

Never heard him say he would get well.

To Watson.—Never heard him say he would get well (tries to fix the time when he said he hoped he would get well.)

MR. ARMSTRONG SWORN.

(Shown a paper); It is my writing; the signature is Daniel McNeill's; I held the pen and he wrote the letters; in Dec., last, at Montgomery's house, about 3 a. m.; was sent for to go to that house; there was a man shot; saw McN. on a lounge. (Marquett objects to introduction of the affidavit or dying declaration; Watson argues the case; Pottenger objects.) The point is that a dying declaration must be made when all hope of life is gone. The defense claim he had hope of life that evening, was expecting to live, &c.

The judge says this is an important point, and gives leave to argue at large after prosecution get in all the testimony they have on this point. Witness answers Watson's question. I was asked to go there to take a man's dying testimony. Before I took the testimony I told him what I was there for; I said I am here to take your dying deposition, are you fit to give it or be sworn? he said he was, and I swore the man and sat by him until he told all there is in that writing. I wrote it, and asked him as I went along if it was correct; Dr. Root, his brother, and some women were there; I finished the writing and went to the lounge and read it carefully and distinctly to him, and asked him if that was correct, and asked him to sign it, he said he could not hold up his hand to make his mark, but could spell his name. (the paper is shown and identified.)

By Watson.—Was he in a dying condition? Objected to. Sustained. I helped lift him; he was in great pain and very uneasy.

Cross-examination.—This was about 3:45 a. m.; he said he would be sworn to state the facts; I saw him once after that; he hoped he would get well; I saw him on the last day of the year; I believe he died New Year's day, 1879.

ALLAN MCNEILL SWORN.

I am a brother of the deceased; saw Daniel after he was shot, in the evening of the day; I heard him say he could not live but a little longer; after I had been there but a little while he went off in a sinking spell, and when I rubbed camphor on his face he came to, and said to mother, "I can't live but little longer." It was before Armstrong came, 3 hours before; I heard him again say the same evening he could not live; He wanted water, and John said he had better not drink; he answered, "Give me all I want, I can't live, John."

Cross examination.—Got to Montgomery's that evening about 9 o'clock; hadn't been in the house long when he said that he could not live; stayed that night and most of next day; was away that night three quarters of an hour, towards morning; was back and forward afterward; never heard him say he hoped to get well; He did not say it that night, for I was there all the evening; don't remember what John answered at that time; he might have said "have courage," he might get well; he got so that we thought he was better; not that night, but afterward; was sworn before, at preliminary examination; was by when the paper, (dying declaration), was taken.

Watson again offers the dying declaration of Dan'l McNeill and it is argued. Judge overruled objection and allowed the affidavit. The District Attorney tries to read the paper to the Jury, and Marquett again objects on

account of interlineations in the affidavit.

Armstrong was re-called; "All the interlining was done by myself. I went to him and asked him a question, and that was how the interlining came. He signed it after all the interlineations were made, (examines paper by request of District Attorney, says: There is no alteration in it except those made by myself and it was signed after the interlining was all done.)

Marquett makes witness show just how the interlining came; objects again that the paper is only the substance, not the words, of deceased.

Watson reads the affidavit of Dan'l McNeill to Jury.

Dying Declaration of Daniel McNeill, Cass County, Nebraska:

The Testimony of Dan'l McNeill, he being first duly sworn deposes and says: I was shooting on west side of Salt Creek in Cass County, Neb., and I heard some person on the east side talking—one said I have ordered two men off this morning and that he would shoot the first son of a B — he found hunting there, then I went along some distance and shot at a Woodpecker and then Maurice Fitzgerald hallooed to me: "Have you shot any quails?" I replied that I had not, and he said "you had better not," I said: "does them quails belong to you?" He said "yes" I said "Have you the papers for it," He said "Its none of your business, I'll show you," I said, "kiss my b—d." He then came over to the place I was loading my gun, and says: "are you the man that said that" I said "yes." He then drew his hand with a revolver in it and struck me on the head, and drew his revolver and I struck him with the butt of my gun, and as he fell he fired, and struck me in the breast, I fell and we both got up, about the same time and as I started off he fired again and struck me on the back of my head. I fell and he kicked me on the face.

DANIEL MCNEILL.

Witnesses present:—H. D. Root and A. E. Wolcott.

This testimony was taken by me and the signature made in my presence on the 12th day of December, 1878.

JOHN ARMSTRONG, J. P.

John H. Montgomery was then brought in. He has been very sick and was very pale and was brought in by two men; was duly sworn.

Live in Greenwood, Cass County. Knew Dan'l McNeill and saw him about the 18th of December last; saw him after he was shot; about 3 p. m. on the 18th of December, 1878; saw him down below my house; found him there after he was shot. He was hauling wood for me in forenoon, went off to shoot, in afternoon. I found him east of my house a "quarter" of a mile. Mr. Irving told me some one was hallooing as if in misery. I ran down through the brush and found him lying on his face in the snow, he was lying on his face hands out, blood on back of his head, saw no other wounds then, saw afterwards at the house, bruise on chin and bullet wound in breast and back of head; pants torn off in crotch; snow was wallowed down; next morning saw five or six places where he fell in coming from where the row took place, to there. He died the 1st of January, 1879. Scuffle took place on Hathaway's land, Cass County, Neb.

Cross Examination:—Know where the shooting took place by blood on the grass and grass trod down; was north west from Fitzgerald's, and I live n. w. from Fitzgerald's; was on "mowing" I found him.

By Watson:—Only saw wound on back of head when I found him, did not examine them; saw the wounds

that evening at home; went after Dr. Root, and telegraphed for Dr. Bunnell at Ashland.

By Marquett:—He was my brother-in-law; there is a wagon track where the shooting was; I tell the ground by marks of blood, &c. Did not say to me he was as much to blame as Fitzgerald was; (Montgomery was led out.)

Moses Chevront is called:—Comes in with gun, cap and pistol. He unloads the gun and pistol in presence of the court and Jury.

CHEVRONT IS SWORN.

Marquett makes a motion to strike out a part of the affidavit of the deceased. Chevront tells the story of the shooting as received from Fitzgerald: said McNeill struck him with the butt of the gun; "I drew my revolver and shot, and as I raised up I shot again;" he said "I kicked him, but didn't want to kill him." I (Chevront) took the revolver from Fitz. on the 18th of Dec. at my store it was loaded, and I drew the loads here before the Court; five chambers were loaded; Fitz shot twice and reloaded it again, and I got it full loaded. He said that was the revolver. Didn't say just when he loaded it. The gun and cap were delivered to me on the day of the examination, by Squire Mathews, but don't remember who gave it to me to keep. Fitz said he picked up the gun and cap and laid them under a box near his house; said it was McNeill's cap and the gun was the one broken over his head; said it was on opposite side of the creek near a draw.

Cross Ex.:—Said it was near the draw that they would find McNeill; he made no resistance, gave his pistol up. I am a constable. He was sitting in Noel's store when I arrested him; I told him he was my prisoner, he looked up and said "all right Mosey;" he said his brains were nearly knocked out. I saw McNeill next day in the afternoon. He has always contended that they had never found the true spot where the affray took place; never took Fitzgerald there to identify the place to my knowledge.

WM. W. GULLION.

called and sworn: identifies gun, cap, &c.; looks like a gun I have seen: It is the gun that the Sheriff told me to go and get at Mrs. Fitzgerald's. I asked Maurice where the gun was and he said his mother would tell me where to find it. They said that it was the gun that was lost in the fuss. Had no talk with Fitzgerald, only to ask him where the gun was. I went to her house and got it; found it under a goods box and the cap also; found the gun and cap on the 18th of Dec.

Cross Ex.:—The box was 10 or 12 feet from south door of the house.—(Contents of gun are offered in evidence together with pistol, cap, and cartridges.)

HENRY MONTGOMERY SWORN.

Know Fitzgerald; McN. was shot the 18th of Dec; saw defendant that day in blacksmith shop at Greenwood; he was on a pony; had blood on his face; said he got into a row with McN and he had shot him; he went over to the drug store and I followed; (tells story about quails, &c); said he made for McN. and McN. struck him with the gun; he shot at McN. and McN. ran; Fitz. shot again. Noel and I went to look for McN.; Fitz. said we had better look for McN., as he had it pretty strong; went by Fitz's house across the creek to down on Hathaway's land; myself, Gullion, Noel and Laverty, and Steven's boy went; found the place in the snow where the grass was mashed down and blood on the

grass, tracked him to where he fell; it was about a quarter of a mile.

We found seven places where he had been down. McN. went a quarter of mile to the first place, and about two or three rods at a time after that, to the place where he was found; It was on Hathaway's land, Cass Co.; from the first place he fell to last place was about 15 rods.

Identifies cap; it was Daniel McN's; the gun is my brother's; suppose McN had the gun; have seen McN. wear the cap.

Cross-examination.—No relation Daniel McN; brother of John Montgomery; not much blood, a little scattered along where he had fallen (states what Fitzgerald said about the scuffle); was found on my ground; he crossed part of Hathaway's ground on to mine

J. C. NOEL SWORN.

Remembers the 18th day of December; saw Fitz that day at the drug store, in Greenwood, (states what Fitz said, about same as the others); told me where to go to find McN. I went with others, mentioned; found where the affray had happened; there was blood upon the ground, or snow; snow was three or four inches deep; went toward Montgomery's house about a quarter of a mile; found blood five times; we found blood where he had been down, a rod apart, on Hathaway's land.

Cross-examination.—I went up on the line 300 yards north and found the corner and looked through; it was Hathaway's land.

JAS. WATERS SWORN.

Saw Fitz the day of trial; went to the spot the next Sunday on my way to Montgomery's; found a gun rod; took it and carried it to M's; found the rod standing up in the tall grass near a stake.

O. C. HOHAM SWORN.

Know the defendant; saw him in Ryder's drug store in Greenwood; Dr. Root was there; defendant stated that he had had difficulty with McNeill.—(Tells pretty much same story about the quails. As he was going by him McN. struck him with the gun, and as he started to run, Maurice shot him.)

Cross-examination.—Dr. Root was there; don't know if he heard conversation; he said nothing about kicking; or k * * to me; said, as he was going by, McN. hit him with the gun, and as he fell he shot at McN.

GEO. MAYFIELD SWORN.

Saw Fitz in jail in Flatts mouth about the last of February; had a conversation with him; I told him I was sorry he had given way to his passions and committed such a deed; he said he did just what he intended, and if he had it to do over would do the same thing again. (Rest of evidence not material.)

ALBERT HASTINGS SWORN.

Corroborated Mayfield's testimony as to the conversation. Court adjourned.

WEDNESDAY Morning, Apr. 30, '79.

Court opened at 9 a. m.

A MCNEILL RE-CALLED.

I saw Daniel about 9 p. m. that day; noticed a lump on forehead, right side. Cross-examination.—It was quite a lump; I rubbed my hand over it and then I could see it.

The State rests.

(The conclusion of the testimony in this case will be found in the regular issue, commencing with testimony for defence.)