this church. He was shot through the stomach with a load of buck shot, and through the neck with a rifle, and there was a hole caved in in the back of his head. I got down there about 4:30 in the morning. Later in the day I examined that church house with reference to bullet holes. There were no bullet holes at all in the church. "It was impossible for those boys to shoot into the church from where they were." We found a lot of clothes, hats, etc., and windows broken out.

CROSS EXAMINATION.

I was special agent for the Missouri Pacific R. R. at that time, and Atkins was my partner. Several examined the church with me, among them, Mr. Dalzell, Mr. Molliter and Mr. Jarman. We found a lot of women and men's hats in there, about a dozen. We also found some literature, blank applications for this union, they were getting up. This church

house had four windows, two in each side. It fronted on the main road from Helena to Elaine. It was a small church house. This examination was about 6:00 a. m. Some of the gentlemen picked up the papers,—I think Dr. James did. The hats looked like they had been worn; they had just rushed off and left them (*Id.* 187-195).

DEFENDANT'S TESTIMONY.

1. LIZZIE WRIGHT testified: I was a member of the Farmers and Laborers Household Union of America,—belonged to the Hoop Spur Lodge. I was there on the night of the 30th of last September, was in the church house, and heard shooting. When the shooting commenced, it came in the windows, threw splinters of glass over the house. Some one told us to fall on the floor, and we did; I went under a bench. The windows were broken out. When the shooting commenced we had three lights, and they went out, or were put out.

CROSS EXAMINATION.

My husband, E. W. Wright, was a member of the union, but was not there that night. I went there with Lit Simmons' wife. We got there about 11:00 o'clock. I didn't see any guards at that, or any other meeting, there. I didn't see any guns. I don't think I said a while ago, that somebody gave the alarm; "I said somebody told us to lay down." I don't know how many shots had been fired when I lay down, nor how many shots were fired in all. It looked to me like the shots were fired from the north. The first shots came in at the northwest window; a

couple of shots were made, and then I could hear them raining all over. I don't know where the automobile was. The first shot I heard entered the church. After several shots were made I fell to the floor. I don't think I said a while ago, that several shots had been fired before any bullet hit the church. The bullets came from the northeast,—from that way,—bullets or shots. I was scared. Everybody in the house were scrambling,—some jumping out at the windows. I don't know who put the lights out. When the shooting commenced, some one said put the lights out, and they were put out. I didn't know who was doing the shooting. I never saw them shooting at any automobile or car; I heard shooting outside. All the shooting was on the outside. I didn't see any stack of guns.

REDIRECT EXAMINATION.

That church house was burned down the next week after that shooting,—on Friday, I think. I saw it burn. I was picking cotton near by it. I saw white men come up there in a car, go into the church, go out and go up the road, and then the church was on fire. I don't know who the men were. It was burned in the morning, about 10:00 o'clock (*Id.* 195-212).

2. VINA MASON testified: I was a member of the Hoop Spur Union, and was there the night of the shooting; got there about 9:00 o'clock. I heard the shooting; was sitting near the pulpit. The second shot, the globe on the lamp fell, and somebody said, "blow out the light, women get on the floor," and we all got on the floor. I dropped on my knees.

The house was packed and jammed, and I got down with the baby in my arms. The men, women and children were scuffling, and I raised up, and got shot in my arm. When the shooting ceased, people were jumping out at the windows. I made it to the door, walking over people, but lost my hat and the baby's. When I got out, my husband took the baby, and told me to "run for the house." By that time another car was coming, and more shooting began, and I was running. Those shots were not fired from the inside of the church house. When I was in there, the people were on the floor, scuffling and going on, under benches and turning over benches. At the first shot window glass fell out on the floor. I don't know how many shots were fired, something like seven or eight, or maybe more. At the second shot we all fell down. We began to stir, and couldn't count the shooting. The only way I could tell the shots were coming through the windows, was by hearing the stuff, glass falling on the floor.

CROSS EXAMINATION.

The ball did not come in from the south, from towards Elaine. It came in on the north side. That was the first bullet. I don't know what kind of a shot struck me. I suppose it was something like a buck shot. I didn't get the bullet out—suppose it is still in there. I had no doctor. My husband told me to say nothing about it. This shooting was going on while I was down on my knees, holding my baby. I heard the shooting off to the north of the house, near the little bridge; that is why I was on my knees. The lights were out when I got shot. The glass was fall-

ing out of the windows. My husband, Henry, had his gun. We went back home. I can't say how many guns were at the church; I saw some, I thought, but don't know to whom they belonged. My husband said he went out when the shooting began, and when I got out, I found him on the outside (*Id.* 213-221).

3. SAM WALKER testified: I live at Hoop Spur, and know when that trouble occurred at the church house, there. The church house was burned down about 8 or 10 days after that shooting. The car ran up from the north, going south, and three white men, apparently two soldiers and one civilian, got out, walked around the church house, went back to the car in a minute or two, and by that time it was burning,—flashed up around the roof, and the car sped away.

CROSS EXAMINATION.

I know nothing about the shooting. I wasn't there that night. My memory is that the house was burned in the afternoon,—seems to me it was. I am farming, and was in the field, about 40 rods away, picking cotton. Lizzie Wright was there (*Id.* 225-227).

4. LULA WARE testified practically the same as Lizzie Wright and Vina Mason, a substantial repetition, in substance, and therefore, it is considered unnecessary to abstract what she says (*Id.* 228-240).

5. SALLIE GILES testified the same in substance as Lizzie Wright and Vina Mason (*Id.* 240-248).

6. WILLIE WORDLOW testified to the same

matters, and in substance the same as Lizzie Wright and Vina Mason, whose testimony has already been abstracted (*Id.* 249-255).

7. LIT SIMMONS testified: I belonged to the union at Hoop Spur, and was doorkeeper the night of the shooting there. About carrying guns there, after the threat was made about breaking it up, I don't know which of the parties gave orders for them to bring some protection, but they told them not to interfere with anybody, unless they interfered with them. They said, "they were going to kill us out about the union". They said, "they didn't want the union in that part of the country"; that is what I understood. Those who carried guns there did it for protection, in case anything occurred. They had heard that they were going to kill us out. I saw an automobile come up there and stop. Some one rapped on the church, and said, "to look out, that the auto was stopping there." I saw three shots from the automobile. They broke the window, and someone shouted, "Put out the lights"; then the house got in gross darkness, and they commenced jumping out the windows, in the opposite side. It was a white man that fired the first three shots. I saw by the flashlight, and the light of the pistol. He fired very rapidly,—from an automatic pistol, and was about 21 or 22 yards from the church.

CROSS EXAMINATION.

When I saw the auto, it was past the bridge and stopped,—around the edge of the bridge, between the bridge and the church. They say it was

the auto Mr. Atkins was in, but I don't know. It was the auto the man came in who did the first shooting, and was killed. The autos came from the north, from toward Helena. I saw two. I don't know how many men were in them or in the first one. I saw the first one before the lights were put out. A man came around the car and went to shooting, and one of the bullets struck the globe. When shooting, he was about 17 or 18 yards from the church. He started the shooting. He had a flashlight in his hand. I heard there were twelve guards, but don't know. Everything was going on when I got there. The guards must have been armed. I saw John Martin there in the church, but didn't see him after he got out, and didn't see him go out. The man, Mr. Atkins (the man they said was Atkins) made three shots, "mighty quick." I was looking right at him when he broke the globe. I suppose he fell dead right there, that someone shot him on the spot,—17 or 18 yards from the front door; I didn't see anybody shoot him, but two boys said they shot him. Many shots were fired there,—after those first shots, just shooting like a canebrake burning,—just down the road. They were white folks,—I don't know who. They had me arrested about this thing, and I will tell you why I didn't make this statement then—tell you just the straight truth about it. The way they were killing and doing, I was scared to death"; I would have said anything to please you all, but I am telling the truth now. If the body of the dead man was moved, I don't know who did it. The car was not between the bridge and Helena. I didn't

go out there and see him where he fell; I had to run to get away from there, because another crew came, and went to shooting, just after I got out a little piece,—another crew of white men. They fired on the church,—looked like the flashes were going right at the church. They must have left their car up the road. I didn't see any of the second crew; I was gone. Alf Banks and one of the Becko boys were disputing, each claiming to have killed the man; one had the pistol and the other the flashlight, and each claimed that it was his, saying that he had killed him. There were orders from somewhere to bring the guns, but I don't know who gave them. Nobody ordered me to bring my gun. The boys got orders to bring guns, and had guns. Not everybody had guns. When I got there, there were guns stacked up in the corner. The boys carried guns there every time we had a meeting. Robert Hill made a speech at Elaine. I didn't hear him, but he must have pronounced the thing about the guns. John Martin was a member of the Hoop Spur Lodge. I didn't see Kid Collins around there; didn't see him get out of the car. I gave no particular notice or attention to anybody but the man who flashed the light; I thought he was coming, until he made the shot. The alarm had then been given on the window, by Will Wright, I think it was, that the car was stopping. Then three quick shots were made with the automatic pistol. When the lamps went out, were put out, John Martin was in the house, and how he got out, I don't know.

RE-DIRECT EXAMINATION.

I made a different statement about this matter to these gentlemen, before, when I was scared. They were beating and doing and killing people so bad, killing some that didn't have anything to do with it, and wasn't at the meeting. They come and got me and put me in jail,—just put all the union in jail. "They beat and killed and done so bad, and looked like they had gone mad on the colored people; it scared me." I ran in the woods and stayed there. I will tell you how it was: "They were asking me wasn't so and so and so and so, and I says, yes, sir." Some gentlemen down there on the lower floor, in this court house were asking me, and I gave it to them as they wanted to hear it (*Id.* 256-281).

8. JOHN MARTIN, appellant, testified: I lived on Mr. White's and Mr. Nelson's place in September, last, and belonged to the union at Hoop Spur. I was there, in the church house the night the shooting occurred,—was in the house at the time of the shooting,—when Mr. Atkins was killed. I had nothing to do with killing him. When they started shooting, I hurried out to get away. The bullets were raining against the house, coming inside, and I got out and ran off. I testified in my case here, before, and made the statement they read this morning, but I was made to say what I did. I was whipped up awful bad, and they told me that if I didn't acknowledge that I had a gun there, they were going to put more on me. They had done whipped me so I could hardly set up; I was raw. One of the straps they whipped me with had copper or brass

on the end of it, and the other didn't have anything on it. They whipped from the middle of my back clear down across my hips. I have the marks across my back now. "If they had whipped me again on those sore places I couldn't have stood it." They beat me up so and were beating up other people, that I had to say something another to keep them from beating me to death. I was done whipped, and I just had to tell something to pacify them,—had to make statements to satisfy them. I had nothing to do with the killing, and had no gun there. I know I was in the courtroom, but they had put me in the jail and brought me back to the courtroom, and some laying in there beat up, and they told me, "When you go there, tell something that will suit them, so they won't beat you up, and I just went there to explain myself in a manner for them to spare me, if they would, but they didn't." * * * That statement was false, and I made it out of fear of being punished afterwards. I am 54 years old. I was never in any trouble before this trouble.

CROSS EXAMINATION.

I had been a member of the union about three weeks. I was not on guard that night. I didn't take any gun there, neither an automatic shot gun nor a Smith & Wesson pistol. I stated that after they whipped me down here. Alf Banks and I were tried together. Mr. Dinning represented us. I did not ask him to let me go on the witness stand; "they omitted me right there, themselves",—the lawyers that were on my case did it. Mr. Dinning just told me to go up and testify; he didn't force me. I made

the statement "that I was there that night; that they put me on guard and I didn't much want to go out there, and they told me that I had to go, I was afraid they would kill me if I didn't. I stated that because I was whipped up then, and had to make something to please the ones that whipped me. That is why I told them that old man, Charlie Robinson and Ed Ware put me out there as guard. I first decided to change this story "after I thought I would get the right in law, so I won't have to be beat up." Then I thought I would tell it like it was. I first told my lawyer, lawyer Jones, in the penitentiary at Little Rock, how it was. I told him I didn't carry any gun there, and that I had been whipped up and made to say what I did. I had no instructions to bring my gun there. I was not present when any such instruction was given Lit Simmons. Those gun shots were fired from the north side of the church,—right through the window,—came just like an automatic shooting. I did not see the white man, Atkins after he was killed, didn't see his body. That car was on the north side of the church, where the shooting was. I don't know how far it was from the bridge. I didn't go there and put my foot on his head, or kick him. Mr. Schmiddy, Mr. Dalzell and Kid Collins are three of the men that whipped me. They told me I had better go and tell the truth, and said, "Didn't you kick Mr. Atkins," and then said, "Some of them told us about you kicking him." I didn't tell Dr. James that I went back to the car, put my foot on his head, or turned him over. I didn't make that statement. "Kid Collins came and got

me and they whipped me down there until I got out of breath, and then after that, they set me in an electric chair to get me to swear to these things against myself, that somebody else had come here and stated against me". I don't know whether Will Wordlow was a guard that night or not; I didn't see him with any guns. When my wife and I got there, I saw Alf Banks and the Beco boys sitting in Jim Miller's buggy. I didn't see any guns there that night. When I testified before, I had to tell a lie to save myself, because they had done beat me up, and were doing me so bad; "I just had to go their way and let it go right or wrong to save myself, and if they killed me, they just killed me, and I just let it go along." I got home that night somewhere about half past 1:00 o'clock, went to bed and got up next morning about sun up. I saw only one car at Hoop Spur that night, the one they say Mr. Atkins was in (*Id.* 281-285).

Appellants then introduced in evidence a certified copy of a petition to the Drew Circuit Court for the incorporation of the Farmers and Laborers Household Union of America, signed by Henry Davis, E. D. Williams, Ned Jones, Pete Davenport, Z. R. McKinnie, D. Adron Nixon, F. H. Barnett, T. L. Dixon, Wm. Mixon, V. E. Powell and Joe Hyde, of the constitution or Articles of Association of said union, and of the clerk's certificate, declaring said Association "a body politic and corporate".

The petition was filed on the 7th day of August, 1919,—and nowhere, either in it or in the Consti-

tution or Articles is there anything indicating any unlawful or evil motive (*Id.* 296-308).

There being no other evidence offered or introduced, the court then instructed the jury at length (*Id.* 309-319); but as there was no exception to any ruling in this behalf, we pass this feature of the case with a mere reference.

The jury then with a promptitude suited to external conditions and demands, returned *their verdict* in the following terms:

"We, the jury, find the defendant, John Martin, guilty, as charged in the indictment, guilty of murder in the first degree, with the penalty of death in the electric chair." (*Id.* 318, 322, 323).

Appellant, Martin, then filed his motion for a new trial, asking the court to set aside the verdict and grant him a new trial.

1. Because the verdict was contrary to law.
2. Because the verdict was contrary to the evidence.
3. Because the verdict was contrary to both the law and the evidence.
4. Because the court erred in overruling his petition for removal to the Federal Court, in failing and refusing to transfer the case for trial to the District Court of the United States for the Eastern Division of the Eastern District of Arkansas, and thereafter forcing him to trial.
5. Because the court erred in overruling his petition for a change of venue, in failing and refusing to change the venue of the case, and in thereafter forcing him through a form of trial.

6. Because the court erred in overruling his petition to temporarily set aside his plea of not guilty, and in failing and refusing to permit him to withdraw the same, as therein prayed.

7. Because the court erred in overruling his motion to quash the indictment, in refusing to hear evidence thereon, and in refusing to set aside the present panel of the petit jury (*Id.* 319, 320).

The court on the same day, May 11th, 1920, overruled his motion, refused to set aside said verdict or grant a new trial, and appellant excepted. (*Id.* 320, 321).

Will Wordlow, Appellant, v. State of Arkansas, Appellee, No. 2450.

STATE'S TESTIMONY.

1. CHARLES PRATT testified substantially, almost literally, the same as in Martin's case, No. 2452. In the record of this case it extends from page 79 to 99.

2. W. K. MONROE, whose testimony in this case, Record 2450, extends from page 99 to page 104, is substantially, almost literally the same as it was in Martin's case, except that in the course of his direct examination, he was asked the following questions, and made the following answers, over appellant's objections:

"Q. Now, I wish you would tell the jury just what happened to you when you got down there (Hoop Spur), what occurred and everything that happened, just as it happened."

"A. I left Helena about 10:00 o'clock that night, going down to this camp, and I got to Hoop Spur church, and there was a Ford car standing there in the middle of the road, and I pulled off to the left or east side of it, and stopped right abreast of the car, thinking possibly the car had broken down or somebody was there. There was no one in the car, and I pulled ahead then forty or fifty feet, and stopped to look at an object in the road, which I afterwards found was a coat. When I stopped and looked at this coat, I was fired upon. The first shots were from my left, the east of the road. Two of the shots hit me, one in the nose and one in the left arm. In trying to leave there, after this shot, I killed my engine, climbed out of the Ford and lay down on the ground by the side of it, and there was a volley of forty or fifty shots fired. When that volley quit, I got up and cranked the car again, and had time to get in and get pretty good headway, when they opened up another volley.

Q. Which direction did those shots come from?

A. They came from the two sides of the car, both east and west.

Q. About how many shots were fired at you while you were there?

A. There were about forty or fifty shots fired at each volley." (Rec 2450, pp. 100-102).

3. AMOS JARMON testified the same as in Martin's case, plus the following:

"Q. Well, you heard the witnesses who were with you testify that there was a whole lot of women and children's hats lying around in there?

A. Yes; I heard it.

Q. Did you see those hats?

A. Yes, sir; I did. There were some hats there; I even saw part of a woman's skirt.

Q. What disposition was made of the literature?

A. Well, sir, I couldn't tell you; some member of our posse took this literature to bring to the sheriff's office." (Rec., p. 109).

H. F. SCHMIDY testified the same as in the Martin case. (Rec. 2450, 1, 12, 13).

4. JOHN RATCLIFF, whose testimony extends from page 114 to page 128, of record 2450, testified substantially, almost literally the same as in Martin's case, plus the following: "Some boys went down the road, to the car, or at least went that way.

Q. Did you hear any conversation down there between the boys and the men in the car?

A. I just heard one of them ask the boys were they going coon hunting, but what they answered I did not understand.

Q. How long after that conversation before the shooting took place?

A. I don't suppose it was more than two minutes, something like that, or a minute.

Q. From where did the first shot come?

A. All the first ones?

Q. All of them.

A. They were repeated backwards and forwards, from the car to the boys that were on the road; they were coming from both ways.

Q. You mean from both sides of the road?

A. From in the road where the car was, to where the boys were, and from the road towards the car. * * *"

ON CROSS EXAMINATION.

They had me charged with killing this man. I think 74 of us were sent to the State Farm, and five of us are here as witnesses. I saw no shots fired from the place where I saw Wordlow and Martin sitting, saw none come from there. The first fire I saw came from the car toward those boys.

Q. Was it in the direction of the church?

A. Mighty near it, not quite." (Rec. 2450, pp. 122-124, 126, 127).

J. D. MOSEBY testified: I am a Helena lawyer, assisting the prosecution, and was so engaged in the trial of the State vs. Ed. Ware, and talked with Will Wordlaw about the trouble at Hoop Spur. He made a statement to me about his connection with it. Absolutely, no promise or inducements were made or held out to him. He had been tried and convicted of murder in the first degree. He said he was there that night. There was no coercion, force or duress used by me.

(Here appellant suggested the taking of proof as to whether force or improper influence had been used, and the court caused the jury to retire, and the following proceedings occurred in their absence):

Appellant's attorney introduced DAVE HAYS and examined him, to this effect:

"Q. You were brought here to testify as a witness?

A. Yes.

Q. Do you know whether or not the defendant here, Will Wordlow, was forced to testify or furnish information against himself, or whether he was beaten?

A. From the scars and sores I saw on him; he told me he was beaten.

Prosecuting Attorney: "I object to that."

Court: "Don't tell anything he told you."

Q. What do you know, independent of what he told you, about being?

A. Will Wordlow?

Q. Yes.

A. He said he was whipped.

Court: "Don't state what he said."

Q. What evidence do you know of that he was forced to testify or make statements?

A. I don't know any other except just seeing the scars on his person. (*Id.* 131-134).

CROSS EXAMINATION.

Q. You were arrested about the time everybody else was, and was brought here and put in jail, charged with this murder, with participating in the trouble down at Elaine, weren't you?

A. I was.

Q. And you say that Wordlow was brought here about the same time?

A. I don't know when he was brought here.

Q. Do you know when you saw him in jail the first time?

A. No.

Q. Did you know of your own knowledge,

except what he told you, who put the sores on him?

A. No.

Q. You don't know anything about what was told him, why they were put on there, if they were put on there by somebody else, do you? You don't know what was said to him, or why he was whipped, if he was whipped, except what he told you, do you?

A. One man told me not to answer about what he told me.

Q. Do you know what was told him by the people whipping him, or why or for what purpose he was whipped—or was you there at the time he was whipped?

A. No; I wasn't there.

Q. Then you don't know whether he was whipped to be made to testify in this or any other case?

Court: "Well, he said he wasn't there; he couldn't know anything about it."

Q. You don't remember about what happened here last court, when Mr. Moseby walked down there while the trial was going on and asked you where Will Wordlow was on the night of this shooting at Hoop Spur?

A. I can't remember anything hardly, because I was so scared.

Q. Did you tell Mr. Moseby then that Will Wordlow was out there as a guard, and had a gun, and that Will Wordlow told you that he took part in the shooting, when the car drove up?

A. I don't think I told that.

Q. And if you did tell him that, nobody whipped you to make you tell him that, did they?

A. Well, I got a whipping, I know.

Q. That was long before this trial, wasn't it? How long did you stay in jail before some fellow licked you?

A. About four five days.

Q. How many times did they whip you?

A. Once.

Q. Do you know who whipped you?

A. I know who did the whipping; there were three or four big Niggers held me down.

Q. You were brought up here the second day after this trouble occurred, wasn't you?

A. I think I was brought on the 5th.

Q. Then, if you talked to Mr. Moseby after Will Wordlow was indicted, tried and convicted, which was along in November, you hadn't been whipped by aybody for something like thirty days before you talked to Moseby, had you?

A. I can't say.

Q. Well, you told a minute ago you were put in jail about the 5th of October; is that the truth?

A. I can't say; I want to tell the truth, because I told a lie against my own self before, and got twenty-one years in the penitentiary.

Q. Well, you are liable to get 2,000 more if you don't tell the truth; did you mean to tell the truth a while ago, when you said you were brought up here and put in jail about the 5th of October?

A. I couldn't say it was exactly the fifth. When you get a man scared as old as I am—

Q. Well, you were whipped four or five days after you were brought here?

A. Let me stop; I don't know how long; I just can't designate the dates." (*Id.* 134-140).

WILL WORDLOW examined:

"Q. Did you on account of being whipped, make some statements that were against you, or state that you were guilty of something you were not guilty of?

A. Yes, sir; I was whipped; I was done this way: If you don't do this, Kid Collins told me—'If you don't tell these people that you did some shooting, and Ed. Ware did a lot, they will take you out and kill you.' Kid Collins told me that, and he helped whip me a whole lot, and everything he did and told me I believed it,—he did me so bad.

Q. And what you did was through fear?

A. Yes, sir.

Q. How many times did they whip you?

A. Twice.

Q. Tell the judge just how they phipped you.

A. Well, they stripped me naked, and two men stretched me out, and they whipped me across my back; if you don't believe I have any scars on me, I will let my clothes down and let you see it. And I was set in an electric chair, and they turned a button, and then I had hortshorn put up to my nose, and was done that way, and made tell these things, and, sure, I told them. I don't deny any of my talk; but that is the reason why I did it.

Q. And you would tell them anything on account of being afraid you would be punished?

A. Yes, sir; anything they would tell me, I would say it, because I was scared I would get whipped again. (141, 142).

CROSS EXAMINATION.

Q. When did they put you in jail; how long after the trouble?

A. As near as I can recollect four, five or six days.

Q. After the first of October?

A. Yes, sir.

Q. When did they give you the first whipping—how long after you had been in jail?

A. About four or five days, I think.

Q. When did they whip you next?

A. About three or four days after that.

Q. You were tried here about the 10th of November?

A. I was tried for murder.

Q. About a month after they whipped you?

A. I don't know.

Q. Do you remember talking to Mr. Moseby?

A. Yes.

Q. After you were convicted of murder?

A. Yes.

Q. In which he was asking you about the parts different people took in this thing?

A. Yes.

Q. You remember telling him that you were out there, one of the guards, had a gun, and took part in the shooting of the people, when they came there in the automobile?

A. Yes.

Q. That was three or four weeks after you had been whipped?

A. Yes.

Q. He didn't threaten to whip you?

A. No.

Q. He did not promise you anything?

A. No, sir; he didn't promise me anything, but this Kid Collins did the promising, and I thought if I didn't tell him, he would go back and tell Kid Collins, and he would come back and tear me all to pieces. Kid Collins had done made me tell this talk, and I thought I had to tell it to him, and to everybody; so I told it to keep from getting another whipping." (*Id.* 142-145).

MR. MOSEBY was then examined by the State, as follows:

Q. At the time the defendant made the statement to you, the trial of Ed. Ware was in progress, was it?

A. It was in progress, or just commencing.

Q. And Mr. Andrews and I were in the court room?

A. I suppose so.

Q. You went to confer with the witnesses?

A. Yes.

Q. And you talked to this man about it?

A. I did.

Q. What did he tell you?

A. The only question I asked him was just what connection he had with reference to the placing of these guards, whether he was there when Ed.

Ware placed the guards. He told me that, and the questions were asked in just that manner.

Q. Was there anybody present at that time?

A. I don't recall whether there was or not. The turnkey who brought him down may have been there, and there may have been another person there. He said he was going to tell me the truth. I made him no promise, and he proceeded to make the statement.

The court then overruled the objection to the testimony, saying he would submit the question to the jury on instruction, and appellant excepted. (*Id.* 146, 147).

The jury was then recalled and the testimony of Mr. Moseby resumed, as follows:

"I had a conversation with Will Wordlow about his being at Hoop Spur church the night Atkins was killed. I think he said he got there between eight and nine o'clock. He said there were men around out in the church yard; that Ed. Ware was out in the church yard and was putting out guards. He said that Ed. Ware told him to take his gun and go out and act as a guard, and gave him instructions to stop any one who approached and ask them whether or not they were members of the union, and if they were not members of the union, and refused to turn back, they had orders to shoot, and that he took his gun, and did so act as a guard." (*Id.* 148).

LIT SIMMONS testified: I am a member of the Farmers and Laborers Household Union, and was at Hoop Spur the night that Atkins was killed. I don't know whether or not guards were placed out

that night; when I got there the meeting was going on, and the guards were out. "I did not see any appointed to go out." I had never seen Will Wordlow there, and don't know whether he was a member. (Rec. 2450, pp. 150, 151).

DAVE HAYS testified: I was a member of the Union at Alaine. I was at Hoop Spur the night of this shooting,—got there about ten o'clock. I know Will Wordlow. He passed my house in the night, that night, about seven o'clock. I didn't see anybody with him. He didn't stop, but his wife did. She was somewhat behind him. I did not see Wordlow at Hoop Spur that night. When I got there, I went into the house and stayed there all the time. The next I saw of Will Wordlow was next morning some time after sun-up. He came to my house. His wife was at my house. I was fixing to go after my cow. He told me he got lost in the woods. He told me he was at the church the night before. I don't know what else he told me; "I never stayed in his presence that long to identify anything he said to me, because I was busy around home." I don't know whether he had been home that night or not. He said nothing to me about it—said he was going home because he wanted to pick some cotton, or something or other. I don't know whether he went home or not, because I went to the back of the field. I left him at my house. I think the next I saw of him was at Joe Machons. (*Id.* 152-157).

Here the State rested, and appellant interposed a demurrer to the evidence, which the court overruled, and he excepted. (*Id.* 157).

APPELLANT'S EVIDENCE.

1. DAVE HAYS testified:

“Q. You stated a while ago that the only way you knew of the defendant's having been beaten and made to make false statements against himself, was by the scars you saw on his person?”

A. Yes.

Q. And that you had been whipped, how many times?

A. Once.

Q. Do you know how many prisoners were whipped there?

A. You want sight, don't you?

Court: “Yes, what you know about it yourself.”

A. By sight I couldn't say any more than what I saw on the person or body.

Q. Well, how many?

A. Will Wordlow, Alf. Banks, Sykes Fox, Frank Moore, Joe Knox, and a fellow over here at the walls.

Q. How did you say they were whipped? How did you say they whipped you?

A. Yes, some men, I think two, am satisfied there were two, held me down. I was so scared I can't say now. They whipped me with a strap, and Kid Collins held something to my nose that took my breath. (*Id.* 158, 159).

CROSS EXAMINATION.

I don't know how we came to get whippings.

Q. Nobody ever asked you to tell anything on anybody or yourself, except the truth?

A. Well I know I told something on myself that was wrong, because I never harmed a man in my life.

Q. No, but you were there that night when this man was killed; that is the reason why you were convicted. But, nobody ever asked you to tell an untruth on anybody, did they?

A. When these men were holding me, and when I would go to tell the way they wanted—the way they would whip me—now, if you don't believe me, I can show you the scars; I will show them to you now; I have got them now.

Q. No; you will not show them to me now; answer my question. Was there anybody that asked you to tell an untruth?

A. They would ask me to tell the truth, and when I would start it, this fellow would hit me, and ask me a question, and shower down on me.

Q. You remember talking to me last Sunday, Dr. James and me?

A. Yes.

Q. There in the office of the jail?

A. Yes.

Q. I told you I wanted you to tell the truth about this matter, that you were through with your part of it, and you told me your part of it, didn't you?

A. I tell you I have been so scared, I couldn't tell anything.

Q. Are you scared now?

A. I don't feel good a bit.

Q. You are scared now?

A. Yes, I am.

I don't know what the defendant, or any of these other parties were whipped for." (*Id.* 159-162).

2. WILL WORDLOW testified:

I live west of Hoop Spur; will be 25 years old the 1st of next October. I was at Hoop Spur church the night Mr. Atkins was killed, but I had nothing to do with killing him. I had no gun. I saw the car when it came up, between eleven and twelve o'clock. I didn't go to it.

I went to the lodge that night with my wife and some other folks. I was a witness against Ed. Ware, when he was tried. Mr. Moseby came down there to the jail, and talked to me, and I made some statements. They were untrue.

"Q. Tell the jury why you made an untrue statement to Mr. Moseby, in connection with Ware's trial?

A. Well, here is the way they come and got at me: They called me everybody's name I knew, and after they got the names, Kid Collins went to bluffing me, and made me say all those Niggers had guns and did a lot of shooting. Well, I had to say that or get torn all to pieces, and I told them that. They said, 'Now, you know Ed. Ware is the leader of this lodge; wasn't he the secretary?' I said, 'Yes, Mr. Kid.' He said, 'Well, if he is the secretary, he must be one of the leaders.' I said, 'Yes, sir.' He says, 'Didn't he command you to go out with guns?' I

said, 'No, sir.' He said, 'You better say it; if you don't, I am going to kill you; you will get torn all to pieces.' Well, I said it, through being afraid; I was scared.

Q. Did Kid whip you down there?

A. Yes; he helped to whip me twice.

Q. Did he punish you any other way?

A. Yes, he sat me in the electric chair, and turned it on. They had a button back there, and when you turn it on, you can't sit still. I called it electric chair; I don't know what it was; but you couldn't sit still. Kid Collins punished me, to make me tell these things. He would come around the jail and tell us. That is the reason why I made these false statements. I never saw Mr. Atkins, and had nothing to do with killing him. I was never arrested before this time." (*Id.* 163-167).

CROSS EXAMINATION.

I belonged to the Hoop Spur Union, and had been there at two meetings. If they put guards out there I don't know it. When the car came up, I was standing in front of the church. I don't know where Alf. Banks was then; when I first got there, he was in a buggy. I didn't know the Becko boys. I had seen them once or twice, but don't remember seeing them there that night. After the car came up and went to shooting into the church, I ran. The first fire came right from that car into the church; and Kid Collins told me he was the first man that shot. I remember two shots came in.

"Q. There was some other shooting there, wasn't there?

A. Yes; another car came up behind this one and went to shooting into the church. I ran when the first two shots were fired—ran out there and lay down, back of the church. I saw the shots from the two cars. I heard plenty of shots. I went home that night. I didn't tell Preacher Hays I hadn't been home. I told him I had to go home. That night I ran and got off from my wife and went home, and came back to Dave Hays' house. We went by Dave Hays' that night, and left the baby there, with his wife. I don't know whether John Martin was in the gang going to Hoop Spur or not. I don't know how many shots were fired—like popcorn popping. As soon as those two shots were fired, the people commenced getting out every way—getting out of the church. I don't know whether there was a thicket between the church and the car; it looked like there was a slough between them—it looked like the car drove up to the bridge over the slough, and stopped. When the second car came up, it got ahead of the first car, and stopped and went to shooting; it got closer than the first car did. I was not at that little bridge. I didn't see John Ratliff there that night.

I told Mr. Moseby I was going to tell him the truth; that Ed. Ware got me into it, and that I wanted him to get what was coming to him. I changed my mind about these things after I got to Little Rock, out of the hands of Kid Collins. I thought I was in danger of Kid Collins whipping me, until I got to Little Rock. Sure, I would rather be killed by the electric chair than whipped to death. Kid Collins was not there when I talked to Moseby,

but he had already told me what I had better say, if anybody called me out. I had never refused to talk to anybody. (*Id.* 167-183).

3. SYKES FOX testified:

I am serving a sentence in the penitentiary, charged with killing a white man. I think they called his name Atkins. I know something about Kid Collins, and about their beating Will Wordlow, when he was in jail. They whipped him the day before they whipped me. They brought him back after they put me in the chair, and then whipped him again. It seems like they struck him a great many licks. They were whipping him for belonging to the union, as far as I know. (*Id.* 184, 185).

CROSS EXAMINATION.

I remember one time. I heard they whipped him, and I know they whipped him once. I was there. They didn't whip him in the same room with me, but in a room next to me. They whipped me about twelve o'clock, day time, and whipped Wordlow that evening. After they had whipped me nearly to death, they dragged me to my cell, and I lay there flat on my stomach for about four days. I don't know when the court met here; I was too glad to get away from here. If I could call the name of the man who did the whipping, I would. I told lies because I got whipped; I lied myself to the penitentiary. I have the scars on my person. (*Id.* 165-191).

4. JOE FOX testified:

I know Will Wordlow. I am a defendant here, in custody about the Hoop Spur trouble. I know

they whipped him in the jail to make him testify. When he was brought back where I was, we had to give him water. He wasn't able to stand up to drink water. (*Id.* 192).

CROSS EXAMINATION.

That took place about three days after he was put in jail. It was three or four days after the Hoop Spur trouble until I was put in jail. He and I were put in the same cell. They whipped him that night and the next day. They brought us up here that day, and whipped us that night. I don't know who they were that whipped us. They told us all they wanted us to do was to tell the truth. I did not tell them the truth. I first told Lawyer Jones, at the penitentiary, at Little Rock, after I was sent there, about being whipped and telling lies. He came out there and asked about it, and told me to tell the truth about it. The officers here told me to tell the truth, and I did tell them the truth, part of it, but all they wanted me to say, I had to say whether it was the truth or not. I told the truth in some things they asked me down here. If the truth kills me, I will just have to go. (*Id.* 192-197).

5. SAM WALKER testified substantially the same in this case as in Martin's case, where his testimony is abstracted. (*Id.* 198-200).

LIZZIE WRIGHT'S testimony is substantially the same here as in Martin's case. (*Id.* 201-207).

7. LIT SIMMONS testified:

I had information from the union that they were coming there to break up the meeting, or to shoot it up.

CROSS EXAMINATION.

Q. Where did you get the information?

A. This union was going on about two months before I got into it. I got the information from a man, I didn't know, a colored man. When I came there and saw guns, I said, "Boys, what are these guns for?" That was at Hoop Spur church, a good while before the night of the shooting. They said the understanding they had was that the white people didn't want that union to be joined, and were going to get with us. Then I spoke to Will Wright, a member of the union, and he said they had instructions from Robert L. Hill, but that Hill told them not to interfere with nobody, except they interfered with us. I don't know anything about what instructions to the lodge about guards and their guns. I saw guns sitting in the corner of the church house—it looked about like seven or eight. I saw no others. The man got out of the car, came across the big road, threw his flashlight, and made three shots with his pistol, that night. After that he fell. (*Id.* 210-213).

8. SALLIE GILES testified:

I have two sons, convicted in connection with this Hoop Spur trouble. I attended the meeting the night Mr. Atkins was killed. I got there a little late, about eight o'clock. The little church house was packed. It is not there now. It has been burned down. The first shooting I noticed was the shots coming through the windows. They were coming in from the north side of the church, from the direction of Wabash and Helena. They struck the lamp, knocked the globe off of it, and the light was put out,

the middle lamp light. There was a good deal of stirring around then. We were falling around there, begging the Lord, getting under benches and everything else. I don't know how they got out of there. I got out through the window. I don't know how many shots were fired. "They fell on the church like fire in cane in a new ground." (*Id.* 915-917).

CROSS EXAMINATION.

That was pretty fast. The first lamp the first bullet struck was hanging about the middle,—that is, the one I know. Two windows were in the north side. I can't distinguish the first bullet; when the first shooting commenced the lamp went out. I never noticed any bullet coming through the wall. I don't know what kind of gun they were shooting with; I never shot a gun in my life. The shooting was so fast I couldn't count it. I don't know about any guards. The church was packed when I got there. If there were guns there, I paid no attention to them. If I had thought of anything like that, I might have noticed. That is the first time I was ever there. I don't know Hill. I know Will Wordlow; I didn't see him there; I wasn't noticing for anybody in particular. (*Id.* BVG-BBV).

9. VINA GRANGER testified here to the same matters, and substantially in the same way as she did in Martin's case, where her testimony is abstracted. (*Id.* 222-238).

The same certified copy of Petition, Articles of Association or Constitution of the Farmers & Laborers Household Union, and Certificate of Incorporation,

mentioned in Martin's case, were introduced here. (*Id.* 239-251).

There being no other evidence on either side, the court then gave the instructions, extending from page 253 to 263 of this record, No. 2450, none of which were objected to.

The jury then promptly returned *their verdict*, couched in the following terms: "We, the jury, find the defendant, Will Wordlow, guilty of murder in the first degree as charged in the indictment, to be put to death in the electric chair." (*Id.* 263, 271).

Appellant thereupon, on the 11th of May, 1920, filed and presented his motion for a new trial, praying that the verdict should be set aside on these grounds:

1. Because the verdict was contrary to law.
2. Because the verdict was contrary to the evidence.
3. Because the verdict was contrary to the law and the evidence.
4. Because the court erred in overruling defendant's petition for removal to the Federal Court, and in failing and refusing to transfer this case for trial to the District Court of the United States for the Eastern Division of the Eastern District of Arkansas, and in thereafter forcing defendant into trial.
5. Because the court erred in overruling defendant's petition for a change of venue, and in failing and refusing to change the venue of this cause, and in thereafter forcing him into trial.
6. Because the court erred in overruling the

defendant's petition to temporarily set aside his plea of not guilty, and in failing and refusing to permit him to withdraw his plea of not guilty, as therein prayed.

7. Because the court erred in overruling defendant's motion to quash the indictment herein, and in failing and refusing to quash it; and erred in refusing to hear evidence thereon, and in refusing to set aside the present panel of the petit jury.

8. Because the court erred in overruling defendant's motion to quash and set aside the sheriff's return to the special venire, and in refusing to hear evidence thereon, and in refusing to discharge the talesmen.

9. Because the court erred in ruling that venireman S. S. Shotts was not qualified to serve on the jury.

10. Because the court erred in overruling defendant's objection to the following questions propounded by the Prosecuting Attorney to the State's witness, Charles Pratt, and in permitting witness to answer the same:

Q. Did any Negroes come up to where you were, besides the ones that went to shooting?

A. No, sir; they were all shooting at one time.

11. Because the court erred in permitting the Prosecuting Attorney to propound to the State's witness, Charles Pratt, the following question, and in permitting the witness to make to them the following answers:

Q. After the shooting commenced, after they

came up and you fell over, did any more shooting occur shortly afterwards?

A. Yes.

And further erred in permitting him to testify in detail as to said further shooting.

12. Because the court erred in permitting P. R. Andrews, counsel for the prosecution, to propound to W. K. Monroe, witness for the State, the following questions, and in permitting witness to make thereto the answer following:

Q. Tell the jury what happened to you when you got down there that night, just as it happened.

A. I left Helena about ten o'clock at night, going down to this camp, and I got down to Hoop Spur church, and there was a Ford car standing there in the middle of the road, and I pulled off to the left, or east side of it, thinking possibly it had broken down, or somebody was there, and there was no one in the car, and I pulled ahead then forty or fifty feet, and stopped to look at an object in the road, which I found was a coat. When I stopped and looked at this coat, I was fired upon.

13. The court erred in permitting the State's witness, W. K. Monroe, to testify as follows:

"The first shot that was fired was from my left, the east side of the road. Two of the shots hit me, one in the nose and one in the left arm. In trying to leave there, after the shot was fired, I killed my engine, and climbed out the Ford, and lay down on the ground by the side of it, and there was a volley of forty or fifty shots fired." And the court further

erred in overruling defendant's motion to exclude said testimony from the jury.

The court further erred in permitting said witness to testify as follows:

"When that fellow quit, I got up and cranked the car again, and had time to get in and get pretty good headway, when they opened up another volley."

And the court further erred in permitting the Prosecuting Attorney to ask said witness the following question, and in permitting witness to answer the same, over defendant's objection:

Q. Which direction did those shots come from, if you know?

A. They came from two sides of the car, east and west.

Q. About how many shots were fired at you?

A. About forty or fifty each volley.

14. Because the court erred in permitting the witness for the State, John Ratliff, to testify that members of the union had orders from the officers thereof to put out guards.

15. Because the court erred in permitting said Ratliff, over defendant's objection, to testify to a conversation he claimed to have heard between some one in the Ford car and the Negro boys claimed to have been the guards.

16. Because the court erred in overruling defendant's objection and in permitting witness Ratliff to testify to other shots than those alleged to have been fired in the killing of Atkins.

17. Because the court erred in holding the

alleged confession or statement of the defendant, claimed to have been made to J. B. Moseby voluntary.

18. Because the court erred in permitting the State's witness, J. B. Moseby, to testify that the defendant told him that he, defendant, got to the Hoop Spur church the night Atkins was killed, about eight or nine o'clock; that any how he said there were men around out in the church yard; that Ed. Ware was out in the church yard, putting out guards, and that he, Ware, told him to take his gun and go out and act as a guard, and that he gave him instructions to stop any man who approached, ask whether they were members of the union, and if they were not, and refused to turn back, that they had orders to shoot, and that he took his gun and did so act as a guard.

19. Because the court erred in overruling the defendant's demurrer to the evidence, made at the conclusion of the State's evidence in chief, and in failing and refusing to direct a verdict of not guilty. (*Id.* 263-271).

The court overruled this motion, appellant excepted, and, after sentence, prayed and obtained an appeal. (*Id.* 275, 276).

Alf. Banks, Jr., Appellant, v. State of Arkansas, Appellee, No. 2453.

STATE'S TESTIMONY.

1. CHARLES PRATT testified here, substantially, almost if not quite literally, the same as he did in Martin's case, plus this statement: I asked Mr.

Atkins to accompany me because he could run the machine, and I could not. (Rec. 2453, pp. 79-80).

2. AUBREY BURKE: I am circuit clerk, and know John Clem. Q. Do you know whether or not Clem was arrested while you were there (in Elaine)?

(To this question appellant objected for immateriality, the court overruled the objection and appellant excepted).

A. I got there Wednesday morning * * *, and was down there Wednesday, Wednesday night and Thursday morning, some time after the soldiers got there. He was arrested and sent to Helena, * * * for something he had done before (*Id.* 91, 92).

3. AMOS JARMON testified substantially, almost literally, the same here as in the Martin case, where his testimony is abstracted (*Id.* 93-103).

4. W. K. MONROE testified in all material respects the same as he did in Martin's case, where his testimony is abstracted (*Id.* 103-106).

5. JOHN RATLIFF testified: I know Alf Banks, Jr. I saw him at Hoop Spur church on the night of October 1st, when the shooting occurred. The union was in session when I got there, and I saw him at the left hand corner of the fence, looking towards Hoop Spur, towards Elaine, with several other boys, whose names I can't give. After that I saw an automobile come up there, and I saw several other boys who were in the road walked towards the church. The last time I saw them they were in the road. The Becko boy

he said, come on, let's go. The auto hadn't yet got there,—hadn't stopped. I saw its light up the road. The boys went a little below me and stopped, and stayed there until the auto came up and stopped; then, directly, the crowd went on towards it. I reckon Alf. was in the crowd; I couldn't tell one man from another. I could only tell one from another just as they were leaving me. There were two or three of them looked to me like they had guns. I don't know whether anybody else had guns or not. After that, I saw several standing around talking. The Becko boy said, "let's go down there"; they didn't move directly, and then he said, "come on, boys", and then they went walking slowly toward the car. Directly I heard firing commence. There were more than four or five shots fired, but I can't say how many. The first shots, about three, were one right after the other, it looked like, and then sort of ceased and commenced again. When they commenced again several shots were fired (*Id.* 106-111).

CROSS EXAMINATION.

As near as I could see, the first shooting came from the back end of the car, and was ranging towards the church, a little. It was a pretty dark night. If Alf. Banks had a gun, I didn't see it; they were bunched up there. I didn't walk right up to them. I thought I knew him well enough to say it was he, but I could be mistaken. I have been around him off and on for about a year,—been in his company a few times. I could have been mistaken. The church lights went out about the time of the second

shot. I am serving a term in the penitentiary, about the killing of this man (*Id.* 111-114).

RE-DIRECT EXAMINATION.

I guess that when the first shots were fired I was something like a hundred yards away from them. I could see their directions by the flash of them. They were fired sort of quartering up the road. When this man spoke to the boys, they sort of run towards the church, and ran into the wire fence, on the side next to the church. I don't think they were quite even with the car. This man threw a flashlight on them, and that was the only way I could see anything at all, from where I was. After the shooting, they came back towards the church, to where this other crowd was standing talking (*Id.* 114-116).

6. LIT SIMMONS testified: I was door-keeper at the Hoop Spur Union the night of the shooting. I got there late, after the meeting had commenced. I know Alf. Banks. I saw him there, after the first shooting. He and the two Becko boys came in the church. He had a flashlight and the other had a pistol. One of them would say, "I killed him", and another one would say, "I killed him". Alf. said, "I killed him", and each of the Becko boys said the same. They were arguing over a flashlight and pistol. They said, "carry on your meeting, we have done killed him" (*Id.* 117-120).

CROSS EXAMINATION.

I don't know that I am wrong about the thing. I have told it just straight, directly. I can tell you how it was: The first starting of the meeting, there was a space between the two

The women were in the house at the first shooting. There hadn't a woman got out. After the women got out, they started another shooting scrape, but I was gone (*Id.* 120, 121).

7. H. P. SCHMIDY testified the same as in Martin's case, where his testimony is abstracted.

APPELLANT'S EVIDENCE.

1. SALLIE GILES testified the same, substantially, almost literally, as she did in Martin's case, where her testimony is abstracted (*Id.* 125-131).

2. VINA MASON testified the same in substance and effect as she did in Martin's case, where her testimony is abstracted (*Id.* 132-140).

3. LIZZIE WRIGHT testified substantially the same, almost literally, as she did in Martin's case, where her testimony is abstracted (*Id.* 141-152).

4. ED. WARE testified: I was secretary of the Hoop Spur Lodge of the Farmers and Laborers Household Union of America, and was there the night of the trouble, September 30th, 1919. I was Secretary, and while we were carrying on our meeting, and I was sitting at the secretary's table filling out some blanks, collecting money and keeping that matter straight, some of the boys who were out of doors, came and rapped on the door and said a car or some cars had driven up out there and stopped. Some of the inside members who were up there at the rostrum next to the pulpit said, "Who is it?" And they said, "Some white folks". They said,

"Let them come in if they want to come in; we will tell them anything they want to know about our business, what we are here for." At that time I had finished my work, and called the attention of the president, and went to get up to make my pronouncing, and a bullet came right across my face. Some one shot right into the window and knocked the glass all over me, and seemed like a bullet came right by my face; I couldn't tell whether it was a bullet or glass. Frank Moore fell right across me; then bullets just kept raining through the house, and I could hear the glass fall there, and I was lying on the floor." I don't know how they all got out,—can only tell about myself. I made for the door, crawling and crouching the best I could, and crawled out in an alfalfa bed, kind of east of the church, and lay down. The guns were firing so fast, I was afraid to stand up.

Lit Simmons was placed at the door, but I didn't get there until after the meeting had commenced. I didn't see him there after the shooting took place. I didn't see any doorkeeper after that (*Id.* 152-154).

CROSS EXAMINATION.

I suppose it was about 9:00 o'clock when I got there. They had opened the lodge and started their meeting. Jim Miller was president. My wife went there with me, also Will McFarland and his wife. I don't know who put out guards that night,—don't know that guards were out; I didn't pass any, as far as I know. I passed lots of men. The church house was small, and was packed. About a hundred

men belonged to that union, and there were women there. I don't know who the people on the outside were; I paid no attention to them. I did not see people at different points on all sides of the church. I did not distribute guns or give orders to people who stood on the outside, nor tell them what to do. I did not station armed guards, nor give them instructions. I knew Alf. Banks, Jr., but was not really acquainted with him. I didn't see him that night when I went in. He came in there once, after I got in. I don't know whether he went out after he came in. I didn't see any guns in the church house; I saw none at all. I didn't carry any gun there. If there were forty or fifty guns in the house, I didn't see them. I don't know who started the shooting, but I know it started from the north side of the church. My gun was at home, a 40-70 Swiss rifle. I don't know how many shots were fired to begin with; when two shots were fired, I fell down. The light went out. I did not, when I got out, ask anybody what started the shooting, nor who was disturbing the proceedings; I made no effort to find out. I did not go home that night, because I was afraid; they were shooting, and the country was all stirred up. I don't know that there was nobody but my own color and community there that night. I did not hear somebody knock on the window and say, "The white folks are coming". And I did not so swear six months ago. I went there to turn over those books that night, because I had been told that trouble was going to occur from that lodge. Mr. Will McCulloch said that, and for me to get out of it, and I was going

to resign that night. I was going to give the President the money; the shooting kept me from it. I don't know whether Alf. Banks was outside or not, when the shooting started. I don't know whether he killed, or helped to kill Atkins or not. During this trouble I left,—went to New Orleans, and was going under an assumed name (*Id.* 154-164).

RE-DIRECT EXAMINATION.

On the 25th of September, I went to Elaine, to the post office, and Mr. Will McCullough came, got his mail, walked out; called me; said that he had been knowing me a long time, and liked me, and began to talk about the union, the lodge; asked me what sort of a lodge it was. I told him I had recently joined, and that, although I was secretary of it, I didn't know much about it. He told me they said I was the leader of it. I told him I was not. He said he had heard that we were making the lodge to make strikes and run cotton picking up to \$1.50 hundred. I told him we were not. He then said that he had been knowing me a long time, and didn't want to see me get hurt. He said, "You get out of that thing, because it is going to cause trouble here." I told him, "I meant to do the square thing." He said, "Well, you get in the square, and get out of that thing." I knew him in Louisiana, 23 years ago. I was accepting his advice, and was going to tender my resignation that night (*Id.* 164-167).

5. Appellant then introduced in evidence the same certified copy of Petition, Constitution or Articles of Association and Certificate of Incorporation as was filed in Martin's case (*Id.* 169-180).

6. LIT SIMMONS testified: I have testified here every day. I saw the man that fired the first shot the night that Mr. Atkins was killed—saw from the flashlight; I think it was a white man. It was the man that fired the first shot through the church (*Id.* 181, 182).

CROSS EXAMINATION.

I saw the flashlight when the shot was made; it went out then. I saw the body laying where the flash was; it wasn't behind the car. Two of the Becko boys and Banks came in. I didn't notice about their having guns (*Id.* 182-183).

7. ALF. BANKS, JR., testified: I am 25 years old. I am charged with killing Mr. Atkins. I was at Hoop Spur that night. I lived between Hoop Spur and Elaine. I had nothing to do with the killing of Mr. Atkins. When the shooting occurred, I was sitting in Jim Miller's buggy, and Albert Giles was sitting in it with me. I had no gun there. I did not go back into the church, after the shooting (*Id.* 184-185).

CROSS EXAMINATION.

I came to Arkansas from Louisiana. I joined the union in September. The people said it was a good thing. I hadn't been to two meetings. I got there about 9:00 o'clock, stood around the yard and talked a while, and then went inside; but it was so crowded that I came on back, and got in Jim Miller's buggy. I had a 12 gauge pump shot gun at home. I saw that car come up, saw the lights of it. I saw John Ratliff there, and the Becko boys. I did not go down the road with them. I testified here last

year in Will Wordlow's trial. I testified then that I was sitting in Jim Miller's buggy when the car came up; that I saw Will Wordlow do shooting, but I didn't see him do any; I was whipped into testifying that. "Q. You testified that you saw Wordlow and Martin coming up the road, shooting towards the car, didn't you?" A. Yes." Q. You were asked this question, weren't you: "Where were you when the shooting began?" A. Yes. Q. And didn't you answer it: "Where was I when the shooting started? I was right there in that little slough where the bridge crosses, and I walked up to the tree, and walked on towards the car, and they were shooting in there so fast, I walked to that little tree. I don't know whether it was a gum tree, or what it was, but I backed up to that tree, to keep him from shooting me, and I says, "This is the front," and he says, "Back out of the way", and then shooting, shot guns and rifles were shooting something scandalous; didn't you testify that? A. Yes, sir; I testified that when I was here before, but the way I was whipped up here before, a man would say anything. Q. And that is the reason that you testified to it? A. Yes. Q. Didn't you testify that you were there at the car, engaged in the shooting? A. Yes, sir; I testified everything what you all got there, but I was forced up to it, whipped up, and with hartshorn or something up my nose. Q. And that is the reason you testified that way? A. Yes, sir; I had to do it.

I got home that night about 1:30 o'clock, and stayed there all night. I was in Jim Miller's buggy

when the shooting took place, when it started; then I jumped out, over into the sorghum patch, right saide of the road, and lay down until the shooting ceased, and then went home. I didn't know the man was dead. I didn't see him. I saw the second car come along, while I was there in the sorghum patch. It stopped, and there was more shooting. I never knew Lit Simmons until he came here to the Helena jail. The Becko boys and I did not have an argument about who would get the man's gun. I don't know the Becko boys, and don't guess they know me. I did not get the flashlight nor the gun (*Id.* 185-194).

No other evidence being offered in the case, by either side, the court then gave to the jury instructions extending from page 186, Rec. No. 2453, to page 205, but as there was no exception to any proposition or feature of them, we do not abstract them.

The jury, with their usual promptitude in these cases, returned *their verdict*, signed by every member, in these terms:

"We the jury, find the defendant, Alf. Banks, Jr., guilty of murder in the first degree as charged in the indictment, and fix his punishment at death in the electric chair."

Appellant thereupon filed and presented his motion for a new trial, praying the court to set aside the verdict and grant him a trial, on these grounds:

1. That the verdict was contrary to the law.
2. That the verdict was contrary to the evidence.
3. That the verdict was contrary to both the law and the evidence.

4. That the court erred in overruling his petition for removal to the Federal Court, in failing and refusing to transfer his case for trial to the District Court of the United States for the Eastern Division of the Eastern District of Arkansas, and in thereafter forcing him through a form of trial.

5. That the court erred in overruling defendant's petition for a change of venue, and in failing and refusing to change the venue of his case, and in thereafter forcing him into trial.

6. That the court erred in overruling defendant's petition to temporarily set aside his plea of not guilty, and in failing and refusing to permit him to withdraw it, as therein prayed.

7. That the court erred in overruling defendant's motion to quash the indictment, in failing and refusing to quash the indictment, and further, erred in refusing to hear evidence thereon, and further erred in refusing to set aside the present panel of the petit jury.

8. That the court erred in overruling his motion to quash and set aside the sheriff's return to the special venire, and in refusing to hear evidence thereon, and in refusing to discharge the talesmen.

9. That the court erred in overruling his objection to, and in permitting the state to prove by witness, Aubrey Burke, that he was at Hoop Spur about 4:00 o'clock in the morning, after W. A. Atkins was killed, and that he knew that John Clem was arrested and sent to Helena for something he did before the killing of Atkins.

10. That the court erred in overruling his objection to this question put by the state to Ed Ware: Don't you know that you distributed the guns and gave orders to the people who stood at different places around the church, and told them what to do?

11. That the court erred in overruling his objection to, and permitting the state to ask him, while on the witness stand, the question in reference to his testimony given in the trial of Will Wordlow, at a former term of the court (*Id.* 206—208).

The court overruled this motion, and appellant excepted.

The court then sentenced appellant to death, and he prayed and obtained an appeal to this court (*Id.* 209-213).

Albert Giles and Joe Fox v. State of Arkansas,
No. 2451.

STATE'S TESTIMONY.

1. HERBERT THOMPSON testified:—I live in Helena. I knew James Tappan intimately. I was present when he received a mortal wound, between Hoop Spur and Elaine, in this county and state. I was there as a member of a body of special deputies sent down there by the sheriff. There were between 35 and 40 in that body. There were some 23 or 24 right there, when he was killed,—shot. Mr. Proctor and I were right near. The parties that shot him were in a thicket or bayou about 35 feet wide. It went through a field, and resembled a fence

rew,—only it was a depression. The shooting occurred near Jim Miller's house. Jim Miller was named in a warrant to be arrested on that occasion. I had no warrant. The killing of Mr. Atkins late the night before, September, or early in the morning of October 1st, was the occasion of our going down there. I didn't know how many persons were in the thicket. I knew there were a number, but couldn't tell how many. I got close enough to see them,—several forms,—one man's blue jumper; but I couldn't distinguish the men. We saw some of them run into the thicket. I warned them that if they came out and gave up, nobody would be hurt. I did this in a voice sufficient to carry further, much further than the distance I was from them. I did it three times. The reply I got was a shot from a rifle, from the side of the thicket I was on. Mr. Tappan was on the other side of the thicket, opposite me, about 40 yards from me. Mr. Proctor was also on the opposite side. When the shot was fired from my side, we made several shots in reply. I could not tell whether they were down or standing. The first shot was fired from the thicket, but I don't know who fired it; I only heard it and saw it flash.

Q. Were the other shots fired immediately after that? A. From the thicket? Q. From anywhere? A. Closely following, yes. Q. Were those fired from the thicket or from those who were with you? A. Both ways. Q. How long after that, before Mr. Tappan was shot you think? A. Oh! duration of a few wminutes. Q. Well, was the shooting continued up there from that time until— A. It was;

I don't know whether or not Tappan fired. The first shot was from the thicket. Mr. Tappan was shot later on. There had been several shots then, and I had gotten close to the thicket, within 15 or 18 feet, possibly closer when Mr. Tappan was killed. I heard some one in the thicket say, in a sort of stage whisper, "Shoot, shoot, shoot", three distinct times. I am reasonably sure Mr. Tappan was shot just at that instant. I don't think he had shot. Just at that instant I saw a flash of a gun in the direction of Tappan and heard the report. I could not tell who fired the shot. I then heard a rustling in the weeds, or underbrush, but could not see Mr. Tappan. I finally went to him, found he was shot, from the top of his collar as far down as I could see, the right side of his face and neck from about the collar line,—and unconscious. He had been shot from a shot gun, with buck shot. I think I counted 14 places where the shots struck him. We took his body up, out of the thicket, to an automobile. I am familiar with the effect shot will have,—whether a shot-gun will scatter the shot, or throw them together in a body. I have had a great deal of experience in shooting shotguns loaded with buckshot, and knowing the way an ordinary shotgun will shoot buck-shot, I would say that Mr. Tappan was shot at not over 30 feet. After Mr. Tappan had been removed some of the parties in the thicket had gotten out. I did not see these two men, the defendant's in the thicket. I found one or two men in the thicket after the shooting, after Mr. Tappan was removed, who had been killed, presumably; I thought they were

all dead. This occurred October 1st, 1919, pretty close to noon (Rec. 2451, pp. 76—84).

CROSS EXAMINATION.

We left here to go there between 7:00 and 8:00 o'clock, and got there about an hour later. Four went with us. There were about 40 there from Helena. From the time we got there, we were all working under instructions of a chief deputy. I don't know how many persons were killed before Mr. Tappan was killed. I have an idea, but won't attempt to say, because there may have been more in the thicket than I saw. I didn't attempt to identify anyone I saw in the thicket, whether they were dead or anything; I went directly to Tappan. I know of no women that were killed. I saw three pistols in the thicket. I saw three men in the thicket, beside Tappan and Proctor,—only three. I did not go all around the thicket. The thicket was about 400 or 500 yards, probably a little further, from the public road,—in a field,—ran through a field. From 20 to 25 of us were down there. Eventually we surrounded the thicket. It was not surrounded when the shooting took place. I called on the men to come out. Q. Were they hid in the weeds? A. I could see them rustling about in the thicket; it was practically incessant. Q. How many were killed in the thicket? A. I don't know. I don't know whether all who were in the thicket were armed or not (*Id.* 84—99).

RE-DIRECT EXAMINATION.

Mr. Dalzell was in charge of the squad, and in his absence I was. He was in the vicinity, but w-

were separated to some extent. I was second in charge (*Id.* 91—93).

RE-CROSS EXAMINATION.

We had a warrant for Miller. I didn't see any warrant for these men, the defendants (*Id.* 93).

2. ALF BANKS testified: Prior to October 1st, 1919, I lived near Hoop Spur, in this county and state. I knew Jim Miller, and know Albert Giles and Joe Fox. I was a member of the Farmers and Laborers Household Union, belonged to Hoop Spur Union. I was at the union meeting there the night the man was killed. I saw Albert Giles and Joe Fox the next day, about 9:00 or 10:00 o'clock, A. M. They were then at a thicket or slough right down in front of Jim Miller's house, in a corn and cotton field,—right close to Miller's house, about as far as from here to the wall. The slough was a thicket, and they were in it, so were Jim Miller, Arthur Washington, Miller's brother and a colored soldier boy. I went there, went in the thicket near 10:00 o'clock. There were seven of us, and some women were in the thicket above there. Albert had an old single barrel shotgun. Miller, Washington and the soldier boy, each, had a gun, and the other one had a little old single barrel, too. We were in there when the shooting took place. The white people came in there and started to shooting. The first shooting they did was at the women, who were about 200 yards above us, in the thicket. Then they started to surround us. I lay down, so did Jim Miller, on the left hand side of me, and Albert Giles on the other side, Joe Fox kind of behind us. Wash-

ington was killed dead on the spot, Jim Miller was shot right there, and Milligan Giles got shot and, crawled across my foot. The white men hollowed "look out, we are killing our own men." Albert Giles was lying on the other side of me; Joe Fox was behind me; if either of them shot, I don't know it. They surrounded us, and started shooting in on us. Fox was behind me, and when I saw him, we were running out of the slough, and passed right by the white man that had been shot there. I don't know what became of the gun the white man had there. I reckon Albert's gun was left in the slough; he was wounded, and was there when we left. I don't know whether any gun bursted or blew off the stock; the old gun Albert had looked like it might do that. When I saw the white man, he was laying there, right on the edge of the slough. He was on one edge and we on the other (*Id.* 94-102).

CROSS EXAMINATION.

I went to the slough to hide from the white people. I didn't think they would come there in the slough. That slough or thicket was about as far from the public road as it is from here to the depot. There were a great many white people there, at and about Hoop Spur; plenty of cars passed my house going that way. I heard they were coming to kill us all, and I went over and hid in the thicket and slough. I wasn't hiding down there to kill anyone. When we left the thicket, I started toward home, but they turned me around, and the soldiers sent us word to come out of the woods, and we came right out to the soldiers (*Id.* 102-105).

RE-DIRECT EXAMINATION.

We just took our guns down there, but not to kill anybody, I didn't; I don't know what they took theirs for. I just carried mine away from home. Fox was behind us, and I don't know whether he was lying down or standing up. I did not hear Herbert Thompson or anyone on the outside halloo or say that if we would come out and surrender, they wouldn't hurt us. We did not start the shooting. They, the white people, commenced it. I could not see the white men shooting at the women, but I heard them. It is not a fact that they came to the thicket and told us to come out and surrender, and that we commenced shooting. When they came in on us they started shooting, and I just laid there, I couldn't raise my head up. When the shooting ceased, I got up and ran. I didn't make a shot. If Giles or Fox did any shooting, I didn't see it nor hear it. The way the other guns were firing, I didn't hear it. I testified once before, "but I was whipped up to it." I told them that Albert Giles' gun bursted, and that he picked up Tappan's gun. I testified that last court, "but I was whipped up to it." After I ran out of the thicket, I went to Joe Machon's house. I took my gun with me. Joe Fox had a little old pump gun. I left Albert Giles laying in the slough; but when I got to Joe Machon's house he was there. Jim Miller got shot in the head. He was laying down about four or five feet from me. He didn't say anything. Miller did not say "shoot, shoot, shoot," and we did not commence shooting.

(Key)

Fox and I ran out of the thicket together (*Id.* 105-111).

3. HERBERT THOMPSON, re-called, further testified: Tappan was straight across the bayou from me,—we were as at the base of a triangle; the point where the underbrush showed the Negroes were, at the apex. The other members of the posse were straight across with me, in line with Tappan. I presume he was moving a little south, and was shot in the right side of the face. He had a repeating Winchester shot gun—20 gauge. It was lost there. It was afterwards delivered to Tappan Hardware Co., while I was still an employe there (*Id.* 112-114).

4. J. N. MOORE testified: I am deputy sheriff, residing at Elaine. Recently I received a subpoena for Cleola Miller and Henry Armstrong. I did not serve them, because I couldn't find them. I searched around and inquired from everybody I thought would know where they were; no one could tell me,—except that I got information that they were in Louisiana. I made a *non est* return of it (*Id.* 115, 116).

CROSS EXAMINATION.

I have resided at Elaine ten years, about, and have been deputy sheriff about seven years. I know Armstrong, but not Cleola (*Id.* 116-118).

5. FREEMAN DANIELS testified: I live at Elaine and know Cleola Miller and Henry Armstrong. I saw them after the trial of this case at the last term of the court here, last fall. They were then living on the same place, the Jackson and Long

Acre place. I think it was. I heard her say they intended to go to Louisiana. That was a while before Christmas. I haven't seen them since (*Id.* 119, 121).

6. DR. O. C. WILLIAMS testified: I live at Elaine, and practice medicine down there. I know Cleola Miller and Henry Armstrong. I don't know where they are now; they said they were going back to Louisiana,—going to leave this country,—said that at the depot (*Id.* v22-124).

7. SID STOKES testified: I have lived at Elaine 10 years, am well acquainted down there; know Cleola Miller and Henry Armstrong, but don't know where they are. I have made search and inquiry for them, as to their whereabouts, but cannot locate them. I am a (big) Justice of the Peace (*Id.* 125-129).

8. DR. A. F. JAMES testified: I am deputy sheriff and jailer. I know Cleola Miller; had a conversation with her last fall, after the last term of the court; she told me she was going to Lake Providence, Louisiana (*Id.* 130, 131).

9. G. H. HARDING testified: I am official court reporter of the Phillips Circuit Court. As such, I took down the testimony of the witnesses in the case of the State of Arkansas vs. Albert Giles and Joe Fox, when they were tried here last November. I took it in shorthand, and later on transcribed it into longhand. I took it down correctly and transcribed it correctly. This (the writing handed him by the Prosecuting Attorney) is a cor-

rect transcript of the testimony of Cleola Miller, also of Henry Armstrong.

Witness then read, at the request of the State's Attorney, the testimony of Cleola Miller and Henry Armstrong, to the following effect:

CLEOLA MILLER: I know Albert Giles, but not Joe Fox. I saw them, these boys, the morning of October 1st, after the difficulty at Hoop Spur the previous night. I left them in front of the house, in the thicket there,—my husband, Jim Miller's house. Jim Miller, Arthur Washington, Albert Giles, Miligan Giles and another one I don't know, were also there, in the thicket. I saw them go in the thicket. I was at Alf. Banks' wife's house when the shooting took place, not very far from where they were when I left,—about a half mile, I reckon. If there were any others in the thicket, I don't know it. I left there about an hour before I heard the shooting.

HENRY ARMSTRONG: I was staying at Mr. Lingard's, picking cotton, at the time of this trouble. I know Albert Giles and Joe Fox. I don't know whether I saw Joe Fox the day of the trouble, but I saw Albert Giles. He was right down at the slough, in the edge of the bushes, right there in front of Jim Miller's house. I don't know what they were doing, and don't know how many were there. It looked like there were about five or six. I went from there to Alf. Banks' house, and heard the shooting back at the thicket, where I left them, a good while after I saw them there (*Id.* 132-139).

10. DR. ELLIS testified: I live at Helena; am a physician and surgeon, and knew James Tap-

pan. Treated him for gunshot wound last October; wounded in right side of his face,—25 or 30 punctures, one in his face, rather larger than the other, looked like a rifle ball. The shots appeared to come from a front angle. The shot covered his entire neck, entire right side of his face, and his mouth,—knocked his teeth out. The result was fatal. He died from the wounds (*Id.* 140, 141).

HERBERT THOMPSON was here re-called for further cross examination, and further testified: That slough or thicket runs practically north and south, I think. Mr. Tappan went through the thicket, and I went on the other side. It was a few minutes after the first shot was fired, until Tappan was killed. I don't think it was as much as fifteen minutes (*Id.* 143-144).

1. JOE MEYERS testified: I knew James Tappan. I helped put him into the auto, and assisted Mr. Thompson in bathing his head, and I was present when Dr. Parker, at Elaine, gave him first aid. In addition to buckshot wounds in the top and side of his face and neck, the doctor lifted out of his mouth a bullet that had the appearance of being a slug, or possibly a steel jacket cartridge. He handed it to me, and I laid it on the window sill in Dr. Richardson's house. I got to Hoop Spur that morning, October 1st, about 7:00 o'clock. I found probably ten or fifteen men at the church. I don't know about a large crowd coming during the day. I was out in the woods the most of the day. There was a large number of sheriffs down there, including myself. There were ex-service men who had been

deputized as deputy sheriffs. I was present at the slough when Tappan was killed. One or two automobile loads went down there, and they reported back the size of the affair, and then the rest of us went. I drove the first automobile load. Tappan was killed about noon, mortally wounded (*Id.* 146-148).

APPELLANTS' EVIDENCE.

1. LULA WARE testified: I live at Hoop Spur, and was there October 1, 1919. All I know about the trouble that day is that there were about 100 white men came to my house, got me and took me to Helena jail. Before they took me from my house, I went out on the porch, saw about 35 white men in that direction, about the same number in this direction, and Kid Collins said, "Come out that house Nigger, come straight to me." I went on, and when I got to the white men, I asked them what they were going to do with us women; one of them said, "Nothing, if there were no men in the house." I said, there were none, and he said, there had better not be. Then they started on to my house, and commenced shooting about the left of it, and that old man, Charles Robinson, was killed, and put in my bed. There was a great deal of excitement there that morning. They took me then, and put me in jail and kept me four weeks. That is all I know about it. I know nothing about the killing of Mr. Tappan (*Id.* 149-151).

2. ANN CRUMB testified: I live on a farm near Ealine, about a quarter of a mile; have for 8 years, and was there on October 1st. There was on

that day, a great deal of excitement there, among the colored people. They heard that the white people said they were coming there to kill everybody, and the colored people were running. I hid out,—stayed out all night. I saw armed white men there that day, looked to me like a hundred or more. I heard shooting that evening. I don't know where Jim Miller lived—didn't know him.

CROSS EXAMINATION.

I lived about two miles from Hoop Spur. I was at home the morning after the man was killed there. I don't know anything about it,—about who did it. I don't know anything about this case (*Id.* 152-154).

3. NINA JENKINS testified: I lived at Elaine last October—went there last January. There was a great deal of excitement among the colored people the 1st of last October. A little boy passed home that morning, and told us some white people were coming, and said they were going to kill everything that was big enough to die; so I went over to Paul Hall's, and a little in the afternoon, lots of cars came from towards Helena, going to Elaine, loaded with white people, and later we saw a gang of white people coming down the lane, and Frank took us back of my house, into the bushes, and we hid. There was a great deal of shooting down there that day, and the colored people were running and hiding out in the thickets and everywhere. When the soldiers came, and were taking us to Ealine, I saw a colored man and a colored crazy woman, called Francis, who had been killed. Her body was out in the yard, with her clothes

turned clean across her back, and some of the soldiers said it was a shame.

CROSS EXAMINATION.

I was never at Hoop Spur or at Jim Miller's. I know nothing about what took place in the thicket, about noon. It was early in the morning when the little boy passed and told us the white people said they were going to kill everybody. I didn't go to Frank Moore's house. There wasn't a great crowd of Negroes at Paul Hall's, and I didn't see any crowd pass the road. I was sick, and went right in the kitchen and lay down,—was just getting up from being sick (*Id.* 155-159).

4. DAISY FRAZIER testified: I was living between Elaine and Hoop Spur last year. There was a great deal of excitement among the colored people down there on the 1st of October. It was caused by a statement that the white people were coming down there to kill the colored people. When the colored people heard that, a great many of them went to the woods. I went to the woods (*Id.* 160).

5. SAM WALKER testified: I live at Hoop Spur. There was a great deal of excitement down there on the 1st of last October, among the colored people, generally. The cause of it was that there was some shooting over there at the church on Tuesday night, and it aroused the country around, and on Wednesday, the next day, "Everybody fled away." The members of that union, a good many of them, passed my house during that same night, after the shooting. We heard that there were a good many white people coming there in large numbers to

avenge themselves of a crime committed over there, at the little church, and we were trying to get out of the way,—I was, for one. I was pretty close to the shooting that night, lived pretty close. I hid out. I did not belong to the union, and was not at Hoop Spur that night. I don't know whether the Negroes who passed my house that night were going home. They passed about 11:30 or 12:00. They couldn't tell me about the killing; every man had a different tale. It was on Wednesday that I heard the white men were coming. At 12:00 o'clock that day I was about two miles from Jim Miller's. I don't know who shot Mr. Tappan, nor anything about it (*Id.* 161-164).

6. ED. WARE testified: I am here under a charge of murder. I have been in prison six months, the 9th of this month. I was near Hoop Spur Wednesday morning, October 1st. I left that country about 10:30 a. m. that day, as near as I can get at it. There was a great deal of excitement among the colored people there at that time. They had heard that the white people were coming there to kill them. Albert Giles was my tenant, and I went to his house that morning on business. There were a good many people there, "squandered" there, and I asked what was the matter. They said a gang of white people over there had killed a little fellow, they called Lemon, and were coming to kill me and every Negro they saw, and I thought it was time to leave. I got afraid, got stirred up, and started back home. I looked up toward Hoop Spur, and saw in the big road about three automobiles coming

abreast, about a quarter of a mile away from my place,—a gang of white gentlemen with guns, walking about four or five abreast, and, as I was going, Isaac Byrd came along, and asked me if I had a gun, and I told him I had. He asked me to let him have it, saying I was not going to use it. Itold him he couldn't have it. He said if I didn't let him have it, and didn't use it myself, he would go in and get it. So I went on home and got my gun and left,—went into the woods, never went back home, and finally got to New Orleans. As I was going away from the house Charles Robinson, who was crippled, was with me, and we saw the white men coming, and ran. I got to the woods and got away, but I have since learned he was killed. I was run away from home about 10:30 o'clock a. m., October 1st. I went to Alf. Banks' to see about some bills, about 9:00 o'clock. I did not go home the night Atkins was killed. I stayed at Henry Mason's that night, and got home about 7:00 o'clock the next morning. I didn't have my gun with me at Mason's,—didn't have it at the church. I did not put out the guards—don't know if any were out, nor, if they were, who put them out.

After I got to New Orleans, I went under the name of Charles Harper. My name is Ed. Ware (*Id.* 165-178).

7. ALBERT GILES testified: I lived about a quarter of a mile from Hoop Spur last year, and am 23 years old. I was never in any trouble before this—never arrested. I was down there in the thicket that morning, October 1st, when Lieut. Tappan was

killed, at the time they say he got killed. That thicket is a slough—grown up in there—pretty thick. I went there to hide. It was said that they were going to kill us all, and I went there to hide. It was away from the public road, and I didn't think they would find me down there, didn't think they would come there. I was in there, in front of all the other boys, was laying up next to a cotton field, and went to moving back, and got my arm broke, got shot in the arm, in the head and in the ear. I did not shoot at all. The white people surrounded the thicket, and shot first; I understand they were white people; I didn't see any white man there, at all. The shooting come from up the slough. I didn't see Mr. Tappan, as I went out. I guess it was 2:30, when I got out; I was sick; had been shot five times. I heard some one say, "Look out, we are shooting our own men."

CROSS EXAMINATION.

I had been a member of the lodge two or three weeks. That night of the shooting was the second meeting I had been to. I left home that morning after that train—near 10:00 o'clock, I guess. Ed. Ware came to my house about 8:30. He was in my house when I saw him. I got home from Hoop Spur the night before, about 2:00 o'clock. I took my gun and went to Jim Miller's house the next morning, but not until I looked and saw the white folks coming. Joe Fox left with me. I don't know where he came from. I lived about a half mile from Miller's. Joe and I didn't go right on to Miller's house; we went into the woods, and slacked along the road to

see what the white people were going to do. I had seen about 150 white people coming down that road. I first saw Arthur Washington and Miller at Miller's house. Milligan Giles was with me. I had a single barrel shotgun. We all went into the thicket. I had shells that I got in Elaine. We all lay down in there. I didn't see any of us fire. I myself did not fire. I was surrounded, some on one side of the slough and some on the other. My gun did not burst, nor jump off the stock. I got shot in the first shooting. The white people didn't ask us to come out. I was in the west side of the thicket—don't know just where Joe Fox was—didn't see him close to me. We were hiding from the white folks. I watched the white folks coming, and watched them when they went in my house. We stayed in Miller's house and around it until we heard the white folks shooting, then we left. I testified in the former trial of this case. Q. Weren't you asked how you came to go into the thicket, if you were hiding from the white people, and didn't you answer, "Jim Miller ordered us to?" A. No, sir; I don't know. I think I told you that the boy said the white folks were coming to kill everybody. I don't remember saying that Miller told us to get into the thicket, and that he was head of the lodge, and told us the white people were coming to kill everybody. I don't remember saying that Ed. Ware came to my house that morning, and told me to go to Jim Miller's house; I told you he came there that morning to get some bills. I didn't testify that Jim Miller ordered me to get in the thicket (*Id.* 179-197).

Appellants then introduced in evidence the certified copy of the same Petition, Articles of Association or Constitution, of the Farmers and Laborers Household Union, and Certificate of Incorporation, as stated in Martin's case (*Id.* 198-209).

No other evidence being offered or introduced, the court, after reading the indictment to the jury, telling them that under it, it was sufficient, if the proof justified it, to warrant conviction of the defendants of murder in the first degree, or of murder in the second degree, or of manslaughter, read to them, from Kirby's Digest, the statutory provisions defining murder in the first and second degrees and in relation to the burden of proof, and then told them that to constitute murder in the second degree, it was necessary to show that the killing was unlawful and done with malice aforethought, but it was immaterial how long the malice had existed, if it preceded and caused the homicide, and that deliberation and premeditation were unnecessary; that to raise it to murder in the first degree, there must be malice aforethought, specific intent to kill, and premeditation and deliberation; that premeditation meant thought of beforehand, deliberation having in mind the consequences of the conduct, as distinguished from acting on a sudden impulse without exercise of the reasoning power, and that it was immaterial how long the premeditation and deliberation had existed, if they preceded the killing; that defendants were indicted as principals under this section of the digest: "One who aids, assists, abets, advises or encourages, shall be

deemed in law a principal, and be punished accordingly"; that if they should find from the evidence beyond a reasonable doubt that defendants were present at the time James Tappan was killed, and that they, or either of them aided, assisted, abetted, advised or encouraged the commission of the offense, and were present at the time it was committed, they should find them guilty as charged; that the State was required to prove all the material allegations of the indictment beyond a reasonable doubt,—not a mere possible or imaginary doubt, but such a doubt as would cause a prudent man to pause or hesitate in the graver transactions of life, and that a juror was satisfied beyond reasonable doubt, when from a fair and candid consideration of all the evidence he had an abiding conviction of the truth of the charge; that under the law, the defendants were presumed to be innocent, and were to be so held until the presumption was overcome by legal and competent evidence on the part of the State.

Appellants then, by an instruction numbered 1, asked the court to instruct the jury to find them not guilty, but the court refused to so instruct, and they excepted.

The court then, at the request of appellants, gave the following instructions, numbered respectively, 1 to 6, inclusive.

1. To constitute murder in the first degree, the killing must be done with malice aforethought, and with deliberation and premeditation; if it is the result of provocation or assault, it cannot be murder in the first degree.

2. If the killing is done as the result of an assault by the deceased upon the accused, and in resistance thereto, the offense can be no more than manslaughter.

3. To constitute manslaughter, the killing be unlawfully done under the influence of a provocation offered by the deceased, apparently sufficient to make the passion irresistible.

4. One who assaults another, or others, with a gun or pistol, by shooting at him with purpose, either real or apparent to kill him or them, or any of them, may lawfully be killed, either by the person assaulted or by some other person; in such case the slayer is justified on the ground of self-defense and should be acquitted.

5. To constitute lying in wait, in the sense used in the instruction of the court, the evidence must show that the accused lay in wait for the purpose of killing the deceased or some other person; if they went into the thicket for the purpose of protecting themselves against the danger of an apprehended attack, they were not lying in wait, in the sense of the law.

6. That if they went into the thicket for the purpose of shielding themselves from an apprehended violent attack, and while there, were surrounded by the deceased and others, and fired upon with guns or pistols, they had a right to return the fire.

Appellants also requested, and the court refused to give to the jury each of the following in-

structions, numbered respectively, 9 and 10, and to each refusal they excepted.

9. Even though you may believe or find that the deceased was deputized an officer of the law, if he and the others with him made an assault upon defendants, or either of them, and commenced discharging their weapons at him or them, and they or either of them feared injury from them on that account, they were entitled to an acquittal.

10. A man has the same right to protect himself against attempted unlawful arrest as he has against an assault made upon him, even to the extent of taking life to protect himself therefrom, if that is the only way he has of preventing the arrest; and if you believe from the evidence that deceased and others with him made an assault on defendants and commenced discharging their weapons upon them or at them, they had the right to protect themselves by killing deceased and those with him, if that was the only reasonable way they had of saving their lives.

The court then, of its own motion further charged the jury that if they found from the evidence beyond a reasonable doubt that appellants were guilty, but had a reasonable doubt as to whether they were guilty of murder in the first degree, they should find them guilty of murder in the second degree; if they had a reasonable doubt as to whether they were guilty of murder in the second degree or manslaughter, they should find them guilty of manslaughter; that they might find both of them guilty, or one of them guilty and the

other one not guilty; that if they found them guilty of murder in the first degree, they should find them guilty of murder in the first degree as charged in the indictment, in their verdict; that if they found them guilty of murder in the second degree, their verdict should so state, and fix the punishment at not less than five nor more than twenty-one years; that if they found them guilty of murder in the first degree, they might, if they saw fit, fix the penalty at imprisonment for life; that the punishment for manslaughter was not less than two nor more than seven years; that they were the sole judges of the evidence and the credibility of the witnesses.

No other instruction was given (*Id.* 211—219).

The jury promptly returned their verdict of guilty in the first degree and fixed the penalty at death (*Id.* 227).

Appellants then filed their motion for a new trial, asking that the verdict be set aside and a trial granted them, on these grounds:

1, 2, 3. That the verdict was contrary to the law and the evidence.

4. That the court erred in overruling their petition for a removal to the Federal Court, and in failing and refusing to transfer their case for trial to the District Court of the United States for the Eastern Division of the Eastern District of Arkansas, and in thereafter forcing them through a form of trial.

5. That the court erred in overruling their petition for a change of venue, and in failing and

refusing to change the venue of their case, and in thereafter forcing them into trial.

6. That the court erred in overruling their petition to temporarily set aside their plea of not guilty, and in failing and refusing to permit them to withdraw the same, as prayed.

7. That the court erred in overruling their motion to quash the indictment, in failing and refusing to quash it, and in refusing to hear evidence thereon, and further erred in refusing to set aside the then present panel of the petit jury.

8. That the court erred in overruling their motion to quash and set tside the sheriff's return to the special venire, and in refusing to hear evidence thereon, and in refusing to discharge the talesmen.

9. That the court erred in holding that sufficient foundation had been laid for the introduction of the testimony of Cleola Miller and Henry Armstrong, given at the former proceeding.

10. That the court erred in permitting the state to introduce said testimony of Cleola Miller and Henry Armstrong.

11. That the court erred in permitting the state's counsel to ask witness, Ed. Ware, over their objection, this question; Don't you know you were right there and helped shoot him, and was the one that was taking up collection and getting the money.

12. That the court erred in refusing to give their requested instruction No. 1, for a directed verdict of not guilty.

13. That the court erred in refusing defendants' requested instruction No. 8.

14. That the court erred in refusing to give their instructions Nos. 9 and 10 (*Id.* 229—223).

The court overruled this motion, appellants excepted, and after sentence of death pronounced, prayed and obtained an appeal to this court (*Id.* 223, 229).

Ed. Ware, Appellant, v. State of Arkansas, Appellee. No. 2449.

STATE'S TESTIMONY.

1. CHARLES PRATT testified substantially the same as he did in Martin's case, where his evidence is abstracted (Rec. 2449, pp. 77—86).

2. KIDD COLLINS testified: My name is Robert Collins; they call me Kid Collins. I was with Mr. Pratt and Mr. Atkins, sitting in the back seat of the car, when the shooting took place at Hoop Spur Church. The outer guard fired the first shot. The first shots came from the left hand side of the car. I don't know whether Pratt or Atkins fired any shots or not. After they made about 60 or 70 shots they closed up on the car, and I commenced shooting. Then I crawled into a narrow pit, next to the railroad. When I was crawling out, Mr. Pratt was at the right hand wheel, going south. He fell toward the pit. I had a pistol. I left there as soon as I got out.

CROSS EXAMINATION.

It was a pretty dark night. I have no idea

what time we left Helena. I did not on that occasion kiss my wife good-bye, and tell her I was going out to help break up a negro meeting. I had a 32-30 revolver, and fired four shots. I couldn't see well enough to tell how many persons there were. All I know, they clustered up around us,—something over 20 or 30. I was kept as a trusty. I talked with all of them, after they were arrested; I was handling them. I had no talk with Ed Ware about the shooting down there. The time that I was here as a trusty, I was serving a term for murder. I was convicted two or three years ago. I pleaded guilty to murder in the second degree. I was at Memphis a week before last Christmas. I am living at Hughes, Ark. (*Id.* 88—93).

3 H. F. SCHMIDDY testified here substantially as he did in Martin's case, where his evidence is abstracted (*Id.* 94—99).

4. W. K. MONROE testified substantially the same here as in Martin's case, where his testimony is abstracted. Here as there, he was permitted to testify, over appellant's objection, that he passed Hoop Spur Church House, saw the car standing in the road (the car in which Atkins, Pratt and the trusty had gone there), about 12:00 o'clock, passed around it and went on about 40 feet, stopped to look at a coat in the road, was shot at and wounded, got out to crank his car, lay down while another volley was fired, cranked his car, got in it, started on, and got under pretty good head way, when another volley was fired at him (*Id.* 100—104).

5. JOE MACHON testified: I belonged to

the union at Hoop Spur, and was there the night of September 30th, when there was shooting. Ed Ware was there that night; he was secretary, and sat at a table sort of in the south-east corner of the church. When the car rolled up, some one run to the window on the back, and said the white people had come,—the window behind me, at the pulpit. I said "If they come, let them in; if it ain't right, may be they can get it right". Then Ware said, "No, don't let them in"; and Miller said, "No, don't let them in". Q. What did Ware say then? A. Ware said we had a guard out there at the door, and if he can't hold it, "I will go out there". Q. What happened then, a short time after that? A. At that time—Ware never did leave the table. He was still at the table, with my wife and Frank Moore. Q. What happened then? A. Then the shooting began. Q. Who was at the door? A. Lit Simmons. Q. What happened to the light? A. The light went out. Q. Then the shooting began? A. Shooting began before the lights went out. Q. Then did you see Ware any more that night? A. No.

CROSS EXAMINATION.

The first fires (shots) came right on through the church; I lay down. Ware was at that time in the church, and was there the last I saw of him. He and Frank Moore piled down on my wife's leg, and hurt it. My wife is in Louisiana (*Id.* 105—110).

6. JOHN RATLIFF testified: I was at the Hoop Spur Union the night of the shooting, and saw Ed Ware there, in the church. I afterwards, after the shooting, saw him outside the church. He came

out and went down the hill toward the fence. It looked to me like he had a shotgun in his hand. He had something in his hand. He walked out there and shot it off two or three times. There wasn't anything going on at that time. There had been shooting before that. A car had come up and shooting had occurred, but it was all over.

CROSS EXAMINATION.

I have been convicted of killing Atkins. I did no shooting. It was pretty dark that night. It was about ten minutes after the shooting, or fifteen, something like that, when I saw Ware on the outside of the church. The lights had all been out. But I don't think they were out when he came out. It looked like somebody lit a match; it didn't flash up very long. Ware was in the house when the first shots were fired. It was so dark I couldn't tell whether he had a gun or not on the outside (*Id.* 111-115).

7. DAVE HAYS testified: I belonged to the Union at Elaine, but was at Hoop Spur, the night of the shooting there. I was in the church house when the shooting took place. I got out as best I could, and ran down through the field. I stayed there a while, and directly some more shooting began, and I lay behind a stump until it ceased, and then went back to the fence, the field fence, off from the church. There I saw Ed Ware and two boys, they say are the Becko boys. I was a good way from them, about 20 feet. I heard those Becko boys talking. I couldn't say how far they were from Ware, probably 10 or 15 feet. I couldn't say whether he was as close to

them as I was or not. Ware was away back, when I came up. He had nothing in his hands that I could see, and I saw nothing in the shape of a gun near him. I saw something laying across the log between the Becko boys. Ware was sitting on the upper end of the log, the same log the Becko boys were on,—a pretty long log. I heard no shooting after that. Then I went home.

CROSS EXAMINATION.

Ed. Ware was sitting some distance from the Becko boys. I was in the church when the first shots were fired. They came from the outside into the church. Ed. Ware was in the church at that time. I can't say how long it was before I got out of the church; it was awful dark, and I rolled and tumbled and got out the best I could. The people in there were very much excited, knocking over benches. I don't know whether the shots put the lights out or not, but they went out while they were being fired, or after they were fired. I am serving a sentence on the State Farm for the killing of Atkins, I suppose; I don't know what it is; I didn't do it, though. I pleaded guilty because they told me it was best to plead guilty, and get the lightest sentence there was, and I got 21 years (*Id.* 116-122).

Here the State rested, and the appellant moved the court to instruct the jury to return a verdict of not guilty; but the court overruled the motion, and appellant excepted (*Id.* 122).

APPELLANT'S EVIDENCE.

1, 2, 3, 4. SALLIE GILES, whose testimony given here extends from page 122 to page 131, SAM

WALKER, whose testimony extends from page 130 to page 134, LIZZIE WRIGHT, whose testimony extends from page 134 to page 149, and VINA MASON, whose testimony extends from page 149 to page 163, testify, each substantially as they did in Martin's case, where all their testimony is abstracted. They all say or show that the first shots were from the outside, went into the house, and those of them who saw Ware, say that he was in the house, at the time.

5. Appellant, ED. WARE, testified: I was a member of the Hoop Spur Lodge,—became a member the latter part of August. I took my papers as secretary out there, the night of the trouble,—for the purpose of resigning. On Wednesday before that, I was at Elaine, at the post office, got my mail, and was there when Mr. Will McCullough come in, and told me he wanted to see me a minute. We walked out, and he told me the thing I belonged to, that union,—asked me what it was. I told him I had just recently joined it, and didn't know much about it. (Here the Prosecuting Attorney objected, and the witness said, "I had instructions to quit the order." The court sustained the objection, and appellant's attorney said, "The object of it is, to show that there were threats made and communicated to him." The Prosecuting Attorney withdrew the objection, and the court said, "Well, we are just consuming time here unnecessarily." Mr. Jones said, "I will make it briefer, and ask him the direct questions." The examination then proceeded): Q. Were you advised that the union was

going to be broken up out there by the white people? A. Yes. Q. How long had you been a member? A. About five weeks. Q. What office were you holding? A. Secretary. Q. Do you know the purpose and object of that organization? A. Not thoroughly, but partially * * *. But the main object, it was explained to me, was for the purpose of co-operating the Negroes, to care for one another, take care of the sick ones and all alike, and make better progressive farmers. Q. Were you in the church when the shooting took place? A. I was. Q. Where were the first shots fired from, in what direction? A. From the north of the church; just as I finished my work on the books, and got up to resign and turn those things over to the President * * *, when I went to rise, the gun fired. Two volleys came in at the window and knocked glass all over the house. I don't know whether it was glass, come by my face or a bullet. Then I fell down on the floor, and Frank Moore and Joe Machon's wife were piled right down on the floor. When the shooting ceased, I ran out the door, turned around, went into the alfalfa patch, lay down, heard men cross Govan Slough, and continued to lay there a few minutes, and then shooting took place down there again. I went to Henry Machon's that night. Q. Did you leave here and go to Louisiana? A. Yes. Q. Why? A. "Because threats have been made that they were going to kill me" * * *. I was afraid that I would get killed here. Q. Did you have a conversation with Kid Collins, after you were brought here last fall, in jail? A. Yes * * *.

He asked me: "Where did you go when I came to your house?" I said, "I went to the woods." He said, "Why didn't you come to us?" I said, "I couldn't afford to come to you all emptying guns at me." He said, "Why did you run?" I said, "So I could get to doing what I am doing now, talk again."

I had no gun or pistol that night. I was hardly able to carry myself over there. I had known Mr. McCullouch for about 25 years,—knew him in Lake Providence, Louisiana. Seventy-five or eighty persons have been convicted here about that trouble. Q. Can you read the Articles of Incorporation? (The Articles of Association of the Farmers and Laborers Household Union of America). (Here the same certified copy of the Petition, the same Constitution or Articles and the same Certificate of Incorporation, mentioned in Martin's case was read in evidence. The Articles or Constitution contain nothing of a malicious, disorderly or a evil nature—nothing indicative of any unlawful, violent or evil purpose).

CROSS EXAMINATION.

I had two guns at home,—a little single barrel shotgun I bought from a little boy, and a 41 Swiss,—an American and Spanish war gun, Mr. P. A. Price gave me here at Locket Lading, in 1912. It was a high power rifle, and had an adjustable sight. Q. You had just a few days before that bought quite a supply of shells for that rifle here in Helena, hadn't you? A. No; I hadn't bought a shell since 1917.

I don't know how many were at Hoop Spur from Elaine Lodge that night. Frank Moore was

there, and Dave Hays,—also Ed. Mitchel. I didn't know Elaine Lodge had any board members. We didn't have any board in Hoop Spur Lodge, so far as I know. I did not help to organize it. After I left that night I went to Henry Machon's. I was afraid to go back home the direction I came from. When I got out of the church, I went east to get out of the road of any more shooting, if any more took place; I was afraid of danger. I didn't see any white men there that night, and didn't see any one shoot. I went home the next morning. The Becko boys belonged to the Hoop Spur Union. I left home the next day, but didn't leave Phillips County until the 4th of October. Then I went to Brickey, Arkansas, where I got a letter from Joe Morey. I then went to Memphis. Then I went to New Orleans. I am not a native of Louisiana. Mississippi is my native State. I moved to Louisiana many years ago, and stayed there about ten years. My name is Ed. Ware, and was in Mississippi. My father's name was William Ware. William Brown was my God father. They called me William Brown after him. The boy that went with me to Louisiana, called me by that name. His name was Charlie Brown. I stayed in Louisiana ten years, and went under the name of William Brown, after they caught that name. Q. There was some trouble in Louisiana, wasn't there? A. Not a bit; search my record. Q. Didn't you excite trouble there, and have to leave? A. No; the only trouble there, was sickness of my wife. When I went back to Louisiana, to New Orleans, after this Hoop Spur trouble, I went by the

name of Charlie Harper, and was going under that name when I was arrested. I was working for the Harris-Jersey Ice Cream Co., distributing ice cream, and was arrested in Algiers. Q. You said something a while ago about somebody threatening to kill you. A. Yes sir; that is what I learned. Q. Did you hear who was going to kill you? A. Just said the white people of Elaine. I hadn't done anything to incur their enmity. Frank Moore's wife told me that, Saturday evening; so did Isaac Byrd. Q. Did you know Suggs Bondsman? A. No; I never saw him until he got on the witness stand to testify against me. I was at Elaine, at the lodge on Thursday before this trouble on Tuesday night. I knew Ed. Hicks, Ed. Baker, Joe Knox and Frank Moore. Q. When you got to Elaine Lodge Thursday night, didn't you have a conversation with Ed. Baker, Joe Knox, Frank Moore and other members about killing people around there, and about whom you were going to kill? (Appellant's attorney objected to this question, the court overruled the objection, and appellant excepted). A. I did not. Q. What time did you get to Elaine Lodge that night? A. About 8:00 o'clock, I suppose. Q. You took charge of the meeting, didn't you? A. I did not; I didn't stop there any length of time; I went to Countiss after a lot of people, and then I came back, and stayed until they adjourned. I did not take charge of the meeting. Ed. Hicks was in charge of the meeting, and turned it over to Robert L. Hill, who was there. I didn't say that I could handle the meeting better than Hicks, nor that I could show

them or him how I handled my people at Hoop Spur. I didn't put out guards. Q. Didn't you instruct the lodge how to put out guards, and didn't you put out guards, and advise the lodge as to how you run your lodge at Hoop Spur? (To this question, appellant's attorney objected, but his objection was overruled by the court, and he excepted). A. No; I never run a lodge at Hoop Spur, and never instructed. Q. And then you said, "You guards go to every cross-road and every path leading around this house, just like I do my guards at Hoop Spur?" (To this question appellant objected, but his objection was overruled, and he excepted). A. I did not. Q. And don't let anything white pass you? (To this question appellant objected, but the court overruled the objection, and he excepted). A. I did not. Q. Now, after the common Niggers had gotten out of the lodge, I want to ask you if you and Ed. Hicks and Knox and Baker and Moore and the other selected members of the Elaine lodge didn't have a conference, a talk around the table? (To this question appellant objected, but the court overruled the objection, and he excepted). A. I did not; I took a car load of people and went home. Q. Then I will ask you, if you didn't say this during that conversation around the table: "There is Mr. Bernard, speaking about the men that should be killed,—there is Mr. Bernard, and you specified Mr. Stokes, Mr. Crow, Mr. Countiss, and Mr. Moore, the post office man?" (To this question appellant objected, but the court overruled the objection, and he excepted). A. I did not. Q. Didn't you tell the

meeting there, around the table, that Mr. Moore had given you people, and was giving you a lot of trouble over your mail, and you were going to get rid of him? A. No; why should I do that? He gave me a box and gave me my mail directly; he treated me all right; I never said anything about him. Q. And you designated Mr. Moore the hooking cow? (To this question appellant objected, but the court overruled his objections, and he excepted). A. No. Q. Or Mr. Countiss as the hooking cow? (To this question appellant objected, the court overruled his objection, and he excepted). A. No. Q. Now, then, after that conversation took place, didn't you look around there and say to your other men there, that were talking, "There are some white mouths here and some snitches, and you had better get closer around the table, write the names of the men on the paper?" (To this question appellant objected, the court overruled his objection, and he excepted). A. I did not. Q. And then didn't you and your crowd just take a piece of paper,—you would write a name down on a piece of paper, hand it around the meeting, and you would decide on that man, mark him for killing? (To this question appellant objected, the court overruled his objection, and he excepted). A. I deny every bit of it. I never made such a statement. Q. Didn't the other members likewise select other men for killing? (To this question appellant objected, the court overruled the objection, and he excepted). A. No; nothing like that occurred. Q. Didn't you advise the members that some of them, when the trouble started, were

liable to get killed? (To this question appellant objected, the court overruled his objection, and he excepted). A. I did not. Q. Didn't you also tell them that they ought to so run their lodge that if any white face showed up there, for them to shoot and shoot right at it? (To this question appellant objected, the court overruled his objection, and he excepted). A. I never did. Q. What time did the business of the Hoop Spur Lodge end that night. A. I don't know exactly when that shooting occurred; I think it was between— Q. The business was over before the shooting occurred, wasn't it? A. No; not my part of it; I was getting up to turn those books over; the president hadn't announced that he had adjourned. When that first shot was fired, I didn't grab or take a gun, pass Lit Simmons at the door, tell him to put out the lights, and then join the two Becko boys, Alf. Banks and the others. The only time I saw Dave Hays was the next morning. I didn't see him that night. What he said about that is a mistake,—not true. Q. And didn't you fire three shots at the automobile? A. I didn't fire a shot at all,—had nothing to fire with. I don't remember when the alarm was given at the window; I was busy at the table. Q. What did you have Frank Moore, there at the table, for? A. Because they had a lot of questionnaire blanks to fill, and lots of members were joining, and I was receiving the money and making a memorandum of it, and I had Frank Moore and Joe Machon's wife to help fill the questionnaires. I asked Frank Moore, because he could do the work. Q. You would go down and help

Frank run his lodge, and he would come and help you run yours? A. I haven't helped him run a lodge. Q. You advised McCulloch, that afternoon, when you talked to him about the lodge, and didn't you tell him there was a man coming there from Washington to take care of you people? A. No. Q. And tell you how to run your lodge? A. No. He told me, said to me: "You get out of that thing, because it will cause you trouble, and I told him I would get out of the lodge. Q. You say you told Mr. McCullough that day, that you were going to resign? A. Yes, sir. Q. Did you not tell him in the same conversation that the union was all right, that it was organized by the United States Government, and had the sanction of the Government? A. No. Q. Do you know A. A. Nelson? A. Yes. Q. While you were in Louisiana were you not convicted of murder? A. You are speaking about Autrey Nelson? Q. You were convicted of murder in Louisiana, were you not? A. I was not. Q. Did you plead guilty? A. No, sir; I was never convicted; I never have been tried for murder. Q. Didn't you serve a term on the farm down there, the state farm? A. I never did; anywhere. Q. Didn't A. A. Nelson have charge of you during the time you were on the farm? A. No. Q. You deny being convicted there, or entering a plea of guilty for killing a woman? A. I deny being tried there for anything, and deny entering any plea of guilty (*Id.* 164-201).

STATE'S EVIDENCE IN REBUTTAL.

SUGGS BONDSMAN testified: I have lived

at Elaine about three years. I knew Ed. Ware a while before the riot. I know Robert L. Hill. I was a member of the Union, Farmers and Laborers Progressive of America, at Elaine, and was there on Thursday night before the trouble at Hoop Spur on the following Tuesday night, and so were Robert L. Hill and Ed. Ware. Some call Hill the counselor, some the great counselor, and some the detective. He was the head leader, one of the leaders. Q. Was Ed. Ware there that night? A. Yes. Q. What part did he take in the matter of organizing the lodge, the guards, and mapping out a program for the killing of white people? (To this question appellant objected, the court overruled his objection, and he excepted). A. Well, he taken an active part in the meeting. Q. What part did he take, what advice did he give about killing people who opposed the program mapped out by the lodge? A. He took a part in sending out guards, just any part about it, told Ed. Hicks to let him have the meeting, wanted to show him how he handled his men at the Hoop Spur Lodge. Q. Who was Ed. Hicks? A. President of the Elaine Lodge. Q. Ware told him he was going to take charge of it? A. He took charge of it. Q. Then what did he do? A. Showed him how to handle the men, what to do, and send out guards. Q. What kind of guards? A. Guards on the outside. Q. What orders were given the guards? A. Told them to stand some at one bridge, some at another, at every forks of the road. Did they have any guns and pistols? A. I saw shotguns and rifles. Q. What instructions did he

give them? A. Told them to go out and be sure not kill one another, not be facing one another, and to kill everything that come by, white. Q. What did he say about how he handled the Hoop Spur Lodge, where he was secretary? A. Said that was the way he handled his men,—always put out guards, ad if the first guards let anybody, any white people pass, the next guard to stop them, and the others close in behind them. Q. Are you familiar with the organization they called board members of the different lodges? A. There were lots of them I didn't know, but he was in the midst of them. Q. Did they have a number of the board members present that Thursday night? A. Yes. Q. What did Ware advise the other board members about killing this, that and the other man? A. They had men, some big men from the country, and said if they could get through them, they could handle the others. Q. Who said that? A. Ed. Ware and Ed. Hicks, the board members. Q. How did they say they were going to get rid of them? A. They said they were going to kill Mr. Countiss, Mr. Crow, Mr. Craig, Mr. Bernard and Mr. Stokes. Then they held the conversation up, and said there were some white mouths in there, and he had better be particular. Then they began to write it off, show it to each other, and asked how about him. Q. Was Ware engaged in passing the names of the people around, that were going to be killed? A. Yes, sir, from him to one another. Q. They were making a list of the folks that were to be killed? A. Yes, sir, and holding it up out of

snitchers' sight; white mouths. Q. Could you see the names? A. No.

CROSS EXAMINATION.

The first I told of this, I told it in the Circuit Court here, the other Circuit Court. Q. Didn't you tell it to somebody before the trial? A. I didn't tell it to anybody but the court. Q. You didn't tell anybody of it until you told it here at the trial? A. Not just like I told it here. Q. Then when you told it here in court was the first time you told it? A. No more than when they got to making their plots, I told it then. Q. To whom, first? A. I told some of the leaders at Elaine. Q. Who were some of the leaders? A. I told Mr. Bernard. Q. Who were the members of the board at Elaine? A. Some of them I don't know; I wasn't a big Nigger, wasn't among the board. They were the biggest class; lots of them I didn't know. Q. Name those you did know. A. Ed. Ware and Ed. Hicks. Q. Were they the big ones you speak of? A. Yes. Q. Was Ed. Ware a member of that board? A. He wasn't a member, but took a part every time he came. Q. Who was Ed. Hicks? A. President. Q. Was he the only member of that board that you can name? A. No. Q. Well, name some of them. A. Well, there was Ed. Hicks, another Ed. Just really I didn't know the people. Q. Name some of the members who were present that night, and heard such conversation? A. I would have to get after that; there were about 300 men; lots of them I didn't know, the biggest ones. Q. Name those you did know. A. The biggest members of the union from

all places. Q. I am asking you to name those you did know, that might have heard it that night. A. All around and about Elaine. Q. Whom did you first tell this to? A. I first told it to the court. Q. At whose trial? A. At their trial. Q. At Ed.'s trial? A. Yes. Q. Were you in jail here at all? A. No. Q. Never had you in jail? A. No. Q. Can you name any of the men Ware sent out there at Elaine union that night? A. No; I don't know them only outside,—don't know whom he sent out; they were so thick, they just got up and sent them out; when I knew anything they were out. I didn't know them; they were new people. I just saw them going out. I guess they sent out about 50. Probably 300 were present at the time of this conversation I have told about. I never did go to the Hoop Spur Union (*Id.* 201-215).

2. WILL McCULLOUGH testified: I live about a mile from Elaine, and know Ed. Ware. I had a conversation with him, in Elaine, about this union, shortly before this trouble. Q. Did he tell you, in that conversation, that he was going to resign as secretary, and get out of it? A. No (*Id.* 216).

APPELLANT'S ADDITIONAL EVIDENCE.

1. MENRY MACHON testified: I lived between Hoop Spur and Wabash, and belonged to the Hoop Spur Union. I was at the Elaine Union on Thursday night before Tuesday night of this trouble. Robert L. Hill and Ed. Ware were there. Ed. Ware did not preside, and no guards were sent out, to my knowledge or hearing. I did not hear him say

anything about any white man, Mr. Countiss, Mr. Moore, or any other being killed. No such conversation took place.

CROSS EXAMINATION.

I don't know what Ware went to the Elaine Union for that night. I got there about 9:00 or 10:00 o'clock, and he was there, when I got there. I expect there were 250 or 300 people there. Q. Did you attend a board meeting there? A. No. Q. They had a board meeting though, didn't they? A. Not that I know of. Q. What time did you leave there? A. After they closed. Q. Was anybody left in the house, after you left? A. There were several men and women in the house when I left. Q. Who were those men sitting around the table? A. What table? There were three tables there. Q. Any one of them? A. The ones I saw sitting around the table were Rich Austin, Ed. Baker, and one woman; the table near the door. Q. At which table was Ed. Ware? A. Ware was walking about in the house; I didn't see him sitting down. When I saw him, they were making up this money to buy this Government land. I don't know who was receiving the money. I paid little attention to that. Q. How many guards did they have around there? A. I don't know; I didn't see one (*Id.* 220-225).

2. JOE MACHON testified: I was at the Elaine Union Thursday night next before the Tuesday night of the shooting at Hoop Spur. I saw Ed. Ware and Robert Hill there, also Dr. Powell. Q. Did he, Ed. Ware, preside that night? A. No. Q. Did he send out any guards? A. No, sir; that was

an open session. Q. No guards out? A. No. Q. Did Ed. Ware say anything about killing anybody there, or having anybody killed or anything like that? A. No, sir; I never heard anything like that. Q. How far were you from him? A. Not very far; he wasn't present much. He was running a jitney and hauling passengers.

CROSS EXAMINATION.

I saw Ed. Ware sitting around a table helping fill some blanks. I had one of them. That was directly after he got there. I didn't go out of the house. There were people there besides lodge members. Q. There wasn't anybody there besides members of the union? A. Oh, yes; plenty of people who weren't members of the union.

Ed Hicks was president of the lodge, and Ed. Baker was secretary. O. Wasn't Ed. Ware moving around about the house all the time? A. No; he went out carrying people, carrying himself some women. He didn't make but one trip, did he? A. Yes; he went to Countiss once, and once, night Hoop Spur. I know of these two times. He made two trips. I got there just as they were fixing to open the meeting. I was ahead of Ed. Ware.

RE-DIRECT EXAMINATION.

Q. Were they filling out blanks for members? A. They were filling out something like cards for all of us. The medical examiner was there (*Id.* 226-232).

3. WILL CURRY testified: I am serving a sentence in the penitentiary, charged with murdering Mr. Atkins, and was brought here as the State's

witness, to testify in these cases. I was a member of the Elaine Union, and was present there on Thursday night before the Tuesday night of this trouble. I don't know whether I got there before Ed. Ware did or not. They were open when I arrived. Hill presided over that meeting. There were no armed guards out that night. It was an open door session; anyone could attend. I didn't hear Ed. Ware say anything about how he conducted the Hoop Spur Union, nor about having anyone or any white people killed, nor about putting out any guards.

CROSS EXAMINATION.

I was at the Hoop Spur meeting the night of this trouble. I was not invited to be there; I just went. Q. Who made speeches that night, there? (At the Elaine Union). A. No one that I know of but Robert L. Hill; he lectured. I don't know what time it was we left. I left Ed Ware there. I was in one of the first crowds going out. Q. Was Ed up around the table? A. Yes, he was up there helping with the finances. Dr. Powell was assisting. That is all I saw at the table (*Id.* 233-237).

Appellant again moved the court to exclude from consideration of the jury the testimony of Suggs Bondsman, the court overruled his motion, and he excepted (*Id.* 238).

There being no other evidence offered or given on either side, the court gave to the jury the same instructions as in the case of Alf Banks, Jr. and Joe Fox, No. 2471, where they are abstracted, with the

exception of the 6th instruction given at the request of this appellant, which is as follows:

“If the defendant belonged to a society or union, some or all of the members of which, including himself, carried fire arms to their place of meeting, for the sole purpose of protecting themselves against apprehended violent and deadly attack by those who were unfriendly to it, this did not constitute a crime for which you can rightfully convict the defendant in this case, nor did it deprive him of the right to defend himself or to kill anyone assaulting him or others with a deadly weapon, with intent, either real or apparent, to kill him or them, or inflict upon him or them a great bodily injury,—if the killing was really or apparently necessary to his or their protection against such assault (*Id.* 242).

The jury then promptly, as all the juries in the preceding cases had done, returned *their verdict*, guilty of murder in the first degree as charged in the indictment (*Id.* 246, 243).

Appellant then filed and presented his motion for a new trial, praying the court to set aside the verdict and grant him a trial, on these grounds.

1, 2, 3. That the verdict was contrary to the law and evidence.

4. That the court erred in overruling his petition for removal to the Federal Court, in failing and refusing to transfer the case for trial to the District Court of the United States for the Eastern Division of the Eastern District of Arkansas, and in thereafter forcing him through a form of trial.

5. That the court erred in overruling his peti-

tion for a change of venue, in failing and refusing to change the venue of his case, and in thereafter forcing him to trial.

6. That the court erred in overruling his petition to temporarily set aside his plea of not guilty, and in failing and refusing to permit him to withdraw said plea, as therein prayed.

7. That the court erred in overruling his motion to quash the indictment, in failing and refusing to quash it; and also erred in refusing to hear evidence thereon, and in refusing to set aside the present panel of the petit jury.

8. That the court erred in overruling his motion to quash and set aside the sheriff's return to the special venire, in refusing to hear evidence thereon, and in refusing to discharge the talesman.

9. That the court erred in permitting W. K. Monroe, witness for the State, to testify, over his objection, that he was shot at a short time after deceased, Atkins was killed, and in permitting him to detail to the jury what occurred, or what he says occurred, after the killing of deceased.

10. That the court erred in overruling his motion for a peremptory instruction of not guilty.

11. That the court erred in failing and refusing to permit him to bring witnesses from the penitentiary at Little Rock.

12. That the court erred in permitting Suggs Bondsman, a witness for the State, to testify, over his objection, to statements claimed to have been made by him on Thursday night prior to September 30th, 1919, and also erred in overruling his motion

to exclude said testimony from the consideration of the jury (*Id.* 246-238).

The court overruled his motion for a new trial, and he excepted (*Id.* 249).

The court then sentenced him to death, and he prayed and obtained an appeal to this court (*Id.* 249, 254, 253).

Argument.

Many grave errors occurred in the course of the proceedings below, to some of which, assigned in the motions for (new?) trials, we are now to call attention.

1. The lower court erred in denying the petitions for removal to the Federal Court. It is true that the deprivation of the civil rights therein complained of, the denial of due process of the law and of the equal protection of the laws, must, to authorize removal, have been the result of State action; but such deprivation by the evil discriminating administration of the law by those entrusted with its execution is State action. The prohibitions of the Fourteenth Amendment to the U. S. Constitution and of the Acts of Congress in pursuance of it "extend to all Acts of the State, whether through its legislative, its executive, or its judicial authority."

Scott v. McNeal, 154 U. S., 38 L. Ed., P. 901.

In *Williams v. State of Miss.*, 170 U. S., 213, 42 L. Ed., pp. 1015, 1016, wherein denial of the petition for removal was affirmed, we find the following:

"It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the Constitution and laws of Mississippi, nor is there any sufficient allegation of an evil and discriminating administration of them. * * *

"It will be observed that there is nothing direct

and definite in this allegation either as to means or time as affecting the proceedings against the accused. There is no charge against the officers to whom is submitted the selection of grand or petit jurors." * * *

But no such objections can be urged to the petitions in the cases at bar; they show the evil and discriminating administration of the law by all the officers entrusted with its execution, and in all the Circuit Courts of the State,—the total and arbitrary exclusion of all Negroes from all juries solely on account of their race and color,—“from time whereof the memory of man runneth not to the contrary.”

In the concluding part of the opinion in *Strauder v. State of West Virginia*, 100 U. S., 303, 25 L. Ed., 664, it is said:

“That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the Federal Circuit Court, under Section 641, is very plain, if, by the Constitutional Amendment and Section 1917 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the Statute Law of the State.

“There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.”

2. There was error in the overruling of the petitions for change of venue, all of which were supported by the affidavits of four Negroes, in which they swore that they were residents and electors of Phillips County, and were not related to the petitioners in any way.

The court, after hearing a long examination of three of the supporting affiants, in which it was shown that they had not been in all parts of the county, had not heard a majority of the people of the county talk of the alleged prejudice, but knew that only white men were permitted to sit on juries in the county, knew of the previous trials and their results, knew that each of the petitioners was charged with the killing of a white man, in a deliberately planned Negro insurrection for the killing of the white people and the taking of their property, knew and had read the long article published in the *Helena World* of October 7th, 1919, the only daily newspaper published in the county, which they knew had a general and extensive circulation among the white people all over the county, and also a considerable circulation among the Negroes, wherein it was stated, among many other things of like character, that it had been found through confessions and statements of more than a hundred of the Negro prisoners, through confiscated papers and investigations of “the committee of seven”, composed of the leading business men of Helena, including the Sheriff, selected and authorized by the municipal and county authorities and by Governor Brough to direct operation in putting down the

insurrection and, to conduct investigations with the view to discovering and punishing the guilty, that the whole trouble was a deliberately planned insurrection for the murder of the white people and the taking of their property, and that from these matters, on which they, affiants, based their belief, as well as on what they had heard, they were convinced that petitioners could not get a fair and impartial trial in the county, the juries always being composed exclusively of white men,—and after hearing read the affidavit of Chief Deputy Sheriff, Dalzell, to the effect that the fourth affiant had not paid a poll tax for either the year 1918 or 1919,—overruled the petitions, without stating or intimating any reason therefor.

The article published in the *Helena World*, which was introduced and read in connection with the examination of the supporting affiants, appears at considerable length in our abstract, and appears at large in all records, extending, in record 2452, from page 61 to page 68, inclusive.

No one familiar with that article could have deemed it possible for petitioners, or any of them, to obtain a fair and impartial trial before a white jury of that county. Every thinking being in the court house, at the time, including the judge and all court officials, knew—must have known that what was taking place could not be a trial—that convictions—verdicts of guilty were predetermined,—that the proceedings were to result just as they did result.

As to the affidavit of Dalzell, the most the tax

books could have shown was that poll tax was assessed against the affiant, and was not there shown to have been paid or that none was assessed, and consequently none was paid. But if it had contained an entry of assessment and non-payment, it would not have overcome affiant's affidavit that he was a qualified elector.

It would have appeared fairer, if the prosecution had submitted Mr. Dalzell to cross examination.

If the motion was overruled because the court thought all the affiants, or at least three of them incredible persons, it must have been on the theory that hearing talk from a majority, was the sole test of credibility in such cases; and if this was or is correct, it is scarcely possible that a change of venue could ever be obtained, except upon a hired canvass of the county,—which of itself would be a very discrediting circumstance.

But we pass from this feature of the cases,—awaiting what the Attorney General may have to say about it.

3. The denial of the petitions to temporarily withdraw the pleas of not guilty, for the purpose of presenting motions to quash indictments, was an abuse of discretion; the judge seems to have felt that the pleas were invalid, or at least under discredit; for, after overruling the petitions, and after overruling the motions to quash the indictments and to hear evidence and set aside the then present panel of petit jurors, all of whom were white, because of discrimination against appellants, solely

on account of color, he had them rearraigned, and exacted of them further pleas.

4. The motions to quash the indictments should have been sustained. They plainly set forth facts showing mal-administration of the law for the selection of jurors, by all officers entrusted with its execution,—unvarying discrimination in the exclusion of Negroes because of their race and color; and if it can be said, notwithstanding the subsequent arraignments and exaction of pleas, that the motion to quash was out of time, the same can not be said of the refusal to hear evidence and set aside the panel of petit jurors, as prayed.

Stauder v. West Va., supra.

5. In the course of forming or completing the several juries for the trial of the cases, orders were issued for the summoning of talesmen, and the Sheriff in executing these, summoned and returned only white men, and in all of them, except Martin's case, motions were made and presented, charging discrimination against appellants, in the rejection and failure to summon any Negroes as such talesmen, solely because of their race and color, and asking that the summoning officers be examined, the returns quashed and the talesmen discharged. But these motions were all overruled without investigation. This, we also contend, was error.

6. In the cases of Martin, Will Wordlow, Alf. Banks and of Ed. Ware, the court erroneously permitted the State, over the objection of appellants, to introduce evidence of Aubrey Burke, to the effect that he went to Hoop Spur and Elaine the morning

after W. A. Atkins was killed, was in Elaine all day, and knew that John Clem was arrested there and sent to Helena for something he had done before the killing.

This testimony was wholly irrelevant, designed, we suppose, to corroborate the testimony of State's witness, Pratt, on an immaterial matter, and was prejudicial.

7. In the case of Giles and Fox, No. 2451, the lower court erred, we think, in refusing to give the ninth and tenth instructions asked by appellants, and also in refusing to direct a verdict of not guilty. They were in a thicket, far from any road, where no whites were expected to come, in hiding with four or five other Negroes, not for any evil purpose, but only for their own safety. There the thicket was invaded, from both sides, by twenty-five or thirty armed white men, among whom was the deceased, Mr. Tappan. They were lying down, secreting themselves as best they could, and were fired upon with such fatal accuracy that three or four were killed. They say they never fired or intended to fire a shot, and no one testified to the contrary. But, candidly, we doubt whether the instructions would have been obeyed, if given.

8. In all the cases, except that of Giles and Fox, the court, over the objection of appellants, permitted the State to introduce, through her witnesses Pratt and Monroe, evidence to the effect that shortly after the shooting of Atkins, another car in which Monroe was, passed the car where Atkins was killed, going in the direction of Elaine, stopped and was

fired upon in three volleys, Monroe saying that there were about fifty shots in each volley. This was an attempt to prove the crime charged, by proof of another and distinct crime, and that, too, without connecting appellants with the latter shooting; and it was prejudicial.

9. The lower court erred in permitting the State's attorneys to introduce through their witness John Ratliff, over the objection of appellants, testimony to the effect that he heard officers or leaders of the union making statements and giving orders to the outer guards, not to let any one other than a member, come to the windows or come in, without showing that appellants were present or had knowledge of such directions.

10. In Ware's case, 2449, the lower court erred in overruling his motion to direct a verdict of not guilty, at the close of the State's evidence.

11. The lower court further erred, in the same case, in permitting the State's attorneys to introduce, over Ware's objection, through their witness, Suggs Bondsman, testimony that Ware was at the lodge meeting at Elaine on Thursday night before the shooting or trouble at Hoop Spur, the following Tuesday night, and took part in the meeting, took charge of the meeting, took part in sending out guards, showed them how to handle the men, how to send out guards and what to do, told them to stand some at one place and some at another, at every forks of the road, and to kill everything that came by, white; that there were lots of board members there, and that Ware was in the midst of them; that

Ware and Ed. Hicks said that if they could get through some few big men through the country, they could handle the others; that they said they were going to kill Mr. Countiss, Mr. Crow, Mr. Craig, Mr. Bernard and Mr. Stokes; that they then held the conversation up, saying there were some white mouths there, and he had better be particular; that they were around a table and began to write it off and show it to each other, and ask how about him; that they were making out a "list of folks" to be killed, and holding it up out of the snitchers' sight, white mouths, and that he could not see the names; and the court further erred in refusing to exclude all this from the jury.

To see plainly that all this was irrelevant, requires but little lore in evidence, and to see that it is a poorly prepared tissue of falsehood requires no mental effort. The methods of interrogation by which it was obtained can leave no doubt about it. We hope this court, or some member of it, will glance over it, as it appears in the record. We think it throws light upon other features of the case.

12. At the conclusion of all the evidence, Ware was still entitled to a directed verdict. It is true, as shown by his own evidence, that after the trouble after the hunting down of the Negroes began, he got out of the way, finally got to New Orleans, and there assumed a different name, which he was going under when arrested; but all this he explained in a manner readily consistent with his innocence. He tells how he was told that the whites were coming, and going

on account of color, he had them rearraigned, and exacted of them further pleas.

4. The motions to quash the indictments should have been sustained. They plainly set forth facts showing mal-administration of the law for the selection of jurors, by all officers entrusted with its execution,—unvarying discrimination in the exclusion of Negroes because of their race and color; and if it can be said, notwithstanding the subsequent arraignments and exaction of pleas, that the motion to quash was out of time, the same can not be said of the refusal to hear evidence and set aside the panel of petit jurors, as prayed.

Stauder v. West Va., supra.

5. In the course of forming or completing the several juries for the trial of the cases, orders were issued for the summoning of talesmen, and the Sheriff in executing these, summoned and returned only white men, and in all of them, except Martin's case, motions were made and presented, charging discrimination against appellants, in the rejection and failure to summon any Negroes as such talesmen, solely because of their race and color, and asking that the summoning officers be examined, the returns quashed and the talesmen discharged. But these motions were all overruled without investigation. This, we also contend, was error.

6. In the cases of Martin, Will Wordlow, Alf. Banks and of Ed. Ware, the court erroneously permitted the State, over the objection of appellants, to introduce evidence of Aubrey Burke, to the effect that he went to Hoop Spur and Elaine the morning

after W. A. Atkins was killed, was in Elaine all day, and knew that John Clem was arrested there and sent to Helena for something he had done before the killing.

This testimony was wholly irrelevant, designed, we suppose, to corroborate the testimony of State's witness, Pratt, on an immaterial matter, and was prejudicial.

7. In the case of Giles and Fox, No. 2451, the lower court erred, we think, in refusing to give the ninth and tenth instructions asked by appellants, and also in refusing to direct a verdict of not guilty. They were in a thicket, far from any road, where no whites were expected to come, in hiding with four or five other Negroes, not for any evil purpose, but only for their own safety. There the thicket was invaded, from both sides, by twenty-five or thirty armed white men, among whom was the deceased, Mr. Tappan. They were lying down, secreting themselves as best they could, and were fired upon with such fatal accuracy that three or four were killed. They say they never fired or intended to fire a shot, and no one testified to the contrary. But, candidly, we doubt whether the instructions would have been obeyed, if given.

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to kill all Negroes "big enough to kill",—tells how just a few days before the trouble began, Mr. McCulloch, whom he had long known, a white planter living near Elaine, met him at the post office, beckoned him out, told him he wanted to talk with him, asked him about the Farmers Progressive Union, told him he was regarded as the leader in, and organizer of it, asked him its object, told him *they* understood that it was to raise the price of picking cotton to a dollar and a half a hundred; that he, Ware, denied this; that McCulloch then told him to get out of it, that it was going to cause trouble, and that he didn't want to see him get hurt, and that he told McCulloch that he would have to go to one more meeting to turn over the books, and would then resign as secretary.

We think the cross examination of Ware very unfair and unwarranted, and hope the court will look through it, in the record.

McCulloch being called by the State in rebuttal of what Ware said, only contradicted him as to Ware's saying that he was going to resign and get out of it,—thus admitting the truth of all other features of the conversation. It is, therefore, but natural that Ware should have sought to get out of the way of the storm and stay out of it,—in accordance with instincts of safety. Hares hasten their flight, "when hounds and horns pursue."

13. One of the grounds assigned in all the motions to set aside the verdicts (?) was that they were contrary to the law and the evidence,—and we think it was well based. Incriminating evidence was

weak and unsatisfactory in all the cases,—in some of them, insufficient to establish any degree of guilt—in none of them, sufficient to support a verdict of murder in the first degree. In the case of Giles and Fox, the State's witness, Alf. Banks who, in answer to questions by the State's attorneys, says he was whipped and tortured into swearing differently and falsely on the former trial, testifies positively that he, Giles, Fox and two or three others were hiding in the thicket or slough,—hiding from white people, were fired upon, some of them killed, and that none of them fired a shot in return, to his knowledge. And in the cases of Martin, of Wordlow, of Alf. Banks, and of Ware, a large number of witnesses, all of whose testimony we have carefully abstracted, testified about the shooting at Hoop Spur in which Atkins was killed, and at least nine of them, three of whom were State's witnesses, testified to the effect, or in direct terms, that the first shots were fired into the glass windows of the church, where the Union meeting of Negroes was sitting, from the car of Atkins, Pratt and Collins; and in this they are strongly supported by the testimony of State's witnesses, Jarmon and Schmidy, wherein they say that they examined the interior of the house early on the next morning, October the 1st, found the lower sash of some of the windows torn out, glass panes broken, benches turned over, men's, women's and children's hats, part of a woman's skirt, and a large quantity of the Union's literature,—indicating great hurry and scramble in getting out and leaving; and Ware is shown to have been in the house when

the shooting occurred. Of all the witnesses, only Pratt and Collins would place the responsibility for the trouble, its beginning, on others than themselves and Atkins; and it is somewhat interesting to note how they attempt to do it. Pratt claiming that the lights were out, that it was dark, says that a string of Negroes with guns, at least eight, approached the car, and that one of them, a black one, asked: "What's the matter, is your car broke?" and that he replied curtly, "No; what is it to you?" or "what is it of your business?" that then a little yellow Negro, further down the line, who "had a shot gun, and had it broke, whipped it back together; that he pointed his finger at him and said "Don't do that, son"; that just about that time the shooting started; and that neither he nor Atkins, nor, as far as he knew, Kid Collins fired a shot.

The Negro's question, if asked, was a civil one, indicated a desire to help, if help were needed or desired; and a peaceable, orderly gentleman would hardly have made the reply Pratt says he made,—especially if all those Negroes had guns.

Moreover, the time, the alleged motive of the going, the known murderous insticts of Collins,—all the circumstances are against Mr. Pratt,—against the accuracy of his testimony, according to which Atkins was going as a mere matter of accommodation,—and Collins, only to help in case of a possible break-down or mireing of the car.

Collins was a confessed murderer, a convict of murder in the second degree, probably in that court, on a plea of guilty, entered "some two or three

years before." Just how or by what authority he was kept in Helena as a trusty, made turnkey of the jail, given the custody of the prisoners, we do not know. Whether he was ever in the penitentiary, or whether his conviction or sentence was ever reported to the proper authorities, is not disclosed; but we learn from his testimony that after his valuable service and assistance in the whipping, electric shocking, strangulation and torturing of appellants and other Negro prisoners into the making of false confessional statements against themselves and false incriminating statements against others, he was given (probably as compensation for that service) liberty to go whither soever he would—and went.

Atkins, Pratt and Collins fired into the meeting of Negroes about twelve o'clock, probably a little later, and, contrary to their expectation, the fire was returned and Atkins was killed. Within an hour and a half from that time, about 1:30 a. m., Dalzell, Jarmon, Schmiddy, Jones and probably others, were leaving Helena for the scene, and the hunting down and rounding up of the members of the Negro union began. Quickly all were "rounded up", and in the Helena jail, under control of Kid Collins, undergoing torture inflicted for the purpose of extracting from them incriminating statements and false testimony,—all but the false pet, Suggs Bondsman; and, by the time the then rapidly approaching term of the Circuit Court came on, October 27th, everything was brought into apt condition and readiness for the desired convictions. Twelve, including appel-

lants, were quickly sentenced to death, and seventy-four sought escape from their tortures in pleas of guilty to murder in the second degree, with penitentiary sentences of twenty-one years. So artful, so impressive, so severe, so terror-inspiring were the whippings, shockings and strangulations administered, accompanied, doubtless with threats of repetition in case of disclosure or of variation, that not a word of it all leaked out in the proceedings of that term. Both the electric chair and the penitentiary were deemed by the victims preferable to a readministration of what they had undergone. Nor had the fear thus inspired lost all its influence within the half year leading thence to the proceedings from which these appeals are brought. The State witnesses, carried back from the penitentiary to Helena to testify in these cases, told with hesitation and reluctance how they themselves had been whipped, or how they had seen some of the appellants and others taken out of their cells by the turnkey, Kid Collins, and how he brought them back bleeding.

They seem to have a way of their own, and methods of their own, down there,—especially in what they call the administration of justice. Let us hope this is confined to their turnkey and keepers of prison. They could add racking refinement to the “duke of Exeters’ daughter”,—deeper horror to the terrible cruelty of the long since discarded *peine forte et dure*.

Cooley’s Blackstone, 3rd Ed., Vol. 2, P. 325.

All the witnesses who testified about the whipping and torutring gave the name of Kid Collins

as one of those who administered it, some of them gave the names of three,—none of them could give the names of all. But why did not the prosecutor call some one or all of those whose names were given to say something about this, if it was not in every respect true? Why did they not call some one or more of the Deputy Sheriffs, if it was not true. The trouble about it was that it was all true, and there was more yet that might be brought to light, if the perpetrators were subjected to cross examination.

The papers of the Union that Jarmon, Schmiddy and others found in the church house were carried to the Sheriff’s office. The long article in the Helena World of October 7th said that these papers showed conclusively that the object of the members was to murder the whites and take their property,—that that was the purpose of the Union. In this way, and by similar means, the minds of the white people were deeply imbued with the belief that all this stuff was true. They were convinced, to start out with, that the Union was nothing but a criminal combination for murder, and plunder, in which they were the intended sufferers. But is it not striking that not a single incriminating paper, was offered or introduced in evidence?

Will such methods as were here employed pass muster? Will the death sentences they brought go into execution? We hope not; certainly they should not.

Respectfully submitted,
SCIPIO A. JONES AND
MURPHY, MCHANEY AND DUNAWAY.