

facts of this case; but, if the rule admitting such evidence were conceded, it could not apply when, as here, for near three months after the slight cold had gone there was a continued and unexplained attendance upon a physician, who, perceiving the presence of an incurable disease, prescribed no treatment whatever, and gave advice only.

The question has been discussed, but need not now be considered, whether the decision in *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, has been modified by the later opinion in *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87.

The judgment below is affirmed.

STEVENSON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1898.)

No. 620.

1. **CRIMINAL LAW—MURDER—DECLARATIONS.**

Evidence as to the declaration of the defendant, made three months prior to the homicide, that he "intended to kill the next deputy marshal that arrested him," was improperly admitted, as too remote and general to have any legitimate bearing on the issue to be tried.

2. **SAME.**

Where conversations and declarations of the accused, after arrest, forming no part of the *res gestæ*, and not admissible in his behalf, but admissible against him, are proved by the United States, the accused is entitled to have the full conversation or conversations given in evidence.

3. **SAME—INSTRUCTIONS—ABANDONMENT OF QUARREL.**

Where there is evidence tending to show that the accused, after provoking a quarrel with deceased, withdrew therefrom, and was thereafter fired upon without warning by deceased, whom he then shot and killed, it is the duty of the court to instruct the jury as to the effect of such withdrawal, and its refusal to do so when requested is reversible error.

4. **SAME—JURISDICTION—AVERMENTS IN INDICTMENT.**

Where an indictment for murder in the Chickasaw Nation, Ind. T., avers that both deceased and accused were white men, proof that deceased was a white man establishes the jurisdiction, and the averment as to citizenship of the accused is surplusage.

Swayne, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

John Stevenson, the plaintiff in error, was, on the 1st day of December, 1893, at a term of the United States circuit court for the Eastern district of Texas, indicted for the murder of one Joe Gaines. On May 13, 1897, he was put upon his trial, and on May 20th was convicted of manslaughter. His amended motion for a new trial was overruled. His motion in arrest of judgment was overruled. The sentence of the court was imprisonment at hard labor for the term of six years and ten months from June 2, 1897, in the Detroit House of Correction, situated at Detroit, in the Eastern district of Michigan, and, besides, a fine of \$50 and all costs of this proceeding. The indictment in the usual form charges the murder as committed in Pickens county, Chickasaw Nation, Ind. T., with the further allegation that both the plaintiff in error and the deceased were then and there white persons, and not Indians, nor citizens of the Indian Territory. The evidence of the trial tended to show the facts substantially as follows: The place of the homicide was the town of Paul's Valley, in the house and business place of one W. R. Bandy, situated on Main street, which runs

north and south parallel with the Santa Fé Railroad. Bandy's place is in the north part of the town, and fronts east on Main street. The building is 18 feet by 36 feet, with a front double door and window south of door in east wall. On the night of the homicide the house was well lighted, and a counter was in the southeast corner, with passage room between it and the south wall. Underwood's drug store is 175 feet south of Bandy's, and the Central Hotel several hundred feet south of Underwood's drug store. Miller & Berry's drug store is still further south of the hotel several hundred feet. All of the buildings are practically, with their fronts, on a line, and face the east and the railroad. Plaintiff in error was legally adopted by the Chickasaw Nation, and his wife, a full-blood Chickasaw, was engaged in the restaurant business in Paul's Valley. The deceased was a constable and deputy marshal for the territory courts. In May prior to the homicide the plaintiff in error, when talking to a Mrs. Joe Paul about deputy marshals, said that he was getting tired of being pulled around by them, and was going to kill the next one that arrested him; but no reference was made to the deceased, nor was it known that plaintiff in error knew him. On the 22d of August, 1893, the plaintiff in error was refused by United States Commissioner Davidson as surety on a bond. About dusk that evening he took from the house of Mrs. Sarah Paul a Winchester. She tried to take the gun from him, and he told her not to be uneasy, he was only going to carry it to his restaurant. She thought her son was in trouble. Subsequent to this, and about 8:30 o'clock that evening, the plaintiff in error saw Davidson, the commissioner, in Underwood's drug store, and cursed him for refusing to take him on the bond, telling the commissioner that he had taken a man in preference to him who could not schedule a horse. Leaving the drug store, he cursed on the sidewalk as he was going off with one Black. At this juncture the deceased came into the drug store, was told by the commissioner of plaintiff in error's conduct, and in about 10 minutes thereafter overtook the plaintiff in error and John Black while they were going home, and talking about a matter of business. Hot words occurred between the two, when the deceased drew his pistol, and presented it to the back of plaintiff in error, and would have shot him, but for the interposition of one Robinson. The deceased arrested the plaintiff in error without a warrant, but released him at the Central Hotel. The plaintiff in error then started home in company with his wife, and en route told Alex Smith (a posse man of deceased) that he would go home, get his gun, come back, and kill the sons of bitches. He went to his house, west of Main street, and found a couple of visitors there,—Mr. and Mrs. Waite; then went to his restaurant, which is between his house and Miller & Berry's drug store, prepared supper for his guests, and took it to his house. After supper (and, the inference is, as he was leaving home then) Ann Palmer, who lived close by, says she heard him say he was going to get his Winchester, and shoot it out with Davidson, but did not hear him mention anything about the deceased, and only called Davidson's name once. Mrs. Waite never heard Davidson's or anybody else's name mentioned by the plaintiff in error, but, as her husband was sick, she requested him to get quinine for him. He was next seen at Miller & Berry's store about 25 minutes before the homicide, where he asked for quinine, and bought some bitters. Arch Matthews invited him to go to Whitehurst (National Hotel) with him, and get some good whisky. This hotel being east of the railroad depot, they started for the hotel, but plaintiff in error, being as "drunk as a goat," was left on some trucks at the depot to wait for the whisky. Matthews not returning promptly, the plaintiff in error left the trucks, and started to Bandy's place, and somewhere between the depot and Bandy's place he fired his Winchester twice in the air, and hallooed, "Hide out, Stevenson is in town yet," or words of similar import. He then went into Bandy's place, and, when first going in was a little angry, but soon got in a good humor, and invited everybody to drink with him. Bandy walked behind his counter to serve the drinks, and plaintiff in error walked up to the counter with his face to the south. When the street shots were fired, Davidson and the deceased were seated in a room in the Central Hotel. The two shots and something like a whoop were heard by Davidson, and, when they were made, the deceased, without saying a word, arose from his seat, got his pistol, and started in the direction of Bandy's place. Deceased was seen going rapidly towards Bandy's, and as he neared the house he was seen in a stooping position, with his pistol in both hands, and as he ap-

proached the south facing of the double door he suddenly wheeled to the left, extended both of his arms with the pistol in his hands, and fired at plaintiff in error, the bullet passing closely in front of plaintiff in error, and lodging in the counter. The plaintiff in error was standing at the time at the counter, preparatory to drinking, his gun at his right side; and, as the deceased fired, he threw his gun across his left arm, and fired, without putting it to his shoulder, or taking aim. The two shots were close together, but the first one was fired by the deceased. There were two gunshot wounds upon deceased made by one bullet. The ball first entered the outside of the left arm about the wrist, and passing through came out on the opposite side of the arm about two inches higher than the point of entrance and entered the body near the left breast. After the shooting, plaintiff in error went out by rear door to his home; had his Winchester with him, and told the people in his house that he had had a shooting scrape; that he was not hurt, and did not know whether the other person got hurt or not, no name being mentioned indicating who the other person was. He then left, saying he would give himself up to the officers.

On the trial the government introduced the evidence of one Scrivener, as follows: "After the killing, I was sent for, and went to where the defendant was, in the rear of the place where the shooting occurred, and walked up to him, and said to him, 'John, it was a pretty bad affair, and you ought to be sorry for this.' He said to me that all he regretted about it was that he did not kill that other son of a bitch, Bluff Davidson. He was talking when I went up to him, and said something about being in danger. I told him not to talk; that any statement made might be used against him. He said he shot at the man that had shot at him. He just fired his gun at the blaze from the door, and he said it was Gaines that shot at him, and when he shot it was in defense of his life. He further said that he would do the same thing again under the same circumstances. Witness stated that no threats or promises or inducements of any kind were made to defendant, but that what was said to him was voluntarily said by defendant." In connection with this evidence the plaintiff in error offered the evidence of one Alexander Smith as to the conversation between the witness and himself at the time just preceding the said Scrivener's approach to the party, to the effect that the witness Smith had opened a conversation with the plaintiff in error, saying to him, "John, you have killed the man," and plaintiff in error replied, "Who is it?" and the witness said "Joe Gaines," whereupon the plaintiff in error replied, "I wish it had been that other son of a bitch, Bluff Davidson;" immediately upon which the government's witness, Scrivener, came up, and continued the conversation as testified to by him. To the introduction of this evidence by Alexander Smith objection was made, and the court excluded the same upon the ground that it was self-serving, and not a part of the *res gestæ*, nor in explanation of the other declarations in evidence. To this ruling of the court exceptions were duly taken. Further, on the trial the court, over the objection of the defendant, permitted a government witness (Mrs. Joe Paul) to testify that she was at the National Hotel in Paul's Valley, and heard defendant say, in May, 1893, "that he intended to kill the next damn marshal that arrested him; that he was tired of being pulled around by them"; which testimony was admitted by the court as showing the feeling of defendant against marshals as a class, and so instructed the jury at the time, which ruling of the court was duly excepted to. After the evidence, the counsel for plaintiff in error asked the court to instruct the jury in some twenty-six propositions of law, besides two special instructions, all and each of which the court refused, because the law applicable to the case was given in the main charge; but this does not appear by any proper bill of exceptions. A regular bill of exceptions does show that on the trial of the cause, and after argument of the counsel, and after the submission of the main charge of the court, the plaintiff in error requested the court to charge the jury as follows: "If the jury believe from the evidence, or have a reasonable doubt of it, that at the time of the homicide the defendant was, previous to and at the time of said homicide, in the public business place of the witness Bandy, you are instructed that the defendant had the legal right to be in said place; and if, when in said place of business, he (the defendant) was not engaged in any act or conduct that showed in itself malice towards Gaines, or a purpose to engage Gaines (the deceased) in an altercation with him, and if at said time, the defendant thus circumstanced, the deceased approached with a deadly weapon, and the